AGORA International Journal of Juridical Sciences

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

Year 2011
No. 2

- *Section I* -
Law

- *Section II* -
Law and Religion

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

EDITORIAL BOARD
Editor in chief

PhD. Professor Elena-Ana NECHITA, AGORA University, Romania – member in Executive Editorial Board
Associate Editor in chief:
PhD. Professor Adriana MANOLESCU, AGORA University, Romania – member in Executive Editorial Board
PhD. Professor Cornelia LEFTER, Academy of Economic Studies, Bucharest, Romania
Scientific Editor
PhD. Professor Ovidiu ŢINCA, AGORA University, Romania – member in Executive Editorial Board
Managing Editor
PhD. Professor Elena-Ana NECHITA, AGORA University, Romania
Executive editor:
PhD. Professor Salvo ANDO, University "Kore" Enna, Italy
PhD. Candidate Assistant Alina Angela MANOLESCU, "S. Pio V" University of Rome, Italy.
Associate executive editors:
PhD. Professor Ion DOGARU, University of Craiova, Romania
PhD. Professor Emilian STANCU, University of Bucharest, Romania
Associate editors:
PhD. Professor Alfio D'URSO, University „MAGNA GRECIA" University of Catanzaro, Italy
PhD. Professor Alexandru BOROI, Police Academy "Alexandru Ioan Cuza", Bucharest, Romania
PhD. Professor Ioan-Nuţu MIRCEA, associated professor "Babeş-Bolyai" University of Cluj-Napoca, Romania
PhD. Professor Ovidiu PREDESCU, ″Law Journal″ (executive editor), "Criminal Law Journal″ (editor chief), Bucharest, Romania
PhD. Professor Brânduşa STEFANESCU, University of Economics, Bucharest, Romania
PhD. Szabó BÉLA, University of Debrecen, Hungary
PhD. Professor Farkas AKOS - University of Miskolc, State and Juridical Sciences Chair - The Institute of Criminal law sciences, Hungary
PhD. Professor Jozsef SZABADFALVI, University of Debrecen, Hungary
Tehnical secretariate:
PhD. Lecturer Laura-Roxana POPOVICIU, AGORA University, Romania
PhD. Candidate Lecturer Radu FLORIAN, AGORA University, Romania
PhD. Reader Alina-Livia NICU, University of Craiova, Romania
Anca TĂTĂRAN, AGORA University, Romania
Web Master: Roberto RICCIO, Department of Economy and Informatics, AGORA University, Romania

TABLE OF CONTENTS

- Section I -
Law

- Section II -
Law and Religion

Section I
Law

CLARIFICATIONS CONCERNING THE SOCIAL INQUIRY – A SPECIAL CASE OF INTERVENTIONS OF MAXIMUM EFFICIENCY ON BEHALF OF MINORS

Carmina Aleca[*]
Daniela Iancu[**]

Abstract

The social investigation is necessary as a thoroughly efficient measure to ascertain the situation of the minor, from the perspective of the measures and treatments to which he is subjected and of the danger they pose to his development. In order to resolve this matter, the request made by authorities responsible for criminal investigations for the bodies specialized in the protection of children to look into such activities is very important. We propose therefore to observe the social investigation of infractions that concern the child, which were committed in the family environment.

Keywords: *social investigation, family environment, minor, tutelary authority, protection.*

Introduction

The social investigation represents an activity of maximum importance, which must be carried out by persons endowed with certain abilities by the social service, every time it is necessary to obtain information on the living conditions of underage people. Pursuing an investigation by specialized persons is imposed by the specificity of family relations, using their professional ability and training, so that such intervention does no harm. We consider the social investigation as a case of intervention with the purpose of ensuring the security of the child, with the use of specific methods adapted to every situation

1. The necessity of the tutelary authority to carry out a social investigation of the living environment of the minor

The social investigation is necessary as a thoroughly efficient measure to ascertain the situation of the minor, from the perspective of the measures and treatments to which he is subjected and of the danger they pose to his development. In order to resolve this matter, the request made by authorities responsible for criminal investigations for the bodies specialized in the protection of children to look into such activities is very important, since its purpose is to ascertain the living conditions of the minor, the way in which he was raised and educated, the way in which the persons to whom he was entrusted fulfill their obligations as stipulated by law, the state of the minor's health etc. As such, we consider that carrying out this activity

[*] Assistant Ph.D. Faculty of Juridical and Administrative Sciences, University of Pitesti, e-mail: carmina.aleca@yahoo.com
[**] Lecturer Ph.D. Faculty of Juridical and Administrative Sciences, University of Pitesti, e-mail: daniela.iancu@upit.ro

is necessary every time there is a risk of mistreatment, as signaled by competent authorities, either when there is actual evidence of such an occurrence, or when there is the suspicion that the child is being harmed. Of course, such a finding is firstly a civic duty and not one imposed by law, whereby every person who has knowledge of acts of aggression or privations suffered by the child, is obliged to make it known to the administrative and legal authorities[1].

Therefore, the social investigation imposes itself as a practical model of serving the higher interest of the child. This is in fact the soul and the essence of all measures of protection is the final and higher purpose[2].

2. Using the social investigation in case of family abandonment (art. 305 Criminal Code)

Most often, in the interest of resolving a criminal matter of family abandonment, the police notify the tutelary authority in whose jurisdiction the minor resides and request that they investigate and forward a report shortly after. Consequently, in case the persons entitled to financial support are minors, it is necessary to ascertain their situation and the results of the investigation, which consists in the gathering of data concerning the upbringing and living conditions of the minor, his mental and physical state, the way in which the caregiver fulfills his duties as stipulated by law and so on.

The social investigation is carried out de facto, keeping in mind the physical and mental state, the intellectual and moral development of the perpetrator, the family and social environment wherein he lives, the factors that influence the conduct of the perpetrator and which have led to the abandonment or privation of financial support, the non-fulfillment of duties or the non-payment of alimony. Also, the financial condition of the perpetrator and of his family are to be ascertained, the sources of income which guarantee the livelihood of the perpetrator, whether he owes debts to third parties or whether the owes money for living costs, whether there are any persons that support him financially or whether he supports them. In order to find out these results, the president of the owners association and the family members will be consulted during the drawing-up of the investigation.

For every given situation, psychological, social and legal counseling is to be ensured, through a differentiated approach, from case to case, concerning the financial support of children in order to keep up with the emotional and cognitive experiences, the mental support concerning the exercise of parental rights and obligations, as well as the interaction between parents and children[3]. Under this aspect, the professional qualifications, the degree of culture, the state of health, the psychological profile subsequent criminal antecedents are to be taken into consideration. The existence of certain behavioral disturbances, the lack of adaptability, in total the norms of social cohabitation and the lack of a stable job and a balanced family life all these betray the instability and lack of self-confidence of the perpetrator.

The specificity of the act of abandoning the family is to be found in the dynamics of its typical elements, in the sense that the respective problem may be generated by many causes, most of which are difficult to evaluate. In this sense, the cause imposes a good

---

[1] Ş. Ionescu (coord), *Copilul maltratat. Evaluare, prevenire, intervenţie* (collective paper), Fundaţia internaţională pentru copil şi familie, Bucharest, 2001, p. 249.

[2] Dana Ţiţian, *Cauze cu minori în materie civilă şi penală. Practică judiciară*, Hamangiu Publishing House, Bucharest, 2006, p. 3.

[3] Ş. Ionescu (coord.), *Copilul maltratat. Evaluare, prevenire, intervenţie,* Fundaţia internaţională pentru copil şi familie, Bucharest, 2001, pp. 255-256.

organizing of the necessary resources towards a certain kind of intervention, being necessary to draw up a detailed evaluation of the situation, whereby one may ascertain the social history of the family, the material and financial situation of the person duty-bound to support financially (whether employed, out of work or without an occupation, whether he has an income or not), aspects concerning the living circumstances and the family atmosphere[1]. The current place of employment, the previous one and all subsequent situations of non-engagement are taken into consideration. Any information concerning possible work conflicts, litigation, dismissals, courses of professional reconversion etc. is also sought out. The source of income, their nature (occasional, stable and other forms of income), other goods, debts, legacies, current expenses etc. are clearly specified. Under this aspect, their value must be marked in relation to the costs necessary for the daily living.

At the same time, it is recommended that the social worker investigate with insistence and evaluate the relations between family members and the community, these types of relationships are relevant to resolve the case (e.g. relations between the parents, their attitude towards the child, the degree of adaptability of the child at school, relations with classmates and teachers). To this end, we must keep in mind the reasons for the appearance of subsequent family conflicts and witnessing as genuine impression of the family atmosphere as possible.

All these aspects are relevant to determine how the child has been exposed to physical and mental suffering through the non-fulfillment or improper fulfillment of duties to take care of him, to evaluate the material possibilities of the person duty-bound to pay alimony and the concrete situation that prevented him from executing his duties, as well as to note the causes that have led to the abandonment, throwing-out or refusal of aid for the minor. Consequently, to ascertain the state of the child's health is essential to social investigation. The social worker is advised to request a medical document that attests to it, irrespective of the child's state of health.

The social worker responsible for the investigation will draw up a synthesis of the information gathered depending on the purpose of the inquiry, followed by recommendations aimed at the plan of intervention. Depending on the result of the findings and if the parents prove to give inadequate care or do not fulfill their parental duties, measures to protect the child (placement or urgent placement in another home) are to be used or sanctions for the parents (removal of parental rights) are to be given. The abandonment must be registered at the court, if the elements of this infraction are discovered. Therefore[2], the child is placed urgently in case the minor is considered to be in danger either of physical and mental nature. Subsequently, the urgent placement can be changed for another placement measure, every time the evidence shows that the latter is in the best interest of the minor. Also, when it is proven that the parents are extremely negligent in the fulfillment of their parental duties they are completely stripped of their parental rights, because it is in the best interest of the child to be protected from the influence of the sanctioned parent. Taking into consideration the best interest of the child, the court may move for the stripping of one or both parents of the right to have personal contact with the minor, when there is evidence that the presence of one or both of them in the life of the child may endanger his mental and physical health[3].

---

[1] L. Rusu (coord.), *Manual de bune practici în asistenţa socială comunitară* (collective paper), document developed by World Vision Romania – Iasi Office, a program financed by Phare 2003, pp. 71-73.

[2] Dana Ţiţian, *Cauze cu minori în materie civilă şi penală. Practică judiciară*, Hamangiu Publishing House, Bucharest, 2006, p. 5.

[3] Tribunal for Minors and Family of Braşov, civil sentence no. 137 of June 27, 2005, irrevocable, unpublished.

3. Carrying out a social investigation on the case of the mistreatment of the minor (art. 306, Criminal Code)

We must specify the fact that, in practice, it is sufficiently difficult to find the necessary proof of the existence of an offence, in order to start criminal proceedings, especially in case the measures and the treatment applied consisted in acts of negligence, not necessarily physical violence that can lead to bodily harm. Thus, if the father is aggressive or an alcoholic and the mother has not shown any preoccupation towards the child, it is to be understood that this behavior is qualified as negligent by art. 109 from the Family Code[1]. Therefore, in such situations the investigative authorities shall frequently notify the specialized service to begin such an investigation.

Concerning the protection of the abused child, the public authority for the protection of children will evaluate the situation through its specialists and carry out the necessary investigation, make note of the significant aspects that can help the authorities resolve the case and recommend measures that must imposed for the protection of the child. Therefore, in case there is proof of aggression in the family, until the investigation is finished, the child is removed from the family and is urgently entrusted to a home for children until other protective measure are taken, if it is necessary. In order to obtain more precise data that can be germane to resolving the matter under investigation, aspects referring to the state of mental and physical health (medical history, the present state of health) are highlighted as well as the psychological profile and the social history (including aspects concerning the way of life). In this respect, all medical antecedents suffered by the child before the respective evaluation was made are to be specified (hospital stays, specific treatments), as well as the present state of health. It is recommended that the social worker request documented evidence of all of these, irrespective of the child's state of health.

Also, the psychological profile, which is to contain information obtained from the mental evaluation chart, the psychiatric examination file or from evaluation reports compiled by specialists in the field, is also seen as relevant. In case there is no such evaluation at the time the file is being compiled, the social worker may record general information concerning the child's behavior. Also, all information pertaining to school system, the present and previous school records, accomplishments/ failures at school, the level of adaptability and integration in the school environment, as well as the relations of the child with his teachers and classmates, all is to be recorded and documents from the respective schools are to be kept (character, school record, justification, etc.). In order to ascertain the material/financial situation, the social worker must settle several aspects concerning the child's living circumstances.

All these matters are crucial to settle the criminal case and a clear hierarchy is imposed, dictated by the influence each one can exercise on the cause and the family dynamics. By corroborating these facts, they may help identify the existing mistreatments suffered by the minor and point out those situations. These facts are the result of an investigation conducted on the principle of cause and effect, but also from effect to cause.

Among the measures that can be used, in our opinion, we must mention that in case the minor was abused, the aggressor should be removed from the family environment, and not the child, who would suffer one more trauma, if taken from his home. For this reason we propose *de lege ferenda* the instituting of a suitable legal framework. Unfortunately, this is the situation only in the blatant cases, where the police automatically take action and retain the aggressor. Therefore, in these conditions, the following protective measures are applied

[1] Tribunal for Minors and Family of Braşov, civil sentence no. 44 of May 3, 2005, irrevocable, unpublished.

with respect to the abused child: keeping him with his family and pacing him under the supervision of a specialized service; familial measures to protect the child: entrusting the child to a foster parent or family; entrusting him to a public placement service or an authorized private body.

At the same time, the legal authorities must carry on their investigations in order to clarify the main problems connected to the perpetrator, the way in which he treated or handled the child, proceeding to the level of culpability with which he acted. Consequently, on the basis of the registered data during the social investigation, corroborated by the investigations conducted by the authorities and keeping in mind all of the proofs, the court may ascertain the existence of acts of abuse suffered by the child and the qualification of the mistreatment as an offence.

4. Conducting the social investigation in case the measures concerning the entrusting of the child were not respected (art. 307, Criminal Code)

Conducting a social investigation becomes necessary for the evaluation of the minor's situation during the time he has been with the parent or the person entrusted with his upbringing and education. Consequently, we have noticed in the practice and experience of the authorities carrying out the social investigation that certain situations exist where the police appeal to the General Department for Social Assistance and the Protection of Children in order to obtain the necessary information that help conclude whether there is any case of violating the measures put into place by court order.

Concretely, in real life there are numerous situations where the development of the minor is endangered by severing the natural bond between parent and child, which must be respected as demanded by law. The authorities may conduct an investigation every time the police needs data about the environment where the child is being raised and cared for, since the necessary conditions of the crimes have not been met, if by keeping the minor from or preventing him from having contact with his parents the person of the child is not endangered.

If however, the necessary data concerning the environment where the child is raised and educated cannot be obtained except through the psycho-social evaluation of the family situation, through specific means, thus preventing any disturbance in their private lives, the police will call on the competent authorities within the jurisdiction where the minor lives. For this purpose, the social worker assigned to the case will precisely evaluate the relations within the family and identify the nature of the problem and the structure of the family. The legal situation of the parents is to be well considered (divorced, stripped of parental rights, unmarried single parent or widowed), also the material state of the perpetrator (residence, utilities and proprieties), financial situation (permanent or occasional income), the degree of social independence (social autonomy, resources and support), in relation to the effect they have on the minor (e.g. verbal and non-verbal behavior, physical appearance, emotional state, school situation, etc.).

All information relevant to the settling of the case are to be noted, information such as attitudes, behaviors, reactions, interpersonal relations, non-verbal language, living circumstances, all these aspects must be clarified, since the purpose of the social investigation is to protect the minor, who may suffer as a consequence of quarrels existing between the parents or to ensure real and effective contact with his parent or parents.

Also, over the course of the investigation important aspects, must be considered, aspects which should be closely monitored, such as the evaluation of certain relations, reactions or behaviors of persons involved in the case. All possible causes which may lead to a subsequent justification for removing the child and keeping him from his parents and must be investigated, thus violating a court order or of the prevention of contact between the parents and their child. Therefore, moral, psychological, physiological and economic aspects

must be referred to, as well as other aspects that may be particularized or which may contribute to forming a clear and whole image of the family of the child. These aspects may refer to the criminal antecedents of other family members, drinking alcohol, certain relevant actions/events, illnesses and medical therapies to which the members of the family have been subjected to and which pertain to the our case[1].

Concerning the family atmosphere, it may be analyzed depending on any aspect that may influence it, such as the interpersonal relations between parents, their attitudes towards different social rules and values, the way in which the child is perceived and seen, the way the parental authorities manifest themselves, the degree of acceptance of various behaviors exhibited by the child, certain tensed states, the way of rewarding and punishing the child, the degree of openness and honesty of the child in relation with his parents.

Conclusions

We consider the social investigation as being a case of intervention with the purpose of ensuring the security of the child, with numerous specific methods that must be applied to every situation. Conducting a social investigation is done in order to obtain all the information that can aver to the danger created through the non-fulfillment of parental duties, by precisely ascertaining its graveness. In reality, it takes the shape of an examination of the living conditions of the minor, in the context of his life. Thus put, it consists in an evaluation of the family with the goal of monitoring the respecting of the child's rights and the identification of special protective measures. Therefore, conducting the social investigation is done with the intention of protecting the development and education of the minor and ensuring the personal relationships between parents and children, even when the parents are separated.

In conclusion, the need to carry out such an activity, over the course of a criminal investigation, takes the shape of the result itself of this special intervention, with maximum efficiency in the continuation of police inquiries.

Bibliography:

Dana Ţiţian, *Cauze cu minori în materie civilă şi penală. Practică judiciară*, Hamangiu Publishing House, Bucharest, 2006;

L. Rusu (coord.), *Manual de bune practici în asistenţa socială comunitară* (collective paper), document developed by World Vision Romania – Iasi Office, a program financed by Phare 2003;

Ş. Ionescu (coord.), *Copilul maltratat. Evaluare, prevenire, intervenţie*, Fundaţia internaţională pentru copil şi familie, Bucharest, 2001.

[1] L. Rusu (coord.), *Manual de bune practici în asistenţa socială comunitară* (collective paper), document developed by World Vision Romania – Iasi Office, a program financed by Phare 2003, p. 81.

THE PHENOMENON OF FAMILY ABANDONMENT. GENERATING FACTORS AND PSYCHO-TRAUMATIC CONSEQUENCES

Carmina Aleca[*]
Amelia Singh[**]

Abstract

Family abandonment is a negative phenomenon and reprehensible and its psycho-traumatic effects are uncontestable. In the context in which most forms of family abandonment produce an undoubted impact on the child, it is mandatory to identify as accurately as possible the traumas that he may suffer. For as realistic an identification of these consequences as possible and also an efficient treatment or contravention of them, we consider it necessary to research the generating situations, especially.

Keywords: *family abandonment, child, traumas, generating factors, protection.*

Introduction

We honestly have to become aware that in Romania, the low living standards have led these last years to a sudden rise in the number of crimes against the family. Although family abandonment is an action that does not involve a violent element, yet we consider that we must point out an extremely relevant aspect which consists in the non-fulfillment of family duties. This represents a form of negligence with drastic effects on the physical, emotional and moral integrity of the person in need.

1. Brief considerations concerning the felony of family abandonment regulated by art. 305 from the Criminal Code

The legislator has incriminated the act of family abandonment in art. 305 from the Criminal Code, which stipulates that this felony is confirmed every time *a person who has the legal duty to provide support to the one entitled to it, perpetrates the following deeds*:

a) deserting, banish or leave helpless, thus exposing that person to physical and moral suffering;

b) non-fulfillment in bad faith of the duty to provide support stipulated by law;

c) non-payment in bad faith over two months of the alimony established by the court.

The act of family abandonment is presented as a felony with alternative contents[1], a qualification which ensues from the legal normative framework, which institutes three ways of perpetrating this. In order to fully stop the act of family abandonment, the legislator consider acts with an independent characteristic, each of this being able to characterize the existence of the felony on its own[2].

---

[*] Assistant Ph.D, Faculty of Juridical and Administrative Sciences, University of Pitesti, e-mail: carmina.aleca@yahoo.com

[* *] Assistant Ph.D Candidate, Faculty of Juridical and Administrative Sciences, University of Pitesti, e-mail: singh.amelia@yahoo.com

[1] V. Dobrinoiu, N. Conea, *Drept penal. Partea specială. Teorie şi practică judiciară*, Lumina Lex Publishing House, Bucharest, 2002, p. 474.

[2] T. Vasiliu, D. Pavel, G. Antoniu, St. Daneş, G. Daranga, D. Lucinescu, V. Papadopol, V. Rămureanu – *Codul penal al R.S.R. comentat si adnotat – Partea specială*, vol. II, Scientific and Enciclopedic Publishing House, Bucharest, 1977, p. 380.

Perpetrating this felony, in any of its versions, presents a grave social danger for the relations within a family and at the same time, for the general rules of social cohabitation. In this vein, family abandonment contravenes the most elementary feeling of solidarity and mutual aid owed by each member of the family to each other, and is criminalized and penalized accordingly by the criminal law.[1]

Therefore, in order to prevent the felony of family abandonment, the legislator considered two essential conditions. On one side, there are the *family relations* that arise as an effect of marriage and involve a mutual obligation. This is transposed in the following actions: to raise the children born from this union, to ensure their necessary food, the adequate education until they are able to support themselves, to subsist in case the parents are not married[2]. Practically, the spouses have both rights and obligations in accordance with the law, and thus the felony of abandonment constitutes in essence the act of fleeing from their duty towards their children[3]. On the other side, there is the existence of a *legal relation* which institutes a duty to support between certain members of the family.

2. Identifying the main generating factors of the phenomenon of abandonment

Family abandonment represents a negative and reprehensible phenomenon, determined by a multitude of social, economic and even individual causes whose extent and seriousness are unquestionable.

Why do we say this? We say this *because we are faced with a victimization that is inherent to the committing of any felony*. Undoubtedly, the abandoned person is subjected to a trauma that may come out in different psychic disturbances with irreversible effects. In order to identify these consequences as realistically as possible and at the same time to treat and counteract them efficiently, we consider it necessary to investigate the generating circumstances, especially.

It has been proved that the main cause of abandonment is the financial situation of the family. In order to get a panoramic view of reality under the aspect of committing crimes against the family, *we are of the opinion that* extreme poverty, poor living conditions, the lack of any source of income and of any support constitute inducing factors. Therefore, certain situations such as the loss of work may determine the victim to become isolated and mentally unbalanced[4], the "perfect" circumstances, *as we consider*, in which to commit family abandonment. Consequently, we ascertain that such circumstances directly affect the other members of the family that are dependent on the perpetrator[5].

We consider that among the main generating situations the type of family wherein the child is born and lives is also a significant aspect. Consequently, families with several children, as well as instable, incomplete and disorganized families (rendered thus by a the death of one of the parents, the separation or divorce, consensual unions, the situation of the single mother or the case if the father who does not recognize the child), dysfunctional

---

[1] V. Dongoroz, S. Kahane and others. *Explicaţii teoretice ale Codului penal român*, Vol. IV, 2nd edition, All Beck Publishing House, Bucharest, 2003, p. 508.

[2] T. Bodoaşcă, *Contribuţii la studiul obligaţiei legale de întreţinere a copilului de către părinţ*i, in „Dreptul" no. 7/2007, p. 99.

[3] R. Merle, A.Vitu, *Traite de droit criminel*, Cujas, Paris, 1967, p. 716.

[4] T. Butoi, D. Voinea, V. Iftenie, Al. Butoi, C-tin Zărnescu, M. C. Prodan, I.T. Butoi, L.G. Nicolae, *Victimologie* (universitary course), Pinguin Book Publishing House, Bucharest, 2004, pp. 99-100; I. Molnar, *Protecţia victimei prin justiţia penală*, Police Academy Annals "Alexandru Ioan Cuza", year 2, 1994, p. 38.

[5] M. A. Hotca, *Protecţia victimelor. Elemente de victimologie*, C. H. Beck Publishing House, Bucharest, 2006, pp. 103-104.

families (due to alcoholism, violence, abuse) or, subsequently, families with ailing parents of children represent most often cases predisposed to abandonment.

3. The analysis of the phenomenon and the prevention of the main psychological consequences

The basis for criminalizing the act of abandonment is found in the fact that it has severe consequences on the personality of the person in relation to whom the crime is committed, whether it is the husband/wife, parent, underage children, as well as those of age who are in need. Consequently, persons that can be qualified as family members may fall in the typologies of representative victims of this phenomenon, from psychic and constitutional perspectives and those persons who possess a certain vulnerability to the perpetrator[1].

Psychologically speaking, the act of abandonment is defined as the action of deserting a being, out of a lack of concern for its fate[2]. Concerning the effects of the abandonment, it can only disturb the development of the child, thus contributing to the appearance of this type of phenomenon: the insufficient structuring of the personality, the lack of behavioral control – with outbursts of emotion and aggressiveness, psychomotor instability, emotional troubles, emotional inconsistency, aggressiveness, antisocial conducts, delinquency and the outlining of a psychopathic personality[3].

The psycho-traumatic effects of family abandonment are uncontestable, especially when thinking of the degradation of the normal coordinates in which the life of a family exists[4]. In order to maintain the psychological balance and the mental health of the individual, especially of the child who finds himself in the first stage of developing and stabilizing the different components of his personality, it is necessary to firstly maintain normal relations within the family, since the conduct of the parents gives the child examples with which he may identify, the structural and organizing effects on his current and future conduct. Under this aspect, we must specify that the child's personality cannot be formed in any case outside of the familial matrix.

On a psychological level, the state of the abandoned person is associated with a state of depression, of an attitude of self-isolation, self-depreciation and self-deprecation, which imposes the adoption of educational measures – therapy. A crucial importance must be given to the psycho-traumatic effects, since they, as opposed to the others which may be set to rights in the courtroom, may not be totally and definitively removed, under this form. Consequently, although it is legal, the family relations may "function" by reassuming the obligations by the person responsible, and yet once disrupted the psycho-emotional atmosphere, it cannot be fully reestablished.

In the context wherein most forms of family abandonment produce an unmistakable impact in the person of the child, since he is the most vulnerable being, we mostly have to identify the traumas he suffers. The act of abandonment committed by one of the parents is understood by the child and he also feels certain contradictory states that will automatically impede his adequate development. Thus he suffers an atypical form of violence that leads to

---

[1] Ina Maria Ropotică, *Violenţa intrafamilială*, Pro Universitaria Publishing House, Bucharest, 2007, p. 93.
[2] Ş. Ionescu, *Copilul maltratat. Evaluare, prevenire, intervenţie*, Fundaţia internaţională pentru copil şi familie, Bucharest, 2001, p. 40.
[3] S. Rădulescu, *Sociologia devianţei*, Editura Victor, Bucharest, 1998, p. 96 in C. Răduţ, *Violenţa în familie în societatea românească*, Sitech Publishing House, Craiova, 2008, p. 123.
[4] T. Butoi, D. Voinea, V. Iftenie, Al. Butoi, C-tin Zărnescu, M. C. Prodan, I.T. Butoi, L.G. Nicolae, *Victimologie*, Pinguin Book Publishing House, Bucharest, 2004, p. 99.

strong emotional reactions from the child (anxiety, depression, fear, self-destructive behavior, suicide attempts, etc.), and so becoming what is known as a problematic child[1].

Understanding the concept of abandonment has two sides – the psychological and the social; often however, a third side appears, the psychiatric one. The rip in the emotional connection represents the main factor responsible for a long series of actions during which the child becomes aware of the loss of his own identity, progressively losing his internal and external acts.

The felony of abandonment can also take on other forms that we may mention:

- *total abandonment* – practiced by mother that are prostitutes, unmarried, delinquent, divorced, emotionally involved or young girls whose children are born from chance encounters, etc.;
- *semi-abandonment* – perpetrated only by divorced parents;
- the most frequent form if *cryptic abandonment*, instituted exactly within the framework of the legally organized family, when the mother shows no emotional interest, by not getting involved in the daily care of the child, by not communicating, by brutality or indifference.

There are also numerous cases wherein the child is not physically abandoned, rather emotionally and morally, with most of them becoming felons. It can also happen that the relations between the parents and the children are so tense, that not even hate can be excluded. Although they do not physically desert the child, parents who are an example of immorality, of which the child becomes aware and afterwards rejects, also compromise the moral future of the children. In certain cases, the moral abandonment of the child by the parents is visible, since they despise the educational requirements of the child or, because they are too busy, they simply ignore him. However, many cases of moral abandonment do not come to light, and the drama of this experience takes place under the cover of understanding, politeness and obvious financial woes.

The problem of education as well as assuming the familial duties are, in an equal measure, the duty of both parents, since they have to give mutual moral and financial support. In real life however, there are situations where, although the spouses are not lawfully separated, the burden of fulfilling the family duties fall on the shoulders of only one parent. Also, any familial conflict has an effect on the behavior of the children. The behavior reflects the degree of interest shown by the parents in the common education. For this reason, it is necessary to cultivate and develop a healthy emotional atmosphere, to which the child is extremely receptive and on which the feeling of security that is necessary to his normal growth and development is founded.

On the background of psychiatric and psychoanalytic findings which resulted from the long study of the phenomenon of abandonment, psychology has come to consider the phenomena of deep psychic disturbances caused by the abandonment, especially in the conscience of the children. We ascertain that this initiative is an extremely important step in the pursuit of knowledge of the child's psyche and in identifying the afflictions they suffer from, for the purpose of administering the adequate treatment, adapted to the degree of vulnerability and sensitivity of each subject in part.

[1] Galina Văduva, *Analiza şi prevenirea violenţelor în familie,* Ministry of Interior Publishing House, Bucharest, 2002, pp. 20-21.

Conclusions

Great interest must be shown towards the interest that children represent for society, as a future citizen and a member of a functional family. The first laws favoring the security and wellbeing of the child came into being because of this interest, the legislation in the field of family law and child welfare progressively establishes a legitimate intervention of the state from a social perspective.

In accordance with what has been presented, we consider that to take efficient preventative measures against of the numerous ways in which abandonment is perpetrated may counteract future incidents. The social impact of this is far-reaching not only for the victims, but also for the persons who witnesses or become aware of such situations.

Bibliography:

C. Răduţ, *Violenţa în familie în societatea românească*, Sitech Publishing House, Craiova, 2008;

T. Bodoaşcă, *Contribuţii la studiul obligaţiei legale de întreţinere a copilului de către părinţ*i, in „Dreptul" no. 7/2007;

Ina Maria Ropotică, *Violenţa intrafamilială*, Pro Universitaria Publishing House, Bucharest, 2007;

M. A. Hotca, *Protecţia victimelor. Elemente de victimologie*, C. H. Beck Publishing House, Bucharest, 2006;

T. Butoi, D. Voinea, V. Iftenie, Al. Butoi, C-tin Zărnescu, M. C. Prodan, I.T. Butoi, L.G. Nicolae, *Victimologie* (universitary course), Pinguin Book Publishing House, Bucharest, 2004;

V. Dongoroz, S. Kahane and others., *Explicaţii teoretice ale Codului penal român*, Vol. IV, 2nd edition, All Beck Publishing House, Bucharest, 2003;

V. Dobrinoiu, N. Conea, *Drept penal. Partea specială. Teorie şi practică judiciară*, Lumina Lex Publishing House, Bucharest, 2002;

Galina Văduva, *Analiza şi prevenirea violenţelor în familie,* Ministry of Interior Publishing House, Bucharest, 2002;

Ş. Ionescu, *Copilul maltratat. Evaluare, prevenire, intervenţie*, Fundaţia internaţională pentru copil şi familie, Bucharest, 2001;

I. Molnar, *Protecţia victimei prin justiţia penală*, "Alexandru Ioan Cuza" Police Academy Anaals, year 2, 1994;

T. Vasiliu, D. Pavel, G. Antoniu, St. Daneş, G. Daranga, D. Lucinescu, V. Papadopol, V. Rămureanu – *Codul penal al R.S.R., comentat si adnotat – Partea specială*, vol. II, Scientific and Enciclopedic Publishing House, Bucharest, 1977;

R. Merle, A. Vitu, *Traite de droit criminel*, Cujas, Paris, 1967.

GENERAL ASPECTS REGARDING SOCIAL INCLUSION

Dascălu Puran Andra Nicoleta*

Abstract

Upholding the human rights and especially ensuring its citizens a decent way of life, are the objectives which Romania has taken, especially in the context of European integration. For the accomplishment of these objectives our country has developed social politics regarding social exclusion, politics imposed on by the European Union bodies.

Key words: *social exclusion, social inclusion, social politics, social reconstruction.*

Introduction

Romania's integration into the European Union has also drawn the internal conversion of politics and legislation regarding social inclusion. Although the concept is not clearly defined, the base of social politics is given by social exclusion, a term which is often mistaken with poverty, marginalization and underclass.

For the accomplishment of social inclusion one must take into consideration the main fields of interest: the labor market, education, health and social care, professional preparation, etc., and also the determinant factors of the phenomenon of social exclusion.

In order to define the term of social inclusion we must first start with defining the term of social exclusion. Regarding this term there is in the doctrine a multitude of opinions.

The origin of the term "social exclusion" is found in France, in 1974, when Rene Lenoir, state secretary with social affairs in the De Gaulle government lead by Jacques Chirac –, published the book "Les Exclus". After Lenoir, the excluded represented all the social categories which were not included in the social insurance systems specific to the social state.

At a European level, the term of social exclusion appeared at the end of the 80's and beginning of the 90's, during the warrants of the Delors Commission. Even since 1975 there were initiated and conducted by communitarian institutions (The Council, The Commission) a series of programs regarding poverty. The third program, conducted between1989–1994 and informally known as Poverty III, financed the construction of the Observatory over national politics against social exclusion. In the first part of the 90's, social exclusion and inclusion were integrated (mainstreaming) in all European Union politics, beginning with the Maastricht Treaty and its related protocols, the reform of the objectives of the European Social Fund, documents of the European Parliament and the Social Action Programs of the Commission (Estivil, 2003).

Some authors claimed that one of the reasons for which social exclusion has been adopted so quickly at the level of European institutions was the refusal of conservatory governments from that time in Europe, more exactly the Thatcher Government from Great Britain (Berghman, 1995, Nolan, 1996), and the German Kohl Government (Hills, 2002) to acknowledge the existence of poverty, preferring the term of social exclusion[1].

* Asist. Ph.D. Candidate, University of Piteşti, Law and Public Administration Departament, e-mail: andradascalu@yahoo.com

[1] D. Arpinte, Adriana Baboi, S. Cace, Cristina Tomescu, I. Stănescu, *Politici de incluziune socială*, Calitatea vieţii, XIX, no. 3–4, 2008, p. 341.

The concept of social exclusion had an independent evolution from the consecrated term of "poverty", being tied to the idea of rights arising from the quality of citizen of a country. If poverty was defined, initially, in regards to income, social exclusion was defined in regards to social rights, as the right to labor, living accommodations, health services, and not exclusion as a terminal point in the process of poverty[1].

In the Romanian doctrine, the definition suggested in the social politics dictionary is found in the Encyclopedia of Social Development. According to the authors, social exclusion "mainly refers to a situation of failure regarding the full accomplishment of the right of citizen, both because of structural causes of a socio-economical nature as well as to causes of an individual nature"[2].

Also, social exclusion is assimilated to the term of social marginalization. So, Law 116/2002 regarding the prevention and combating social marginalization defines this concept in art.3 as the *marginal social position to isolate individuals and groups with limited access to economic, political, educational and communicative resources of the collectivity; it is manifested by the absence of a minimum of living social conditions*.

Inclusion is a much newer term than that of social exclusion, being defined as the answer politic to situations of social exclusion, in the documents of the European Council from 2000, amongst which the Lisbon Strategy is pointed out. Alongside the December summit of the same year which took place in Nice, the objective of social inclusion became an integrating part of antipoverty national plans.

At the level of European Community, the Rome treaty sets the grounds of social politics through its articles regarding the free circulation of workers and their freedom to domicile, in the context of creating a common market. In this treaty was also foreseen the creation of the European Social Fund, as an instrument to finance social politics. This is the oldest of the structural funds at a European level.

In 1989, after the 1986 phase of adopting the Unique European Act, the first programmatic document of social politics is adopted – the Social Charta, the fundamental social rights are established and alongside these the action directions of the social politics.

Starting also from the establishment that a key indicator of quality of life is everyone's opportunity to build wealth through work[3], one year later, in 1990, the Maastricht Treaty (approved in 1992) establishes in art.2 that one of the Union's objectives is to reach "a high level of labor employment and of social protection, equality between men and women […] the growth of life standards and the quality of life…". In 1991the Social Policy Protocol was adopted, and attached to the Maastricht Treaty and which establishes the objectives of social politics (previewed by the social Charta): promoting the labor employment, improving the life and work conditions, fighting social exclusion, development of human resources, etc. (signed by 11 state members, not by Great Britain).

Through the approval of the Amsterdam treaty in 1999, the Social Policy Agreement is launched and a new article is integrated in the EU Treaty, regarding the labor employment.

The Amsterdam Treaty confirms the acknowledgement, bidirectional, of the fundamental role of social partners: at a national level – state members can entrust social

---

[1] Simona Ilie, *Sărăcie şi excluziune socială.Incluziunea socială ca obiectiv al sistemului de protecţie socială,* Calitatea vieţii, XIV, no. 3–4, 2003.

[2] C. Zamfir, Simona Maria Stănescu, (coord.), *Enciclopedia dezvoltării sociale,* Polirom Publishing House, Iaşi 2007, p. 241.

[3] Camelia Şerban Morăreanu, Orestia Olteanu, *Piaţa muncii. Fenomenul şomajului şi al migraţie*i, published in the Volume of the International Session of Scientific Comunications: *"Integrare şi globalizare"*, University of Piteşti,15 -16 April 2005, University of Piteşti Publishing House, 2005, p. 380.

partners the enforcement of certain directives (art. 137); at a communitarian level – the European Commission has the task of promoting the consult of social partners and taking any useful measure in order to facilitate dialog, pursuing the balanced support of the parties. The Amsterdam Treaty placed the equality between men and women among its main communitarian objectives[1].

The Lisbon Strategy of the year 2000 establishes at the level of European Union, over ten years, the objective of changing the communitarian economy into the most competitive economy based on knowledge.

As regards to the European strategy against social exclusion and all forms of discrimination, the European Council from Nice in December 2000 has approved the objectives of fighting against poverty and social exclusion which recommends to the state members the development of politics which are considering these objectives. And the actions taken at a European level do not stop here, being continued under various forms to the present, especially because a main social problem brought forth by the expansion of the EU was the discrimination of ethnic minorities, and this problem required common solutions at the level of the Union.

In Romania the concepts of inclusion and social development came into use with the adoption of H.G. 829/2002, regarding the National Plan of Antipoverty and Promotion of Social Inclusion – PNAinc. There followed an important document which is the JIM (Join Inclusion Memorandum), elaborated by the Romanian Government in collaboration with the European Commission, in the purpose of promoting social inclusion and fighting poverty in Europe until 2010, in the perspective of accomplishing the Lisbon objectives.

Among the main objectives of JIM we find:

- the growth in efficiency of methods to prevent and absorb unemployment for high risk groups: young men, unemployed persons over a long period, people in the rural environment, gypsies, persons with handicaps;
- the promotion of effective ways to fight employment discrimination, especially regarding the gypsies, but also other high risk groups: young men of 18 fresh out of placement centers, persons out of detention, older people, women;
- the permanent adaptation of the structure of education programs to the necessities emerged as a following to the work market changes;
-young men of 18 who leave the protection system are characterized, according to the JIM, with a high deficit to socially reinsert themselves, difficulties of social integration because of the fact that they are not professionally prepared and also do not have the necessary education for the adult life[2].

Because of the accession process of Romania to the European Union[3] and later on to the 2007 integration, starting with the year 2002, the process to elaborate the National Development Plan for the programming period of 2004-2006 was initiated, and in the year 2004 was initiated the process to elaborate the National Development Plan 2007-2013.

It was also elaborated the Sector Operational Program – Development of Human Resources 2007-2013 which regards important aspects on the main fields of social inclusion.

---

[1] D. Arpinte, Adriana Baboi, S. Cace, Cristina Tomescu, I. Stănescu, *Politici de incluziune socială*, Calitatea vieţii, XIX, no. 3–4, 2008, p. 350.

[2]D. Arpinte, Adriana Baboi, S. Cace, Cristina Tomescu, I. Stănescu, *Politici de incluziune socială*, Calitatea vieţii, XIX, no. 3–4, 2008, p. 356-357.

[3]See also: Elise Nicoleta Marinescu, Camelia Şerban Morăreanu, published in the Volum of International Session of Scientific Comunications: *"Aderarea României la Uniunea Europeană, Economia contemporană. Prezent şi perspective*", University of Piteşti, 24 - 25 April 2004, Agir Publishing House, 2004, pp. 535-538.

Following the analysis of Romania's situation at that time and forming the possible causes of the phenomenon of social exclusion, the Sector Operational Program – Development of Human Resources 2007-2013, established the following priorities[1]:

In relation to the Joint Document to Evaluate Occupation Policy:

- the consolidation of efforts to ensure the access to education to all children and graduation of the mandatory period and to increase the access to upper secondary education; intensification of efforts to improve conditions for the education of minority and vulnerable groups and the implementation of the existing strategy; the finalization as quickly as possible of the reform of the training system and the improvement of adapting the professional and technique education to the long term needs of the labor market; the evaluation of the measure in which the upper education is adapted to the long term needs in terms of strategy, infrastructure, curricula, financial mechanisms and resources; the insurance of an adequate allocation of responsibilities and resources;

- development of the strategy for the continuous training in close collaboration with social partners, as also of an adequate and stimulating environment for the training of employed persons; development of the training capacity of the unemployed taking into consideration the medium term changes regarding restructuring;

- the promotion of active programs in regards to the growth of the training offers; supervising the implementation of the new environment for active politics, improving the focus and impact of the programs, so active politics can contribute in a real way to the adaptation of the labor force regarding future challenges. As a following, alongside the implementation of actual strategy to improve the quality and efficiency of the SPO, the management of the public employment service must also concern itself with the proper allocation of personnel at a local level and of the registration control, so that the persons in search for a job can be effectively supported, and the SPO resources be used effectively;

- implementing strategies for a better integration of the minority groups, especially the gypsies, in education and on the labor market and the close observation of the results;

- continuing to implement the legislation and the measures to insure equal access on the labor market for all persons, no matter the sex, race, ethnic origin, religion or faith, disabilities, age or sexual orientation.

According to the analysis made by the JIM:

- encouraging participation on the labor market with accent on learning during the whole life and on education and training, and the fight against forms of discrimination from all socio-economical fields;

- intensifying the measures to eliminate the absenteeism from mandatory education, the reduction of school abandonment and growth in participating in a secondary education, at least at European standards, the improvement of adaptability to a professional and technical education at the demands of the labor market and intensification of learning for the whole period of life;

- improving the social assistance services;

- improving the access to education and to the labor market for vulnerable groups, especially the gypsy population.

As regards to the gypsy population, it represents the second largest ethnic minority, after the Hungarian ethnic population. According to the made social studies, the gypsy

[1]The priorities were taken from *Programul operațional sectorial Dezvoltarea resurselor umane 2007-2013 (Human Resources Development Operational Programme 2007-2013).*

population has the lowest self-respect and awareness, compared to the other large ethnic minorities from Romania.

Although the legislation and social programs for the integration of the gypsies into society[1] are multiple, the level of participation on the labor market is very low, major deficiencies are registered at the level of training and especially the participation in education and the level of education of this community are very low.

Knowing these things, we must do more at the individual level and indirectly at the community level. Over time there have been concerns in this area, the first international document that sets out the fundamental rights and freedoms to be guaranteed every human being, is the Universal Declaration of Human Rights proclaimed and adopted on 10 December 1948 by UN General Assembly, which in art. 1 provides that "all human beings are born free and equal in rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" and in art. 3 provides that: "Everyone has the right to life, liberty and security of person".[2]

Conclusions

The rights of the European citizens – the right to dignity, to equality of chance etc., are guaranteed by the Charta of fundamental rights of the European Union attached to the Lisbon Treaty[3].

Social inclusion is accomplished by institutions and European legislation, implemented at a national level, taking into account the main risk factors: long term unemployment, reduced incomes, poorly paid work places, the precarious health, the lack of a home or an inadequate home, the status of immigrant, the low level of qualification, handicap, addiction to drugs or alcohol, belonging to communities which are marginalized/poor, the low level of education and illiteracy, raising children in vulnerable families, the major changes in the labor market, modifications in the demographic structure and the growth in ethnic diversity.

Bibliography:

Programul operaţional sectorial Dezvoltarea resurselor umane 2007-2013;

Elise Nicoleta Vâlcu, *Drept comunitar instituţional. Curs universitar*, Ediţia a II-a, revizuită şi adăugită, Sitech Publishing House, Craiova, 2010;

Elise-Nicoleta Vâlcu, Florin-Anton Boţa, *Brief considerations about the legal protection of the Romany minority in the European context*, Agora International Journal of Juridical Science, no.1/2010;

D. Arpinte, Adriana Baboi, S. Cace, Cristina Tomescu, I. Stănescu, Politici *de incluziune socială, Calitatea vieţii,* XIX, no. 3–4, 2008;

C. Zamfir, Simona Maria Stănescu, (coord.), *Enciclopedia dezvoltării sociale*, Polirom Publishing House, Iaşi, 2007;

Simona Ilie, *Sărăcie şi excluziune socială. Incluziunea socială ca obiectiv al sistemului de protecţie socială, Calitatea vieţii*, XIV, no. 3–4, 2003.

[1]To be seen also Elise-Nicoleta Vâlcu, Florin-Anton Boţa, *Brief considerations about the legal protection of the Romany minority in the European context*, Agora International Journal of Juridical Science, no. 1/2010.

[2] *Riscuri asociate regimului juridic şi drepturilor individuale legate de protecţia datelor personale şi a vieţii private în condiţiile noilor generaţii de tehnologii informatice şi de comunicaţii (TIC*), Part I, Interdisciplinary program for the prevention of major risk events nationwide. Fundamental program of the Romanian Academy, Academician Florin Gheorghe Filip program coordinator, (2008), p. 2-3, *http://www.ince.ro/cfl.htm, accessed in 07.10.2011.*

[3]See E. Vâlcu, Drept comunitar instituţional. University Course, Second Edition, revised and added, Sitech Publishing House, Craiova, 2010, pp. 109 - 111.

CIVIL LIABILITY ISSUES IN VIEW OF THE NATIONAL LEGISLATION IN 2011

Dascălu Diana-Nicoleta[*]

Abstract

The new Civil Code provisions maintains part of the provisions of the 1864 Civil code, consecrates institutions accepted and devoted to the doctrine and judicial practice, and also brings new elements taken from the codes and laws that were the source of inspiration.

Key words*: civil liability, general provisions, novelties.*

Introduction

Monistic theory, which led to the adoption of the new Civil Code, was imposed over some items that were originally specific to the commercial law and gave them a general nature, applying them in a way to the institutions which belonged to civil law by tradition. From our point of view, monistic theory is welcomed in drafting such a code, trying to unify the provisions in civil and commercial matters, however, the wording of the document code, gives us the a reason to believe that it has not fully achieved its purpose. For example, although the actual code introduces a number of specific contracts of commercial law, such as contracts of current account, bank contracts, insurance contracts etc., it leaves out other commercial contracts such as leasing contracts.

1. General provisions referring to tort liability and contractual liability

Civil liability, perhaps the most important institution of civil and commercial law, which Josserand[1] called "the sore point of all institutions", is known within the new code as a complex regulation, given by the legislature as the entire Chapter IV, of the "Obligations Book".

The need to adapt the transformation of social relations to civil liability, although acknowledged at times by the 2011 legislature, does not present major changes in its regulatory means or the foundation of this institution.

As very well put by a voice of international doctrine[2], accidents at work, traffic accidents, nuclear accidents as well as the full range of sources of danger created by technical progress, have produced a more pronounced process of social responsibility in all components products, and a decline in individual responsibility.

It is noted however that the vision of the 2011 legislation remains dependent to subjective liability based on fault liability, which focuses on the punitive function of criminal liability rather than reparative function. This gives preference to repair damage suffered by the victim and not to sanctioning the originator of the illegal deed. The importance of this difference between these two views is that in certain legal relations, subjective civil liability does not meet the requirements of reparation either because of difficulty in the author's fault probations, or because the author will be required to answer, even in the absence of the concept of guilt, on the principle of security risk, family solidarity etc.

---

[*] Assistant professor, PHD candidate, Faculty of Law, University Titu Maiorescu, Bucuresti, email: diana.dascalu@gmail.com

[1] L. Josserand, *Rapports et domaines de la responsabilite contractuelle et delictuelle*, Sirey, Paris, 1993, p. V.

[2] G. Viney, *La declin de la responsabilite individuelle*, Librairie Generale de Droit et de Jurisprudence, Paris, 1965.

The new regulation preserves the unique but inconsistent nature of the institution of civil liability, with its two forms, tort and contractual liability, expressly establishing general rules for each one.

As was natural, the new legislation starts protecting the new institution in question from the obligation to repair damage caused to individuals through a willful act, common to both forms of a liability requirement, to a liability being the technicality implied to repair the damage.

The foundation of the civil liability institution has always been the need to force the repair by the one that causes injury to another person. It is the principle formulated by the European Group on Tort Law, found in the contents of the Principles of European Tort Law: "A person to whom damage to another is legally attributed is liable to compensate that damage".

Regarding the first form of tort liability from the interpretation of art. 1349, results that will be required to repair damage done through action or inaction, he who with discernment, violates the rules of conduct imposed by law or local customs, bringing through these actions of inactions harm to any rights or legitimate interests of others.

It is understood that the legislation, using the phrase "law or local custom", does not give the author the option to choose between law and local custom, if it in any way would violate the law. It is trying to complete or replace the rules of conduct if somehow the legal provision should prove incomplete or does not regulate some aspects. We believe, however, that expression is not the best because on the one hand the term "local custom" is an archaic construction that would not find place in a modern code of this century, and on the other hand the term itself is not defined and is left to the discretion and interpretation of the parties involved. Therefore the judge can give rise to non-unified interpretations and inconsistent practice solutions.

Article 1349 mentions in paragraph 3 cases of civil liability subject to vicarious things or animals under his watch and also for the ruin of the edifice. Nothing new so far as long as the old articles of the Civil Code of 1864 treat these often encountered and debated cases by the literature and legal practice. However, the wording of this article, which introduces liability cases listed above by the phrase: "in particular cases provided by law, an individual is required to repair the damage caused by…" suggests that only by exception, expressly provisioned by the law, will an individual be responsible for the act of another, of animals, things under guard or ruin of edifice.

The phrase "in cases provided by law" one would expect the legislation to list the cases for which such a liability would work, expressly, either in legal texts of the Code or in special laws which would at least make reference to article 1349.

We believe that in fact whenever the conditions that attract vicarious liability issue or injury caused by animals or incidental things, will be the responsibility covered by articles 1372, 1375, 1378 et seq.

Therefore we consider the wording of the modern legislation a failure, when it speaks of "specific cases provided by law", thus giving the impression that when the conditions of legal texts of civil liability would be met, specific liability would not be upheld as long as the law does not expressly so provide.

We also believe that the 3rd paragraph of article 1349 of the Civil Code should be revised as follows: "in the case when conditions are met", considering this approach much closer to the legislation's intent.

Monistic theory also presumed the need that the legislation would include, in the legal text corresponding to the general requirements, the liability for defective products, specific to commercial law, but it is only named and then referred to in the special laws.

Article 1350 treats general aspects of contractual liability, the second form of liability. This time the obligation to repair the damage is the responsibility of the individual

who, under a contract, "without justification" does not fulfill its obligations and so causes a prejudice to the other party.

The legislation chose to use the term "without justification" to avoid referring to the guild, expressis verbis, but only making an instinctual reference to the notion of guilt, which would be part of the content of an unjustifiable act.

It is yet another reason why we think the legislation of 2011 is trying to shift liability to the reparative function, leaving on a lower level the punitive function and fault sanctioning.

Paragraph 3 of article 1350 states that "if the low does not provide otherwise, neither party may remove contractual liability in order to opt for other rules that would be more favorable".

Before the introduction of this provision, under the effects of the Civil Code of 1864, legal literature and legal practice have dealt with overlapping of the two forms of liability. Thus it was concluded that under any circumstances there is the possibility for the victim to receive two compensations under the two forms of liability damages that exceed the cumulative amount of the suffered prejudice. Nor is it possible to combine the rules applicable to tort liability with the ones applicable to contractual liability in a joint action, as it is not possible to request repair through tort liability if repairs were requested first through a contractual liability action.[1]

Regarding the issue of choice between two types of liability, practice and doctrine prior to October 2011, the date of entry of the current Code, in legal practice emerged a rule that if there was a contract between the parties from the failure of which resulted prejudice to one of the parties, it would not be possible to resort to tort liability and therefore the only possible action being upon the path of contractual liability.[2]

From this rule of avoidance of choice between the two actions, the most important exception admitted by legal practice is the situation in which failure to comply with the contract is also a crime. In this case the option is at the choice of the victim, may it be tort action or civil contractual action. Moreover, if the victim has agreed to join the penal accusations as a prejudiced civil party, the civil side of the settlement rules shall apply to tort liability and not contractual liability (article 14, paragraph 2, Code of Criminal Procedure).

Likewise, once one has chosen one of two possibilities, namely tort action or contractual action, there is no longer the possibility to follow the other, according to the rule *electa una via non datur recursus ad alteram.*

Regarding the relationship between tort liability and contractual liability, it is widely recognized that the first is the common law of civil liability, while the second is a liability of derogatory, special nature. Thus, whenever the civil law does not have a provision of contractual liability, rules regarding tort liability will be applicable[3].

So the legislation of 2011 reiterates the tendency of jurisprudence, establishing that one cannot waive contractual liability when its conditions are met, except when the law specifically allows it. The legal text removed not only the possibility of the simultaneous aspects of both types of liability, but also a choice between contractual liability and tort.

---

[1] C. Stătescu, C. Bîrsan, *Drept civil.Teoria generală a obligaţiilor*, ALL Publishing House, Bucureşti, 1994, p. 126; I. Albu, Drept civil. *Introducere în studiul obligaţiilor*, Dacia Publishing House, Cluj-Napoca, 1984, p. 238-241 p. 237.

[2] Plenul T.S., dec. îndr. nr. 11 from 5 august 1965, in C.D. 1965, p. 37, cited by C. Stătescu, op. cit., p. 126, note nr. 2.

[3] M. Eliescu, *Răspunderea civilă delictuală*, Editura Academiei, Bucureşti, 1972, p. 61-62.

Contractual liability becomes imperative in cases where conditions for both types of liabilities are met.

As between the two forms of liability there are no substantial differences, but there is no denial of the fact that both have specific issues, legal literature has risen the issue whether the two forms of liability may be considered as constituting a single legal institution or on the contrary, be regarded as essentially two kinds of special responsibility, thus outlining two theories: the theory of unity and the theory of duality.

Duality theory advocates claim that duality between contractual liability and tort liability have essential differences, beginning with the fact that contractual liability has its origins within the contract and the tort liability origin is in the legal text as an expression of the public power.[1]

Duality followers consider that the term "liability" should be assigned only to tort liability, and would designate contractual liability the term "warrant" which would be more appropriate.[2]

Unity theory advocates saw a nearly perfect similarity between the two forms of liability, claiming its unit based on the some kind of fault, whether the violation of an obligation arising from a contract or legal obligation[3], the main idea being that both contractual liability and tort liability have as its main purpose the damages.

The contemporary legal doctrine of sustained theory of unity of civil liability considers that the two forms it presents should not be considered identical. Differences between them, although not essential and not part of distinct institutions, present a practical importance. Thus being considered in the future there might be conceived a unified regulatory liability possibly indicating the specificity of the acting in the two plans – tort and contract – and characteristic differences.[4]

We consider that the new Civil Code is built for the purposes of contemporary legal doctrine based on the concept of civil liability unity, without giving up its two forms. The common element being the requirement to repair the damage may it be born through violation of rules of conduct mandatory by law or local custom, or in violation of the contractual obligations.

2. The causes of exemption from liability in the New Civil Code

Regarding the causes of exemption from liability, which the legislation has established in the 2nd Section, they are treated as a whole inside the frame of general provisions on civil liability, and hence they would be common to both forms of liability.

Article 1351 deals with two cases that remove civil liability, specific to criminal liability. They are that of the force majeure and that of the fortuitous event.

The two cases of liability exemption were analyzed, formulated, reformulated and discussed by the entire legal literature and practice, and most appreciated and acknowledged definitions have been taken in the text of the Code of 2011, thus transforming the legal definitions to synthetic ones with a great practical application.

---

[1] D. Ghiță, *Raportul dintre răspunderea civilă delictuală şi civilă contractuală* , in Revista de Ştiinţe Juridice nr. 2/2009, p. 102. ; A. Benabent, *Droit civil. Les obligations*, 5-e édition, Montchrestien, Paris, 1995, p. 257-258.

[2] I. M. Anghel, Fr. Deak, M. F. Popa, *Răspunderea civilă*, Editura Ştiinţifică, Bucureşti, 1970, p. 290.

[3] M. Planiol, *Traité élémentaire de droit civil*, sixième édition, tome deuxième, Paris, Librairie générale de droit et de jurisprudence, 1912, p. 290-292; M. Planiol, G. Ripert, *Traité pratique de droit civil francais*, Paris, Librairie générale de droit et de jurisprudencee, tome VII, 1931, p. 320-321.

[4] D. Ghiță, *op. cit*, p. 108.

Therefore the force majeure has been defined as "any external event, unpredictable, absolutely invincible, and inevitable". The fortuitous event is being seen as "an event that cannot be predicted nor prevented by the one who was called to respond if the event would not have occurred".

Text provisions are however available so that the parties may agree otherwise; it's certainly the case of contractual liability, because in the case of tort liability the parties can't agree in any way upon worsening the liability. In other words in the latter case, provisions of article 1351 of the new Civil Code are mandatory.[1]

So unlike the force majeure, which takes into account unpredictable circumstances *in abstracto* and in relation to any person if it relates to subjective criteria, its unpredictability and impossibility to prevent the event's occurrence being thus appreciated based on the person whom would have been called to answer if the event that constitutes the fortuitous event would not have been produced.

Last paragraph of article 1351, specific to contractual liability, states the causal value of the two justifiable cases. It establishing that if according to the law the debtor is relieved of the liability for a fortuitous event, it is understood that he will be exonerated in the case of force majeure as well, but not vice versa.

As well noted by doctrine[2], regarding force majeure, the regulation given by the new Civil Code, wishing to be strong and forceful, is tautological, because the adjective "invincible" bears no degree of comparison nor characterizations like the term "absolute".

Instead the definition of unforeseeable circumstances, although the wording will be less categorical, is actually about the same character of exempt-event, which cannot be predicted, is unpredictable, and cannot be prevented, so it's invincible.

Moreover we join the doctrinal view that in fact what matters in characterizing such an event as a force majeure or fortuitous event is its invincible, insurmountable character and less the fact that it couldn't be prevented. The text adds in the case of force majeure that it is an external event without specifying what is envisaged compared to the unforeseeable circumstances.[3]

Other causes of liability exemption contained in article 1352 are acts of the victim, or of a third party, provided that they eliminate the liability, even if they have the characteristics of force majeure, but only those of unforeseeable circumstances, and only in the cases where the law or agreement of the parties shall be relieved of liability if fortuitous.

The provisions of the old code and case law did require that the act of the victim or of the third party had to have the same characteristics to the fortuitous event and to be able to be retained only if the incident would have been partially or totally produced due to the act of the victim or the third party.

Sole negligence or fault of the prejudice would have as effect, case being, removing the obligation to repair the damage, or fault corresponding reduction of repairs to which originator of the deed would be obligated to.

The new regulations, if the act of the third party contributed to the prejudice, the third party would be a co-author, which would attract solidarity to repair the damage.

The new code introduces a new justifiable exempt, "the law exercise", considering the damage originator, within the exercise of his own rights, would not be obligated to repair unless they are a result of right abuse.

---

[1] Marilena Uliescu, *Instituţii de drept civil în Noul Cod civil*, Bucureşti, 2010, p. 206.
[2] *Idem*, p. 207-208.
[3] *Ibidem*.

The concept of abuse of rights is a controversial doctrine and practice problem. For decades the doctrine and practice of trying to define the term in order to establish which might be considered the limits of the right, which when exceeded might give birth to an abuse of a right. The new Civil Code does not stop at a definition of this term, leaving the task of appreciation to doctrine and judicial practice.

We believe however that the exercise of the right cannot be called into supporting causes that remove the obligation to repair the damage, the exercise of the right being a rule, not the exception in civil liability.

A particular novelty brought by the Civil Code is presented under the name of "other causes of exemption".

Express mention of the fact that the repair of the damage can not obtained by the victim caused by the person who gave selfless assistance in times of work, animal or building that was used freely, but only if it would not prove intent or gross on negligence of one who by law would be called to respond is a progress.[1]

Conclusions

We analyzed in this study the general liability provisions in the legislation in 2011 and will devote the rest of the legal provisions to following studies.

As noted in the paper this review of the text of the new Civil Code is not a criticism either at the formal level of terminology or in terms of substance and implications of the legal provisions. One of the problems is the legislation's expression correlation terminology. The fact that the same legal terms are used with different meanings. The fact that many important terms are not defined thus leaving too much discretion in the "public" which throws the simple reader and especially the practitioner into confusion. All of which is not beneficial to the application of the law which is moreover a national and European goal.

Regarding the issue of liability funding, modern legislation, as we noted before, adopts solutions that are not surprising in their majority. They are often reiterations of doctrinal and judicial trends, sometimes supplemented or replaced, with provisions taken from the European inspirations codes.

Bibliography:

Marilena Uliescu, *Instituții de drept civil în Noul Cod civil*, București, 2010;

D. Ghiță, *Raportul dintre răspunderea civilă delictuală şi civilă contractuală*, in Revista de Științe Juridice nr. 2/2009;

A. Benabent, *Droit civil. Les obligations*, 5-e édition, Montchrestien, Paris, 1995;

C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor*, ALL Publishing House, Bucureşti, 1994;

L. Josserand, *Rapports et domaines de la responsabilite contractuelle et delictuelle*, Sirey, Paris, 1993;

I. Albu, *Drept civil. Introducere în studiul obligaţiilor*, Dacia Publishing House, Cluj-Napoca, 1984;

M. Eliescu, *Răspunderea civilă delictuală*, Editura Academiei, Bucureşti, 1972;

I. M. Anghel, Fr. Deak, M. F. Popa, *Răspunderea civilă*, Editura Ştiinţifică, Bucureşti, 1970;

[1]Marilena Uliescu, *op.cit*., p. 208.

G. Viney, *La declin de la responsabilite individuelle*, Librairie Generale de Droit et de Jurisprudence, Paris, 1965;

M. Planiol, G. Ripert, *Traité pratique de droit civil francais*, Paris, Librairie générale de droit et de jurisprudencee, tome VII, 1931;

M. Planiol, *Traité élémentaire de droit civil*, sixième édition, tome deuxième, Paris, Librairie générale de droit et de jurisprudence, 1912.

HISTORICAL REFERENCES REGARDING THE PENAL REPRESSION

Gheorghe Diaconu[*]

Abstract

In the course of time, the repressive reaction had different forms; it began with the unlimited revenge which was out of any regulation and then it got to the reaction which is legally regulated and it is strictly controlled by the state authority. The stages of the repressive reaction represent the proves of the permanent effort that has been made in order to keep under control the behaviors that are contrary to the social order by sanctioning the most serious forms of them and they also represent the proves of the continuous concern regarding the efforts that have been developed in order to humanize the punishment.

Keywords: *punishment; revenge; repression; reaction; talion.*

Introduction

The penal law history attests not only the permanent effort made to keep under control the behaviors that are contrary to the social order by sanctioning the most serious forms of these behaviors, but also it attests the concern regarding the continuous effort made in order to humanize the punishment. In this respect the proves are represented by the very stages of the repressive reaction. In the course of time, the repressive reaction had different forms. Thus, it has started with the unlimited revenge based on the instinctive reaction that was out of any legal regulation and then it got to the reaction that is legally regulated and it is strictly controlled by the state authority (the nationalization of the repression).

A. The period without juridical regulation

1. Any human being puts up resistance and reacts when she feels that she is threatened with a danger. Naturally, the victim's repressive reaction is only dictated by the instinct of self-preservation, it has a defensive character so that she tries to realize a defense which must last as long as the jeopardy that threatens her lasts[1]. But, in comparison with other beings, the man, even the primitive one is endowed with superior spiritual aptitudes and he has a more complex attitude when he has to cope with actions directed against him. Although the human being as any other beings reacts in a defensive way when he is in front of the danger, he still keeps the reminiscence of the danger or of the injury that he suffered, he is afraid of the fact that the aggressive action could repeat and at the same time he conceives feelings of hate and perceives any aggressor as an enemy. The fear and the hate push the man's reaction beyond the limits of an immediate defense and they add to the defensive reaction the repressive one; in other words, besides the defensive attitude it appears the victim's repressing attitude[2].

2. The victim's *unlimited revenge* against the one who caused her an injury was the first form of the repressive reaction during the primitive Age.

Whenever the victim and the aggressor belonged to different social groups (for instance, two families, clans, tribes) the revenge took the collective form and it wasn't

[*] Judge; Lecturer Ph.D. University of Pitești, Faculty of Law and Admnistrative Sciences, Law Department, gheorghe.diaconu@just.ro

[1] G. Stefani, G. Levasseur, *Droit penal general*, the 6th edition, Dalloz, Paris, 1972, p. 12.

[2] Vintilă Dongoroz, *Drept penal*, Bucharest, 1939, p. 36.

submitted to any regulation. The only restrictions that existed were those that naturally resulted from the physical possibilities, from the skill (abilities) and the courage of each individual or of each group of individuals.

The full lack of regulation has given to this revenge the name of unlimited or borderless revenge and the period within it functioned as an unique form of the repressive reaction it was given the name of period without juridical regulation (non-juridical period) because no legal rule regarding the mode in which the members of the group were to revenge it was imposed to them[1].

Vindicta privata, a basic reaction, a brutal and an unlimited one it appears as the first form of sanctioning the inconvenient behavior of the individual or of the social group.

3. In most cases, the one who suffered an injury couldn't revenge by himself, thus he asked for the help of his near relatives and the insignificant conflicts degenerated into collective and repeated attacks. Owing to this fact, each family or clan or tribe etc. was jeopardized because of the important losses caused by the killing or by the crippling of the group members, facts that weakened the group's power of work and defense. All these could finally lead to a possible conquering of the group made by a stronger and more solidary collectivity.

In order to reduce as minimum as possible these difficulties, the family chiefs and the social groups chiefs have tried to impose to the members of the respective families or social groups the obligation of not committing actions that could provoke a revenge, but they (the members) had to leave to the chief of the group the charge of punishing the guilty person.

These obligations not only regarded the internal relations (among the members of the same group) but also they referred to the external relations, respectively to the attitude of the group members. It was forbidden to cause a discontent to other social group without having the chief's permission. Thus, the external conflicts and possibly the revenge of that group were avoided. Those who didn't observe these obligations were driven out from the respective group or they were submitted to certain privations.

Gradually, in the bosom of the great social groups (family, clan, tribe, etc.) it has appeared the necessity of regulating the revenge and of imposing certain restrictions under the sanction of punishment. Within this disciplining, we can find the origins of the penal law[2].

B. The juridical period

The interminable and the exhausting character of these vindictae have gradually transformed the private vendetta into a public revenge (*vindicta publica*). The state authority which was in process of formation has imposed its control over the performance of the individual act of justice.

The lacks of the unlimited revenge that were felt in the bosom of the families, clans, tribes etc. have finally appeared within the great collectivities that were represented by the cities-states (polis). The great collectivities meaning the polis were permanently threatened with the invasion and with the conquering that came from the part of other collectivities and they needed numerous and capable people in order to realize their defense, they needed social order and cohesion and material prosperity. The unlimited revenge harmed all these

[1] Ioan Ceterchi, Vladimir Hanga and collaborators, *Istoria dreptului românesc*, volume I, Academia Publishing House, Bucharest, 1980, p. 431.
[2] Vintilă Dongoroz, *Tratat*, op.cit. p. 38.

conditions of social solidity. As a consequence, those who had the public power have proceeded as the chiefs of the small social groups proceeded and they imposed to the collectivity members certain orders regarding the repressive reaction.

Even if the private justice in which the victim and her family appeared as the initiators and executors and as the beneficiary of the justice act it continued to exist for a certain period in the primary stages of the state society organization, then the state authority gradually limited the degree and the modes of reaction against the doer[1].

In the course of time, the tendency of regulating the repressive reaction had various forms as it follows: the talion (the unlimited revenge), the facultative composition (the subsidiary revenge) and the compulsory (legal) composition.

a. The talion (the unlimited revenge)

1. The unlimited revenge had among its great disadvantages the one regarding the disproportion between the committed action and the retribution, although the idea of law and justice has been always considered as meaning a good account, well measured and weighed thing. These principles were broken and distorted when the victim was the party, the judge and the executor of the punishment at the same time; her reaction was a passionate one and she had no measure when she punished the doer[2]. Thus, instead of restoring the equality that was disturbed by the offence, another inequality was established, this time the inequality was in the victim's favor and it was against the offender. On the other hand, when the victim was weak, she had no means for punishing the aggressor who was stronger than her.

This is why in the primitive society; the repressive reaction was disciplined when the necessity of disciplining the social relations it appeared. Thus, the repressive reaction was forced to observe the principles of law, justice and equity that were deeply rooted in the collective conscience. The repressive reaction becomes justified only when the one who committed a harmful action suffers an equal harm as a consequence of the victim's reaction.

The revenge that was limited by these measures, it was given the name of talion or the lex talionis which is suggestively expressed by the following statement: "*an eye for an eye, a tooth for a tooth*".

2. There are authors that say that the talion's origin can be found in the ancient Jewish laws; the Old Testament and the Talmudic writings often refer to the talionis lex[3]. But, this principle can be found within the oldest collections of laws of the humanity: the Laws of Manu (India), the Code of Hammurabi (Mesopotamia), the Law of the XII Tables etc., fact which quashes the existence of a unique origin of the talion. In fact, the talion only represented the result of a historical process which was common for all human collectivities, process that concerned the legalization and the control of the vindicta privata by the state authority.

The Code of Hammurabi[4] which is known as the oldest code up to now (approximately 2.250 B.C.) it contains numerous dispositions that state the talionis principle: "When somebody puts out somebody else's eye then his eye has to be put out (¶196)";

---

[1] G. Findaca, E. Musco, *Diritto penale. Parte generale*, 3rd edition, Zanichelli, Bologna, 1995, p. 248.
[2] Ad. Franch, *Philosophie du droit penal*, Paris, 1880, 2nd edtion, p. 76.
[3] The Old Testament. The Exodus. 23-25 "*If a misfortune occures, then you'll have to give a life for a life, an eye for an eye, a tooth for a tooth, a hand for a hand, a leg for a leg, a burn for a burn, an wound for an wound, a bruise for a bruise*", The Bible.
[4] In the code of Hammurabi – as I. Ieremias states – we find the beginning of the state which acts as a guarantor of the private revenge and replaces it with the judicial punishment.

"When somebody breaks somebody else's bone, then his bones have to be broken (¶197)"; "When somebody breaks somebody else's teeth, then his teeth have to be broken (¶200)"[1].

It is true that the talion was not an absolute rule in the Code of Hammurabi because sometimes it was replaced with pecuniary penalties, but as a general rule, the punishment for the committed offence it was given according to the talion which represented a limited and a regulated revenge.

Also, in the ancient law of Greek and Roman people, the talionis system was enforced; for instance, Achilles killed 12 Trojans as a punishment for Patrocle's killing[2].

Pythagoras sustained the talion system too and Aristotle names the talion as the Pythagorean justice. As Diogenes from Laert stated, Solon – the great Athenian legislator pushed on the severity beyond the aspects mentioned before: „if somebody put out somebody else's eye and that person could only see with an eye, then his both eyes have to be put out". In this case, the talion is not defined anymore as an eye for an eye, but the loss of sight for the loss of sight, expression which is more reasonable if the principle of talion was admitted.

As it results from a fragment of the Law of the XII Tables which it has been kept to this very days ("*si membrum rupit, ne cum eo pacit, talio esto*"), although the talion was known in the ancient Rome, it started to be subsidiary enforced when the parties did not reconcile with one another. This fact means that the principle of the facultative composition gradually started to interfere[3].

The idea of revenge within the limits of the talion can be found in the works that belong to certain classical legal advisers. Ulpian stated the following in law 131 Dig., in the 2nd Book, Title 16: "*poena est noxae vindicta*". The idea of revenge can be found in the barbarian laws, in the feudal and in the regal legislations, so that in the Middle Ages it can be stated with good reason that the idea of the punishment utility has been replaced with the barbarian idea of revenge (within the talion limits).

3. The talion does not completely disappear not even in the modern Age. The writings of the modern Age (amongst them there have been writings that were in force until the XX century) continued to admit the principle of talion, at least in a partly mode.[4] The same opinion was sustained by Selden and by Leibnitz[5].

Within his commentary upon the English laws, Blackstone admitted that talion in the case of crippling, "*membru pro membro*" – as he said, although at the end of his paper he sustained that the talion „is almost out of use in England"[6].

In France, during the XVI century, Loysel stated that "*La peine du Talion n'est point maintenant ordinaire en France*"[7], but in the XVIII century, when Muyart de Vouglans referred to this punishment, he wrote that it was acknowledged in France when it was about perjury[8]. Filangieri pointed out too that the talion punishment is the wisest and the most opportune institution of a barbarian society; its advantage is that it doesn't let the revenge

[1] V. Scheil O.P. *Textes Elanites semitiques*, T. IV. Paris, 1902, p. 95; I. Kohler and F.E. Peiser, *Hammurabis Gesetz*, Leipzig, 1904, T.I. p. 91 and the Romanian translation is in Curier judiciar, 1994, an XIII, no. 70, p. 585.
[2] Homer, *Iliada*, X, 682.
[3] Aul Gellius, *In Noctes Atticae*, XX, chapter 1.
[4] D'Argon, *Institutes du droit francais*, III, 38, I, II, p. 353, ed. 1762.
[5] Selden writes that he doesn't admit Platon's idea according to which the punishment has as a goal the prevention of the future harm; "ea se inflige pro malo actionis praeteritae, which has to be repaired".
[6] Blackstone, *Commentaire sur les lais anglaises*, translation by G. Bruxelles, 1776, I.VI. p. 130.
[7] Instit. Coutumieres, Book VI, Title II, Maxim 2.
[8] De Vouglans, *Les laix crim*. Book II, Title III, § II, Number VII, p. 82, ed. 1783.

slide; it doesn't permit that each person proceeds as she pleases, but it totally transforms the private power into a public power[1].

Not even Montesquieu was totally hostile regarding the talion, he approved the death penalty when a person killed or he tried to kill another person[2].

Amongst the maintainers of the talionis lex, we also mention Renouvier, Guyau and Proal. Thus, Renouvier stated that "the talion is far from deserving the disdain or the indignation with which the commentators hit it and whose penal theories are often badly based on the strict justice"[3]. Guyau showed too that the talion is an improvement of the punishment evolution because in the old days, the man in order to defend from the aggressor he crushed him. But, he also mentioned, that later on it was noticed that such a great riposte wasn't necessary so it has been tried the achievement of proportioning the reflex reaction of the attack[4]. Finally, Proal mentioned that the talion adopted by the ancient legislators in order to regulate the right to revenge it proves a high feeling of justice[5].

The dispositions regarding the talion existed even in the Romanian law of the XIX century (Pravila of Donici, Title XLI, number 11). Thus, this law stated that „the one who strikes another individual in his eye in order to deprive him of sight and if he puts out his eye, then he'll have to be punished with the same punishment".

4. Many modern legislations have admitted the talion, especially for the slanderers and for the lying witnesses that were punished with the same punishment that would have been enforced to the offender if the accusation had proved to be true.

Iulius Clarus wrote in his work about the talion punishment which was enforced to the slanderers and he mentioned that „if the accused person was taken into the dungeon cell, then the accuser had to stay there at the same time and if the accusation proved to be unfounded then he would suffer the talion"[6].

In the old Romanian legislation there can be found provisions regarding the enforcement of the talion to the slanderer. Thus in 1669, *vornicul* Stroe Leurdeanul was condemned to the talion punishment by the Divan of the country for the calumnious accusation according to which Grigore Ghica *Vodă* had killed the *postelnic* Constantin Cantacuzino. The chronicle of Wallachia mentioned as it follows: "then Antonie *Vodă* with father *Vlădica* Teodosie and the two bishops and with all fathers superior from all monasteries of the country made a great trial; they search in the Holy Pravila and they find to kill Stroe too in order to take the payment, as they did"[7]. In the code of Caragea of 1818 (part V, chapter VII, number 2) it was provided as it follows: "the denouncer has to be punished with the punishment that would have been enforced to the accused person if that person would have been declared guilty". Also, in the penal *condica* of 1826 (¶ 42) that belonged to *domnitor* Sturza, the dispositions regarding the talion enforcement to the slanderer are provided under the name of *tavtopathia*. This document stated that "the calumniator is punished with the same punishment that would have been enforced to the calumny individual if he had been punished".

---

[1] G. Filangieri, *Le scienza dela legislazione*, Venezia, 1782, I.IV. Book IV, part II.
[2] Montesquieu, *Esprit des lois*, Paris, I.II. p. 296.
[3] Renouvier, *Science de la morale*, Paris, I.II, p. 296.
[4] M. Guyau, *Esquisse d'une morale sans obligation, ni sanction*, Paris, 1893, p. 209.
[5] L. Proal, *Le crime et la peine*, Paris, 1892, p. 339.
[6] Iulius Clarus, *Opera omnia*, 1636, Quaest LXXII, No. 1. p. 626 şi Quaest XVIII, No. 4. p. 104 (Liber V. De maleficii).
[7] *Magazin istoric pentru Dacia*, T. V. p. 5.

5. In our opinion, the talion represented an important progress step in the matter of punishment. The talion not only represented a mode of nationalizing the social reaction against the offence, but also the idea of the retributive character of punishment it has been grounded by the proportioning of the social reaction against the offender. Not even the modern penal doctrine gives up this idea; on the contrary it searches a revaluation of this concept[1].

Regarded on its own, although the talion corresponded to a perfect justice, practically it had enough disadvantages and it couldn't remain as a durable form of resolution the conflicts among the people[2]. The talion based on revenge and it perpetuated the hate and the discord among the individuals and among the social groups. Because of the symmetry which was driven to absurdity, its enforcement often prejudiced those who were not guilty. For instance, if a wall crumbled and it killed a child, then the victim's father had the right to kill the child of the master who had built the respective wall although that child had no guilt. In all cases, the talion led to sacrifices of human lives and it led to crippling that had as a consequence the weakening of the social group's power of defense.

The most expressive reminiscence of the talionis lex is the death penalty which couldn't be removed not even in the XX century although the abolitionism was established as a requirement of some international documents (for example, European Convention of Human Rights). A significant aspect is the fact that in the penal law of certain Islamic peoples, the death penalty is executed, at present, by the decapitation made by a relative of the victim[3].

b. The facultative composition (the subsidiary revenge)

The drawbacks that were created by the talion enforcement and the conditions of the gradual consolidation of the public power have determined its holders to impose to the collectivity members the obligation to try to solve the conflict in an amicable way. Only if they didn't manage to solve the conflict, they had the liberty to appeal to the sanctioning of the offender, according to the talion system. The composition represented a reminiscence of the private justice; it consisted in an agreement between the doer and the victim or her relatives by whom the doer agreed to expiate his guilt by the payment of a sum of money or by giving certain goods (cattle, lands, etc.).

In the Romanian countries, the composition was practiced as a consuetudinary law even before the constitution of the feudal states. In the XVIII century, the composition was justified within an anaphora which based on text cited from Basilicale (L.X. 53, 1): "In the case of guilt that involved the death penalty, the guilty person had the liberty to compensate his plaintiff by giving"[4].

The composition, as a mode by which the doer saved himself from the death penalty it had a large enforcement. This fact made that some historians (P. P. Panaitescu) believe that the homicide was a "civil matter", which it's a mistake. In fact, the documents have only noted the cases when the parties reconciled with one another by payment (it seemed to be a civil litigation) and they haven't noted the cases when the guilty persons were hanged because they had no material means in order to expiate their guilt.

---

[1] G. Findaca, E. Musco, *op.cit.* p. 248.
[2] M. Le Graverand, *Traite de legislation criminelle*, Paris, 1830, p. 562.
[3] M. Hosni, *La péine de mort en droit égyptien et en droit islamique*, R.I.D.P. 1987, p. 407; A. Wazir, *Quelques aspectes de la peine de mort en droit penal islamique*, R.I.D.P. 1987, p. 421.
[4] V. A. Urechia, *Documente inedite din domnia lui Al. C. Moruzi*, Bucharest, 1895, p. 392 (the anaphora of 22 decembrie 1794).

Those who held the public power didn't establish the conditions of the reconciliation, the parties involved in the conflict were allowed all latitude to agree on its content.

Generally, the influence of the family chiefs or of the social group's chiefs it was decisive for the parties' reconciliation. But, there were cases when the reconciliation was difficult to realize, especially when it existed a disproportion between the situations of the two parties. Thus, it was possible for the victim to claim exaggerated compensations when the power was in her favor or the guilty person could offer a ridiculous compensation as he knew he was stronger and he also knew that the victim wouldn't dare to proceed to the talion enforcement.

As a form of repression, although it was very reasonable, the facultative composition it was difficult to realize in practice.

c. The compulsory (legal) composition

The permanent increase of the public power authority and the consolidation of its position have produced consequences in the matter of the penal repression. Under these circumstances, it was natural to impose to the parties involved in the conflict the obligation to try the reconciliation and only if they the reconciliation didn't realize, and then the victim could resort to the talion enforcement[1].

But this time, in comparison with the facultative composition, the assessment of the compensation quantum, as a price of reconciliation, it wasn't left to the parties' agreement. Consequently, once with the imposing of the obligation to reconcile, it has been fixed a tariff which provided the proper compensation for each type of harming deeds. Neither of the two parties could raise for discussion the quantum of the fixed compensation[2]. Only if the doer refused the payment of the compulsory indemnification, then the victim could resort to the talion enforcement.

In the Romanian countries, the compulsory composition was provided in many documents amongst we mention the 1220 cases of reconciliation as a result of the putting out of eyes and the 1326 cases of reconciliation for murder and crippling. The tariff of the expiation finally led to the stipulation within normative acts of the sum of money owed in case of murder (sum that was named homagium) and that it was established as it follows: for killing the prelates and the barons the sum was fixed at 100 Deutsche marks and for killing the common nobles the sum was in quantum of 50 Deutsche marks. These tariffs that were especially enforced in Transylvania, they were different from the tariffs utilized in other parts of the Hungarian Kingdom where for the nobles the price was 66 *florini* and for the peasants the sum was 25 *florini*. The sums for various crippling were fixed too: 20 florini for the cutting of the hands and of the ears, for the putting out of the eyes and for the wounding of the face; 6 florini for the putting out of the teeth.

In the course of time, the public power has added to the compensation owed to the victim a sum that reverted to the public money under the title of collective reparation for the evil caused to the society by the disturbance of the public order and the sum was also paid for the efforts made in order to restore the broken order[3]. In fact, this sum is the origin of the fine, as a pecuniary penalty.

---

[1] I. I. Thonissen, *Etudes sur l'histoire du droit criminel*, Bruxelles, 1869, p. 57.
[2] V. Dongoroz, Tratat, *op.cit.* p. 40.
[3] A. Franck, *Philosophie du droit penal*, Paris, 1880, 2nd edition, p. 216.

As a form of the private justice with repairing functions, the composition was utilized until the modern Age[1].

d. The nationalized repression

The legal composition had its own limits and it could only be enforced when the doer had the material means to pay the compensation and the fine that were established by the public power. But, when the doer had no financial means, the compulsory composition couldn't be enforced anymore and the victim got back the liberty to appeal to revenge.

The subsidiary revenge wasn't convenient anymore for the public power as the latter permanently entrenched its authority and it couldn't accept the parallel existence of a particular power that exercised the penal repression. Therefore, the public power took the responsibility to punish the guilty persons when they couldn't pay the damage and the fine that were fixed by the legal tariff. Thus, the repressive reaction got to its last form and it became an exclusive attribute of the public power[2].

The nationalization of the repression based on three causes.

The first cause was the need to ensure the authority of those who held the public power. In this respect, any attack, any harmful action that was directed against a person had to be considered as an action that stroke in the very juridical order and that undermined the state authority.

The second cause was the necessity of defending the collective security and in the last resort it was about the defense of the state security. At the beginning, the nationalized defense was directed against the slaves. It is known that in every state, there were numerous slaves that represented a real danger for the public power; in case of insubordination or if they committed actions that harmed the collectivity, then they were submitted to certain repressive measures. In the course of time, in order to realize the same objective, the repressive measures enforced to the slaves were extended to the group members that committed actions which jeopardized the collective security.

Finally, the last cause was represented by the incompatibility between the public power that was in process of consolidation and the particular person's right to revenge, even according to the talion system. As long as the public power wasn't strengthened enough, the parallel existence of a right to revenge of the particular persons was unnoticed, but when the public power became all-ruling, the presence of the private revenge was hard to accept; this was the reason for which the members of the society had to surrender the right to punish the doer to the public power. This surrender of right wasn't made unconditionally because at the beginning, the authority that took the place of the victim it had to enforce punishments as severe as those that were enforced by the individual revenge[3].

The revenge of the primitive man was an excessive one because in order to defend from the aggressor he crushed him. In the second stage, when the society took the place of the injured person, the revenge was an excessive as before for a long time, otherwise the reconciliation between the victim and the aggressor couldn't have been realized and the peace couldn't have been brought in the social group. Under these conditions, a double progress couldn't be obtained at the same time, on the one hand it was about the replacement of the punitive agent and on the other hand it involved the sweetening of the punishment. In the first place, it is hard to believe that in those barbarian times, the injured persons would

---

[1]F. von Liszt, *Traite de droit penal alemand*, Tome I, Paris, 1911, p. 19; I. Ceterchi, *Istoria dreptului românesc*, volume I, Academia Publishing House, Bucharest, 1980, p. 421.

[2] J. Novelli, *Tractatus criminalis*, Venetus, 1575, p. 86.

[3] A. Prins, *Criminalite et repression*, Paris, 1886, p. 28; P. Rossi, *Traite de droit penal*, Paris, 1829, p. 56.

have accepted that other persons exercise their right to revenge and in the second place, they couldn't accept the fact that these persons may give a punishment that was shorter than the punishment they would have given to him.

Conclusions

Vindicta privata, a basic reaction, a brutal and an unlimited one it appears as the first form of sanctioning the inconvenient behavior of the individual or of the social group.

Gradually, in the bosom of the great social groups (family, clan, tribe etc.) it has appeared the necessity of regulating the revenge and of imposing certain restrictions under the sanction of punishment. Within this disciplining, we can find the origins of the penal law.

Even if the private justice (in which the victim and her family appeared as the initiators and executors and as the beneficiary of the justice act) it continued to exist for a certain period in the primary stages of the state society organization, then the state authority gradually limited the degree and the modes of reaction against the doer.

In the course of time, the tendency of regulating the repressive reaction had various forms as it follows: the talion (the unlimited revenge), the facultative composition (the subsidiary revenge), the compulsory (legal) composition and the nationalized repression.

Bibliography:

Findaca, G., Musco, E., *Diritto penale. Parte generale*, 3rd edition, Zanichelli Publishing house, Bologna, 1995;

Ceterchi, I., Hanga, V., *Istoria dreptului romanesc*, volume I, the Publishing house of 3. Academia, Bucharest, 1980;

Stefani, G., Levasseur, G., *Droit penal general*, 6th edition, Dalloz Publishing house, Paris, 1972;

Dongoroz, V., *Drept penal. Tratat*, Bucharest, 1939;

Liszt, von F., *Traite du droit penal alemand*, 2nd edition, Paris, 1911;

Kohler, I., Peiser F.E., *Hammurabis Gesetz*, Leipzig, 1904;

Scheil, V., *Textes Elanites semitiques*, volume IV, Paris, 1902;

Urechia, V.A., *Documente inedite din domnia lui Al. C. Moruzi*, Bucharest, 1895;

Guyau, M., *Esquisse d'une morale sans obligation, ni sanction*, Paris, 1893;

Proal, L., *Le crime et la peine*, Paris, 1892;

Prins, A., *Criminalite et repression*, Paris, 1886;

Franck, A., *Philosophie du droit penal*, 2nd edition, Paris, 1880;

Thonissen, I.I., *Etudes sur l'histoire du droit criminel*, Bruxelles, 1869;

Le Graverand, M., *Traite de legislation criminelle*, Paris, 1830;

Rossi, P., *Traite de droit penal*, Paris, 1829;

Filangieri, G., *Le scienza dela legislatione*, Venezia, 1782;

Blackstone, *Commentaire sur le lais anglaises*, Bruxelles, 1776;

Montesquieu, *Esprit des lois*, Paris;

D'Argon, *Institutes du droit francais*, 1762.

Novelli, J., *Tractatus criminalis*, Venetus, 1575.

STUDY ON THE FEE PAYMENT CLAUSE INTO THE CONTRACTS FOR CREDIT RISK WITH MORTGAGE

Dumitrescu Aida[*]
Mihăilă Ştefan[**]

Abstract

The problem of unfair terms in contracts with the mortgage loan is a real and present theoretical and practical situation that requires a proper analysis.

One of the unfair terms in contracts of mortgage credit, which excite the expert discussions, is the clause that obliges the bank customer - the borrower to pay a risk fee. Discussions on the clause concerning the risk fee have to be relating to the recent legislative change in order to harmonize with EU legislation.

Keywords: *risk, risk fee, good insurance, bank credit agreement with mortgage guarantees, unfair.*

Introduction

The Romanian citizen, as debtor in a bank credit agreement, is obliged, under the impact of economic crisis especially today, to grow at a rapid pace in terms of how it intends to address existing or future contractual relations with creditors (banks).

A consequence of this situation is that, in signing a credit agreement secured by real estate banking, the customers - borrowers began to show increased responsibility, reflected by a more careful documentation and information and hence, observation and punishment of abusive clauses in the contract stipulated by the lender.

Problems arising from the provision of unfair terms into contracts with the mortgage bank led determined in the current period, multiple theoretical discussion and an abundant jurisprudence.

1. Theoretical considerations on the stipulation of a fee payment clause in the credit risk of mortgage guarantees.

1.1. The risk and the risk fee. Statement bank loan agreement secured by real estate is a feature in relation to bank credit agreement and the discussion on the stipulation clause that obliges the bank to pay a fee to the credit risk in bank secured by real estate should be reasonably on part due to recent changes in legislation in the field, on the other hand, due to the need to sanction non-compliance to the law**.**

The specific of the credit mortgage contract is that the risk involved in granting credit by the bank is covered by the existence of real estate collateral, which is an insurance guarantee on the lease for the bank, paid by the client. Moreover, into these contracts there is a clause inserted which oblige the debtor to pay a commission fee for not paying on time penalty rates.

* Ph.D. universitary assistent, University of Craiova, Faculty of Law and Administrative Sciences, Departament of Public Law, e-mail: aida_dumitrescu@yahoo.com
** Ph.D. universitary reader, "A. I. Cuza" Police Academy, Faculty of Police, Departament of Privat Law, e-mail: stefan.mihaila@academiadepolitie.ro

Given the above considerations, the risk of the bank, whatever its nature, is entirely covered by the existence subsumed under the same purpose of the insurance and the penalty fee.

According to art. 3 ¶ 1 letter g from the provisions of the National Bank of Romania no. 17 of 18 December 2003, the credit risk, as a bank risk is defined as the risk of loss or failure of the record profits expected, failure to perform contractual obligations to customers consisting of repayment and the cost of its.

Someone may plead that this insurance is not covering the risk integral if the insured property value of the mortgage good would fall until after the conclusion of insurance and renewal thereof, below the credit, but then, we have to observe that there is a penalty clause for fee timely paying annuities which is supposed to cover the difference in value.

In banking practice, some banks have arrangements with customers – borrowers, so it included into the credit agreements secured by real estate outside the clause of property mortgage insurance requirement and the clause of penalty fee for not paying on time annuities, another clause to which the debtor must pay a fee of risk.

The risk commission is established as a commission which is going to cover the risk premium associated with a particular customer financing by the financial institution.

This situation led to a series of discussions in doctrine and practice specialty, enhanced by recent legislative changes, changes in the growth of currency in which they were borrowed and economic crisis, all within the meaning of the unfair nature of this provision.

1.3. The problem of unfair terms in contracts regulation of mortgage credit. Initially, the provisions of Law no. 193/2000 on unfair terms in contracts concluded between traders and consumers1 were the general regulatory provisions on the problem of unfair terms.
Subsequently, the need for transposition and implementation until June 11, 2010, in our legislation of the Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on credit agreements for consumers and repealing Directive 87/102/EEC Council determined to adopt the Government Emergency Ordinance no. 50/2010 on credit agreements for consumers[2].

The provisions of this bill allows banks to fulfill obligations under the European legal act in order to achieve the objective of creating a Community internal market because, in the absence of regulation of consumer credit contracts, they could not enjoy the rights under EU law (transfer credit from one lender to another advantageous contractual conditions and the possibility for the consumers to repay early without paying penalty amounts incurred excessive)[3].

Adopted on 11 June 2010, the Government Emergency Ordinance no. 50/2010 entered into force on 21 June 2010 and was approved by Law[4] no. 288/2010 approving Government Emergency Ordinance no. 50/2010 on credit agreements for consumers, with amendments.

Changes and additions to the text of the ordinance adopting by the law led to many controversies in doctrine and practice specialty, including the nature of risk fee clause.

a) Nature of the clause which requires the commission of bank credit risk into contracts with collateral mortgage in anticipation of Law no. 193/2000 on unfair terms in contracts

---

[1] Republished in the Official Gazette, Part I no. 305 from of 18 April 2008, as amended by Law 161/2010 amending art. 84 of Law no. 296/2004 on consumption and the Law no.193/2000 on unfair terms in contracts concluded between traders and consumers, published in the Official Gazette, Part I no. 497 of July 19, 2010.

[2] Published in the Official Gazette, Part. I, no. 389 from 11 June 2010.

[3] The Romanian legislator stated in the preamble to the ordinance that this aspects concern the public interest and represent emergency and extraordinary situations, whose regulation can not be postponed, pursuant to art. 115, ¶ 4 of the Romanian Constitution, republished.

[4] Published in the Official Gazette, Part. I, no. 888 from 30 December 2010.

concluded between traders and consumers. According to art. 1 ¶ 1, 2 of Law no. 193/2000, any contract between the bank (merchant) and client (consumer) for contracting must include clauses clear and unambiguous, for understanding which may not be necessary expertise, and in the case, the clauses must be interpreted in favor of consumers.

Law[1] expressly prohibits the provision by banks stipulation unfair terms into the consumer contracts and defined as unfair clause[2] any clause that was not negotiated directly with the consumer and by itself or with other contractual provisions, creates a significant imbalance between the rights and obligations of the parties detrimental to the consumers and contrary to the requirements of good faith, noting that it will consider that a clause was negotiated directly with the consumer, if it was set and the consumer was enable to influence its nature.

The consumers can give their consent for the purpose of continuing the contract, if possible, after removal of unfair terms or if the contract cannot have effect after the removal of unfair terms, he can request the termination, and possibly damages.

The procedure3 of Law 193/2000 provides that the control4 bodies shall carry out the notification of victims or office, and banks were required to submit monitoring bodies, the original consumer contracts.

Supervisory Body concluded in a report recording the findings and articles of the law violated and transmit the minutes to the court in whose territory the crime was committed or in whose jurisdiction the offender resides or business.

If the court finds out that there were used unfair terms in contract, apply the sanction offenses and decides, under penalty of damages, changing the terms insofar as the contract continues to run or cancellation of the contract, with damages.

If later, the court considers that unfair terms are not covered into the contract, it takes a decision which cancels the minutes.

Even if bodies are not notified or control does not notify the office, the clients harmed by violation of law may apply to the judiciary according to common law (Civil Code and Civil Procedure Code).

b) Discussion of the Government Emergency Ordinance no. 50/2010 on credit agreements for consumers. From 21 June 2010, the provisions of the banking contracts that violate Government Emergency Ordinance no. 50 / 2010 are null and void, whether or not the contract has been updated and all charges on loans must be updated. Since the entry into force of the act, banks must comply with new rules and the term[5] of 90 days to updates the contracts to the legal form is not a period of derogation from the provisions of the law.

The new regulations[6] provide consumers the opportunity to notify the National Authority for Consumer Protection or to use extra-judicial mechanisms for complaint and

[1] See art. 1. 3 of Law no. 193/2000.
[2] See art. 4 al. 1 of Law no. 193/2000.
[3] See art. 8 – 14 of Law no. 193/2000.
[4] The bodies provided by Law no.193/2000, who have duties in the procedure for finding the causes of abuse are the empowered representatives of the National Authority for Consumer Protection and some other experts authorized public administration bodies.
[5] «According to article no. 95 of Government Emergency Ordinance no. 50/2010: "(1) For contracts in progress, the lenders are obliged, within 90 days from the entry into force of this law, to ensure the compliance of the contract to the provisions of this law. (2) Change into the contracts in progress will be made by addenda within 90 days from the effective date of this emergency ordinance."
[6] See the provisions of art. 85-89 of the Emergency Ordinance no. 50/2010.

redress for consumers, according to Law[1]no. 192/2006 on mediation and the profession of mediator, as amended and supplemented.

Authorized representatives of the National Authority for Consumer Protection in consumer complaint or on its own, finds offenses and apply penalties, with the possibility that the inspector (agent) have and implement additional sanctions without contesting the court to suspend enforcement of sanctions as it were ordered as additional offenses.

According to art. 1 of Government Emergency Ordinance no. 50/2010 on credit agreements for consumers2, this applies to credit, including credit agreements secured by mortgages.

The provisions of art. 36 of the Ordinance provide that, for the loan, the bank may charge: file analysis fee, administration fee or administration fee credit current account, compensation for early repayment, insurance costs, if necessary, penalties, and a unique commission for services to consumer demand.

After proceed to change bank contracts in line with the ordinance, the fees cannot be renamed to include the old charges of contract and cannot create another situation that would have a negative impact on loan quality.

c) The effect of the adoption of Law no. 288/2010 approving Government Emergency Ordinance no. 50/2010 on credit agreements for consumers, with amendments. After the entry into force of Government Emergency Ordinance no. 50/2010, it was adopted the Law3 on the approval of the ordinance which provides that provisions of the ordinance does not apply to contracts in progress at the effective date of the ordinance, except as art. 37.1, art. 66-69.

We note that at present, for ongoing contracts will apply only to article on the early repayment fee and the article which provides that the lender can refinance the loan under the new proposals, if the debtor will be good payers.

2. Analysis of recent jurisprudence generated by the fee payment stipulation clause in the credit risk of mortgage guarantees.

2.1. European case law. The Court of Justice[4] found many court decisions which ruled on the interpretation of Directive no. 93/13/EEC on unfair terms in consumer contracts. (Court of Justice delivered on 27.07.2000 into the process between Océano Grupo Editorial SA versus Rocio Murciano Quintero, Court of Justice delivered on 26.10.2006 into the process between Elisa Maria Mostaza Claro versus Centro Móvil Milenium SL, Court of Justice dated June 4, 2009 marked the process of Pannon GSM Zrt. C. Erszebet Sustikné Gyorfi).

2.2. National case law. Recently, on the role of national courts have been many cases having as object actions promoted by banks (annulment of the minutes signed by the competent bodies, which have imposed fines on banks) or action for declaration of unfair terms in credit contracts promoted by consumers (borrowers).

[1] Published in the Official Gazette, Part I no. 441 of 22 May 2006.

[2] According to art. 94 of Government Emergency Ordinance no. 50/2010, the provisions of this bill come into force within 10 days after publication in the Official Gazette of Romania, Part I.

[3] Law no. 288/2010 was published in the Official Gazette, Part I, No, 888 of 30 December 2010. See art. Section 39 of Law 288/2010 I for approval of Government Emergency Ordinance no. 50/2010 on credit agreements for consumers, with amendments.

[4] www.juridice.ro, www.curia.europa.eu

The clause which establishes the obligation of the debtor to pay the fee risk was found[1] made both in special conditions and the general conditions of contracts, on the manner:

- art. 5 letter a) from the special conditions (risk commission): "0.125% applied to the loan balance, payable monthly in days to maturity for the entire duration of the credit of this Convention".
- art. 3 ¶ 5 from the general conditions (risk commission): "for the provision of credit, the Borrower may be due to the Bank a fee of risk applied to the loan amount drawn, payable monthly, in the first 12 months of the credit, how computing and maturity / payment deadlines are established in the Special Conditions. If during the first year of the credit Convention (the first 12 months) there is delay in payment of outstanding rates, the Bank may also decide to ask for the perception of the risk commission risk during the second year (the next 12 months).

Arguments of the banks, on which they argued in court for the legality of the clause relating to the commission of risk are subsumed to the idea of demonstrating that were fulfilled the legality conditions of the clause (clause was negotiated, its existence does not create an imbalance between rights and obligations of the parties and the commission of risk is part of the contract price), and the distinction between the notions of risk, credit risk and credit risk justifies the insertion of such clauses, as follows:

- has not generated a significant imbalance to the detriment of consumers contrary to the requirements of good faith, because this cost has been established in terms of contract value (percentage) and in terms of duration (duration of the contract), with the contract.
- legal risks can arise from a failure to apply or wrong application of laws or regulations. For a right assessment 2 of the legal risk assessment and of the reputation risk, the credit institutions must take into account the regulatory and social, or other items that may affect the activity (negative publicity, loss of confidence in the credit welcome by customers of problems use of certain products, etc.).
- each contractual provision on risk perception is nuanced depending on ability to repay at maturity of the loan advanced, according to the internal criteria adopted.
- the debtor cannot be relieved of the responsibility to choose wisely in relation to particular matters of fact and choosing a quality product with a report.
- opinion, according to numerous decisions3 of courts, that provision for risk fee is unfair and should be removed from the contract for the following reasons:

---

[1] See civil sentence no. Satu Mare 4445/07.07.2010 District Court confirmed on appeal by the Court Satu Mare, in file no. 3439/296/2010 published on www.just.ro.

[2] art. 175 from Regulation of the National Bank of Romania no. 18 from 17 September 2009 on the management business of credit institutions, the internal assessment of capital adequacy and conditions of their outsourcing activities.

[3] Recent judicial practice consisting of judgments published on www.just.ro: Brasov Court file no. 19410/197/2009, Deva Court file no. 4337/221/2009, District Court Satu - Mare in file no. 2085/296/2009, Drobeta Turnu Severin Court file no. 9657/225/2009 (commission risk), Slatina Court file no. 3614/311/2009, Buzau Court file no. 11964/200/2009, Focşani Court file no. 1092/231/2009, Oradea Court file no. 16075/271/2009, Vrancea Court file no. 10517/231/2009, Bihor Court file no. 560/271/2010, Slatina Court file no. 11649/311/2009, Slatina Court in file no.11650 /311/2009, Slatina Court in file no. 11651/311/2009, Slatina Court in file no.11110 /311/2009, Slatina Court in file no. 10987/311/2009, Slatina Court no.10597 /311/2009, Slatina Court in file no.9717 /311/2009, Slatina Court in file no. 5315/311/2009, etc.

- the fee applies without show depending on what was established without customization, and its meaning was not clear even during the course of litigation.
- the commission is paid even if the risk is the risk covered by the mortgaged property insurance obligation and by paying the penalty fee for not paying rates on time.
- the risk in the contract fee is non-refundable and it is also not repaid in the end when the risk was not produced or into another situations.
- clause, because the wording and perception, and lack of negotiation, is it in fact, a new commission.
- borrowers did not have another real possibility, insofar they want to benefit from services of the bank, then to accept pre-conditions for bank building.
- there was a massive imbalance to the detriment of consumers.
- risk analysis shows that the amount of commission is not justified, the bank was not offering plausible explanations courts and motivates its provisions by reducing beneficiaries and profit, the number of clients and turnover.
- the European regulatory framework and the recent changes of the national legislation confirms that such a contractual term is unfair and have expressly for the future, not including its credit agreements, thus preventing the flow of litigation in courts.

Conclusions

Currently, we are witnessing a redefinition of relations between banks and their customers, whose parameters can be sized to recent legislative changes, the gradual professionalization of banking services, and also to the increased accountability of the contract partners (bank - client).

A proof in the sense of sustained is representing by the attention and the intransigence with which the legislature and the courts sanctioned, in general, the existence of unfair terms in credit agreements with mortgage banking, and settlement of concrete provisions in the contract clause that requires the debtor to pay bank a risk commission.

Bibliography:

Law no. 161/2010 amending art. 84 of Law no. 296/2004 concerning the Code of consumption;

Government Emergency Ordinance no. 50/2010 on credit agreements for consumers, with amendments;

Law 288/2010 approving Government Emergency Ordinance no. 50/2010 on credit agreements for consumers, with amendments;

Civil award of Satu Mare 4445/07.07.2010 District Court, confirmed on appeal by the Court Satu Mare, in file no. 3439/296/2010;

The Regulation of the National Bank of Romanian no. 18 of 17 September 2009 on the management of the activities from the credit institutions;

Law no.193/2000 on unfair terms in contracts concluded between traders and consumers;

www.juridice.ro;

www.curia.europa.eu;

www.just.ro.

EMPLOYMENT POLICIES IN THE EUROPEAN UNION

Eneida Sema[*]
Florian Bjanku[**]

Abstract

Employment constitutes one of the priority issues in the European Union. After 2003, the European Union decided a new direction for EES, based on the new needs of the European labor market and the aging of the population.

The European Union institutions pay considerable attentions to the employment policies by considering them as priority policies.

Key words: *employment, labor market, active workforce, priority policy.*

Introduction

The Lisbon Treaty, which was signed in December 2009, explicitly states that the European Union is founded on fundamental principles, respect to human dignity, freedom, democracy, equity, the respect to the law and the fundamental human rights, including the rights of the minorities.

Pursuant the principle of free movement of persons of the European Union member states, any kind of discrimination in employment, remuneration and work conditions on grounds of nationally by the employers is prohibited.

Nowadays, the labor market includes the active workforce that represents the persons participating in one labor relation form which they benefit the salary, as well as the self-employed persons.

Employment policies

Employment constitutes one of the priority issues in the European Union. The employment issue was treated in the Treaty of Rome (art. 125 – 130) and the Treaty of Amsterdam (1997). The member states of the European Union are encouraged to strengthen cooperation amongst each other via employment strategies that aim at the minimization of unemployment.

In 1994, the European Union determined the objectives and the priorities related to employment:

- Implementation of quantitative policies of employment
- Implementation of qualitative policies of employment
- Increasing the efficiency of employment policies
- Improvement of assistance and services for categories of the persons for whom it is difficult to find employment.

In 1996 the Council and the European Commission submitted a summarized report on the concrete employment measures and policies based on the priorities related to this issue.

The Treaty of Amsterdam, which also entered into power in 1999, determined employment as one the main objective of the European Community.

The Luxemburg Summit "On employment", on November 21st, 1997, determined

[*] Dr. Lecturer at Law Faculty, Tirana University, e-mail: eneidasema@yahoo.com
[**] Ph.D. (in process) Lecturer at Law Faculty Shkodra University, e-mail: bjanku@gmail.com

that the European Employment Strategy should treat four main issues[1]:

- full employment
- improve entrepreneurship
- adoptability
- equal opportunities

In March 2000, in the European Summit of Lisbon, the heads of the states and the governments of the member states determined the further strategic aim for the next decade: economic growth, more efficient employment and social cohesion.

The European Employment Strategy has these priorities: reduction of unemployment larger participation of women in the labor market permanent qualification support to enterprises elimination of non-declared employment (illegal employment) After year 2003, the European Commission determined a new direction for the EES (European Employment Strategy), based on the new needs of the European labor market due to the aging of the population[2]. This new spirit that pervaded the EES aimed at full, productive and qualitative employment, completely based on the economic development of the member states.

The Treaty of Lisbon, signed in December 2009, explicitly states that European Union is founded on the fundamental principles, respect to human dignity, freedom, democracy, equity, respect to the law and the fundamental human rights, including the minorities' rights. These values are protected by the legislations of the member states which support pluralism, the prohibition of discrimination, justice and equity between men and women.

Article 6 of the Treaty states that the European Union recognizes the rights, freedoms and the principles stated in the European Union Charter of Fundamental Rights.

Title III/133 of the Founding Treaty of the European Union, which is included as an integral part of the Treaty of Lisbon, also provides for the freedom of movement for the entrepreneurs.

Pursuant the principles of the free movement of persons of the member states of the European Union, any kind of discrimination by the employers in employment, remuneration and the work conditions on grounds of the workers nationality is prohibited.

In this context, the employers in the EU member states have the right to:

- accept employment offers in the member states
- move freely to find employment within the territory of the member states
- of residence because of employment in one of the member states

However, restrictions have been imposed for the public sector.

The labor market in Europe and the temporary labor market in Europe under the influence of some temporary factors.

Nowadays, the labor market includes the active workforce which represents the persons participating in one labor relation from which they benefit the salary, as well as the self-employment persons. Therefore, we can say that labor market is inevitably related to the development of some group-factors qualified as temporary and changeable at the same time:

- transition period from the education and studying system to labor relationship;
- determining the ratio between family engagements and work;

[1] Ralf Rogowski, "The European Social Model and Transitional Labour Markets".
[2] Gianni Arrigo, Giuseppe Casale, "Glossary of labour law and industrial relations with special reference to the European Union".

- transition period from the labor relationship to retirement or the status of a person with limited capabilities;
- defining the ratio between the employment and unemployment level;
- transition within the labor market itself, from a dependable labor relation to self-employment;
- transition within the labor market itself from a typical labor relation to new atypical form of labor relation (for example to a part-time job or any other news form of labor relations).

The relations that exist within these group factors and the labor market are very flexible and fluid. Nowadays, it is very important to define and predict their flexibility level. In this context, the support to positive transitional changes in the labor market as well as the undertaking of legal regulatory and institutional measures, also play a very important role.

The social risks closely related to the aspect of income on a national level should also be "well – administrated".

As regards the transitional period between the completions of the studies to employment, the definition of employment policies, as well as the professional qualification and training play an important role. The member states should designate such measures related to the labor market that can create a balance between the income that will be benefited by the needy strata (such as the invalids, the unemployed, the retired persons, persons who take care of their children in certain periods, etc.) and the income on a national level. The employment policies are designated based on the level of social assistance given to the needy strata, thus aiming at creating opportunities and encouraging employment for the invalids of different levels, the unemployed, as well as the creation of opportunities for training and professional qualification courses.

Legal regulations that aim at gender equity between women and men are considered one of the stabilizing elements being very positive in the improvement of the labor market aiming at the reduction of unemployment.

Active policies in the labor market also promote the important role played by the employment agencies.

The European Union member states encourage amongst others, the exchange of efficient employment policies. In a summarized way, the employment policies include:

1. Youth employment;
2. Elimination of prolonged unemployment;
3. Encouragement of private enterprises;
4. Promotion of contemporary forms of cooperation and organization;
5. The creation of possibilities to enable workers to obtain leaves of absence in cases of family needs and to return to the same job position;
6. Promotion of persons with limited capabilities in the labor market;
7. Prohibition of gender discrimination;
8. Promotion of professional development, qualifications and re- qualifications.

The Social European model which includes the European Employment Strategy is a multi-dimensional notion which aims at social welfare through economic development and social protection.

Amongst the EES (European Employment Strategy) main objectives, it is the cultural and professional growth of the member states; measures which aim at the full implementation not only of employment quantitative policies but qualitative ones as well.

The employment policies in the European Union member states in this way aim at the longest term possible employment; thus trying to achieve the necessary balances between

the full time job and the newest forms of labor relations; the most prominent one being the part time job. Nevertheless, requests coming from EES (European Employment Strategy), should be seen in a wide context imposed by the economic changes and the needs of the labor market in the member states of the European Union.

Influenced by the "globalization" effects as well as the "the aging of the European population", the common requests impose: the creation of "knowledge based economies" increase of women employment, as well as providing a fair balance between "flexibility" and "security".

The creation of social and legal balances between Flexibility and Security

The above-mentioned aspects are represented in the form of new challenges for the European Union; as such they pose the request for the creation of the necessary balance between the "flexibility" and "security" in achieving objectives of social and economic nature.

Therefore, the required policies in the labor market are very often known by different researchers with the term flexicurity. The creation of "protective" policies and their implementation in the labor market any time and as required, the undertaking of institutional measures or policies in this context, clarifies the term flexicurity.

Conclusions

European rule of law researchers, often adopt skeptic stances towards the efficacy of the implementation of the legal and social media which serve to preserve the above mentioned balances.

The labor market flexibility does not imply increase of unemployment, but types of appropriate states interventions via different employment policies based on the labor market needs.

Welfare Regimes do not harm the balances between the flexibility and the security in the labor market.

The European Union institutions pay considerable attention to the employment polices by considering them as priority policies towards the economic and social development of the member states.

Bibliography:

G. Arrigo, Giuseppe Casale, "Glossary of labor law and industrial relations," 2005;

Labour law in motion, Diversification of the Labour Law Force and Terms and Conditions of Employment, Bulletin of Comparative Law, Kluwer Law International, 2005;

"Employment Law at the European Court of Justice, Judicial Structures, Policies and Processes", Siofra O'Leary Oxford – Portland Oregon, 2002;

Ball.S. "The European employment strategy: the will but not the way?" Industrial Law Journal, 2001;

Ceshtjet e barazise gjinore ne standartet ligjore dhe jurisprudencen kombetare e nderkombetare, Shkolla e Magjistratures;

Pascal Lokiec, "The framework of French Labour La and Recent Trends in Regulation;

Ralf Rogowski "The European Social Model and Transitional Labour Markets".

SEXUAL HARASSMENT: LIMITING THE AFFIRMATIVE DEFENSE IN THE DIGITAL WORKPLACE

Daniel B. Garrie[*]

Abstract

There has been a disturbing rise in sexual harassment claims in recent years that have been facilitated by the ubiquitous availability of digital communication devices. Such harassment occurs through unprovoked and offensive e-mails, messages posted on electronic bulletin boards, and other means available through the Internet. To date, courts have remained silent on this issue. Should this type of harassment be treated any differently from physical harassment? The somewhat surprising answer is yes.

This article suggests a new judicial framework for addressing sexual harassment perpetrated through digital communications. This framework accounts for both the real-world technology in place in the digital workplace and the legal framework that courts have constructed in connection with affirmative defenses to harassment. The fundamental difference between digital and physical sexual harassment is the employer's ability to monitor and block offensive digital communications and thus prevent sexual harassment; this possibility of prevention is the underlying reason for treating the two forms of harassment differently and for modifying the existing affirmative defense.

This article proposes that when an employer fails to use available technology to prevent known digital sexual harassment issues, the affirmative defense should be either modified or altogether unavailable. The adoption of this approach would compel employers to deploy blocking and monitoring technology as a preventative means designed to eliminate digital harassment in the workplace.

Key words*: sexual harassment, workplace, defense, employers.*

Introduction

Sexual harassment law has evolved greatly over the last few decades. Harassment claims have expanded to include employer liability for co-worker harassment, supervisor harassment, and, most recently, third party harassment.[1] *Correspondingly, courts have*

---

[*] The author would like to note that an earlier version of this article was published with the invaluable contributions of both Matthew Armstrong and Professor Donald Harris. See Donald P. Harris, Daniel B. Garrie & Matthew J. Armstrong, Sexual Harassment: Limiting the Affirmative Defense in the Digital Workplace, 39 U. MICH. J.L. REFORM 73, 83–87 (2005), ijjs@univagora.ro

[1] *See* Powell v. Las Vegas Hilton Corp. 841 F. Supp. 1024, 1028 (D. Nev. 1992) (holding that an employer may be liable for sexual harassment of employees by non-employees); Galdamez v. Potter, 415 F.3d 1015, 1022-25 (9th Cir. 2005) (the employer may be responsible for actionable third-party harassment of its employees); Turnbull v. Topeka State Hosp. 255 F.3d 1238, 1244 (10th Cir. 2001) (employer may be responsible for sexual harassment toward employees by acts of nonemployees); Crist v. Focus Homes, Inc. 122 F.3d 1107, 1111 (8th Cir. 1997) (employer may be responsible for sexual harassment toward employees by acts of nonemployees); Rosenbloom v. Senior Res. Inc. 974 F. Supp. 738, 743-44 (D. Minn. 1997) ("employer can be held liable for the racial hostile work environment created by a third party.") AP v. Anoka-Hennepin Indep. Sch. Dist. No. 11, 538 F. Supp. 2d 1125, 1146 (D. Minn. 2008). *See generally* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 Colum. L.Rev. 1357, 1372-73 (2009); Karen Kaplowitz & Donald P. Harris, *Third Party Sexual Harassment: Duties and Liabilities of Employers*, A.B.A. BRIEF, Spring 1997, at 32, 33-35.

provided employers with specific defenses against such liability.[1] For example, an employer escapes liability by taking corrective measures reasonably calculated to permanently end the harassment;[2] in many instances, the employer cannot prevent the initial harassment but is able to ensure that it does not continue or recur.[3]

With no provision for preventing harassment in the first instance, however, such judicial treatment provides little comfort to a harassment victim. The Supreme Court has recognized this insufficiency of redress, holding that employers should take preventive measures to ensure a harassment-free workplace consistent with Title VII of the Civil Rights Act of 1964 and its policy of encouraging the creation of anti-harassment policies and effective grievance mechanisms.[4] While an employer cannot observe or control all the actions and manifestations of its employees in the physical workplace, it can more practicably prevent harassment in the digital workplace because cost effective technology exists to actively monitor the content of digital communication in e-mail, Internet postings, instant messaging, and other digital means.

Increasingly, sexually harassing conduct occurs through these digital communications channels,[5] even though employers have access to information technology capable of preventing such conduct.[6] Employers can and do monitor and block employee communications[7] to protect trade secrets,[8] track productivity,[9] and enforce corporate policies and procedures.[10] In light of these uses—and, more importantly, the legal sanction of these uses—employers should also be required to monitor their internal networks for offensive e-mails or communications that constitute harassment. Whether an employer took reasonable precautions with respect to the size and scope of its existing domestic technological infrastructure should determine its liability and should bear directly on its ability to claim an affirmative defense to employee allegations of digital workplace harassment.

This article recommends a new framework for courts to analyze modern digital sexual harassment claims. Part II of the article briefly reviews the existing legal remedies for

---

[1] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[2] *See, e.g.* Galdamez v. Potter, 415 F.3d 1015, 1022 (9th Cir.2005) ("An employer may be held liable for the actionable third-party harassment of its employees where it ratifies or condones the conduct by failing to investigate and remedy it after learning of it."); Dunn v. Washington County Hosp. 429 F.3d 689, 691 (7th Cir.2005) (finding that a hospital could be required to protect a nurse employee from harassment by a doctor even though the doctor was not an employee of the hospital). *See also* Kaplowitz & Harris, *supra* note 1, at 36.

[3] *Id.* at 38.

[4] *Faragher*, 524 U.S. at 806; *Ellerth*, 524 U.S. at 765; Miller v. Kenworth of Dothan, Inc. 277 F.3d 1269, 1278 (11th Cir.2002); *see also* Dunn, 429 F.3d at 691.

[5] *See* Garrity v. John Hancock Mut. Life Ins. Co. No. 00-12143-RWZ, 2002 U.S. Dist. LEXIS 8343 (D. Mass. May 7, 2002) (holding that an employee terminated for sending harassing e-mails had no reasonable expectation of privacy in his work e-mail); McLaren v. Microsoft Corp. No. 05-97-00824-CV, 1999 Tex. App. LEXIS 4103, at *1 (Tex. App. May 28, 1999) (holding that there is no reasonable expectation of privacy in an employer-owned e-mail system); *see also* Mitchell Waldman, Annotation, *Expectation of Privacy in Internet Communication*, 92 A.L.R.5TH 15, ¶ 3(c) (2001); Daniel B. Garrie & Matthew J. Armstrong, Comment, *The Sarbanes-Oxley Act's Effect on Electronic Discovery*, FED. LAW, May 2005, at 4, 51. *But see* Stengart v. Loving Care Agency, 990 A.2d 650 (N.J. 2010) (finding that employees do have a reasonable expectation of privacy in email accessed on a work computer).

[6] *See* David N. Greenfield & Richard A. Davis, *Lost in Cyberspace: The Web @ Work*, 5 CYBERPSYCHOL. & BEHAV. 347 (2002).

[7] *See* discussion *infra* Part III.A.

[8] *See* Frank C. Morris, Jr. *Workplace Privacy Issues: Avoiding Liability, in Employment Discrimination and Civil Rights Actions in Federal and State Courts* 697, 715 (ALI-ABA Course of Study, June 3-5, 1999), *available at* WL SD52 ALI-ABA 697.

[9] *Id.* at 713.

[10] *Id.* at 725-26.

sexual harassment, the employer's affirmative defense, and the underlying rationale of the defense. Part III critiques the defense's application to the digital workplace, and Part IV presents a new test, the Digital Workplace Defense Test, which courts should invoke when reviewing an affirmative defense to digital sexual harassment.[1]

The proposed approach permits the affirmative defense in the digital workplace under more limited circumstances than in the physical workplace. Courts should first examine the defendant employer's technological infrastructure to determine whether the employer and current technology offerings were capable of monitoring and blocking the digital communications comprising the harassment claim. If not, the employer should be permitted to plead the affirmative defense. If, however, the court finds that the existing technology did possess such capabilities, the court then should explore whether the defendant took reasonable steps to monitor and block the offensive digital communications, or whether the defendant's failure to use readily available technology to prevent the harassment was reasonable.[2] *The resolution of this inquiry should involve a determination of whether and to what extent the employer used such technology to monitor and block communications for purposes unrelated to harassment. If the court concludes that the employer did not take reasonable steps to prevent the harassment in light of both the capabilities and the existing use of its technology, the court should not allow the defendant to*

---

[1] *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619 (2010); *Quon v. Arch Wireless Operating Co. Inc.* 529 F. 3d 892 (9th Cir. 2008). *See also* Justin Conforti: COMMENT: Somebody's Watching Me: Workplace Privacy Interests, Technology Surveillance, and the Ninth Circuit's Misapplication of the Ortega Test in Quon v. Arch Wireless, 5 Seton Hall Cir. Rev. 461, 472-91 (Spring 2009); Rachel Sweeney Green, COMMENT: Privacy in the Government Workplace: Employees' Fourth Amendment and Statutory Rights to Privacy, 35 Cumb. L. Rev. 639, (2004/2005); James P. Nehf, Incomparability and the Passive Virtues of Ad Hoc Privacy Policy, 76 U. Colo. Law. Rev. 1, 4-18 (Winter 2005); and Paul F. Gerhart, Employee Privacy Rights in the United States, 17 Comp. Lab. L. 175, 176-205 (Fall 1995). In addition, s*ee e.g. United States v. Greiner*, 235 Fed. Appx. 541, 542 (9th Cir. 2007) (discussing a case of an employee's claim that his employer's remote Internet monitoring violated the Fourth Amendment and holding that the warning banner confronting [the plaintiff/employee] every time he logged onto his computer gave him ample reason to be aware that his stored files and internet usage were subject to monitoring by his employer and disclosure to law enforcement personnel, and that by using the computer he was deemed to have consented to such monitoring and disclosure. Thus, [the plaintiff/employee] lacked a legitimate expectation that his internet activity would remain private from his employer) and *United States v. Heckenkamp*, 482 F.3d 1142, 1147 (9th Cir. 2007) (stating that "privacy expectations may be reduced if the user is advised that information transmitted through the network is not confidential and that the systems administrators may monitor communications transmitted by the user [i.e. via an automatic screen warning]"). *See also* William A. Herbert, Symposium: *The Electronic Workplace: To Live Outside the Law you Must be Honest*, 12 EMPL. RTS. & EMPLOY. POL'Y J. 49, 60-61 (2008) (stating that "automatic screen warnings, upon logging in, can help to ensure that an employee's subjective expectation of privacy will be found unreasonable by a court."). *See further e.g.* Ann Carrns, *Prying Times: Those Bawdy E-Mails Were Good for a Laugh -- Until the Ax Fell*, WALL ST. J. Feb. 4, 2000, at A1 (discussing a lawsuit brought against Chevron employees accusing the company of allowing sexually harassing e-mails to be sent and received on company accounts; Chevron settled the claim for $2.2 million). The e-mails in question contained a story entitled "25 Reasons Why Beer is Better than Women." *See* JOKES AND HUMOR.COM, http://www.jokesandhumor.com/jokes/137.html (last visited September 15, 2011); *2007 AMA Survey* at 1 (stating that the "failure to monitor internal e-mail is a potentially costly oversight, as employees tend to play it fast and loose with internal e-mail, transmitting jokes, gossip, disparaging remarks, pornography, and other content that triggers workplace lawsuits."); Thomas J. Harvey, *Beware Workplace E-Mail, Survey Says*, ASAE & THE CENTER FOR ASSOCIATION LEADERSHIP, 2001, *available at* http://www.asaecenter.org/PublicationsResources/whitepaperdetail.cfm?ItemNumber=12168 (stating that 8% of companies in a recent survey claimed that they had battled a sexual harassment or sex discrimination lawsuit based on employee e-mail or Internet use.); *Webmail at Work, supra* note 85, at 651 (stating that a "short list of other risks [of not monitoring employee e-mail] includes compromise of sensitive or proprietary information, damage to public image, and vicarious liability for various torts.").

[2] *See* discussion *infra* Part IV.A.

plead the affirmative defense.[1] *The adoption of this approach would appropriately place an obligation on employers who already possess and use blocking and monitoring technology capable of culling out offensive content to take reasonable preventive measures to prevent digital workplace harassment.*[2]

I. HOSTILE WORK ENVIRONMENT AND GENDER DISCRIMINATION

Claims about gender discrimination derive from Title VII[3] of the Civil Rights Act of 1964.[4] Congress enacted Title VII to protect employees from discrimination based on gender, race, or religion in the workplace.[5] Title VII establishes two different theories of liability for gender discrimination and sexual harassment: (1) hostile work environment; and (2) quid pro quo, or discriminatory acts having tangible employment consequences.[6]

A. Review of Legal Remedies

A hostile work environment is created when the discriminatory conduct of a supervisor, coworker, or third party is sufficiently severe or pervasive to alter the conditions of an individual's employment and create an abusive working dynamic.[7] Courts first recognized the hostile work environment cause of action in race discrimination cases in the early 1980s.[8] In *Meritor Savings Bank v. Vinson*,[9] the Supreme Court subsequently extended the hostile work environment cause of action to include gender discrimination, noting that sexual harassment constitutes a form of such discrimination and is therefore prohibited by Title VII.[10] The Court recognized that the standard for imputation of liability to an employer for creation of a hostile work environment differs depending on whether the alleged harasser is a coworker, third party, or supervisor.[11] When the harasser is a coworker or third party, the employer is liable only if the plaintiff can prove that (1) the employer knew of or should have known of the harassment, and (2) the employer failed to take prompt and effective remedial action reasonably calculated to end the harassment. In essence, the employer's liability in this context is determined in accordance with a negligence standard. [12] However, the Supreme Court declined "to issue a definitive rule on employer liability"[13] when a supervisor's

---

[1] *See* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971); Snyder v. Guardian Auto. Prods. Inc. 288 F. Supp. 2d 868, 874 (N.D. Ohio 2003) (holding in part that a harassed female employee failed to establish that she was subjected to a hostile work environment on the basis of her gender because anonymous computer messages telling her to "stop acting like you're actually working" did not reflect gender-based motive or bias). *See further* Garcez v. Freightliner Corporation, 188 Or. App. 397, 72 P.3d 78 (2003); Vasquez v. County of Los Angeles, 307 F.3d 884, 892 (9th Cir.2002).

[2] *Id.*

[3] Civil Rights Act of 1964, 42 U.S.C. ¶ 2000e to 2000e-17 (2000).

[4] 42 U.S.C. ¶ 2000e-2(a).

[5] *Id.*

[6] *Id.*

[7] *See generally* Kaplowitz & Harris, *supra* note 1, at 33.

[8] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-66 (1986); *Rogers*, 454 F.2d at 236-41.

[9] *Meritor*, 477 U.S. 57.

[10] *See id.* at 73; *see also* Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988) (finding supervisors' behavior created a hostile environment).

[11] Faragher v. City of Boca Raton, 524 U.S. 775, 793-801 (1998); *Meritor*, 477 U.S. 57; *see also* Kaplowitz & Harris, *supra* note 1, at 33-34.

[12] Llewellyn v. Celanese Corp. 693 F. Supp. 369, 380-81 (W.D.N.C. 1988) (citing Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983)) (holding that employer's response to complaint of sexual harassment fell short of prompt remedial action reasonably calculated to end the harassment where employer spoke to one alleged harasser and placed a warning letter in the file of another alleged harasser, but failed to inspect or discipline numerous other harassing employees); Kaplowitz & Harris, *supra* note 1, at 36.

[13] Meritor, 477 U.S. at 65-66 (citing Firefighters Inst. for Racial Equal. v. City of St. Louis, 549 F.2d 506, 514-15 (8th Cir. 1977); Gray v. Greyhound Lines, 545 F.2d 169, 176 (D.C. Cir. 1976); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)), 454 F.2d at 238). The Court articulated that a hostile work environment was actionable in sex

harassing conduct creates a hostile work environment;[1] rather, the Court stated simply that it "agree[d] with the EEOC that Congress wanted courts to look to agency principles for guidance in this area."[2]

The lack of a definitive standard for determination of employer liability for harassment by supervisors initiated twelve years of disagreement among the circuit courts, as their attempts to establish a standard varied in accordance with their differing applications of agency principles. The courts held employers vicariously liable for supervisor misconduct according to three different criteria: (1) if the supervisor was "aided by" the scope of his or her employment; (2) if the supervisor was "aided by" the agency relationship; or (3) if the employer had actual or constructive knowledge of the harassment and failed to remedy it.[3] Some courts also have held employers liable for supervisor misconduct on negligence grounds for failing to prevent harassment.[4]

In order to resolve the disagreement among the circuit courts, the Supreme Court established a new method for determining employer liability in two groundbreaking decisions, *Faragher v. City of Boca Raton*[5] and its companion case, *Burlington Industries, Inc. v. Ellerth*.[6] In these cases, the Court presented two different standards for employer liability for harassment by supervisors. First, the Court held that an employer may be found liable even if supervisor harassment is not accompanied by an adverse official act or "tangible employment action," such as discharge, demotion, or undesirable reassignment; in such situations, however, the employer may raise an affirmative defense to such liability. The affirmative defense consists of two necessary elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[7] Second, the Court held that an employer must be found strictly liable if the supervisor harassment is accompanied by

---

discrimination cases because "the EEOC issued Guidelines specifying that 'sexual harassment,' as there defined, is a form of sex discrimination prohibited by Title VII." *Id.* at 65.

[1] *Id.* at 72.

[2] *Id.* With regard to quid pro quo harassment, which by definition is committed by a supervisor or someone with power to effectuate tangible employment actions, employers are strictly liable for supervisor harassment. *Faragher*, 524 U.S. at 808.

[3] *Faragher*, 524 U.S. at 793.

[4] *See, e.g.* EEOC v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir. 1989) (holding employer liable where hotel manager did not respond to complaints about supervisors' harassment); Hall v. Gus Constr. Co. 842 F.2d 1010, 1016 (8th Cir. 1988) (holding employer liable for harassment by co-workers because supervisor knew of the harassment but did nothing); Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (upholding employer liability because the "employer's supervisory personnel manifested unmistakable acquiescence in or approval of the harassment"); *see also* Torres v. Pisano, 116 F.3d 625, 634-35, 634 n.11 (2d Cir. 1997) (citing Kotcher v. Rosa & Sullivan Appliance Ctr. Inc. 957 F.2d 61, 64 (2nd Cir. 1992); Hunter v. Allis-Chalmers Corp. 797 F.2d 1417, 1422 (7th Cir. 1986)) (noting that a supervisor may hold a sufficiently high position "in the management hierarchy of the company for his actions to be imputed automatically to the employer"); Nichols v. Frank, 42 F.3d 503, 514 (9th Cir. 1994) ("Under traditional agency principles, the exercise of such actual or apparent authority gives rise to liability on the part of the employer under a theory of respondeat superior." (Citation omitted)); *Kotcher*, 957 F.2d at 62 ("The supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee. From the perspective of the employee, the supervisor and the employer merge into a single entity."); Shager v. Upjohn Co. 913 F.2d 398, 405 (7th Cir. 1990) ("[A] supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer.").

[5] 524 U.S. 775 (1998).

[6] 524 U.S. 742 (1998).

[7] *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

an adverse official act or "tangible employment action;"[1] in such cases, the employer may not raise the affirmative defense.[2] When a perceptible and hostile employment action accompanies harassment, strict liability and the unavailability of the affirmative defense are appropriate for a variety of reasons: the supervisor's decision "merges" with that of the employer, and his or her act becomes that of the employer; the supervisor acts within the scope of his or her authority when he or she hires, fires, or demotes the employee; and the supervisor is aided by the agency relation in discriminating against the employee.

B. Rationale behind the Supreme Court's Creation of the Affirmative Defense

The Supreme Court reasoned that the availability of an affirmative defense would provide an incentive for employers to take both preventive and remedial measures to limit occurrences of sexual harassment in the workplace.[3] Examples of such measures include instituting a grievance procedure, educating employees and supervisors about sexual harassment, and ensuring that employees are notified of their rights regarding harassment.

By holding that employers can be held vicariously liable for supervisors' conduct, the Court recognized that employers are in the best position to prevent sexual harassment, a clear goal of Title VII.[4] However, the Court also recognized that employers are not the only actors who can curtail harassment. Thus, while the first prong of the affirmative defense imposes an obligation on employers to prevent harassment from occurring, the second prong imposes an obligation on employees to take actions to minimize resulting harm.

C. The Affirmative Defense Today

While the Supreme Court did not explicitly direct employers to adopt internal anti-harassment policies and procedures, it provided a noteworthy incentive to do so by granting employers possible immunity if they do implement such policies and procedures.[5] In explaining why employer liability for supervisor misconduct might be appropriate, the Court noted that the different treatment between supervisors on the one hand, and coworkers and third parties on the other, is justified because a supervisor "[n]ecessarily draw[s] upon his superior position" in harassing the victim and because the employer has a greater opportunity to guard against supervisor misconduct.[6] The Court refused, however, to impose "automatic

---

[1] *Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 765.

[2] *Faragher*, 524 U.S. at 790-91.

[3] *See* Petrosino v. Bell Atl. 385 F.3d 210, 226 (2d Cir. 2004); Pfeiffer v. Lewis County, 308 F. Supp. 2d 88, 106 (N.D.N.Y. 2004); Sutton v. Zemex Corp. 261 F. Supp. 2d 392, 395 (W.D.N.Y. 2003); Sconce v. Tandy Corp. 9 F. Supp. 2d 773, 777 (W.D. Ky. 1998).

[4] *Faragher*, 524 U.S. at 798, 806 ("[Title VII's] 'primary objective'... is not to provide redress but to avoid harm." (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975))); *see also* Baldwin v. Blue Cross/Blue Shield 480 F.3d 1287, 1303-1304 (11th Cir. 2007); Swenson v. Potter 271 F.3d 1184, 1196 (9th Cir. 2001); Bradley v. Department of Corrections & Rehabilitation,158 Cal.App.4th 1612, 1631 (Cal. 2008); Hathaway v. Runyon, 132 F.3d 1214, 1224 (8th Cir. 1997).

[5] *See, e.g.* Slay v. Glickman, 137 F. Supp. 2d 743, 752 (S.D. Miss. 2001) (granting employer's motion for summary judgment, concluding that because the employer had a sexual harassment policy of which the plaintiff was aware and promptly investigated plaintiff's allegations of harassment, plaintiff did not establish a genuine issue of material fact with regard to whether the defendant employer exercised reasonable care to prevent and promptly correct sexual harassment in the workplace); Hairston-Lash v. R.J.E. Telecom, Inc. 161 F. Supp. 2d 390, 394 (E.D. Pa. 2001) (granting summary judgment for the defendant employer, stating that plaintiff did not contest that she had received notice of employer's extensive policies and procedures on handling sexual harassment). *See also* Harris, Donald P.; Garrie, Daniel B.; Armstrong, Matthew J. *Sexual Harassment: Limiting the Affirmative Defense in the Digital Workplace*, 39 U. Mich. J.L. Reform 73 (2005-2006).

[6] *Faragher*, 524 U.S. at 803. *See also* Joens v. John Morrell & Co. 354 F.3d 938, 940 (8th Cir.2004); Gordon v. Shafer Contracting Co. 469 F.3d 1191, 1194-95 (8th Cir.2006); Al-Zubaidy v. TEK Indus. Inc. 406 F.3d 1030, 1038 (8th Cir.2005).

liability" for supervisor harassment because liability might be inappropriate under certain conditions, such as when the employer exercised due care to avoid harassment and to eliminate it when it occurred.[1]

In 2004, in *Pennsylvania State Police v. Suders*,[2] the Supreme Court reaffirmed the affirmative defense in the context of a constructive discharge claim. In *Suders*, a female police dispatcher for the Pennsylvania State Police filed a claim against her employer alleging both sexual harassment and gender discrimination.[3] She claimed constructive discharge by alleging that relentless sexual harassment by her supervisors had left her no option but to resign from her position.[4] Reversing the trial court's decision, the Third Circuit held that her constructive discharge constituted an adverse employment action; therefore, under *Faragher* and *Ellerth*, her employer was found strictly liable and was not permitted to assert the affirmative defense.[5]

The Supreme Court reversed, holding that while some constructive discharges amount to official employer action, others do not result from a supervisor's official act. Accordingly, the Court concluded that an employer is prohibited from relying on the affirmative defense only when a supervisor's official act precipitates a constructive discharge.[6] *Suders* thus reinforces the role of the affirmative defense in the physical workplace; however, it does not address whether the affirmative defense should be permitted in the digital workplace.[7]

II. CRITIQUE OF THE AFFIRMATIVE DEFENSE IN THE DIGITAL WORKPLACE

Digital workplace harassment occurs when employees use e-mail or the Internet to sexually harass other employees or to create hostile work environments.[8] Few cases have addressed employer liability for such acts. In *Owens v. Morgan Stanley & Co.*, the court held that while unchecked offensive e-mail communications circulating within the workplace could constitute harassment, a single incident of inappropriate e-mail was insufficient to establish a claim.[9] In *Strauss v. Microsoft Corp.*,[10] the court held that jokes and sexual parodies, in conjunction with other remarks e-mailed by a supervisor to employees, were admissible and relevant evidence of sexual harassment.

---

[1] *Faragher* at 805.

[2] 542 U.S. 129 (2004); s*ee also* Ford Motor Co. v. EEOC, 458 U.S. 219, 231, 102 S. Ct. 3057, 73 L.Ed.2d 721 (1982) (discussing a Title VII plaintiff's responsibility to mitigate damages).

[3] *Id.* at 133.

[4] *Id.*

[5] *Id.* at 139.

[6] *Id.* at 148.

[7] *Id. See also* Mac's Shell Service v. Shell Oil Products, 130 S. Ct. 1251 (2010); Fincher v. Depository Trust and Clearing Co. 604 F.3d 712 (2nd Cir. 2010).

[8] *See* Gorzynski v. JetBlue Airways Corp. 596 F. 3d 93 (2nd Cir. 2010); Strickland v. UPS Inc. 555 F. 3d 1224 (10th Cir. 2010); Helton v. Southland Racing Corp. 600 F. 3d 954 (8th Cir 2010); Blakey v. Cont'l Airlines, Inc. 751 A.2d 538, 551-52 (N.J. 2000); Jay M. Zitter, Annotation, *Liability of Internet Service Provider for Internet or E-mail Defamation*, 84 A.L.R.5th 169, ¶ 4(b) (2000).

[9] Owens v. Morgan Stanley & Co. No. 96 CIV. 9747, 1997 WL 403454, at *2 (S.D.N.Y. July 17, 1997). *See also* Lueck v. Progressive Insurance Inc. and Fritz, No. 09-CV-6174 (W.D.N.Y. Oct. 19, 2009); Martin v. MTA Bridges and Tunnels, 610 F. Supp. 2d 238 (S.D.N.Y. 2009).

[10] Strauss v. Microsoft Corp. 91 CIV. 5928, 1995 WL 326492, at *4-5 (S.D.N.Y. June 1, 1995). *See also* Song v. Ives Labs. Inc. 957 F.2d 1041 (2d Cir. 1992); Miller Brewing Co. v. State Div. of Human Rights, 66 N.Y.2d 937, 938, 498 N.Y.S.2d 776, 777 (1985); Pace College v. Comm'n on Human Rights, 38 N.Y.2d 28, 34, 377 N.Y.S.2d 471, 474 (1975).

In *Blakey v. Continental, Inc.*,[1] the New Jersey Supreme Court found that a female employee had a valid harassment claim when allegedly defamatory and sexually harassing material was posted on an electronic bulletin board. Although the employer, Continental, did not maintain the bulletin board, and employees could access it only through the Internet, the court found that Continental had notice of the harassment and that the electronic bulletin board forum was integrated into the workplace to such a degree that Continental had a duty to correct off-site harassment by coworkers.[2] *Blakey* stressed that an employer's responsibility to prevent sexual harassment and hostile work environments extends not only to the physical but also to the digital workplace[3] Under *Blakey*, an employer must take affirmative steps to halt employee-to-employee digital harassment once the employer has knowledge of harassment.[4]

However, the *Blakey* court stopped short of placing an affirmative obligation on employers to prevent sexual harassment by monitoring digital communications.[5] The court stated that while "employers do not have a duty to monitor private communications of their employees," they "do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know" of such harassment.[6] The court limited the scope of its holding due to "grave privacy concerns,"[7] but recent decisions and legislative enactments have reduced these concerns and suggest extending the reach of the decision.

A. Monitoring Technology in the Workplace

Courts have recognized an employer's rights to monitor employees' e-mail messages and to use digital technologies to protect trade secrets.[8] Moreover, courts have consistently found that employees do not have an objectively reasonable expectation of privacy when their employer's e-mail policies notify employees that the employer may monitor their e-mail or Internet use.[9] Employers have a right to invade employees' digital workspaces because

---

[1] *Blakey v. Continental Airlines*, 751 A.2d at 543.538 (N.J. 2000). In *Blakey*, a female pilot claimed that she suffered from a hostile work environment by being the subject of a series of harassing and defamatory messages posted on an Internet bulletin board accessible to all Continental pilots and crew members. *Id.* at 544. *See also Doe v. XYZ Corp*. 887 A.2d 1156, 1162 (N.J. 2005) (repeating that companies have no duty to investigate the private communications of their employees); *Lafranco v. Avaya*, Docket No. A-1666-06T2, *29 (N.J. App. Div. Sep. 8, 2009); *Goldhaber v. Kohlenberg*, 928 A.2d 948, 395 N.J. Super. 380 (N.J. Super. 2007); *Griffis v. Luban*, 646 N.W.2d 527 (Minn.2002); *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir.2002), *cert. denied*, 538 U.S. 1035 (2003); *Bible and Gospel Trust v. Wyman*, 354 F.Supp.2d 1025 (D.Minn.2005); *Medinah Mining, Inc. v. Amunategui*, 237 F.Supp.2d 1132 (D. Nev. 2002); *Burleson v. Toback*, 391 F.Supp.2d 401 (M.D.N.C.2005); *Barrett v. Catacombs Press*, 44 F.Supp.2d 717 (E.D.Pa.1999); *Novak v. Benn*, 896 So.2d 513 (Ala. Civ. App.2004).

[2] *Id.* at 543, 551-52, 558.

[3] *Id.* at 551.

[4] *Id.* at 551-52.

[5] *2007 AMA Survey* at 5 (71 percent of employers monitoring employee e-mail notify such employees prior to any monitoring; 11 percent of employers do not notify employees; another 18 percent did not know whether e-mail monitoring took place).

[6] *Id.* at 552; *see also* Herman v. Coastal Corp. 791 A.2d 238, 251-52 (N.J. Super. Ct. App. Div. 2002) (finding no employer liability absent showing that harassing employee operated within scope of employment and that employer acted negligently or intentionally and/or failed to take effective remedial measures).

[7] *Blakey*, 751 A.2d at 551. *See also* Doe v. XYC Corp. 887 A. 2d 1156 (N.J. App. Div 2005); Tacket v. General Motors Corp. 836 F.2d 1042, 1046 (7th Cir. 1987).

[8] *Id.*; *see also* Eric P. Robinson, *Big Brother or Modern Management: E-mail Monitoring in the Private Workplace*, 17 LAB. LAW. 311, 325-26 (2001). *Contra* Stengart v. Loving Care Agency, 990 A.2d 650 (N.J. 2010) (finding that employees do have a reasonable expectation of privacy in email accessed on a work computer).

[9] *See* Holmes v. Petrovich Development Co. 191 Cal.App.4th 1047 (Cal. App 2011); Scott v. Beth Israel Medical Center, Inc. 17 Misc.3d 934 (N.Y. Sup. Ct. 2007); Register.Com, Inc. v. Verio, Inc. 356 F.3d 393, 409 (2d Cir. 2004); Konop v. Hawaiian Airlines, Inc. 302 F.3d 868, 874 (9th Cir. 2002); Nexans Wires S.A. v. Sark-USA, Inc. 319 F. Supp. 2d 468, 474 (S.D.N.Y. 2004); *see also* Stored Communications Act, 18 U.S.C. ¶ 2701-2711 (2000).

employers have legitimate interests in communications transmitted on their digital networks for a multitude of reasons:[1] to ensure work productivity,[2] to prevent trade secret disclosure,[3] to ensure compliance with federal regulations, to prevent transmission of defamatory statements, and to prevent transmission of unauthorized or illegal material over employers' digital communication networks.[4]

The vast majority of large employers use digital tracking technology to monitor employees.[5] According to a recent *Washington Internet Daily* release, eighty percent of major U.S. companies at least occasionally record and review employees' electronic communications or browser use.[6] Sixty-seven percent of employers have disciplined at least one employee for improper or excessive use of e-mail or Internet access, and thirty-one percent have fired employees for such conduct.[7] It is estimated that more than three-quarters of major U.S. corporations record and review employee communications and activities on the job, including, but not limited to, telephone calls, e-mail, Internet communications, and computer files.[8] E-mail monitoring by employers is both a necessity and a legally recognized right;[9] courts have granted employers this right to enable them to prevent personal use or abuse of company resources, to investigate corporate espionage and theft, to resolve technical

---

See also Loving Care at 687-88 (holding that "Stengart had a reasonable expectation of privacy in the e-mails she exchanged with her attorney on LovingCare's laptop. Stengart plainly took steps to protect the privacy of those e-mails and shield them from her employer. She used a personal, password-protected e-mail account instead of her company e-mail address and did not save the account's password on her computer. In other words, she had a subjective expectation of privacy in messages to and from her lawyer discussing the subject of a future lawsuit. In light of the language of the Policy and the attorney-client nature of the communications, her expectation of privacy was also objectively reasonable. As noted earlier, the Policy does not address the use of personal, web-based email accounts accessed through company equipment. It does not address personal accounts at all. Nor does it warn employees that the contents of e-mails sent via personal accounts can be forensically retrieved and read by the company. Indeed, in acknowledging that occasional personal use of e-mail is permitted, the Policy created doubt about whether those e-mails are company or private property. Moreover, the e-mails are not illegal or inappropriate material stored on Loving Care's equipment, which might harm the company in some way.).

[1] *See* Muick v. Glenayre Elecs. 280 F.3d 741, 743 (7th Cir. 2002) (holding that the abuse of access using workplace computers is so common that "reserving a right of inspection is so far from being unreasonable that the failure to do so might well be thought irresponsible"); United States v. Silva, 247 F.3d 1051, 1055 (9th Cir.2001) (noting that "[t]he reasonableness of an expectation of privacy is evaluated... `[by reference] to understandings that are recognized and permitted by society'" (quoting Rakas v. Illinois, 439 U.S. 128, 143 n. 12, 99 S. Ct. 421, 58 L.Ed.2d 387 (1978))); United States v. Zeigler, 456 F. 3d 1138 (9th Cir. 2006). *See also* D. Garrie and R. Wong, *Demystifying Clickstream Data: A European and U.S. Perspective*, Emory Int'l L. Rev. 2006.

[2] Morris, *supra* note 10, at 702.

[3] *Id.*

[4] *See* Amy Rogers, *You Got Mail but Your Employer Does Too: Electronic Communication and Privacy in the 21st Century Workplace*, 5 J. TECH. L. & POL'Y 1, 9-30 (2000).

[5] *Lawyer; Employers Fighting Net Abuse Must Mind Privacy*, WASH. INTERNET DAILY, Apr. 24, 2002, *available at* http://www.wrf.com/ (search "employers fighting net abuse"; then follow article hyperlink under "In the News").

[6] *Id.* Numerous providers offer a myriad array of employee monitoring software; the following is an incomplete list: StaffCop, by AtomPark Software Inc. (http://www.staffcop.com); OfficeShield, by Computer Business Solutions, Inc. (http://www.office-shield.com); Spector 360, by SpectorSoft Corp. (http://www.spectorsoft.com); and GuardBay, by Interlative LLC (http://www.guardbay.com). These solutions generally include keylogging, capture of instant messages, email, and social networking usage, file transfer recording, screenshot capture, and program usage, for example.

[7] *Id.*

[8] AM. MGMT. ASS'N, 2001 AMA SURVEY: WORKPLACE MONITORING & SURVEILLANCE: SUMMARY OF KEY FINDINGS 1 (2001), *available at* http:// www.amanet.org/research/pdfs/ems_short2001.pdf.

[9] *See generally* Jennifer J. Griffin, *The Monitoring of Electronic Mail in the Private Sector Workplace: An Electronic Assault on Employee Privacy Rights*, 4 SOFTWARE L.J. 493 (1991).

problems, and to better cooperate with law enforcement officials in investigations.[1]

Many companies also use software that monitors and/or blocks their employees' use of the corporate technology infrastructure.[2] SilentRunner is illustrative of such software.[3] While most lawyers and employees have never heard of SilentRunner,[4] companies and governmental agencies use the program to monitor their agents and employees.[5] According to Susan Lee, a representative for the Internet security assurance service provider TruSecure, SilentRunner provides constant employee monitoring for nearly four hundred companies.[6] Organizations such as Deloitte & Touche that use SilentRunner and similar software,[7] have adopted top-secret policies[8] regarding their use of the product;[9] such an approach enables companies to avoid public scrutiny from groups concerned about the erosion of privacy in the workplace.[10] While the effort to maintain secrecy about configuration of monitoring software

---

[1] *See* US v. Steiger, 318 F. 3d 1039 (11th Cir. 2003); Konop v. Hawaiian Airlines, Inc. 302 F.3d 868, 874 (9th Cir. 2002); Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F. Supp. 2d 548 (S.D.N.Y. 2008); Greenfield & Davis, *supra* note 7, at 348.

[2] *See generally* Ed Orum, *10 Ways Your Employer is Spying on You*, available at http://jobs.aol.com/articles/2009/12/27/10-ways-your-employer-is-spying-on-you/ (last accessed Aug. 13, 2011); Stephanie Armour, *Employers look closely at what workers do on job*, USATODAY, Nov. 7, 2006; Richard Hull et al. *Enabling Context-Aware and Privacy-Conscious User Data Sharing*, IEEE INT'L CONF. ON MOBILE DATA MGMT. Jan. 19-22, 2004, at 187; R. H. Irving et al. *Computerized Performance Monitoring Systems: Use and Abuse*, 29 COMM. ACM 794 (1986); Pete Lindstrom, *Diverse Security Technologies Deliver the Same Message: Keep Out! Guide to Intrusion Prevention*, INFO. SECURITY, Oct. 2002, *available at* http:// www.infosecuritymag.com/2002/oct/sidebar.shtml; M. Tamuz, *The Impact of Computer Surveillance on Air Safety Reporting*, 22 COLUM. J. WORLD BUS. 69 (1987).

[3] SilentRunner, now called *SilentRunner Sentinel* and sold by the AccessData Corporation, is capable of recognizing approximately 2000 different protocols. Jay Lyman, *SilentRunner Spyware Out-Snoops FBI's Carnivore*, NEWSFACTOR, Mar. 2, 2001, *available at* http://www.newsfactor.com/story.xhtml? story_id=7873. It can collect any traffic on the network at a rate of 195,000 plus packets per second. Jeffrey Benner, *Nailing the Company Spies*, WIRED NEWS, Mar. 1, 2001, http:// www.wired.com/news/business/0,1367,41968,00.html (quoting Dave Capuano, Vice President of Product Management for TruSecure); *see also* J. Rule & P. Brantly, *Surveillance in the Workplace: A New Meaning to 'Personal' Computing*, PROC. INT'L CONF. ON SHAPING ORG. SHAPINGTECH. 1991, at 183.

[4] *See* Jeffrey Benner, *Privacy at Work? Be Serious*, WIRED NEWS, Mar. 1, 2001, http://www.wired.com/news/business/0,1367,42029,00.html; *see also* Benner, *supra* note 69 ("In 1999, Raytheon took action against some of its own employees it suspected of compromising company information. Some of them learned the hard way that talking about one's employer 'privately,' and even anonymously, can be risky. In February of that year, Raytheon sued twenty-one 'John Does' for $25,000 in damages due to criticisms of the company made on Internet message boards. Raytheon said it suspected current and former employees of being responsible for the anonymous postings, accusing them of revealing confidential information. The company successfully subpoenaed Yahoo to find out who made the comments, then abruptly dropped the suit. At least four of the twenty-one, including one Vice President, resigned after being identified.").

[5] Benner, *supra* note 69; *see also* Kristie Lu Stout, *China Police Unleash NetFilterware*, CNN, Mar. 1, 2001, http:// archives.cnn.com/2001/WORLD/asiapcf/east/02/28/hk.policefilter/index.html.

[6] Benner, *supra* note 69.

[7] *Id.* ("'SilentRunner is completely undetectable to end users, and it captures everything,' said Kris Haworth, manager of the Deloitte & Touche computer forensics lab in San Francisco."). *See generally* Detmar W. Straub & William D. Nance, *Discovering and Disciplining Computer Abuse in Organizations: A Field Study*, 14 MIS Q. 45 (1990).

[8] *See* A. Gumbel, *Techno Detectives Net Cyber-Stalkers*, INDEP. ON SUNDAY, Jan. 31, 1999, at 17.

[9] Benner, *supra* note 69 ("Until December 2000, when security services provider TruSecure revealed it had purchased the 'lite' version of the program, not one organization, public or private, had admitted to buying SilentRunner. On Feb. 1, the computer forensic division of consulting firm Deloitte & Touche became the second to say it uses the program.").

[10] *See generally* Mary J. Culnan, *Protecting Privacy Online: Is Self-Regulation Working?*, 19 J. PUB. POL'Y & MARKETING 20, 20-26 (2000). While the authors strongly believe that privacy concerns should trump employer concerns, the point of this section is to demonstrate that courts have permitted employers to use such monitoring and tracking devices despite employee privacy concerns. Whether this is appropriate is not the subject of this Article.

may seem to indicate that such monitoring is dishonest or immoral, whether it is in fact unethical depends on the reasonable expectations of employees. When an employer's policies indicate clearly that such monitoring takes place, employees have little or no expectation of privacy. When no such policies are made known to employees, the question of reasonable expectations is more open to debate.[1]

In addition to the ability to monitor and block employee digital transmissions, employers often possess a high degree of control over employee computer desktops by ensuring that a uniform technical environment exists to stimulate productivity. For example, ActivatorDesk's Enterprise Desktops Controller monitors employee computing activities and compares them to a list of approved activities.[2] If an employee performs previously unapproved activities, "ActivatorDesk can instantly implement a 'lock-down policy"' while sending network administrators an e-mail alert of the violation.[3] Today, monitoring tools are very common and easily available. For example, parents can utilize the stealth and anti-detection capabilities of "Spector Pro 2011" to monitor their children's activity on the latest chat programs (Google Talk, Skype Chat/IM, and the latest versions of AIM, MSN, and Yahoo) as well as monitor webmail from Google Gmail, Hotmail, Yahoo Mail, AOL Mail, and access to Facebook and MySpace.[4] Enhanced versions of these forms of monitoring applications are readily available for corporate networks.

The majority of large corporate employers in the United States currently use monitoring and blocking software that allows them to observe and block inappropriate digital communications over corporate IT networks before the intended recipient receives them. Currently, employers can exercise this power without also being required to protect their employees; as a result, employees are relinquishing privacy rights without receiving the benefit of employer protection in return. Due to the judicially recognized diminished expectation of privacy in the workplace, employees are entitled to bring suit only when an intrusion infringes upon intensely private matters or when their employers have failed to inform them of the monitoring.[5]

---

[1] *Id.*

[2] Michelle Delio, *New Tools a Spying Boss Will Love*, WIRED NEWS, Nov. 13, 2002, http://www.wired.com/news/privacy/0,1848,56324,00.html.

[3] *Id.*; *see also* Wallace Immen, *Workplace Privacy Gets Day in Court*, GLOBE & MAIL, Apr. 28, 2004, at C1. On a different note, however, regarding the dangers of remote webcam access, *see* Robbins v. Lower Merion School District, No. 10-CV-0665 (E.D. Pa, 2010). In *Robbins*, school administrators installed webcam-monitoring software on laptops issued to students. They then used the software to spy on students at home, including keylogging, webcam access, and site access logging. A much wider discussion of this case – as well as links to numerous articles – may be found on the extensive Wikipedia article dedicated to the matter, found at http://en.wikipedia.org/wiki/Robbins_v._Lower_Merion_School_District.

[4] Costs are less that $100 per computer. See http://www.spectorsoft.com/products/SpectorPro_Windows/index.asp?refer=12081 (last visited Sunday, September 25, 2011)

[5] "No comprehensive statutory scheme supplements the common law to provide protection for employees' privacy or even simply from employer monitoring. Instead, a variety of federal and state laws offer only targeted and limited protections… "[M]oreover, because the Fourth Amendment only applies when the government acts, private sector Employees have [basically] no statutory federal protection. While the Electronic Communications Privacy Act of 1986 protects against various kinds of electronic surveillance and interception of communications by public and private actors...this regime presents several potentially insurmountable hurdles for any employee who alleges his employer intercepted private communications on workplace technology."" Ariana R. Levinson, *Industrial Justice: Privacy Protection for the Employed*, 18 Cornell J. L. & Pub. Pol'y 609, 621 (2009). *For case law, see* Med. Lab. Mgmt. Consultants v. ABC, Inc. 30 F. Supp. 2d 1182, 1188 (D. Ariz. 1998); Doe v. Kohn Nast & Graf, P.C. 862 F. Supp. 1310, 1326 (E.D. Pa. 1994) (finding employer may have intruded on an employee's privacy by reading personal medical documents on employee's desk). *See also* Craig v. M & O AGENCIES, INC. 496 F. 3d 1047 (9th Cir. 2007); Mindy C. Calisti, You Are Being Watched: The Need for Notice in Employer Electronic Monitoring, 96 Ky. L.J. 649 (2007-08); Somebody's Watching Me, supra note 12, at 464 (reiterating that if "employers monitor

The Second Circuit illustrated the diminished expectation of privacy in the workplace in *Leventhal v. Knapek*,[1] holding that an employee does not have a reasonable expectation of privacy with respect to his or her digital activities in the workplace.[2] In support of the same principle, Congress enacted the Electronic Communications Privacy Act of 1986 (ECPA)[3] and the Stored Communications Act (SCA),[4] both of which grant employers the right to monitor employees' e-mail communications as long as the monitoring occurs in the ordinary course of business.[5] The majority of case law interpreting the ECPA has found that employers can monitor employee e-mail messages with or without consent, and even without notice.[6]

These judicial and congressional actions have effectively expanded employers' ability to monitor employee electronic communications without violating federal privacy laws.[7] Because employers have access to and control over employee electronic communications, they are now in a position to greatly minimize digital sexual harassment in the workplace.[8] For example, employers can block e-mails containing sexually explicit terms and restrict wallpaper settings on corporate computers so that users cannot display inappropriate or offensive material; they might also monitor employee use of social

---

communications on workplace technology and employees inadvertently divulge personal information, employees will often struggle to find any legal protection, as the American legal regime does not provide any generally applicable, affirmative protection for employee privacy.")

[1] 266 F.3d 64 (2d Cir. 2001).

[2] *Id.* at 74. *But see* Matikas v. Univ. of Dayton, 152 Ohio App.3d 514, 524, 788 N.E.2d 1108 (Ohio App.2003) (employer accessing employee's private information on employer's computer is actionable); US v. Heckenkamp, 482 F. 3d 1142, 1147 (9th Cir. 2007) ("However, privacy expectations may be reduced if the user is advised that information transmitted through the network is not confidential and that the systems administrators may monitor communications transmitted by the user."); United States v. Angevine, 281 F.3d 1130, 1134 (10th Cir.2002); United States v. Simons, 206 F.3d 392, 398 (4th Cir.2000).

[3] Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.). The ECPA, enacted nearly a decade before the creation of the World Wide Web, did not anticipate the contemporary monitoring technology which primarily involves the Web. *See Konop v. Hawaiian Airlines, Inc*. 302 F.3d 868, 874 (9th Cir. 2002) (stating that "the difficulty [in deciding how the ECPA must apply to contemporary technology] is compounded by the fact that the ECPA was written prior to the advent of the Internet and the World Wide Web. As a result, the existing statutory framework is ill-suited to address modern forms of communication like [this] secure website. Courts have struggled to analyze problems involving modern technology within the confines of this statutory framework, often with unsatisfying results."). *See further United States v. Ropp*, 347 F. Supp. 2d 831, 833 (C.D. Cal. 2004) (citing *United States v. Councilman*, 373 F.3d 197, 200 (1st Cir. 2004)) ("[T]he language of the [Wiretap Act] makes clear that Congress meant to give lesser protection to electronic communications than wire and oral communications. Moreover, at this juncture, much of the protection may have been eviscerated by the realities of modern technology. [In fact]... the language may be out of step with the technological realities of computer crimes.").

[4] Stored Communications Act, Pub. L. No. 99-508, tit. II, 100 Stat. 1848, 1860-68 (1986) (codified as amended at 18 U.S.C. ¶ 2701 (2000)).

[5] *See* Daniel B. Garrie, The Legal Status of Software, 23 J. MARSHALL J. COMPUTER & INFO. L. 711, 732–35 (2005); Daniel B. Garrie, Matthew J. Armstrong & Donald. P. Harris, Voice Over Internet Protocol and the Wiretap Act: Is Your Conversation Protected?, 29 SEATTLE U. L. REV. 97, 108–11 (2005).

[6] *See, e.g.* KLA-Tencor Corp. v. Murphy, 717 F. Supp. 2d 895 (N.D. Cal 2010); US v. Weaver, 636 F. Supp. 2d 769 (C.D. Ill. 2009); Theofel v. Farey-Jones, 359 F.3d 1066, 1075 (9th Cir. 2004); Fraser v. Nationwide Mut. Ins. Co. 352 F.3d 107, 115 (3d Cir. 2003); United States v. Angevine, 281 F.3d 1130, 1134-35 (10th Cir. 2002) (holding that the professor, who had entered a conditional plea for downloading child pornography to his workplace computer, had no expectation of privacy in his use of his public employer's computer, especially since the university's usage and monitoring policy was displayed upon login); United States v. Bunnell, No. CRIM.02-13-B-S, 2002 WL 981457, at *2 (D. Me. May 10, 2002) ("A [public university] student has no generic expectation of privacy for shared usage on the university's computers."); In re DoubleClick Inc. Privacy Litig. 154 F.Supp.2d 497, 512 (S.D.N.Y. 2001); .

[7] *See supra* notes 83-87 and accompanying text.

[8] *See supra* notes 63-67 and accompanying text.

networking sites such as Facebook and Twitter; and they could review phone calls, text messages, and data use on a mobile phone.[1] The ability and the right to monitor all employee digital transmissions places employers in an ideal position to take simple, proactive measures that has the ability to prevent most instances of digital harassment.

The rights and abilities of employers to read digital communications sent and received by employees should extend the holdings of *Ellerth*, *Faragher*, and the *Blakey* line of cases. Because employers who use blocking and monitoring technology have effective notice of potential digital sexual harassment before it reaches the intended recipient, employers should bear the burden of providing reasonably sufficient technical protection to limit exposure to such harassment. [2] Unfortunately, however, courts have not yet bridged the gap between employers' freedom and responsibility to monitor employee acts capable of causing harm. More precisely, many courts have yet to address whether an employer should be entitled to plead an affirmative defense to digital sexual harassment claims when the employer has failed to monitor the digital work environment, prevent digital sexual harassment, or institute mechanisms to facilitate employee complaints of digital sexual harassment.[3]

B. The Current Affirmative Defense Framework's Undermining of both Congressional and Judicial Policies

Though the Supreme Court in *Ellerth*[4] and *Faragher*[5]sought to compel employers to take a preventative approach to eliminate sexual harassment in the workplace, an employer pleading the affirmative defense today can avoid accountability for hostile digital work environments created by the transmission of sexually harassing material over corporate IT networks. The failure to require preemptive policies in the digital sphere is particularly inappropriate when employers have effective notice of sexually harassing communications

---

[1] The authors believe that there is a difference between what can be called "internet monitoring" and what can be called "social network monitoring." Social Network monitoring – when done at work – falls clearly under internet monitoring. The use of a social network by an employee on a work computer involves access to the site via the internet and is part of internet monitoring. Instead, the authors view "social network monitoring" as browsing through an employee's Facebook page or Twitter stream, etc. or conducting a search of an employee's name to discover information. *See further* John Browning, *Employers Face Pros, Cons With Monitoring Social Networking*, HOUSTON BUS. J. Feb. 27, 2009, *available at* http://www.bizjournals.com/houston/stories/2009/03/02/smallb3.html ("On Oct. 31, 2007, Kevin Colvin told his employers at Boston's Anglo Irish Bank that he had to miss a day of work due to an emergency at home in New York. The next day, Colvin's manager happened to check the employee's Facebook profile, where Colvin had thoughtfully posted a photograph from a Halloween party he had attended the previous night, featuring him in a sparkly green fairy costume, complete with wand and a can of beer. Colvin's manager replied to an e-mail from his soon-to-be ex-employee, attaching the photo of Colvin in drag — and blind copying the entire office — and stating 'Thanks for letting us know — hope everything is okay in New York (cool wand).' Colvin was fired for lying.")

[2] *See generally* US v. Heckenkamp, 482 F. 3d 1142, 1147 (9th Cir. 2007); United States v. Angevine, 281 F.3d 1130, 1134 (10th Cir.2002); United States v. Simons, 206 F.3d 392, 398 (4th Cir.2000);United States v. Simons, 206 F.3d 392, 398 (4th Cir. 2000); United States v. Butler, 151 F. Supp. 2d 82, 84 (D. Me. 2001) (finding student had no objective expectation of privacy in using university computers even absent evidence of a university policy giving notice of right or intent to monitor use). *Contra* Robbins v. Lower Merion School District, No. 10-CV-0665 (E.D. Pa, 2010) (discussed *supra* n.80).

[3] *See supra* notes 48-51 and accompanying text. *See also Doe v. XYC Corp*, 887 A.2d 1156, 1169-70 (N.J. App. 2005) (holding that an employer might avoid vicariously liability when one of its employees transmits child pornography at work and the employer had policies against such activities). In the *Doe* case, however, the employer knew of the illegal activities and did little to nothing to shut them down or discipline the employee. The appellate court remanded the case for a jury trial but likely would have dismissed the employer from the case had management enforced its Internet policy.

[4] Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[5] Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

using monitoring software.[1] The inappropriateness of this position also violates the Supreme Court's intent to compel employers to take a proactive role in preventing workplace harassment.[2] Moreover, the docket of both state and federal courts is likely to grow until the issues arising from digital harassment are effectively addressed.[3] Courts should therefore modify the *Faragher* and *Ellerth* affirmative defense to protect employees in the digital workplace by creating an efficient and effective legal framework to address digital sexual harassment claims. While a judicial approach to the problem would not preclude legislative action, the Supreme Court's willingness to address harassment in cases such as *Meritor* and *Ellerth* indicates the courtroom as the natural locus for the framework's development.

The existing affirmative defense focuses on the employer's remedial measures and the employee's availment of these corrective opportunities. This assessment approach, while perhaps effective in the physical workplace, does not account for the technology available in the digital workplace today. Employers in the digital workplace have the ability to "know everything," and can control digital communications to stop harassment before it occurs. The profoundly increased monitoring abilities of employers in the digital workplace call for a modification of the affirmative defense in cases of digital sexual harassment.[4]

C. The Affirmative Defense in the Digital Workplace

Employers should be required to institute more than merely remedial policies in order to be able raise the affirmative defense in the digital workplace when they already use a wide and complex array of advanced technology to monitor employee transmissions.[5] Because many employers already have the ability to prevent digital sexual harassment facilitated by e-mail, Internet, and desktop monitoring software, they should be required to take such preemptive measures.[6]

The affirmative defense should be modified in two respects in cases of digital sexual

---

[1] The EEOC has declared that twelve Minneapolis librarians were subjected to a sexually hostile work environment when they were exposed to pornography accessed on the Internet by library patrons. *See, e.g. EEOC Rules in Minneapolis PL Complaint*, AM. LIBR. ONLINE, May 28, 2001, http://www.ala.org/ala/alonline/currentnews/newsarchive/ 2001/may2001 (follow "EEOC Rules in Minneapolis PL Complaint" hyperlink). If courts agree with the EEOC, all libraries, public and private, will need to ban Internet access to "offensive" sites or face hostile environment liability. *See, e.g. Five More Minneapolis Librarians File Discrimination Charges*, AM. LIBR. ONLINE, May 29, 2000, http://www.ala.org/ala/alonline/currentnews/newsarchive/2000/may2000/fivemoreminneapolis.htm.

[2] *See supra* note 54 and accompanying text.

[3] Digital harassment is not limited to the workplace and numerous organizations are taking steps to combat its presence in all areas of life. *See* MTV Launches 'A Thin Line' To Stop Digital Abuse, MTV, Dec. 3, 2009, http://www.mtv.com/news/articles/1627487/20091203/story.jhtml. For this initiative, MTV partnered with Facebook, MySpace, the Family Violence Prevention Fund, WiredSafety, the Anti-Defamation League, Blue Shield of California Foundation, LoveIsRespect.org, the National Teen Dating Abuse Helpline, the National Network to End Domestic Violence, Liz Claiborne Inc. DoSomething.org, Break the Cycle, Ruder Finn, Teenangels, and PBS's "Frontline." See MTV's A Thin Line: About the Campaign, http://www.athinline.org/about.

[4] While the affirmative defense is available to employers in the context of vicarious liability for supervisor misconduct in hostile work environment sexual harassment claims (or claims in which no tangible employment action results), the presence of employer monitoring and blocking technology is also relevant in cases of co-worker and third party sexual harassment. First, an employer can guard against harassing conduct by subordinate or common employees using digital technology just as easily as it can against such conduct by supervisors. It would thus appear inappropriate to uphold the two-tiered liability for these classes. Second, as noted above, in the context of co-worker or third party harassment, the employer is liable if it knew or should have known of the harassment and failed to take effective remedial action. Arguably, armed with the technological capability to do so, an employer will not be able to satisfy the first prong of this test, as it either knew or should have known of the conduct.

[5] *See* discussion *supra* Part III.A.

[6] *See generally* Joan E. Feldman & Larry G. Johnson, *Lost? No. Found? Yes. Those Computer Tapes and E-mails Are Evidence*, GPSOLO, Mar. 2000, at 8; Matthew Fordahl, *Screening of Instant Messaging on Rise*, CHI. TRIBUNE, Apr. 15, 2002, at 6.

harassment. First, it should focus on the employer's preventative efforts rather than corrective measures.[1] Second, it should reduce or eliminate the employee's obligation to take advantage of these preventative opportunities, as employees are often unaware of or unable to access monitoring and blocking software.[2]

IV. A PROPOSED TEST ADDRESSING SEXUAL HARASSMENT IN A HOSTILE DIGITAL WORKPLACE

Courts should permit employers to raise the affirmative defense in the digital workplace under a limited set of circumstances. Whether a particular case falls into this category should be determined by applying the Digital Workplace Defense Test (DWDT).[3]

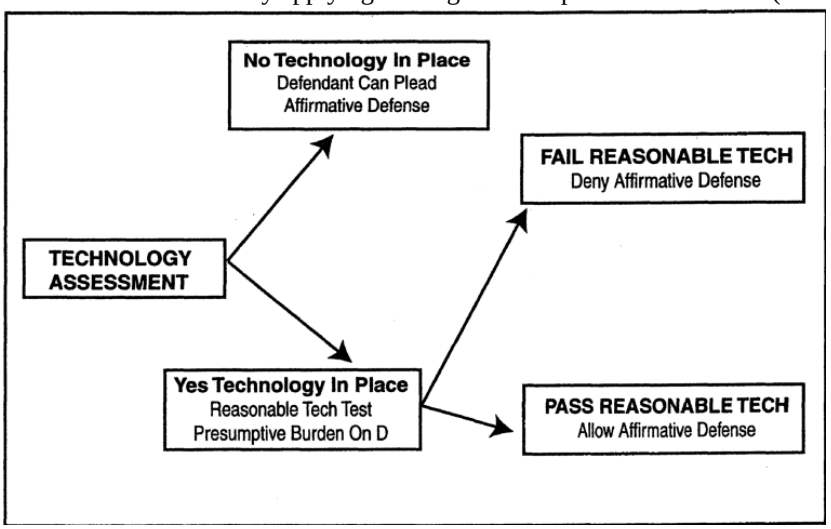

Figure 1 - DWDT Analysis

In applying the DWDT, a court should first examine the defendant employer's technological infrastructure to determine whether its existing information technology was capable of monitoring and blocking the digital communications responsible for the sexual harassment claim. If the court ascertains that the technology lacked this capability,[4] the court

---

[1] This is not to suggest that corrective measures will no longer be relevant. In some circumstances, an employer may have the ability to monitor digital communications without the ability to block them. In these instances, the employer's prompt and effective action to address the conduct may demonstrate that it exercised due care.

[2] Again, employee actions may nevertheless be relevant. If an employee fails to act with reasonable care in taking advantage of other employer safeguards to either prevent harassment that could have been avoided or to notify the employer of harassment, the employer's liability may be affected. In other words, while the employee will not have access to, and will often be unaware of, the employer's monitoring and blocking software, the employee should still be required to exercise due care in situations not involving an adverse or tangible employment action.

[3] See Donald P. Harris, Daniel B. Garrie & Matthew J. Armstrong, Sexual Harassment: Limiting the Affirmative Defense in the Digital Workplace, 39 U. MICH. J.L. REFORM 73, 83–87 (2005) (discussing the Digital Workplace Defense Test).

[4] Companies usually block all communications that they know fall outside the bounds of acceptable communications in the workplace and monitor employee communications. See David F. Linowes & Ray C. Spencer, *Privacy: The Workplace Issue of the '90s*, 23 J. MARSHALL L. REV. 591, 597-615 (1990) (discussing the history of suits brought by employees for invasion of privacy); Gary T. Marx, *The Case of the Omniscient Organization*, HARV. BUS. REV. Mar.-Apr. 1990, at 12 (describing use of new electronic devices to monitor employees outside of traditional "workplace," including monitoring in one's home and car). A company may elect to monitor and then

should allow the defendant to plead the affirmative defense.[1] If, however, the court finds that the employer did possess and had deployed within its infrastructure monitoring and blocking information technology capable of detecting and blocking content typical of sexual harassment, it must then determine whether the employer took reasonable steps to monitor and block the communications in question. At this stage, the employer has the burden of proving that it made reasonable efforts to prevent the communications based on the capabilities and normal use of its information technology systems. If the employer cannot establish that its use of monitoring and blocking technology was reasonable, the court should deny the affirmative defense.

Under the framework of this test, the availability of the affirmative defense is contingent on the presence and use of technological systems that are capable of monitoring and blocking digital communications. By placing the burden on the defendant, the court properly holds employers responsible for the alleged hostile work environments that they control. This approach reflects the reality that, unlike in the physical workplace, preventative measures can effectively eliminate harassment in the digital workplace.

A. Review of an Employer's Technological Systems

In performing the first step of the analysis, a court should examine whether the employer's technological infrastructure had the capability to block and monitor the particular digital communications alleged in the plaintiff's action.[2] To make this determination, the court should explore various aspects of a defendant's technological environment, including infrastructure and policies.[3] The court should address six potentially applicable issues: 1) whether the defendant routinely protects sensitive and confidential information; 2) whether the defendant employs real-time tracking technology to monitor digital activity within its infrastructure; 3) whether the defendant tracks employee activity based on some form of unique ID; 4) whether the defendant monitors suspicious activity; 5) whether the defendant routinely reviews the alerts generated by its logging systems; and 6) whether the defendant uses early end-user-monitor-management technology.

First, the court should ask whether the defendant protects valuable digital information such as financial data, customer records, or sensitive intellectual property.[4] The court should be mindful that an employer who protects its digital information is likely to monitor its Web applications because early detection enables the defendant to avert serious economic damage.[5] For example, employers in the media industry protect their media with both physical and digital technologies, often using some form of encryption and an access monitoring tool, to ensure that employees do not make unauthorized copies of the media for pre-release.

---

block employee communications depending on the specifics of the company information technology policies. *See* Julia Turner Baumhart, *The Employer's Right to Read Employee E-Mail: Protecting Property or Personal Prying?*, 8 LAB. LAW. 923, 936 (1992); *see also* James J. Ciapciak & Lynne Matuszak, E*mployer Rights in Monitoring Employee E-Mail*, FOR DEF. Nov. 1998, at 17, 17-20.

[1] The genesis of this Article came from Mr. Garrie's extensive work implementing information technology systems, as he questioned the concept of privacy in light of an employer's unbridled access to all digital communications that employees transmitted via company system components.

[2] *See* Lynda M. Applegate et al. *Information Technology and Tomorrow's Manager*, HARV. Bus. REV. Nov.-Dec. 1988, at 128.

[3] *See* Karen Nussbaum, *Workers Under Surveillance*, COMPUTERWORLD, Jan. 6, 1992, at 21, 21.

[4] *See generally* Carl Botan, *Communication Work and Electronic Surveillance: A Model for Predicting Panoptic Effects*, 63 COMM. MONOGRAPHS 293 (1996).

[5] *See generally* Philip Brey, *Worker Autonomy and the Drama of Digital Networks in Organizations*, 22 J. BUS. ETHICS 15 (1999); BRITISH TELECOM, VISION & VALUES: BETTER WORLD—OUR COMMITMENT TO SOCIETY (2001), *available at* http://www.btplc.com/Societyandenvironment/PDF/2001/vision_values.pdf.

Second, the court should consider whether the defendant employs any real-time suspicious activity and policy violation detection technologies.[1] Some financial institutions, for example, implement instant messaging systems with real-time logging capabilities[2] that not only enable the institutions to comply with the message storage requirements that are established under Sarbanes-Oxley but also allow them to track instant message conversations as they occur. [3] The court should examine whether the defendant's inaction with respect to digital harassment is reasonable in light of the specific capabilities of its monitoring technology.[4] When such technology is actively used, the court should further explore the process and design of the system, focusing on whether the defendant both monitors and blocks communications.[5]

Third, the court should examine whether the defendant utilizes user tracking technology capable of recording employees' actions with respect to a particular Web-based tool set, such as the "research trail" provided by Westlaw. [6] Again, when an employer uses such tracking devices, the court should ascertain whether the employer could have reasonably modified this monitoring and tracking technology to protect the digital workplace.[7]

Fourth, the court should determine whether the defendant uses real-time technology to monitor its systems for suspicious behavior related to the activities of its users.[8] For example, when a user mistypes his or her password three times, the system may flag the account or send an alert in real time to a monitoring party. Such technology assists banks in preventing fraud or abuse of financial accounts and is common in the financial sector.[9]

Fifth, the court should review all of the defendant's logging systems.[10] Financial and medical organizations rely heavily on these systems to access data that enables forensic computer experts to construct an audit trail and deliver evidence of transactions.[11] Hospitals, too, often use this technology to track the protection of patients' digital records and demonstrate that the records are released only to authorized parties.

---

[1] *See generally* Bill Bruck, *How Companies Collaborate Sharing Work Online* (2001), *available at* http://consortium.caucus.com/pdf/collaboration.pdf; COLLABORATIVE STRATEGIES, ELECTRONIC COLLABORATION ON THE INTERNET AND INTRANETS: HOW MAJOR CORPORATIONS ARE LEVERAGING IP NETWORKS FOR COMPETITIVE ADVANTAGE (2001).

[2] *See* Roger Harris, *IM: When Time Matters*, HISPANIC BUS. Nov. 2002, at 34, 34, available at http:// www.hispanicbusiness.com/news/newsbyid.asp? id=7679&cat=Magazine&more=/magazine.

[3] *See* Doug Henschen et al. *Brave New World: Three Trends Redefining Content Management*, TRANSFORM MAG. Apr. 2004, at 16, 16-18, 20-22, 24.

[4] *See* W. Michael Hoffman et al. *You've Got Mail... and the Boss Knows: A Survey by the Center for Business Ethics of Companies' Email and Internet Monitoring*, 108 BUS. & SOC'Y REV. 285, 302 (2003).

[5] *See generally, 2007 Electronic Monitoring & Surveillance Survey*, AM. MGMT. ASS'N, Feb. 28, 2008, *available at* http://www.plattgroupllc.com/jun08/2007ElectronicMonitoringSurveillanceSurvey.pdf (citing another AMA study and stating that concern "over litigation and the role electronic evidence plays in lawsuits and regulatory investigations has spurred more employers to monitor online activity. Data security and employee productivity concerns also motivate employers to monitor Web and e-mail use and content. Workers' e-mail and other electronically stored information create written business records that are the electronic equivalent of DNA evidence.").

[6] *See* Westlaw, http://www.westlaw.com.

[7] *See generally* Joey F. George, *Computer Based Monitoring: Common Perceptions and Empirical Results*, 20 MIS Q. 459 (2001); Terri L. Griffith, *Monitoring and Performance: A Comparison of Computer and Supervisor Monitoring*, 23 J. APPLIED SOC. PSYCHOL. 549 (1993).

[8] *See* Martin Butler, *Staff Left in the Dark over Monitoring Technologies*, COMPUTER WKLY. May 4 2004, at 24.

[9] *See generally* E. L. Lesser & J. Storck, *Communities of Practice and Organizational Performance*, 40 IBM SYS. J. 831 (2001).

[10] *See generally* Simson L. Garfinkel, *Privacy Matters*, CIO MAG. June 1, 2000, at 178; Il-Horn Hann et al. *Online Information Privacy: Measuring the Cost-Benefit Trade-Off*, INT'L CONF. ON INFO. SYS. Dec. 2002, at 1-2, *available at* http://www.comp.nus.edu.sg/~ipng/research/privacy_icis.pdf.

[11] *See* Hoffman et al. *supra* note 110, at 290-92.

Sixth, the court should determine whether the defendant uses a form of early end-user-management monitoring technology.[1] Such technology monitors end users from the end users' location. For example, global companies with worldwide customers use tools that monitor the location from which their customers communicate.[2] Employers frequently use this technology to ensure that employees perform work off-site and that clients receive authorized services.[3]

These six elements are intended only as a guideline for courts, since different companies combine them uniquely and in addition to other forms of technology.[4] Regardless of the individual characteristics of the different tools and their uses, however, the guideline can help determine the degree of actual tracking, monitoring, and blocking of digital activity in light of the capabilities of an employers' particular technological system.

Courts should apply a reasonableness standard in their analysis of employers' blocking and monitoring capabilities.[5] While "reasonableness" is a malleable concept, courts are nonetheless often required to use such a standard.[6] In applying the standard to cases of digital sexual harassment, courts should be mindful of the costs and efforts associated with, and defendants' knowledge of, their respective monitoring capabilities.[7] More precisely, courts should make fact-specific inquiries on a case-by-case basis, considering such factors as the size of the company, the number of employees, the ease and economy with which the system can be used or modified to monitor and prevent harassment, the employer's awareness of acts of harassment, and the volume of the digital transmissions the employer must track.[8] Finally, courts should scrutinize closely defendants who use technology that complies with the Sarbanes-Oxley Act, HIPAA,[9] or other legislatively mandated tracking or monitoring requirements.[10] In such cases, monitoring and tracking technology will almost certainly be in place.[11]

When a court finds that a defendant does not in fact possess the necessary technological infrastructure, it should permit the defendant to plead the affirmative defense as it currently operates, with the focus appropriately on corrective procedures and preventative measures such as education and notice. When the infrastructure is in place but has not been

---

[1] *See* Jay Mellman, *Where IT, Business Meet*, COMM. NEWS, Aug. 2005, at 38, 39-40, *available at* http://www.comnews.com/stories/articles/0805/0805where_ IT.htm.

[2] *See* Dawn S. Onley, *Technology Gives Big Brother Capability: New Technology Allows Companies to Monitor Employees' Whereabouts to Improve Productivity*, HR MAG. July 2005, at 99, 99-101.

[3] *See* Mellman, *supra* note 117, at 39-40.

[4] *See generally* Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000); Leysia Palen & Paul Dourish, *Unpacking "Privacy" for a Networked World*, in CHI LETTERS, CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS, Apr. 5-10, 2003, at 129, *available at* http://www.cs.colorado.edu/~palen/Papers/palen-dourish.pdf.

[5] *See generally* Paul Attewell, *Big Brother and the Sweatshop: Computer Surveillance in the Automated Office*, SOC. THEORY, Spring 1987.

[6] The reasonable person standard is commonplace in tort, criminal law, and commercial law. *See, e.g.* U.C.C. ¶ 2-504 (1998) (make contract for transportation of goods "as may be reasonable").

[7] *See supra* note 115.

[8] In essence, the analysis resembles a cost/benefit analysis that examines the reasonableness of preventing harassment in the context of a particular employer's technological capabilities and current use of such technology. For example, if an employer currently uses e-mail monitoring technology and would not incur additional cost to monitor e-mails for inappropriate and offensive communications, it would be reasonable to impose liability or limit the employer's ability to use an affirmative defense.

[9] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 26 U.S.C. 29 U.S.C. and 42 U.S.C.).

[10] Gramm-Leach-Bliley Act, Pub. L. No 106-102, 113 Stat. 1339 (1999) (codified as amended in scattered sections of 15 U.S.C.).

[11] *See* Jeremy Blackowicz, Note, *E-Mail Disclosure to Third Parties in the Private Sector Workplace*, 7 B.U. J. SCI. & TECH. L. 80, 89 (2001).

used to prevent harassment, the affirmative defense should be also be permitted, except when the plaintiff's claim presents clear and overwhelming evidence that the defendant deliberately decided not to use the existing technology. For example, if a plaintiff produces e-mails establishing that the decision was driven by a desire to avoid losing the right to plead the affirmative defense, the court should deny the defendant the right to assert the affirmative defense notwithstanding the technological systems in place. This exception is necessary because courts should sanction defendants who purposely expose their employees to a hostile digital workplace. After finding that the defendant's infrastructure was capable of blocking and monitoring the alleged digital communications, the court must then determine whether the defendant took reasonable steps to block or monitor the communications. [1]

B. Determination of Whether the Employer Took Reasonable Efforts to Prevent the Receipt and/or Transmission of the Digital Communications

In the second step of the DWDT framework, the court should use the information acquired in the initial stage of its analysis to determine whether the company took reasonable measures to track digital communications unrelated to the sexually harassing communications. [2] The court may find it appropriate to appoint an independent third party, similar to the expert called to resolve digital discovery disputes, to ascertain whether the defendant used its existing technology in a reasonable manner to protect the digital workplace. As mentioned above, the court must perform a fact-specific analysis in each case, considering both fiscal costs and corporate policies, to determine the practicability of the defendant's implementation of its technological system.

Conclusions

Sexual harassment and hostile work environments violate an individual's right not to suffer discrimination in the workplace. Because employers cannot control the actions of all their employees, business associates, or customers, and cannot compel them to make use of their preventive procedures, the Supreme Court adopted equitable principles in permitting an affirmative defense. Today, however, courts have yet to fully appreciate an employer's ability to take reasonable preventive measures to protect the digital workplace.[3] This lack of awareness provides a disincentive for employers to use these digital measures and is inconsistent with the congressional mandate to prioritize the avoidance of harm over the

---

[1] *See e.g. Doe v. XYC Corp*, 887 A.2d 1156, (N.J. Ct. App. 2005). In *Doe*, the court looked into three areas to determine if the monitoring was legal. First, the court looked to whether the employer had the capability to monitor. *See id.* at 1164 (holding that the suspect's " immediate supervisor, [searched through the employee's] computer while he was at lunch and clicked on 'websites visited.' . .. [N]one of the sites identified were actually explored and no further action was taken to determine the nature of Employee's pornographic related computer activities. Instead, [the supervisor] was simply instructed to tell Employee to stop whatever he was doing. Thus, defendant's capability to monitor Employee's activities on his work computer was clearly established."). The court then looked to whether the employee had a legitimate expectation of privacy. *See id.* at 1166 (holding that the employee's "office, as with others in the same area, did not have a door and his computer screen was visible from the hallway, unless he took affirmative action to block it. Under those circumstances, we readily conclude that Employee had no legitimate expectation of privacy that would prevent his employer from accessing his computer to determine if he was using it to view adult or child pornography."). Finally, the court analyzed whether the employer had a right to search the office to investigate an employee's computer use. *See id.* at 1166 (concluding that the employer, "through its supervisory/management personnel, was on notice that Employee was viewing pornography on his computer and, indeed, that this included child pornography [and thus had a duty to investigate].").

[2] See *supra* and Diagram I: DWDT Analysis.

[3] *See, e.g.* Losey, Adam C. *Clicking away Confidentiality: Workplace Waiver of Attorney-Client Privilege*, 60 Fla. L. Rev. 1179 (2008); Brabham, Cicero H. *NOTE: Curiouser and Curiouser: Are Employers the Modern Day Alice in Wonderland? Closing the Ambiguity in Federal Privacy Law as Employers Cyber-Snoop Beyond the Workplace*, 62 Rutgers L. Rev. 993 (Summer 2010).

provision of redress.[1] Given employers' expansive monitoring of employee digital communications in general, it is reasonable for courts to require the monitoring of communications that are of a sexually harassing nature. The courts, therefore, should modify the affirmative defense to ensure protection of the workplace for employees and to create an effective legal framework to address digital sexual harassment claims.

[1] Employer reasons for monitoring are diverse and important:

1. Electronic monitoring allows employers to make significant gains in the areas of productivity, quality, and safety.
2. Monitoring enhances productivity by facilitating more efficient resource scheduling, more immediate feedback, and more meaningful evaluations.
3. Quality likewise is improved, and customers benefit from better service and lower prices.
4. Monitoring is the key to some safety initiatives, and better safety means lower insurance premiums and workers' compensation payouts.
5. Payroll and equipment costs can also be reduced by monitoring employees for personal use of company equipment and for taking excessive breaks. It has been estimated that employees wasted 170 billion dollars of employer time in one year alone. Further savings may be realized by curbing theft and legal liability.
6. In one year, it is estimated that employees stole the equivalent of 370 billion dollars from their employers. Monitoring can be used to detect illegal or wrongful deeds so that the offenders may be punished. For example, the data flow in and out of a company can be watched to find employees transmitting sensitive data or hackers attempting to crack into the system.
7. E-mail within the workplace also can be monitored to detect electronic harassment.
8. Alternately, monitoring may be used proactively to minimize respondeat superior liability to detect a problem before it happens.
9. As a final incentive, the law sometimes requires employers to monitor employees.

Jay P. Kesan, *Cyber-Working or Cyber-Shirking?: A First Principles Examination of Electronic Privacy in the Workplace*, 54 FLA. L. REV. 289, 319-20 (April 2002) (internal citations omitted). *See also* Chanen, Jill, *The Boss is Watching*, ABA Journal, available at http://www.abajournal.com/magazine/article/the_boss_is_watching/ (discussing the multitude of issues facing employers and employees with workplace privacy and monitoring).

DEVELOPMENTS IN THE LEGAL REGULATION OF DIVORCE. LEGAL AND SOCIAL ISSUES

Gavrilă Simona Petrina*

Abstract

If the traditional space has preserved family values in a fixed structure, both due to the uniform mentality of partners and to the general community principles which would restrict the life of married couples to certain points impossible to call into question or negotiate, the modern family has a new set of rules where the will of the parties comes before the will of parents, where the values of the couple are no longer the object of the community approval and where the intimacy of the partners is no longer disturbed by the external influences of public social Law Courts.

Key words: *civil divorce, law's evolution, religious divorce.*

Introduction

Most of the times, the current society has a legal aspect (formal punishment decided by a legitimate institution for marital union) and a religious aspect (formal punishment, through sanctification, by a legitimate religious institution for marital union). Starting from this point, it is easy to make an association between stability, morality, harmony and balance – as elements considered when speaking about marriage – and its opposite pole, that is instability, imbalance and even immorality, when speaking about divorce.

In order to understand the relation between a laic and a religious divorce, one needs to describe their progress in time, starting during the Middle Ages when all the medieval Romanian states were Christian and up to present.

The evolution of divorce in the Romanian law system

The basis of the Romanian life during the Middle Ages period was the institution of marriage which, as it results from the popular conception transmitted in time, was a mandatory element in the cycle of life. An important requirement for marriage was the existence of dowry and its size, but when this was the only purpose of a marriage, the end could not be other than adultery or divorce.[1]

One of the first written laws, since 1652, is Pravila cea mare[2], also called Law amendment, having a profound religious nature which establishes, among others, the reasons for which a divorce may be requested, i.e. "loss of judgment"[3], in case of epilepsy, "in case of adultery", "for sodomy", "when the woman is pregnant with another man and the husband

* Lecturer Ph.D. Universitatea „Dunărea de Jos" University of Galați, Law Departament, e-mail:gavrilasimonapetrina@yahoo.com

[1] Ioan Chelaru, *Căsătoria şi divorţul. Aspecte juridice civile religioase şi de drept comparat*, A92 Actami Publishing House, Iaşi, 2003 p. 25, 26.

[2] http://www.archive.org/details/IndreptareaLegii.PravilaCeaMare1652.

[3] Alexandru Angelescu, *Nebunia ca motiv de divorţ,* Libertatea Presei Publishing House, Bucharest 1934, page 5. The interesting aspect of this reason for divorce is the duration of the "illness", i.e. to declare the divorce; the insanity should have lasted between 3 and 5 years. When insanity was caused by a reason previous to the marriage, the divorce could be requested without requiring the expiry of the term.

was not aware of the fact beforehand", "for insults and bad treatments"[1]. The wife is also granted the right to divorce if her husband is always drunk[2].

In terms of family relationships, the end of feudalism and the beginning of modern Romania are both characterized by the issuance and existence of numerous written laws which have regulated in detail marriage and divorce[3].In Moldavia, the most important laws are the Manual of Donici and Calimach Code, with visible modern influences[4].

As for the divorce reasons, Calimach Code includes the following divorce reasons which a man could invoke[5]: "if the woman knew about a conspiracy against reign and parish safety and she did not tell her husband about it", "if she proved to be too much of a whore or if she was condemned for murder", "if she put her husband's life in danger or if she knew that others did so, she did not prevent him", "if she relished on eating and drinking or bathing together with other foreign people, without the approval of her husband", if without his approval, she shall eat in a house other than her parents' or "if the husband casts her out without being guilty of any of the above and without having parents or being far from them, she shall spend the night somewhere else", "if without his approval and knowledge, she shall go visiting around", "if she causes the loss of conceived children or kills them after being born", "if she falls in alcohol consumption".

The law of Caragea provides special care to family institutions, treating them in the spirit of local and Byzantine medieval traditions.[6] The reasons for divorce stipulated in Caragea Code[7] are as follows: "when made against the law, that is when free people marry slaves or Christians with people of other religions", "when the man, due to his weakness, does not fulfill the duty of his marriage within years", "when the woman has from the very beginning reasons against sleeping together, which cannot be healed", "when the husband or wife wish to enter a monastery, they are free to separate", "when the man proves that his wife has thought bad of her life or when the wife proves that her husband has thought bad of his life, then they need to separate ", "when the man proves that his wife was not a virgin, he is free to separate", "when the man proves that his wife is a whore, he is free to separate", "when the man has a concubine in his house or pays for her living expenses, the wife is free to separate", "when the man lies to harm his wife's reputation saying that she was not a virgin or that she is debauched and he cannot prove it for a fact", "when they have no desire one for the other and when they have no desire for each other up to three years", "when the man sells his wife's honesty, the woman is free to leave him".

In Transylvania, Articuli novelare (1791) brings several amendments to the **Code of Werboczi**. A special system named it the so-called "Transylvanian marriage", a procedure through which Catholics – especially the Austrian gentry – were turning to a reformed confession in order to divorce and then, properly repentant, returned to Catholicism and were able to get married.[8] Although severely punished, the adultery was extremely difficult to

[1] Ioan Gr. Perieteanu, *Excesele, cruzimile şi injuriile grave în materie de divorţ*, Gutenberg Publishing House, Bucharest, 1902, p. 18, 19.
[2] Alexandru Angelescu, Op. cit. p. 6.
[3] Ioan Chelaru, Op. cit. p. 33.
[4] Liviu P. Marcu, *Istoria Dreptului Românesc*, Lumina Lex Publishing House, Bucharest, 1997, p. 170.
[5] Constantin P. Crasnaru, *Divorţul în Dreptul Roman şi în Dreptul civil Român*, Concurenţa Publishing House, Bucharest, 1905, p. 33, 34.
[6] Liviu P. Marcu, Op. cit. p. 170.
[7] Caragea Law appeared in Walachia in 1818, the law entering into force in 1819.
[8] Liviu P. Marcu, Op. cit. p. 170.

prove, especially regarding the so called "Transylvanian procedure" which consisted of not admitting any adultery evidence, except for eye witness of at least 24 persons.[1]

In general, the divorce did not have an agreed treatment, due to the Church position who considered marriage as immutable. Yet, the divorce has become quite frequent in time and there were opinions stating that: "they are the only Orthodox Churches permitting the divorce or rather the only Churches abusing from the power to pronounce it"(...) in the Principalities, the divorce used to be so easily pronounced and the reasons were so insignificant that they never harm the woman's reputation … and do not arise the feeling of conscience of the men willing to marry her, irrespective of the nature of the divorce reasons.[2]

The Unification of Principalities (1859) and the immediate period afterwards, also characterized in terms of family by numerous reforms, have actually marked almost the entire change of a legal edifice: the Romanian Civil Code, promulgated by A. I. Cuza December 4/16, 1864, this has been the main source of the regulation for family relationships for almost 100 years.

According to the Civil Code, a divorce could not be requested except for certain reasons expressly stipulated by law, if the request was motivated differently, it was rejected. The reasons for divorce stipulated by the Civil Code were: the man or the woman may request a divorce for adultery, married people can, individually, request the divorce for excess, cruelty and serious insults existing between them, the dissolution of marriage may be requested and obtained when one of the partners shall be condemned for hard labor or reclusion[3], life endangering[4], mental alienation[5].

The adoption of the Family Code, i.e. Law no. 4 of January 4, 1954, entered into force February 1, 1954, was a special moment, establishing the existence of the family law as an independent branch of the Romanian law system.[6] It is obvious that the implementation of the Family Code during 51 years has submitted it to numerous completions and modifications.

Until the issuance of Law no. 59/1993, completed by law no. 65/1993, the divorce regulation was that the dissolution of marriage had an exceptional character. This character resulted from the formulation of art. 37 par. 2 C. Fam., stipulating "(...) that a marriage could be dissolute through divorce in exceptional cases", a character appropriated by legal practice, by the guiding decision no. 10 of November 13, 1969 where the divorce was not of interest only to the parties, but to the society itself, the largest responsibility belonging to the judge.

For example, legal practice has considered solid reasons for divorce: the unjustified refuse of one partner to live together with the other one or the unjustified leaving of the conjugal domicile[7], the infidelity of one of the partners[8], the inappropriate attitude of one of the partners, expressed through violent acts and other similar manifestations, or which lead to

---

[1] Ioan Chelaru, Op. cit. p. 36.
[2] Ioan Chelaru, Op. cit. p. 36, 37.
[3] Constantin P. Crasnaru, Op. cit. p. 37.
[4] This reason for divorce was considered useless to be introduced in the Civil Code as it could have been combined with the reason concerning excess, cruelty and serious insults, Constantin P. Crasnaru, Op. cit. p. 40.
[5] One of the determining factors for which mental alienation was introduced as a reason for divorce was the concern of the society who did not want the "illness" to be transmitted hereditarily and there was an opinion according to which: "the signs of the illness affecting an individual do not disappear at the same time with the individual, they are passed on to his/her descendants, always under an enhanced form". Alexandru Angelescu, Op. cit. p. 31.
[6] Adrian Pricopi, *Evoluţia dreptului familiei în România*, Magazine Studii de drept românesc, no. 3, Romanian Academy Publishing House, year 1993, p. 217.
[7] Supreme Court, guiding decision no. 10 of November 13, 1969, modified by guiding decision no. 10 of December 28, 1974, in C.D. 1970, p. 46 and R.R.D. no. 4/1975, p. 40.
[8] Supreme Court, civil section, decision no. 1084/1969, in R.R.D. no. 12/1969, p. 172-174.

serious misunderstandings between partners, making impossible the continuation of marriage.

As we have already mentioned, art. 38 of the Family Code also regulates the possibility to dissolute the marriage through the consent of the parties. Such being the case, two cumulative requirements shall be fulfilled: at least one year shall have been completed before the divorce request date and that there are no under-age children resulted from such marriage.

Following the modifications made to the Family Code by Law no. 202/2010 regarding certain measures for the acceleration of law suit settlement[1], the divorce could be declared either through the consent of both parties or at the request of one of them when, due to solid grounds, the relationships between them are seriously affected and the continuation of marriage is no longer possible or when the health condition of the claiming partner makes impossible the continuation of marriage.

This regulation has also introduced the possibility of divorce through mutual consent in front of the civil status registry officer or the notary public, stating that the partners may file the request to the civil status registry officer or the notary public *if they agree with the divorce and have no under-age children, born during the marriage or adopted.*

According to the new regulation stipulated in art. 373 of the New Civil Code, the divorce may be obtained: through the parties' consent, at the request of both parties or at the request of one of them if accepted by the other party; when, due to solid grounds, the relationships between the parties are seriously damaged and the continuation of marriage is no longer possible; at the request of one of the parties, following a separation de facto lasting for at least two years or at the request of one the partner whose health condition makes impossible the continuation of marriage.

Obviously, the new regulation approaches divorce cases and divorce reasons in a much more relaxed and less formal manner, trying to adapt legal instruments to the reality of modern society.

Maintaining the regulation of the non-contentious divorce in front of the civil status registry officer and the notary public, the New Civil Code eliminates in this case the requirement for the absence of under-age children, but conditions the divorce to the agreement regarding the family name used after the divorce, the exertion of parental authority by both parents, the determination of the domicile of children after divorce, the way of maintaining personal relationships between the separated parent and each child, the determination of parents' contribution to the expenses for living, education, learning and professional training of their children.

The New Civil Code also introduces, through art. 373 letter c), the possibility to dissolute marriage at the request of one of the parties following a separation de facto lasting for two years.

Divorce in Orthodox Church

If art. 48 par. (2) thesis II of the Constitution admits the religious celebration of marriage, indicating that it can only be performed following the civil marriage, no legal norm mentions the existence of a "religious divorce". Naturally, the two institutions are distinct and they may not overlap: in the absence of a religious marriage, a religious divorce cannot

[1] Published in the Official Gazette, Part I, no. 714 of October 26, 2010.

be considered and the legal decision regarding a civil divorce shall not relate to the religious divorce.

The idea of love, understanding and harmony in the everyday life and in family life has been preached by the Church for centuries. The Christian-Orthodox Church considers marriage a sacrament, a sacred relation which should last for the rest of the partners' life. But what happens when the marriage is obviously compromised and the living together becomes a real ordeal, thus the marriage causing more sufferance than joy? Following this line, the Orthodox Church has established its canonic attitude towards divorce: "The legal marriage relationship between two persons can only be dissolute by death or by such reason which through itself is stronger than the idea of the Church on the indissolubility of marriage and which destroys its moral and religious basis and which is death as well, only under a different form".

Although the Orthodox Church does not encourage divorce, except for exceptional situations and for certain reasons which we shall describe hereinafter, it allows married people to get a divorce. From a canonic point of view, marriage being unification in front of God, it shall only be dissolute by death or in case of adultery.

Later on, the Church has allowed the divorce for other causes as well, both at the desire of being in harmony with state laws and on the principle that certain reasons are associated to the person's death.[1] Starting from the assertion that the divorce is only admitted by the Savior for a serious act whose effects have been assimilated to moral death and, considering that there are many acts which can cause the moral death of one of the partners, as well as others which can cause the religious death and others which can cause the civil death of one of the partners, with negative effects upon the entire family and the church parish in general, practically speaking and through certain decisions, some of them originating in the apostolic age, the declaration of church divorce was admitted for several categories of reasons assimilated to death, considering that they produce similar, although not identical effects to physical death, able to determine the cessation of matrimonial relationship in certain cases.

The divorce reasons accepted by the church are divided into reasons which cause religious death, reasons which cause moral death, reasons which cause partial physical death and more important reasons which cause civil death.

The presentation of several divorce reasons, recognized by the Christian-Orthodox Church, which have been either always accepted by the Church or, for certain grounds, accepted later on, allows us to draw a general picture both on the canonic perception on divorce and on the way Church right has progressed due to the modifications occurred in history.

1. Adultery. From the very beginning, the adultery was accepted as a reason for divorce by the Orthodox Church, and for a good period of time it was considered as the only reason accepted by the Church. What determined the Church not to refuse the divorce caused by adultery was the fact that the permission to separate in such case exists in "Matei c. V, v.32", where the Savior permits separation[2].

---

[1] Ioan Chelaru, Op. cit. p. 278 and Ioan N. Floca, *Drept canonic ortodox. Legislaţie şi administraţie bisericească*, Institutul biblic şi de misiune al Bisericii Ortodoxe Române Publishing House, Bucharest, 1991, p. 103.

[2] Ioan Popescu, *Căsătoria tratată din punct de vedere istoric, dogmatic şi moral*, Cărţilor Bisericeşti Publishing House, Bucharest 1889, p. 109.

2. Becoming a bishop[1]**.** According to canon 48 of the synod of Trula, a married man could be elected as bishop only if his wife agrees to leave him and provided that, following his ordination, he shall enter a monastery and receive the monarchic face. From the content of this canon, it results that the Church admits this reason for divorce.

3. One of the partners' transition to another religion. The reason is based on the words of apostle Paul (I Cor., c. VIII, v.15), and admitted by the Priests of Trulan Synod in canon 72: "An Orthodox man shall not marry an heretic woman, nor an heretic man shall marry an Orthodox woman; and if such thing is found, the wedding shall be considered null and the marriage shall be dissolute..."[2]

4. Abortion. A wife's voluntary abortion is considered by the church a murder, a sin and a reason for divorce.

5. Holding one's own child when baptized. The godfather shall not marry the widow mother of his godson, which means a second degree of spiritual kinship. Therefore, if the father holds his own child when baptized, then his marriage with his wife, now a relative, shall be dissolute.

6. Missing husband. According to canon 93 of the 6th Ecumenical Synod and to canons 31 and 36 of Saint Basil, the husband's disappearance is accepted as a reason for divorce and the woman shall be able to get married in five years.

7. Impotence. A natural relationship is when partners love each other, support each other and satisfy both their spiritual and physiological necessities. In order to be considered a reason for divorce, from a canonic point of view, impotence should occur during marriage and before the request for divorce; the wife should wait for a longer period of time so that her husband can "heal".

Unlike the content of legal norms regulating the divorce, canonic rules do not accept as reasons for divorce the following: imprisonment for several years for a serious offence[3], psychical illnesses, and severe diseases.[4]

The analysis regarding the dissolution of marriage indicates a change of the legislator's preference from the system of sanction divorce to the mixed system (conception) of divorce, considered both as a remedy and as a sanction: as a remedy because, due to solid grounds, the partners' relationship is seriously damaged; as a sanction because the impossibility to continue the marriage implies the fault of one or both partners, except for, we must underline it now, the exclusive fault of the claiming partner. In the case of a divorce with partners' consent, their mutual consent, expressed in repeated times, has the signification of a peremptory presumption of the solid grounds for divorce which make impossible the continuation of marriage.

As for the Church canons, we note that, although the divorce is most often approved for the acts of the partner guilty for violating certain rules, in fact the divorce is approved as a remedy, the partial moral, religious or physical death making impossible the continuation of marriage.

We also note that, at the same time with the social changes occurred in time, both legal and religious norms have evolved, allowing a more relaxed framework for this institution of divorce.

---

[1] Stefan Popa, *Divorțul din punct de vedere canonic,* Gutenberg Publishing House, Joseph Gobl, Bucharest, 1901, p. 62.
[2] Ștefan Popa, Op. Cit. p. 61.
[3] Ioan Chelaru, Op. Cit. p. 282.
[4] Ioan Popescu, Op. Cit. p. 111.

Conclusions

It is obvious the fact that the two systems – legal and canonic, try, each in its own way, to solve a social acute issue – that of family dissolution, but one aspect should be underlined, namely that despite their similarities, laic and religious divorce cause special consequences, both regarding the patrimonial and non-patrimonial relationships of the partners and regarding their relationships with children resulted from the marriage. One of the most important differences consists in the fact that, if a person can validly conclude several civil marriages which he/she can end up through divorce, from the religious point of view, the Orthodox Church recognizes one marriage and one divorce, for subsequent situations, only blessing services can be performed.

Bibliography:

Marcel Ioan Rusu, *Procedura divorţului în dreptul românesc*, Rosseti Publishing House, Bucharest, 2003;

Ioan Chelaru, *Căsătoria şi divorţul. Aspecte juridice civile, religioase şi de drept comparat*, A92 Publishing House, ACTEON, Iaşi, 2003;

Adrian Pricopi, *Evoluţia dreptului familiei în România*, Studii de drept românesc Magazine, no. 3, Romanian Academy Publishing House, 1993;

Ioan N. Floca, *Drept canonic ortodox, Legislaţie şi administraţie bisericească*, Institutul biblic şi de misiune al Bisericii Ortodoxe Române Publishing House, Bucharest, 1991;

Alexandru Angelescu, *Nebunia ca motiv de divorţ,* Libertatea Presei Publishing House, Bucharest, 1934;

Ioan Gr. Perieteanu, *Excesele, cruzimile şi injuriile grave în materie de divorţ*, Gutenberg Publishing House, Bucharest, 1902;

Ştefan Popa, Stefan Popa, *Divorţul din punct de vedere canonic,* Gutenberg Publishing House, Joseph Gobl, Bucharest, 1901;

Ioan Popescu, *Căsătoria tratată din punct de vedere istoric, dogmatic şi moral*, Cărţilor Bisericeşti Publishing House, Bucharest, 1889.

THE NOVELTIES BROUGHT BY LAW NUMBER 287/2009 IN THE MATTER OF THE PARTITION OF INHERITANCE[1]

Ilioara Genoiu[*]

Abstract

In the present paper we intend to point out the new elements regarding the partition of inheritance that were brought by Law 287/2009 concerning the Civil Code[2], in comparison with the Civil Code of 1864. Equally, we intend to consider over their justness and opportuneness.

Keywords: *partition in a friendly way, partition by court, joint possession, coheirs.*

Introduction

The new Civil code regulates the partition of inheritance in the IVth Book "About inheritance and liberalities", the IVth Title "The transmission and the partition of inheritance", Chapter IV "The partition of inheritance and the report", Section I "General dispositions regarding the partition of inheritance", art. 1143-1145. In these legal texts, the normative act named before defines the joint possession, the voluntary partition and it regulates the possibility of taking certain preservative measures regarding the inheritance goods. Within the same legal texts, the new Civil Code has inserted the provision according to which its dispositions that are incident on the partition of the common property (art. 669-686) are enforceable to the partition of inheritance as far as they are not incompatible with them.

1. The notion and the legal regulation of the inheritance partition

According to the provisions of art. 1143 (1) of the new Civil Code "Nobody can be obliged to stay in joint possession. The heir can request the coming out of joint possession at any time even when there are conventions and testamentary clauses that provide in a different way".

Therefore, it results that the action of coming out of joint possession has an imprescriptible character in the light of the new Civil Code too and it can be lodged at any moment. But, regarding the partition, on the strength of art. 672 of the new Civil Code, there can be drawn up conventions of suspension, of which duration cannot exceed 5 years. Concerning the immovables, the conventions have to be drawn up in an authentic form and they have to be submitted to the publicity proceedings provided by law.

---

[1] This work was supported by CNCSIS-UEFISCSU, project number PN II-RU, code PD_139/2010, contract number 62/2010.

[*] Lecturer Ph.D. "Valahia" University of Târgoviște, Faculty of Law and Social-Political Sciences, Law Department, e-mail: ilioaragenoiu20@yahoo.fr

[2] It was republished in "the Official Gazette of Romania", part I, no. 505, 15 July 2011. The provisions of this law are only enforceable, in principle, to the testamentary executions that regard the successions which were opened after 1 October 2011 which its date of entry into force. According to the principle of *tempus regit actum*, the inheritances opened after this moment is to be governed by the provisions of the Civil Code of 1864. But, we mention that, from the interpretation of article 6, ¶ 5 and 6 of the new Civil code it results that the provisions of this normative act are enforceable to the inheritances which were opened before 1 October, but that are debated after this moment. As a consequence, the partition act that was drawn up after the date mentioned above, it has a constitutive effect even if the heir certificate on which base it was issued it hadn't the juridical value of a title of property. To be seen in this respect too, The National Union of the Public Notaries from Romania, *Codul civil al României. Îndrumar notarial, volume I*, Monitorul Oficial Publishing House, Bucharest, 2011, p. 442.

Analysing these legal dispositions, we notice that the new Civil Code utilizes the term of "partition" instead of "division" – term which can be found within the previous Civil Code. The new Civil Code states as a novelty aspect – the possibility of maintaining the joint possession for a period that cannot exceed 5 years; it also imposes that the partition adjournment conventions regarding the immovables has to be realized in an authentic form and they have to be submitted to the publicity proceedings. Consequently, the new Civil Code does not provide anymore the possibility of prolongation the partition adjournment convention, thus it cannot exceed the period of 5 years.

2. The general basic conditions of the partition

The partition of inheritance has to be made with the observance of certain fundamental conditions concerning the persons that can request the partition and the capacity requested by law which is necessary in order to promote and to participate to the partition of inheritance.

Regarding these conditions, the new Civil Code does not bring any major novelty because it takes over the principles of the previous Civil Code. Concerning the capacity which is necessary in order to request and to participate to the inheritance partition, we can notice that the new Civil Code has replaced the "tutorship authority" (which was utilized by the Civil Code of 1864) with "the tutorship court". Thus, the incapable person and the person with limited capacity of exercise need the representation of the legal protector, respectively they need to be assisted by it and they also need the tutorship court approval.

3. The partition's object

In principle, the goods that exist in the defunct's patrimony on his death day, they are the object of the partition. By exception, there can be goods that are not submitted to the partition although they existed in the successional patrimony on the inheritance opening day. Also, there can be goods that are submitted to the partition although they did not exist in the successional patrimony on the inheritance opening date.

The defunct's bond[1] and debts are not submitted to the partition because, in principle, they are proportionally divided among the coheirs according to the part of heir that every one of them has the right to, on the inheritance opening date (art. 1155 of the new Civil Code).

In conclusion, only the rights of estate over the defunct's good are jointly assigned and they are submitted to the partition.

Thus, we notice that the new Civil Code does not innovate concerning this aspect. However, the normative act mentioned before has the merit of stating the legal regime of the family recollections. Thus, according to art. 1142 (1) of the new Civil Code, the partition of the family recollections can only be realized in a friendly way, otherwise they remain in joint possession.

According to the provisions of art. 1141 of the new Civil Code, "The family recollections are the goods that belonged to the family members and they represent a prove of the family history. There are included in this category goods as the correspondence made by the family members, the familial archives, the decorations, the arms of collection, the family portraits, the documents and any other goods that have a special moral significance for the respective family".

[1] For instance, such rights can be: the return of a loan which was accomodated by the defunct or the obligation to pay the price for a good which was sold by the defunct. To be seen D. Chirică, *Drept civil. Succesiuni*, Lumina Lex Publishing House, Bucharest, 1996, p. 300.

On the supposition that the heirs haven't realized the voluntary partition of the family recollections, these are to be deposited at one or at many heirs or they are to be deposited in a place established by them, according to the family interest. The keeper's appointment is to be made by the heirs' accord or, in the absence of it, by the court's decision.

In this context, we point out a negative aspect of the (3rd) ¶ of art. 1142. Thus, within this legal text as in many other texts of the new Civil Code, the legislator utilizes the expression "…by the *court's* decision…". We consider that such expression is an incomplete one and the legislator has to utilize the expression "… by the *trial court's* decision" as long as its dispositions also refer to other instances, different from the trial courts, for example they refer to the tutorship court.

The keeper heir can vindicate the goods that represent family recollections from the one that wrongfully keeps them. But, he can alienate them or lend them and he also can let them on hire only with the joint owners' unanimous accord.

4. The forms of the partition

Under the influence of the new Civil Code, the partition has to be realized as it follows: by the strength of law, in a friendly way or by court.

a) *The partition in a friendly way*

According to art. 1144 of the new Civil Code, the partition in a friendly way will be valid if the following conditions are fulfilled: all coheirs are present, all coheirs have full capacity of exercise, the joint owners agreed on the partition and they established its form and the document by which it is to be made; the partition has been drawn up in an authentic form if there are immovables among the successional goods.

The sanction that enforces in case of non-observance of the last condition is the absolute nullity of the partition act. The relative nullity is the one that interferes for the non-observance of the other conditions.

Therefore, as a novelty aspect, Law number 287/2009 states the compulsiviness of the authentic form in the case of voluntary partition that has as an object real estates. On the supposition that there are no immovables among the successional goods, the partition can be made in the form and by the act established by the parties because the partition act of movable successional goods is governed by the principle of consensuality.

Within art. 1145, the new Civil Code regulates the possibility of taking some legal preservative measures for a part of the successional goods or for all successional goods, at the request of any interested person. Therefore, the preservative measures that can be requested by any interested person for any reason (that are provided by art. 1145 of the new Civil Code by a suppletory norm) mustn't be confounded with the measure of putting the seal to the inheritance goods, measure which has to be taken when all coheirs are minors or they are persons submitted to a judicial interdiction or they are missing persons [it is regulated by art. 1144 (2) of the new Civil Code by an imperative norm].

b) *The partition by court*

The new Civil Code does not regulate the partition by court within the IVth Book "About inheritance and liberalities". Within art. 1143 (2), the new Civil Code, as we have shown before, the fact that "The dispositions of art. 669-686 are enforceable to the inheritance partition as far as they are not incompatible with it". As a consequence, the provisions of the IIIrd Book "About goods" that we mentioned before, they are enforceable to the inheritance partition, especially to the partition by court, as far as they are not incompatible with it.

Regarding the cases of partition by court, Law 287/2009 does not innovate and keeps those of the old regulation. But, concerning the modes of realizing this type of partition, the new Civil Code provides in art. 676 that it can be made in the following ways:

- in kind; and in this case it is made proportionally with the share quota of every one of the joint owners;

- by assigning the good in joint possession to one or to many co-owners at their request, in exchange of a compensation named sulta;

- by selling the good according to the mode of sale established by the co-owners or in case of dispute, by the sale by auction under the legal conditions and by the division of the price among the co-owners in a proportional way with the share quota of every one of them.

The last two modes of performing the partition operate on the supposition that the good which is to be divided is indivisible or it is not properly divisible in kind. Therefore, it results that the rule of sharing the good in joint possession is represented by the partition in kind.

As a novelty aspect, the legislator has stated the possibility of suspending the partition pronouncement by a judicial decision, within art. 673. Thus, „The court informed with the partition request can suspend the partition pronouncement for one year at the longest, in order to not bring serious prejudices to the other co-owners' interests. If the danger of these prejudices is removed before the term fulfillment, the court will reconsider the decision, at the request of the interested party".

Consequently, the suspension of the partition as an effect of the convention drawn up by the parties and of which duration cannot exceed 5 years (it is stated by art. 672 of the new Civil Code) it cannot be confounded with the adjournment of the partition pronouncement by a judicial decision which cannot last more than one year (regulated by art. 673 of the new Civil Code).

In our opinion, we consider that Law number 287/2009 brings certain novelties that only can regard the two last modes of sharing the successional goods. Thus, if the good is indivisible or it is not properly sharable in kind, then the partition will be made by giving the good to the joint owner or to the joint owners that lodged a request in this respect. In order to utilize this mode of partition which is enforceable to both movables and immovables, the following conditions have to be fulfilled:

- the good is indivisible or it is not properly sharable in kind;

- the sharer(s) must lodge such a request.

We consider that, in the light of the new Civil Code provisions, in the case of the judicial partition, a sharer cannot receive both goods in kind and a sum of money as a compensation (named sulta). In our opinion, the two modes of realizing the partition cannot be cumulated, thus a heir is to receive whether goods in kind or sums of money.

Equally, if the good is indivisible or is not suitably sharable, the joint owners can agree on selling the good in any mode that they established and the price is to be divided proportionally with the share quota of each of them. Only if they do not agree on the selling mode of the joint good, then the good is to be sold by auction, according to the legal conditions and the price will be divided among the joint owners according to the share quota of every one of them.

We mention that the joint owners can utilize the last two modes of partition in any order they want, according to their interests, as the legislator alternatively regulated them.

5. The effects of the partition

The partition has a *constitutive effect*, no matter the form in which it was made. The joint owners retroactively become the exclusive owners of the quotas from the successional goods that they get from the good included in the successional fund [art. 1114 (5) of the new

Civil Code[1]]. The joint owners become the exclusive owners of the successional goods or of the sums of money that they got by the voluntary partition and by drawing up the partition act. They become the exclusive owners beginning with the date established in the partition act, but not before the date of drawing up the act. In the case of judicial partition, the joint owners become the exclusive owners of the successional goods or of the sums of money that they were assigned since the date when the judicial decision has remained as a final sentence [art. 680 (1) of the new Civil Code][2]. Therefore, the partition act/decision has a translative property effect.

But, regarding the immovables, the partition legal consequences interfere only if the partition act which was drawn up in an authentic form or, as the case may be, the sentence that remained as final, it was entered in the land register [art. 680 (2) of the new Civil Code].

Thus, we notice that the new Civil Code states the constitutive character of the partition in comparison with the old Civil Code that only established the declarative effects for the partition.

The partition's constitutive effect generates the following judicial consequences:

a) The acts that were drawn up, according to law, by a co-owner regarding the joint good they remain valid and they are opposable to the one who received the good as a consequence of the partition (art. 681 of the new Civil Code).

We notice that the new Civil Code establishes the opposability of the acts that were drawn up by one of the co-owners and that regard the joint good, in comparison with the old Code that conditioned the future of the these acts depending on the partition result.

b) In comparison with the previous regulation, on the supposition that the partition's object is represented by real immovables rights, the new Civil Code establishes the compulsiviness of carrying out the real estate publicity proceedings [art. 680 (2) of the new Civil Code].

c) The partition cannot regard those successional goods that the defunct obtained by acquisitive prescription.

6. The obligation to guarantee among the sharers

On the ground of ensuring the equality of rights of the coheirs after the successional goods partition[3], the legislator has stated the sharers' obligation to guarantee one each other for eviction and latent defects that are anterior to the partition.

According to provisions of art. 683 (1) of the new Civil Code "The co-proprietors reciprocally own, in the limit of their share-quotas, the guaranty for eviction and latent defects; the legal provisions regarding the seller's obligation to guarantee are correspondingly enforceable".

Thus, we notice that the new Civil Code regulates the obligation to guarantee for latent defects in addition to the Civil Code of 1864. The rule which is enforceable to the matter submitted to our analyse is that the obligation to guarantee operates independently of the fact if it was or if it wasn't provided in the partition act. By exception, the co-proprietors are not obliged to guarantee if the prejudice is the consequence of the fact commited by other co-proprietor or if they were relieved from the obligation by the partition act [art. 683 (3) of the new Civil Code].

---

[1] According to this legal text, "the acceptation consolidates the transmission of inheritance which is realized to the full right on the death day".

[2] To be seen: the National Union of the Public Notaries from Romania, *op.cit.* p. 441.

[3] To be seen: C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român,* Bucharest, 1929, p. 549.

Consequently, the guarantee is not owned in the two following situations:

- the prejudice is caused by one of the co-owners and in this case he has to repair it on the strength of provision of art. 1357 of the new Civil Code (which it regulates the conditions of responsibility for the personal deed). Therefore, it results that the guarantee is only owed for the third person's deed.

- the co-proprietors have been relieved from the obligation to guarantee by the partition act.

If the eviction interfered or the successional good is affected by latent defects and the conditions for involving the responsibility are fulfilled, each sharer is obliged to compensate the damaged co-proprietor. If one of the co-proprietors is insolvent, his part is to be proportionally paid by the other co-proprietors, inclusively by the damaged co-proprietor [art. 683 (2) of the new Civil Code].

7. The creditors' rights regarding the partition of inheritance

On the strength of art. 1156 of the new Civil Code, the sharers' personal creditors take advantage of the *right to opposition* or of the *right to intervention* on which base they can claim their presence at the amicably partition or they can interfere in the process of partition.

The personal creditors of an heir cannot sue his part of the succesional goods before the partition of inheritance [art. 1156 (1) of the new Civil Code]. Therefore, only the exercise of the right to opposition allows the heir's personal creditor to sue the part of the successional goods which ought to be taken by the respective heir.

Within the final ¶ of art. 1156, the particular legatee whose legacy hasn't as an object a res certa, it is assimilated to the inheritance's creditor because his bond is preferentially satisfied too.

The other heirs (except for the sued ones) can obtain the rejection of the partition action that was lodged by the creditor and they pay the debt in the name of the debtor heir and on his account [art. 1156 (3) of the new Civil Code].

From the analysis of the legal provisions that are incident on the personal creditors' rights, it does not result that these dispositions bring essential novelties in comparison with those of the Civil Code of 1864. But, we have noticed that the new Civil Code only utilizes the notion of "action of revocation" and it gives up the notion of "paulian action".

Conclusions

In the matter of the inheritance partition, the new Civil Code does not substantially innovate and it keeps the principles established by Civil Code of 1864. However, comparing the two regulations, we can identify the following novelties brought by Law 287/2009: the joint possession can be kept for 5 years at the longest and the possibility of renewal the partition suspension clause is not regulated anymore; a proper legal regime is conferred to the family recollections, these are susceptible of partition only in a friendly way; the sharers owe guaranty to one each other not only for eviction but also for latent defects; the partition act that regards immovable goods has to be drawn up in an authentic form and the real estate publicity proceedings have to be fulfilled; the partition produces constitutive effects and as a conseqence of this fact, the coheirs whether receive goods in kind or sums of money, the assigning of both good(s) in kind and sums of money as a sulta it is not permitted anymore.

Finally, we consider that the new Civil Code ensures a modern, a supple and a just regulation of the inheritance partition.

Bibliography:

Stănciulescu L., *Drept civil. Contracte şi succesiuni*, Hamangiu Publishing house, Bucharest, 2008;

Bacaci Al., Comăniţă Gh., *Drept civil. Succesiunile*, 2nd Edition, C.H. Beck Publishing house, Bucharest, 2006;

Chirică D., *Drept civil. Succesiuni*, Lumina Lex Publishing house, Bucharest, 1996;

Hamangiu, C.; Rosetti-Bălănescu, I.; Băicoianu, Al., *Tratat de drept civil român,* Bucharest, 1929;

Titulescu N., *Împărţeala moştenirilor,* Bucharest, 1907.

THE NOVELTIES BROUGHT IN THE MATTER OF SEIZIN BY THE LAW NUMBER 287/2009[1]

Ilioara Genoiu[*]

Abstract

In the present paper we intend to analyse the matter of seizin with all the aspects that this issue involves, in the light of the provisions of Law number 287/2009 regarding the Civil Code[2]. We also intend to point out the new aspects that are brought by this normative act in the matter submitted to our analyse in comparison with the Civil Code of 1864. We'll also consider on their justness and opportuneness.

Keywords: *actual possession, right to administrate, successional patrimony, heirs with seizin, heirs without seizin.*

Introduction

The new Civil Code regulates the seizin in the IVth Book "About inheritance and liberalities", in the IVth Title "The transmission and the partition of the inheritance", Chapter I "The inheritance transmission", the 4th Section "The seizin", art. 1125-1129. Thus, the new Civil Code defines the seizin, identifies the heirs that have seizin and regulates the obtaining of the seizin by the heirs without seizin, the entry of the sole legatee or of the legatee under an universal title into the inheritance possession and it also regulates the delivery of the legacy under a particular title. Thus, we can notice that in comparison with the Civil Code of 1864 that dedicates to this judicial institution one legal text (art. 653) in which the heirs with seizin are identified, the new Civil Code regulates the seizin in detail.

1. The notion of seizin

According to the provisions of art. 1125 of the new Civil Code "Besides the actual possession exercised over the successional patrimony, the seizin also gives to the heirs with seizin the right to administrate this patrimony and the right to exercise the defunct's right and action".

In the light of these legal provisions, the seizin can be defined as a benefit, as a fiction of law and by virtue of it certain heirs (named as heirs with seizin) have by law the inheritance actual possession, they also have the right to administrate the successional patrimony and the right to exercise the rights and the actions that belonged to the defunct, beginning with the inheritance opening day[3].

---

[1] This work was supported by CNCSIS-UEFISCSU, project number PN II-RU, code PD_139/2010, contract number 62/2010.

[*] Lecturer Ph.D. "Valahia" University of Târgoviște, Faculty of Law and Social-Political Sciences, Law Department, ilioaragenoiu20@yahoo.fr

[2] It was republished in "the Official Gazette of Romania", part I, no. 505, 15 July 2011. The provisions of this law are only enforceable to the testamentary executions that regard the successions which were opened after 1 October 2011 which its date of entry into force. According to the principle of *tempus regit actum*, the inheritances opened after this moment is to be governed by the provisions of the Civil Code of 1864.

[3] To be seen: M. Eliescu, *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România,* Academia Republicii Socialiste România Publishing House, Bucharest, 1966, p. 60; Fr. Deak, *Tratat de drept succesoral,* IInd Edition, updated and enlarged, Universul Juridic Publishing House, Bucharest, 2002, p. 468; D. Chirică, *Drept civil. Succesiuni,* Lumina Lex Publishing House, Bucharest, 1996, p. 258; L. Stanciulescu, *Drept civil. Contracte şi succesiuni,* Hamangiu Publishing House, Bucharest, 2008, p. 447, Veronica Stoica, *Dreptul la moştenire,* Universul Juridic Publishing House, Bucharest, 2007, p. 312-313; I. Popa; *Curs de drept succesoral,* Universul Juridic

Therefore, in the light of the new Civil Code provisions, the seizin gives to the heirs with seizin the following rights, beginning with the inheritance opening date:

- the actual possession of the successional patrimony;
- the right to administrate the successional patrimony;
- the right to exercise the defunct's right and action.

Comparing the definition of the seizin given by the new Civil Code with the doctrinarian one that was stated in the light of the previous Civil Code, we do not identify any difference of substance because the seizin confers the heirs with seizin the same prerogatives. But, we can see that the new Civil Code utilizes the notion of "inheritance actual possession" instead of the notion utilized by the doctrine in the light of the previous Civil Code "possession of the inheritance". However, in the light of the previous Civil Code too, the inheritance possession had special significance which was different from the ordinary law one.

We consider that the new Civil Code, by using this proceeding it avoids the merging of the seizin with the ordinary law possession regulated by art. 916 of the new Civil Code; the latter one involves the fulfillment of two elements: *corpus* (the material possession of goods) and *animus* (the intention of owning the goods for itself). Therefore, the essence of the seizin only consists in the material possession of the good; the seizin does not involve the second element of the possession – *animus*.

The seizin cannot be confounded with the transmission of the successional rights which operates on the inheritance opening date, no matter if the heirs have or they don't have seizin.

As the the new Civil Code does not make the distinction between the testamentary executors without seizin and the testamentary executors with seizin, then the pointing out of the differences between the two types of seizin is not necessary anymore. Consequently, in the light of the new Civil Code, the seizin only characterizes the successional rights that belong to certain heirs.

2. The heirs that have seizin

According to the imperative provisions of art. 1126 of the new Civil Code, the heirs that have seizin are as it follows: the surviving spouse, the privileged descendents and ascendants of the defunct.

Thus, we can notice that the new Civil Code has assumned another form of the seizin's beneficiaries, it has given up the ordinary ascendants and it has inserted into this category the surviving spouse, taking into account the doctrine's request and the model of other legislations. The defunct's privileged descendents and ascendants are still considered as heirs that have seizin. Consequently, the heirs that have seizin are equally the heirs that take advantage of the successional reserve. Thus, the criteria utilized by the Civil Code of 1864 in order to establish the heirs that have seizin – the direct kinship, it is replaced by the principle according to which the heirs that take advantage of the successional reserve, they equally take advantage of the inheritance seizin.

We consider that the legislator's option to offer the seizin to the surviving spouse against the ordinary ascendants as being a benefic one. It has a special practical utility because on the one hand, in most cases, the surviving spouse is the defunct's closest person and it's natural that he should own the successional goods by right, from the inheritance

---

Publishing House, Bucharest, 2008, p. 328; I. Dogaru, V. Stănescu, Maria Marieta Soreaţă, *Bazele dreptului civil. Volume V. Succesiuni*, C.H. Beck Publishing House, Bucharest, 2009, p. 440; Ilioara Genoiu, *Drept succesoral*, C.H. Beck Publishing House, Bucharest, 2008, p. 345.

opening date and independently of the heir certificate issue. On the other hand, the ordinary ascendants cannot revaluate the prerogatives offered by the seizin because, in most cases, they are not alive on the descendents' inheritance opening date (grandson, great-grandson, etc.).

Therefore, the heirs that have seizin are the following:

- the surviving spouse;

- the defunct's descendent (children, grandsons, great-grandsons etc.), no matter the degree and that belong to the first category of legal heirs;

- the defunct's privileged ascendant that are relatives of the first degree and that belong to the second class of legal heirs.

The other defunct's legal heir and also the legatees do not take advantage of this law fiction. We mention that, in our opinion, the commune, the town or the municipal town and also the state take advantage of the inheritance seizin as they are the beneficiaries of the vacant successions. In order to sustain our point of view, we invoke the provisions of art. 1139 of the new Civil Code according to which "The commune, the town or the municipal town comes into the inheritance actual possession as soon as all the persons known as entitled to succeed have given up the inheritance or as soon as the term provided by art. 1137 is fulfilled, if no heir is known. The inheritance is retroactively obtained from its opening data". But, whenever the territorial-administrative units mentioned before and the state comes to get the inheritance as legatees, they do not take the advantage of the seizin.

In order to take advantage of the inheritance seizin, the surviving spouse and the defunct's relative must have an actual (concrete) title to the inheritance. For this reason, it is said that the seizin has an individual character (it does not collectively belong to all relatives whithin the beneficiary class/subclass) and it also has a successive character (the place of the heir with seizin that has an actual title to inheritance, but he has given up the inheritance or he is undignified) it is taken by the subsecvent heir that has seizin)[1].

The heir that cannot be totally disinherited but that has been disinherited and that it belongs to the descendents class, respectively to the privileged ascendants subclass, he keeps the quality of heir with seizin regarding the successional reserve.

The rules that governate the seizin are imperative[2] and it results that *de cuius* cannot modify them by his will. However, the imperative character of the seizin is diminished on the supposition that the heir with seizin gives up the seizin benefit, but he doesn't give up the inheritance[3].

3. The effects of the seizin

The seizin has the following effects:

a) The heir with seizin can take possession of all successional goods and he can administrate all of them, inclusively their fruits, without making any formality as the previous certification of the quality of heir which is made by the public notary[4].

By exception, the heir with seizin cannot exercise the actual possession of those successional goods that are submitted to special legal preservation measures on the strength of the provisions of Law number 36/1995 regarding the public notaries and the notarial activity and on the strength of art. 1117 and 1145 of the new Civil Code. He cannot exercise an actual possession of the sums of money and of other values (stock market values, cheques

[1] Fr. Deak, *op.cit.* p. 469.
[2] M. Eliescu, *op.cit.* p. 64.
[3] Fr. Deak, *op.cit.* p. 470.
[4] To be seen: M. Eliescu, *op.cit.* p. 60; Fr. Deak, *op.cit.* p. 470; D. Chirică, *op.cit.* p. 258.

and other values) that are kept in security banking boxes that were rented by the defunct under the conditions stated by the banking legislation.

The heir with seizin also needs the heir certificate in order to dispose of the sums of money deposited at a banking unit (inclusively C.E.C. - The Savings Bank) if the titular hasn't disposed by a testamentary clause.

b) The heir with seizin can exercise all the patrimonial actions that belonged to the defunct, whether they are petitory or possessory actions, even regarding the goods he had never had in his possession[1].

The heir with seizin can sue the inheritance debtors but, corelatively he can be sued by the defunct's creditor.

4. The obtaining of the seizin by the heirs without seizin

According to the provisions of art. 1127 (1) of the new Civil Code "The legal heirs without seizin only get the seizin by the issue of the heir certificate, but they get it retroactively from the inheritance opening day".

The heirs without seizin that need the certification of their heir quality in order to exercise the successional rights and the defunct's action, they are as it follows: the privileged collateral relatives, the ordinary ascendants, the collateral relatives and the legatees. Regarding these categories of heirs, it is necessary the coming into the actual possession of the inheritance, except for the particular legatee[2].

Thus, we notice that regarding the heirs without seizin the new Civil Code does not utilize anymore the expression of "sending in possession", but it utilizes "the coming into the actual possession of the inheritance", because the latter expression avoids any confusion between the seizin and the ordinary law possession.

The entry into the actual possession of the inheritance has the same legal consequences as the seizin and it retroactively operates, beginning with the inheritance opening day [art. 1127 (1) of the new Civil Code]. Consequently, the patrimonial actions that were introduced by the heirs without seizin before they came into the actual possession of the inheritance, they (the actions) cannot be rejected for reason of lack of active processual quality and the heirs without seizin ought to take the fruits from the inheritance opening date, just as the heirs with seizin.

5. The obtaining of the inheritance possession by the legatees

The general legatees or the legatees with a general title get the seizin by the *entry into the actual possession of the inheritance* which is regulated by art. 1128 of the new Civil Code and the particular legatees get the seizin by the *legacy's delivery* which is regulated by art. 1129 of the new Civil Code.

According to the provisions of art. 1124 of the new Civil Code "The sole legatee can ask the entry into the actual possession of the inheritance from the heirs that cannot be totally disinherited. If such heirs do not exist or they refuse, the sole legatee comes into the inheritance possession by the issue of the heir certificate".

Therefore, the sole legatee's entry into the actual possession of the inheritance can be made by the following modes:

[1] To be seen: M. Eliescu, *op.cit.* p. 61.

[2] Regarding the particular legatee, the legacy's delivery is necessary.

- the heirs who cannot be totally disinherited agree of their own will, in an express or in a tacit mode that the sole legatee should come into the inheritance possession[1];

- in the absence of the heirs who cannot be totally disinherited or on the supposition that they refuse, the sole legatee comes into the inheritance possession by the issue of the heir certificate which is made by the competent public notary;

- the public notary issues the heir certificate to the legatee after the court solves the disputes among the involved parties, disputes that are related to the inheritance[2].

According to provisions of art. 1128 (2) of the new Civil Code, the general title legatee's request regarding the entry into the actual possession of the inheritance is to be forwarded to:

- the heirs who cannot be totally disinherited if this is the only category of legal heirs that exists;

- the sole legatee that has the inheritance possession;

- the legal heirs that can be totally disinherited that "…came into the inheritance possession by right or by the heir certificate issue", according to the legal text mentioned before.

We consider that this legal text contains an inadvertance because in the light of the new Civil Code, only the heirs that simultaneously have seizin and cannot be totally disinherited can come into the successional patrimony possession by right. As a consequence, we consider that the legislator's expression "to the legal heirs that can totally be disinherited that came into the inheritance possession whether *by right…*" it is wrong.

- the public notary, by the issue of the certificate heir if such heirs do not exist or they refuse. Concerning the situation of the general title legatee, it is possible to meet disputes among the involved parties, in this case too. Thus, the public notary issues the heir certificate after the court solved the litigation.

Therefore, regarding the general title legatee and its coming into the actual possession, we can see that both modes are enforceable: by their own will and eventually by the agency of the public notary, after the court solved the disputes.

According to the provisions of art. 1129 of the new Civil Code, *the particular legatee* comes into the possession of the legacy's object from the day the legacy was delivered to him of his own will or in the absence of delivery, from the day the delivery request was forwarded to the court.

Thus, we notice that regarding the particular legatee, the new Civil Code utilizes the same terminology as the Civil Code of 1864 did and that is – *the legacy's delivery*.

By exception, the particular legacy's delivery is not necessary in the following situations:

- the object of the particular legacy is represented by the legatee's discharge of debt (*legatum liberationis*) and in this case the debt is paid off beginning with the inheritance opening day[3];

- the legacy's object is represented by sums of money, values or stock market values which are deposited at specialized institutions and the legatee was appointed by the testament

---

[1] If they are aware of the fact that they let the legatee to have the possession of the successional goods, then it has the significance of a tacit acceptation of the legacies' delivery. To be seen: D. Alexandresco, *Explicaţiunea teoretică şi practică a dreptului civil român,* volume IV, part II, Socec & Co. Publishing House, Bucharest, 1912, p. 199-200; M. B. Cantacuzino, *Elementele dreptului civil*, All Educaţional Publishing House, Bucharest, 1998, p. 361; M. Eliescu, *op.cit.* p. 79; D. Chirică, *op.cit.* p. 263.

[2] To be seen: M. Eliescu, *op.cit.* p. 83.

[3] To be seen: I. Rosetti-Bălănescu, Al. Băicoianu, *Drept civil român. Regimuri matrimoniale. Succesiuni. Donaţiuni. Testamente,* volume III, Socec Publishing House, Bucharest, 1948, p. 583.

of the sums and values deposited; in this case the specialized institutions can proceed to the legacy's delivery only basing on the judicial decision or on the heir certificate that states the validity of the testamentary disposition and the quality of legatee [art. 1049 (2) of the new Civil Code].

- the object of the particular legacy is represented by a res certa, in this case the legatee gets its property from the inheritance opening moment, on the strength of the provisions of art. 1059 (1) of the new Civil Code.

The delivery of the legacy under a particular title it will be made basing on the rules of the legacy under an universal title. But, we have to mention that in the case of the legacy under a particular title, the delivery can be asked to the legatee under an universal title and even to the particular legatee that was charged by the testator with its payment.

The new Civil Code acknowledges the particular legatee's right to utilize the action of the legacy's delivery. The legacy is to be delivered to the beneficiary from the delivery request lodging day and not after its solving.

Conclusions

In comparison with the Civil Code of 1864 which contains express and direct references to the seizin within one legal text, the new Civil Code dedicates to this juridical institution five articles and it regulates it concerning all the aspects involved by it.

In our opinion, the new civil regulation has, in principle, the merit of giving a definition to the seizin. Then, the new Civil Code innovates regarding the seizin and its beneficiaries; it replaces the ordinary ascendants with the surviving spouse.

We also consider that the new Civil Code has the merit of utilizing the expressions "the actual possession of the inheritance" instead of "the inheritance possession" and "the entry into the inheritance possession" instead of "sending into possession", all these were made in order to avoid any confusion between the seizin and the ordinary law possession.

Utilizing an actual speciality language, the new Civil Code, far from being a perfect one, it ensures a proper regulation of the seizin.

Bibliography:

Dogaru I., Stănescu V., Soreaţă Maria Marieta, *Bazele dreptului civil. Volume V. Succesiuni*, C.H. Beck Publishing house, Bucharest, 2009;

Stănciulescu L., *Drept civil. Contracte şi succesiuni*, Hamangiu Publishing house, Bucharest, 2008;

Popa I., *Curs de drept succesoral*, Universul Juridic Publishing house, Bucharest, 2008;

Genoiu Ilioara, *Drept succesoral*, C.H. Beck Publishing house, Bucharest, 2008.

Stoica Veronica, *Dreptul la moştenire*, Universul Juridic Publishing house, Bucharest, 2007;

Bacaci Al., Comăniţă Gh., *Drept civil. Succesiunile*, 2nd Edition, C.H. Beck Publishing house, Bucharest, 2006;

Deak Fr., *Tratat de drept succesoral*, IInd Edition, updated and enlarged, Universul Juridic Publishing house, Bucureşti, 2002;

Cantacuzino M.B., *Elementele dreptului civil*, All Educaţional Publishing house, Bucharest, 1998;

Chirică D., *Drept civil. Succesiuni*, Lumina Lex Publishing house, Bucharest, 1996;

Eliescu M., *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România*, Academia Republicii Socialiste România Publishing house, Bucharest, 1966;

Rosetti-Bălănescu I, Băicoianu Al., *Drept civil român. Regimuri matrimoniale. Succesiuni. Donaţiuni. Testamente,* volume III, Socec Publishing house, Bucharest, 1948;

Alexandresco D., *Explicaţiunea teoretică şi practică a dreptului civil român*, volume IV, part II, Socec & Co. Publishing house, Bucharest, 1912.

DEPRIVATION OF RIGHTS OF SALARY AND PENSION - TRANSPOSITION OF A STATE POLICY WITH NO SOCIAL PROTECTION

Gheorghe Isabela-Maria[*]
Păunescu Angela[**]

Abstract

Protection of the individual by the society in which he lives should be a direct transposition of the Christian phrase "love thy neighbor," which should involve strong implications in the context of profound socioeconomic changes.

Keywords: *protection, income, individual, state, morality.*

Introduction

The individual is no longer seen as being behind the building of the society, of the "city" to which he belongs, but that element within that society, who ought to bear the results of an economic strategy, with uncertain results and, as appears today, with adverse repercussions on the patrimony of the citizen.

The legislative frameworks imposed in recent years, from the need to create a balanced state budget, generated favorable conditions for some unwanted, regrettable events, especially for those who represented the subject of the decreasing of salary rights, or have been subject to recalculation / revision of the pension rights.

In a society where the state's need to face the loans, generate antisocial measures, only representatives of the judiciary have succeeded in to enforce a protection of individual life, by recognizing the absolute and inalienable character of the right of ownership subjecting the salary or pension.

Judgments of courts, given with respecting the principles of law (recognizing the obtained right, non- retroactivity of civil law, etc.) provide the protection for citizens in accordance with European practice in this field.

These principles of law, actually represents the transposition of an interior building based on the thought with religious substrate accordingly to which, the human being must be protected from all those around him. If this form of protection was first embraced within religious orders, afterwards succeeded in being translated into legal regulations since Roman times. What is important however, is that the care for the neighbor must be contained in the interior structure of each of us, whether is imposed by a strong religious conscience or simply the moral conscience, good - faith is present at all times.

Court finds that domestic laws violate the covenants and treaties regarding the fundamental human rights to which Romania is part. The domestic laws contain provisions less favorable than the covenants and treaties, and the courts are obliged to ignore these provisions and to apply the more favorable from international regulation. In doing so, the courts do nothing but comply with art. 20 of the Constitution as well as with the covenants and treaties subjecting fundamental human rights to which Romania is party.

[*] Assistant Professor in the Faculty of Law and Public Administration, Rm Vilcea, "Spiru Haret" University / Lawyer in Gheorghe Isabela-Maria Office, Bar Vilcea, email: avocat_isagheorghe@yahoo.com
** Lawyer in Păunescu Angela Office, Bar Vîlcea, email: angela_paunescu@yahoo.com

Finding of the Constitutional Court of Romania, in its decision no.872/25 from June 2010 and no.874/25 from June 2010, both published in the Official Monitor no.433/28 from June 2010 that the No. 118/2010 Law does not violate the Romanian Constitution, does not prevent the courts to apply the provisions of art. 20 of the fundamental Law and to give priority to the pacts and treaties regarding the fundamental human rights that Romania is a part to.

As international regulations have priority over the domestic ones, including the Romanian Constitution, the provisions of the European Court of Human Rights from Strasbourg, for example, have priority over those of the Constitutional Court of Romania, being mandatory for the courts.

In reference to international provisions about fundamental human rights which were violated by wage cuts or revisions of pension rights, under art. 17 of the Universal Declaration of Human Rights: "1. Everyone has the right to own property alone as well as in association with others, 2. No one shall be arbitrarily deprived of his property.

Also, according to art. 1 of the First Protocol to the Convention of Defending Human Rights and Fundamental Freedoms, ratified by Romania by Law no.30/18 May 1994: "Every natural or legal person has the right of his possessions to be respected. No one shall be deprived of his possessions except in the public interest and as provided by law and general principles of international law. The above provisions shall not affect the right of states to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties".

To analyze if the provisions of art. 1 of the First Protocol are violated, there should be considered, therefore, several issues: whether the applicants have a "good" within the meaning of art. 1 ¶ 1 of the First Protocol; the existence of an interference of public authority over the exercising the right of the possession to be respected, which had the effect of depriving plaintiffs of their property under the provisions of the second phrase of the first paragraph of art. 1 of Protocol No. 1; if the conditions of deprivation of property are met, namely whether the interference is provided for law and pursues a legitimate aim of general interest (it intervened on ground of public interest), whether the interference is proportionate to the legitimate aim pursued, namely whether was maintained a "fair balance" between the public interest requirements and imperatives of fundamental of human rights protection.

European Court of Human Rights in Strasbourg ruled repeatedly, even against Romania, meaning that the right of claim is a "good" within the meaning of art. 1 of the First Protocol to the Convention of Human Rights and Fundamental Freedoms Protection if it is well enough established to be due or if the plaintiff claims to have had at least a "legitimate expectation" to see it materialized (Stran Greek Refineries and Stratis Adreadis vs. Greece causes, Judgement from 9th December 1994, Series A no. 301-B, page 84, ¶ 59; Jasiuniene vs. Lithuania case, request no. 41.510/98, ¶ 44, March 6, 2003, Pressos Compania Naviera SA and Others vs. Belgium case, Judgement from 20th November 2005, Series A 332, p. 21 and ¶ 31; Ouzunis and Others vs. Greece case, no.49144/99, April 18, 2002, ¶ 24; Decision of 24 March 2005 in Sandor vs. Romania case, published in the Official Monitor. no. 1048 of November 25, 2005; Judgement from 28 June 2005 in Case Virgil Ionescu vs. Romania, published in Official Monitor. no. 396 of May 2006, decision of 19th October 2006 in Matache and Others vs. Romania case - request no. 38113/02, Judgement from 2 March 2004 in Case Sabin Popescu vs. Romania, published in the Official Monitor. no. 770 of August 24, 2005; Decision from 15th February 2007 in Bock and Palade vs. Romania case - request no.21740/02; Judgement from 1st of December 2005 in the Trading Company "Masinexportimport Industrial Group" vs. Romania case, published in the Official Monitor no. 682 of August 9, 2006; Decision from 23rd February 2006 Stere and Others vs. Romania, published in the Official Monitor no. 600 of August 30, 2007; Decision from 21st February

2008 in Driha vs. Romania case - request no. 29556/02; Judgement from 6th December 2007 in Beian vs. Romania case - request no. 30658/05, etc.)

More recently, the Judgement from 15th June 2010 from Muresanu vs. Romania case (request no. 12821/05); the European Court of Human Rights from Strasbourg had been given especially in the sense that the salary represents a "good" under the art. 1, ¶ 1 of the First Protocol provisions.

The second condition that must be checked to see whether or not there is a violation of art. 1 of the First Protocol, is the existence of an interference of public authorities in the exercise of the right of the possession to be respected, which had the effect of depriving the applicants of their property within the meaning of the second sentence of first paragraph of art. 1 of Protocol No. 1.

Country's economic stability and protection of national security are circumscribed notions of a "legitimate purpose of general interest" and "the public use cause". It is therefore also fulfilled the second condition of deprivation of property.

Finally, the interference must be proportionate to the legitimate aim pursued. And this happens only if it has been maintained a "fair balance" between the requirements of general interest and the imperatives of the protection of fundamental human rights. There must be therefore a reasonable relationship of proportionality between the means employed and the aim pursued (Pressos Compania Naviera SA and Others vs. Belgium case, Judgement from 20th of November 2005, Series A No. 332, p. 23 and ¶ 38, Judgement from 21st of July 2005 in Strain and Others v. Romania case, published in the Official Monitor. No.99 from 2nd February 2006).

To determine whether the contested measure respects the fair balance required and, especially, if it doesn't oblige plaintiffs to bear a disproportionate burden, compensation arrangements must be taken into consideration in accordance with national law.

In this regard, the Court has already held that, without paying a reasonable amount compared to the value of the property, deprivation of property is normally an excessive violation and that the total lack of compensation cannot be justified by the art. 1 of Protocol no. 1, but in exceptional circumstances (Ex-King of Greece and Others vs. Greece [GC], no. request no. 25.701/1994, ¶ 89, ECHR 2000-XII; Broniowski vs. Poland case [GC], request no. 31.443/1996, ¶ 176, ECHR-V).

In any case, as the Court already ruled, if a radical reform of political and economic system of a country or its financial situation may justify severe limitations of compensations, such circumstances cannot be made at the expense of fundamental principles arising from the Convention, such as, for example, the principle of legality and the principle of authority and effectiveness of the judiciary (Broniowski case, cited above, ¶ 175, 183 and 184). Moreover, the total absence of compensation cannot be justified even in the exceptional context, in the presence of a violation of the fundamental principles of the Convention (Decision from 21st July 2005 in Strain and Others vs. Romania case, published in the Official Monitors no.99 from the 2nd February 2006, ¶ 53).

Legal obligation for compensation has been found from the Court within the provisions of art. 1 of Protocol No. 1, too. The Court concluded that this obligation arises implicitly from the text, taken as a whole. Court has held that, in the absence of compensation, art. 1 of Protocol No. 1 would provide only illusory and ineffective protection of property rights, in total contradiction with the Convention.

Good, whether a salary or a pension right is the one that must be protected and recognized by the society of which the individual belongs.

The principle of acquired rights expressly stipulated in the law practice of the ECHR, which has consistently ruled in favor of affected subjects in terms of financial rights by subsequent legislation.

Also, the public interest pursued, namely to ensure a uniform pension system violates the principle of proportionality outlined in the ECHR, by that it breaks the fair balance that must be maintained between protecting property and public interest requirements by deprivation of the right to benefit for the pension within the amount limit guaranteed by the provisions of the special law.

Conclusions

Condition of provision provided by property deprivation law is met, if there is a law within the meaning of the Convention, under which the property deprivation took place and if this law fulfill the qualities determined by the Court in its jurisprudence; to be accessible precise and predictable.

In a society ruled by government policy crisis, it is important that care for *thy neighbor* to be a priority, because the diminishing of the citizen's patrimony has repercussions on the individual and the society in which he lives, as well. Our interior structure based on religious education more or less imposed, should lead us to normality required by the preservation of good living relationships.

Bibliography:

Decision from 21st of February 2008 in Driha vs. Romania case, no. 29556/02 request;

Decision of 15th of February 2007 in Bock and Palade vs. Romania, case no. 21740/02 request;

Judgement from 6th of December 2007 in Beian vs. Romania, case no. 30658/05 request.

Decision from 28th June 2005 in Virgil Ionescu vs. Romania case, published in Official Monitor, no. 396 from May 2006;

Decision from 1st December 2005 in Trading Company "Masinexportimport Industrial Group" vs. Romania case, published in Official Monitor no. 682 from August 9, 2006;

Decision from 19th October 2006 in Matache and Others vs. Romania, case - request no. 38113/02;

Decision from 23rd February 2006 Stere and Others vs. Romania, published in Official Monitor no. 600 from August 30, 2007;

Decision from 24th of March 2005 in Sandor vs. Romania case, published in Official Monitor no. 1048 from November 25, 2005;

Judgement from 21st of July 2005, Foreign and Others vs. Romania case, published in Official Monitor No. 99 from 2nd of February 2006, ¶ 53;

Decision from 2nd of March 2004 in Sabin Popescu vs. Romania case, published in the Official Monitor no. 770 from August 24, 2005;

Pressos Compania Naviera S.A. and others vs. Belgium case, Judgement from 20th November 2005, Series A No. 332, p. 21 and ¶ 31;

Ouzunis and others vs. Greece case, no. 49144/99, April 18, 2002, ¶ 24;

Jasiuniene vs. Lithuania case, no. 41.510/98, ¶ 44, March 6, 2003;

Stran Greek Refineries and Stratis cases Adreadis vs. Greece, Judgement from 9th December 1994, Series A no. 301-B, page 84, ¶ 59.

First Additional Protocol to the Convention of Human Rights and Fundamental Rights;

Universal Declaration of Human Rights.

JEAN-JACQUES ROUSSEAU AND FREEDOM AS FOUNDATION OF SOCIAL CONTRACT

Gherghe Anca Costina[*]

Abstract

Frustrated by the condition of the society of his time, Jean-Jacques Rousseau attempted throughout his work to lay the foundation of a legitimate way of establishing the political power, based on the free will of those who bear its effects. Individuals can make this happen by concluding between them a social pact through which each one gains civil freedom in return for giving up a part of their natural freedom.

Key words: *state of nature, social contract, freedom, equality, legitimate power.*

Introduction

The political theory of Jean Jacques Rousseau is relevant to the evolution of freedom and security concepts, because, according to his declarations, one of the purposes of the association between the individuals in order to create the state is to gain security and, more than that, freedom. The social pact on which Rousseau founds the creation of the state has the purpose to ensure this freedom for the individuals and to consolidate their natural equality. Therefore, it is important to underline Rousseau's explanations about the need to create the society in order to ensure the freedom and security of its members and about the way to carry out this through a pactum societatis, taking into consideration the difficulty and complexity of transferring a legal concept from private law into political philosophy.[1]

According to Rousseau's theory, the purpose of the social structure is the freedom and the security of individuals that compose it. Here, it is interesting to emphasize the fact that the state purpose is similar to its cause and, at the same time, to its legitimacy principle. In other words, the principle on which society existence is based, its absolute cause is the free will of individuals that is a will necessarily built on freedom. The purpose of the social structure is to ensure the continuity of this freedom, which is also the source of any law and the legitimacy of state existence.[2] That's why the concept on which Rousseau's theory regarding the state is based is freedom because "it is incontestable and a fundamental principle of the entire political law that men have chosen their leaders in order to defend their freedom."[3]

How does the philosopher reach this conclusion? Influenced by the social and political reality of his time, which was completely unfavourable for the majority of the population, raised against the entire feudal regime, Rousseau criticises this state of facts, starting from the inequality created at the social level, because, from its point of view, the inequality which the society gets to live in represents the source of all its misfortune. He tries

---

[*] Candiate Ph.D. University of Craiova, Law and Administrative Sciences, project POSDRU/6/1.5/S/14 "Creşterea atractivităţii, calităţii şi eficienţei studiilor universitare de doctorat prin acordarea de burse doctorale", ijjs@univagora.ro.

[1] Thierry Ménissier, "Présentation" în, *L'idée du contrat social. Genèse et crise d'un modèle philosophique*, Ed. Ellipses, Paris, 2004, p. 5-7.

[2] Gheorghe Dănişor, Nicolae, Popa, Ion Dogaru, Dan Claudiu Dănişor, *Filosofia dreptului. Marile curente*, All Beck Publishing House, Bucharest, 2002, p. 179.

[3] Jean-Jacques Rousseau, *Discurs asupra originii şi fundamentelor inegalităţii dintre oameni,* Scientific Publishing House, Bucharest, 1985, p. 141.

thus to explain how things have "arrived to this inequality, source of social disorder between the individuals that compose the society at a certain moment in time, imagining the wild man state, that of the man before the creation of the state, and comparing him to the state of the social man. It is important to underline the fact that the state of nature Rousseau depicts has its origins in many writings of that time that had a quite important influence on him. These documents described the characteristics of humans that have not yet known civilisation and Christianity, and that, according to those stories, they were freer than civilised men.[1]

From "Discourse on the Origin and Basis of Inequality among Men" one can clearly grasp the idea that the state of primitive man, as Rousseau imagines it, has nothing in common with the social man. Or, the inequality causes must be looked for in the society that is in the social man and under no circumstances in the natural state of pre-social man.[2] Why? Because the creation of interhuman relations is the reason that lead to the emergence of vices and disorder that generate conflicts. Therefore, the wild man was a happy man thanks to its ignorance that generally characterized it, because he had no fears since he could not conceive another way of living. The life he was having was neither good nor bad especially because he had no moral relations with other people[3], he was a free man, because he lived alone, his only feelings being love for oneself and compassion, pity[4]. Actually, this feeling is the one that in its state of nature plays the role that the law plays in society, because, as it is a specific feeling of human nature, it prevents the man from harming its fellows.[5] All these characteristics that the wild man has make him a free human being, totally opposed to social man, who, according to Rousseau, is weak, fearful and servile,[6] characteristics that have nothing in common with the nature of man. The question is what it is that made man get to this situation, where establishing an authority that makes possible the life in freedom and security is necessary, in other words why "the man is born free and after that he is in chains everywhere else?"[7]

According to the philosopher theory, the cause of disorder is a indirect consequence of the gathering together of people, of the life in common that those people begin to have after the constitution of family, which brings along the sedentarization in a territory, and, especially the idea of property, which leads to another source of all bad things from society, the inequality. The inequality comes along with the socialization, which is obvious, giving that it is a phenomenon which stems from the way that people perceive one another that is a phenomenon based on relationship.[8] According to Rousseau's explanations, the inequality emerged as follows: after the settlement of first communities during one of the final stages of the state of nature, people began to carry out activities together, and those who stood out as the most skilful became appreciated more than the others and started to have more than the others. Envy appeared then as a result of the inevitable differences aroused among men. These differences accentuated more and more and envy lead to cruelty and aggression. This is why Rousseau reckons that only after the emergence of human groups the state of man deteriorates and he becomes aggressive and cruel, unlike Hobbes' theory, according to which

[1] Idem, pp. 41-42.
[2] Idem, p. 48.
[3] Idem, pp. 102-103.
[4] Idem, p. 72.
[5] Idem, p. 109.
[6] Idem, p. 85.
[7] Jean-Jacques Rousseau, *Contractul social sau principiile dreptului politic*, Nemira Publishing House, Bucharest, 2008, p. 48.
[8] Maurizio Viroli, *Jean-Jacques Rousseau and the well-ordered society*, Ed. Cambridge University Press, Londra, 1988, p. 4.

man is by his nature a cruel being and only through society can he be tamed.[1] Therefore, Rousseau's theory explains that all those differences that appeared at human group level have lead to inequality, state of facts unknown until that moment of human being development, and which sowed between people the want for power, mutual hate and finally the domination of someone or several people over those weaker than them. The want for power of those who dominated, on the one hand and the envy of those who were dominated on the other made that this gathering of people create the premises "of one of the worse war situations: human people, perverted and humiliated, being unable to go back or to give up the bad things that they had acquired and not honouring themselves by abusing the characteristics that make them appreciated, they fell into ruin"[2]. This state of facts determined the rich, for fear that the poor do not rise against them and use force to take their valuable things, to spread the idea of a union between all people and a creation of some common rules that protect everyone interests and grant community security. This is the origin of society in Rousseau's opinion that coincides, as it easily can be noticed, with inequality emergence. This is the moment when natural law is replaced by civil law, whose only role is to provide security for the newly created society, but not a security as it is understood in modern society, but the security regarding the goods men own.[3] Here, we speak about a false social contract that Rousseau criticizes in his work.

Property is the principle which is the basis of the social creation because since its appearance it creates the need for laws that could protect it, which means that the beneficiaries are the rich people. Therefore, the society is born from the beginning with a handicap: inequality. According to Rousseau's theory it is obvious that only a category of the population benefits from the state structure.[4] That's why he claims that the first source of inequality was the introduction of law and property law. Then, this inequality was spread by creating public functions, magistrates, because during all kinds of government, the want for power of leaders conducted to the mass oppression. And the third source of inequality, which chronologically marks its final stage, was the replacement of legitimate power with arbitral power that is the transformation of leaders' power over the people into a power similar to that of the master over slaves.[5] At this stage, extreme inequality between the governors and the governed leads to a certain equality of the latter, that is their equality before the governors "especially because they represent nothing"[6], because they have no value whatsoever anymore. This is another kind of state of nature, one in which the man is so perverted that he finds himself only through the others, in which there is no trace of the true nature of man, and this because the social man "always lives outside himself."[7]

As one can notice, in the "Discourse on the Origin and Basis of Inequality among Men", Rousseau criticizes the situation of the society of its time, emphasizing the causes that determined all bad consequences he mentions, and then, in "On social contract or the principles of political law", he draws up a theory that can provide the basis of a legitimate state structure. In fact, the basic idea of this second work is related to the question: who or what legitimates the political power? Under no circumstances is the natural law that does

---

[1] Jean-Jacques Rousseau, *Discurs asupra originii şi fundamentelor inegalităţii dintre oameni,* Scientific Publishing House, Bucharest, 1985, pp.125-127.
[2] Idem, p. 134.
[3] Idem, pp 135-137.
[4] Idem, pp 137-145.
[5] Idem, p. 150.
[6]Idem, p. 154.
[7] Idem, p. 157.

that, although this would be the simplest solution.[1] Rousseau's answer to this question is totally different, and this is why I claimed that his theory is relevant to the subject in discussion. Jean-Jacques Rousseau conceives a theory which could ensure the co-existence of natural freedom of the individual and the social life, in other words a theory that transforms the state power into a legitimate power. And this power, in his opinion, cannot find its foundations in a law prior to the state, a theory shared by natural law school, because, since the human being, by its nature, is free, man is born free, no authority of an individual over another can be natural, and consequently, the authority that the state exercises on people that compose it is not something natural.[2] Rousseau does not totally reject the idea of natural law, but he does not accept it as a political power foundation, but only as a basis for freedom and equality of individuals, because these two elements coexist in the nature of man.

If the power of the state does not find its legitimacy in the natural law, than how it can be found and what can legitimate that "association form that defends and protects with all common force the person and the goods of each associate and by which each one, uniting oneself with the others, obeys only to himself and remains as free as before?"[3] The answer to this question resides in a social pact based on free wills of people. It is the idea that can also be found in modern constitutional theories, and it is about people maintaining their freedom in society by obeying an order that should be based on their will, and those who obey legal order must equally participate to its creation.[4] And Rousseau chooses especially this idea in order to explain the state legitimacy, a freely consented convention, concluded between equal citizens. Thus we speak about the conception of a different social contract, different from the one criticized by the author in "Discourse on the Origin and Basis of Inequality among Men", which provided advantages only for owners, thus it was based on inequality. This convention is essentially an association pact and under no circumstances a pactum subjectionis. Rousseau totally rejects the idea of the double contract of Thomas Hobbes, according to which there would be a first association pact, concluded between the individuals that compose the society, through which the state takes shape and then a second pact, a subjection pact, concluded between the subjects and the sovereign, through which they should give up their entire freedom in the favour of the sovereign. According to the Swiss philosopher "there is only one contract within the State: that of association. This contract, by itself, is exclusive of other contracts. We cannot imagine a public contract that should not be a violation of the first.''[5] Such a contract would be contrary to the equality principle because it would mean that one of the parties undertakes to command and the other one to subject, which is inacceptable in Rousseau's opinion. Thus, the nature of the contract by which the political body is created is that of a convention based on free will of individuals, associates, and not on force, and concerning the establishing of the regime, this is not carried out through a subjection pact but through law.[6]

Pactum societatis that Rousseau describes in his work is, among other things, the direct result of the human being characteristic to be perfectible, because due to this perfectibility man can change its way of living by accessing the social contract and the

---

[1] Jean-Jacques Rousseau, *Contractul social sau principiile dreptului politic*, Nemira Publishing House, Bucharest, 2008.
[2] Idem, p. 53.
[3] Idem, p. 61.
[4] Dan Claudiu Dănişor, *Drept constituţional şi instituţii politice. Vol. I. Teoria generală*, C. H. Beck Publishing House, Bucharest, 2007, p. 85.
[5] Jean-Jacques Rousseau, *Contractul social sau principiile dreptului politic*, Nemira & Co Publishing House, Bucharest, 2008, p. 161.
[6] Idem, p. 163.

benefits it brings him.[1] This social pact creates the premises of a government that grants freedom and equality for the governed. This social pact creates the premises of a government that grants freedom and security for the governed. The fact that freedom is the basis of any association between individuals in order to create the social body is sustained by the way in which the philosopher conceives the premises and the structure of social contract.

Thus, one of the foundations of the society constitution pact, which makes it possible, is the free will of individuals. If this autonomy of will didn't exist, the conclusion of a social democratic contract could not be possible. And the most important thing is that this will remains free. The way will remains free is by being the law foundation itself. This is in fact the essence of social contract having as purpose the freedom of associates, because a people will remain free as long as it can establish by itself the rules to which it subjects. "Any law that the people, by itself, did not ratified, is null, is not even a law."[2], says Rousseau. That's why it is the law which establishes all individuals' rights in society and it must be equally respected by everyone, as it is an act with general vocation which stems from general will that is the will of sovereign people. General will is the Sovereign will, which, according to the philosopher's opinion, it identifies with the people. People will have the purpose to ensure common well-being that is freedom and equality between the members of political body. That's why whoever refuses to subject to Sovereign's will be constrained by the latter to do it, that is one will be constrained to be free.[3]

On the other side, the social contract purpose is to come up with a solution to the problem of conciliation between individual nature, whose essence is to be free, with social life, through ensuring freedom, equality and security for the members of the society. Therefore, the principle of social contract existence and at the same time its purpose resides in freedom, equality and security concepts. What actually happens by concluding this social pact? Each individual gives up the same part of its natural freedom in order to obtain in return civil, "conventional", freedom, states Rousseau. This civil freedom is not absolute anymore, like natural freedom, but it is limited by general will, and, at the same time, it is a certain right, based on ration and protected by the state, while natural freedom was rather related to the natural instinct of individuals, having as sole limit their physical capacity, and thus characterized by uncertainty. Then, after this association, the individual obtains from the state the property right. We talk about a right based on a legitimate title, which has nothing to do with possession from the state of nature, which was the result of the force or the first occupant right.[4] Thirdly, social pact also brings into social relations "moral and legitimate equality", that is equality of chances, in order to replace physical and intellectual inequality from the state of nature".[5] We talk about the equality before law, which, in Rousseau's opinion, means that no one can do something that is forbidden for another one, that is no one can extend its freedom to the detriment of the freedom of the other, so that he can impose his will over them, which could lead exactly to what Rousseau thinks is not freedom.[6]

In conclusion, the one who has certain benefits from the conclusion of this pact is the individual, the most important being civil liberty, contrary to Thomas Hobbes' opinion, who thinks that by concluding this contract the individual, gave up its entire freedom in

---

[1] Yann Mouton, *Le contrat social à l'épreuve de la religion civile* în *L'idée du contrat social. Genèse et crise d'un modèle philosophique*, Ed. Ellipses, Paris, 2004, p. 57.
[2] Idem, p. 157.
[3] Idem.
[4] Idem, p. 67.
[5] Idem, p. 72.
[6] Maurizio Viroli, *Jean-Jacques Rousseau and the well-ordered society*, Ed. Cambridge University Press, Londra, 1988, p. 155.

favour of the state. On the other hand, Rousseau claims that it would be impossible that men, by concluding the social contract, give up their freedom without getting anything in return from the state, all the more freedom is a natural right that man cannot give away like a material good. "To give up your own freedom means to give up your human quality, your rights specific to the entire humanity and even your obligations. There is no possible remedy for the one who gives up everything. Such a decision is incompatible with human nature and means the elimination of the morality from one's own actions and the freedom assumed by one's own will. Finally, it is non-sense and contradictory to stipulate, on the one hand an absolute authority, and on the other, an endless subjection".[1]

Another aspect of Rousseau's social contract, having the same importance, consists in the fact that it is the alternative to political power imposed by force. While the power established by the force of the strongest is an illegitimate, arbitral power that would transform the leader into master and the population into slaves, the authority that results from the convention is a legitimate one, between the people and its leader. Thus, "subjecting a population and governing a society are not the same".[2] Rousseau draws a model of an equitable society that represents a solution for all problems that cause disorder, and this can be carried out only in a state where the law is sovereign, the merit is the criterion for obtaining jobs and moderation is its operational principle".[3]

Conclusions

It cannot be denied the fact that among social contract foundations that Rousseau describes in his works there can be found law state characteristics, such as equality, individual freedom and democratic participation to the power exercise, which leads to the conclusion that the state, as Rousseau conceived it, has as its final purpose granting individual freedom.

But, the theory advanced by Rousseau as regard to the foundations of the society and the social pact described by him, is, in my opinion, illusory enough. Why? Because the starting point, which is the creation of a political theory that transforms the state power into a legitimate power, by building it onto the individuals' freedom and will, is an illusion. It is true that this legitimacy is necessary, but its necessity does not imply its possibility too, at least not under this form. Firstly, we all know that the individual's freedom has never been and will never be the foundation or the purpose of any social construction, because if the state were sincerely interested in its members' freedom, it would lose its own power, would alienate its own purpose, leading to a contradiction in the concept of state. We can speak here about a combination of the two philosophical and legal meanings of the word freedom. Secondly, the legitimacy of the state power does not exist because the power, irrespective of its kind, can never be legitimate. In Rousseau's opinion, this legitimacy of the power is given by the fact that it is based on the will of the sovereign people, will which represents in the end the source of the law. This argument is reproduced in contemporary constitutional theories in order to legitimate the state power, but there are two aspects that need to be underlined: on the one hand, we speak about the process of legitimating and not the legitimacy itself, this being just one of the arguments used by these theories. This argument cannot be sufficient to legitimate the power and also to guarantee the preservation of freedom in society, as states Rousseau. On the other hand, it is very likely that this freedom ends together with the conclusion of this contract, and also with the constitution of the state.

[1] Idem, p. 55.
[2] Idem, pp. 53-59.
[3] Idem, p. 2.

In conclusion, Rousseau's efforts to create a theory laying the foundations of a legitimate state structure have a necessary but pessimistic result. Yet, in spite all the efforts that are still carried out today, there are still no tangible results.

Bibliography:

Jean-Jacques Rousseau, *Contractul social sau principiile dreptului politic*, Nemira & Co Publishing House, Bucharest, 2008;

Thierry Ménissier, ,,Présentation'' în , *L'idée du contrat social. Genèse et crise d'un modèle philosophique*, Ed. Ellipses, Paris, 2004;

Dan Claudiu Dănişor, *Drept constituţional şi instituţii politice. Vol. I. Teoria generală*, C. H. Beck Publishing House, Bucharest, 2007;

Yann Mouton, *Le contrat social à l'épreuve de la religion civile* în *L'idée du contrat social. Genèse et crise d'un modèle philosophique*, Ed. Ellipses, Paris, 2004;

Gheorghe Dănișor, Nicolae, Popa, Ion Dogaru, Dan Claudiu Dănişor, *Filosofia dreptului. Marile curente*, All Beck Publishing House, Bucharest, 2002;

Maurizio Viroli, *Jean-Jacques Rousseau and the well-ordered society*, Ed. Cambridge University Press, Londra, 1988;

Jean-Jacques Rousseau, *Discurs asupra originii şi fundamentelor inegalităţii dintre oameni*, Scientific Publishing House, Bucharest, 1985.

APPLICATION STAGE OF THE GOOD ADMINISTRATION EXIGENCIES AT NATIONAL LEVEL

Goga Gina Livioara[*]
Vasilica Negrut[**]
Gabriel Gurita[***]

Abstract

The adoption of a Good Administration Code comprising the good administration principles that will be mentioned in the content of the future Administration and administrative procedure code is one of the main subjects that still raises interest in the area of national public law.

Key words: *good administration, administration code, national law, principles*.

Introduction

The national administrative law does not have a source of principles from which the European Union would inspire in elaborating the European Union law or from which the Court of Justice would take over certain rules, therefore principles of good administration are not already grounded in the tradition of the Romanian administrative law. Our research will be limited to analyzing the stages of good administration within the public administration in Romania and analyzing the way in which the national administration integrated in the European Administrative Space, by assuming the principles of good government at national level.

Present judicial frame for the application of the good administration principles

If we relate to the judicial signification of the European Union Chart of Fundamental Rights, we could righteously assert that the principle of good administration has the value of a fundamental right deriving from the quality of citizen of an EU member state. For example, in the Preamble of the Charter, it's stated that his legislative act of the EU respects the rights resulting mainly from the *constitutional traditions and common international obligations of the member states,* from *the European Convention on defending the human rights and fundamental liberties,* from *the Social Books* adopted by the Union and the Council of Europe, as well as from the *jurisprudence of the EU Court of and the European court of Human Rights. Therefore, the quality of member state, representing the recognition of the national values, promoted at the level of the EU once again grant, if we can assert so, the right to claim the respect of these principles of constitutional value.*

Since the administrative right in or country did not represent a source of principles from which the EU would inspire in elaborating the EU law or from which the Court of Justice would adopt certain rules, we cannot approach the principle of good administration as being already grounded in the traditions of the Romanian administrative law. Good administration raises debates in The Netherlands from the perspective of raising it to the

[*] Lecturer Ph.D. at "Danubius" University of Galati, Romania, Faculty of Law, e-mail: livia_goga@yahoo.com
[**] Professor Ph.D. at "Danubius" University of Galati, Romania, Faculty of Law, e-mail: vasilicanegrut@univ-danubius.ro
[***] Lawyer – Galati Bar, Romania, e-mail: gabigurita@yahoo.com

degree of constitutional principle. We have to mention though that within the Dutch administrative law there is already a codification of this principle.

Therefore, in what concerns Romania, the approach of this principle involves two sides. In the first place, the *degree of good administration within the authorities of public administration in Romania must be analyzed, in order to observe the way in which the administration in Romania took over the principles of good administration* (by adopting these principles within the legislation, or by applying the jurisprudence of the European Courts or issue jurisprudence, general and mandatory, by the national instances, *from the perspective of its obligation to apply the law of the EU, according to the principle of subsidiarity,* respectively *the way in which the national administration integrated in the European administrative space by assuming the most democratic principles* that define in the end, a *good administration at national level.*

In art. 51 in the Charter the application domains of its dispositions are established namely that they address also to the member states but only when the dispositions of the EU law are put in application. *Therefore, the extension of the application scope of the EU law is not allowed, besides from its competencies and no other competencies or new tasks are created for the Union. From this perspective, we are most interested in the second variant.*

Regarding the obligation to motivate the decisions by the public administration authorities in the Romanian legislation we do not find the obligation to motivate all the administrative acts as a basic principle of a good administration of their activities.

From the perspective of the regulations existent at the level of the EU but considering the fact that the *obligation of motivating the acts at the level of the member states of the EU represents a general tendency*[1]*, we assert that, de lege ferenda, imposes the regulation of the public servants obligation to motivate all the acts adopted by them in exerting their service. Their content must comprise the grounds that led to the adoption of the decision or the measurement, together with an objective analysis of the legal criteria* ***on which the solution is*** *based, according to a reasoning that individually concerns the request.*

This provision would diminish the risk or arbitration in the public administration, constituting therefore *a factor of progress for the administration.*[2]

Also, besides the means of appeal direct towards the administrative that issued the acts or the hierarchic organs, the mention with which the citizens that are not satisfied with the way in which their petition was solved can address to the Ombudsman for bad administration.

Another principle defined by the *European Charter of Fundamental Rights* as a principle of good administration is *the right to be heard* before the adoption of a decision. The Court of Justice[3] stated that the *respect of the right to defense* in any procedure initiated against one person is mandatory, if it is susceptible to leading to a measure that would negatively affect the person. This principle has fundamental value in the EU law and this s why it imposes to be guaranteed even when lacking specific orms regarding the procedure. Therefore, in the *cause Sopropé c. Fazenda Pública*[4], the Court restated the right to defense

---

[1]Vasilca. Negruţ, *Reflectarea dreptului la o bună administrare în Constituţia României,* Annual session of scientific communication, ISA Sibiu, May 28-29, 2010.

[2]Verginia Vedinaş, *Drept administrativ si instituţii politico-administrative*, Practical handbook, Lumina Lex Publishing House, Bucharest, 2002, p. 98.

[3]CJCE, Decision on July 9, 1999, *New Europe Consulting and Brown / Commission,* Rec. Case T-231/97, p. II-2403, pct. 42.

[4] CJCE, Decision on December 18, 2008, *Sopropé – Organizações de Calçado Lda c. Fazenda Pública* C-349/07, p. *I-10369.*

as being a general principle of the Union, applicable each time when the Court wants to adopt an act that causes prejudice to a person.

Although few, *we find regulations regarding the assurance of the right to be heard in the Fiscal Procedure Code.* Thus, according to art. 9, *the right to be heard* must be respected every time before making a decision regarding the facts and relevant circumstances. *It is observed that the dispositions mentioned are close as regulation but not as judicial effects.* On these grounds, the *High court of Cassation and Justice* sanctioned the non compliance with the right to on reviewing a decision[1], in which it was observed that the suing of the administrative act by the General Directorate of Public Finance was made by non complying with the provisions of art. 9, ¶ 1 in the Fiscal Procedure Code. The Court stated that in the cause, it didn't operate the respect of the right to defense of the tax payers by listening to them prior to taking decisions with significant effect and invocated to this end, a Decision of the EU Court of Justice.

In what concerns the right to access the file, legislation in Romania seems to get close to the European exigencies in the matter of public procurement. This is also due to the fact that the European legislation in this field, with principles and procedures for public procurement was entirely transposed at national level. According to art. 215 in EGO *no. 34/2006* on *awarding public procurement contracts, public works concession contracts and service concession contracts, the access of people to the public procurement file is allowed and performed complying with the terms and procedures provisioned by Law 544/2001.*

In the meaning of the law mentioned above, the access to the file is allowed because the procurement file is a *public document,* and can be restricted only with certain exceptions, related to the existence of classified information or information protected by a law of intellectual property. In case the restriction is not legal, the person in cause can address, through the administrative- jurisdictional procedure, to the National Authority for Regulating and Monitoring Public Procurement.

The necessity to adopt a Code of Good Administrative Conduct at national level

In order to identify the role and the efficiency of the institution of the Ombudsman for the remedy of the cases of bad administration at the level of the public administration, we must depart from the purpose of its establishment.

When analyzing the purpose for which the institution of the ombudsman was established at the level of the European Union, the conclusion deriving from the content of the *European Code of Good Administrative Conduct* is that the *administration will never find another role than to serve the citizens.* For example, in the motivation given by the European Ombudsman on April 1st, 2003, in the Preamble of the *Code* it is indicated that the *institution of the Ombudsman has a double dimension,* being necessary in order to observe the way in which the administration solves the requests of the citizens, recommending remedying measures when necessary and on the other side, represents a source of support for the administration, as it helps improve its activity by mentioning the areas that need improvement.

Relating to the purpose of establishing this institution at national level, it aims not only at protecting the interests of the privates, but also the public interests, if we consider the

[1] ÎCCJ, Fiscal and administative contentious Section, Decision on May 14, 2009, *SC U. SA Cluj Napoca c. DGFP Cluj and AFPCM Cluj Napoca.*

particularities regarding the impossibility for the Ombudsman to withdraw the action against the acts with normative character.

In the initial regulation, provisioned only by art. 1, ¶ 3 in *Law 554/2004 on the administrative contentious*, it was stated that the Ombudsman, after the proper control according to his attributions established by organic law, can refer to the competent instance of administrative contentious from the residence of the solicitor, if assessing that the illegality of the act or excess of power of the administrative authority cannot be eliminated in other manners than by justice. By this procedure, the Ombudsman is substituted to the prejudiced private person in his right, exerting the attribution to refer to the court. This matter regarding the quality of subject of an unconstitutionality exception[1], as the principle of the availability of the party is being breached and implicitly the free access to justice, exception which was rejected under the consideration that *the role of the Ombudsman is precisely to support the citizen, including thorough its prerogatives of introducing the action at the instance of administrative contentious as in the end, the citizen is the one who decides if he will continue the solving of the trial or not.*

Still, we cannot but observe that in the present regulation of the Law of administrative contentious 9after the amendments brought by Law 262/2007) no mentioning is made regarding the possibility of the private person to refer to the Ombudsman. This thing does not supersede the *right of the citizen to complain to the Ombudsman for the cases of bad administration coming from the authorities of the public administration,* as the fundament of his right *is a constitutional one.* The institution of the Ombudsman has the role to protect, as indicated in the Romanian Constitution (art. 58-60) the rights and liberties of the private people, the exertion of his attributions being based on two ways of making knowledge of these cases of bad administration, namely by exerting the control on his own as well as at the demand of the private persons prejudiced in *rights and liberties, within the limits established by law.*

Conclusions

By analyzing these interpretations, we assert that the adoption of a Code of good administrative conduct represents a desirable fact for Romania, in these moments in which the administration needs a more and more impulses to revive an institution about to become a tradition. Such a Code should contain all the principles of good administration defining the relation between the citizens and the public administration authorities (the right to be heard, the access to own file, the motivation of the administrative acts, etc.) and will represent a guide of good conduct of the activity of these institutions, depending on which the control by the Ombudsman will be performed.

Bibliography:

Vasilica Negruţ, *Reflectarea dreptului la o bună administrare în Constituţia României, Annual session of scientific communication, ISA Sibiu, May 28-29, 2010;*

ICCJ, Fiscal and administative contentious Section, Decision on May 14, 2009, *SC U. SA Cluj Napoca c. DGFP Cluj and AFPCM Cluj Napoca;*

CJCE, Decision on December 18, 2008, Sopropé – Organizações de CalçadoLda c. FazendaPública C 349/07, p. I-10369;

[1] Constitutional court, Decision no.*507 on November 17, 2004 on the unconstitutional intimation of the provisions in article 1 par. (3), art.7 par.(5), art.11 par.(3), art.13,* published in M. Of. no. 1154 on December 7, 2004.

Constitutional Court, Decision no.*507 on November 17, 2004 on the unconstitutional intimation of the provisions in art. 1 par. (3), art.7 par.(5), art.11 par.(3), art.13*, published in M. Of. no. 1154 on December 7, 2004;

Verginia Vedinaş, *Drept administrativ si instituţii politico-administrative, Practical handbook, Lumina Lex Publishing House, Bucharest, 2002;*

CJCE, Decision on July 9, 1999, New Europe Consulting and Brown / Commission, Rec., Case T-231/97, p. II-2403, pct. 42.

THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY WIHTIN THE NATIONAL ADMINISTRATIVE LAW

Goga Gina Livioara[*]
Vasilica Negrut[**]
Gabriel Gurita[***]

Abstract

At national level, there is no obligation for the administrative authorities to motivate all the decisions from the perspective of the application of the principle of proportionality. In the context of the regulations comprised in art. 53 of the Romanian Constitution and analyzing the rigors of the German law in the matter of the principle of proportionality, we assert that these exigencies should be also assumed at national level.

Key words: *administrative authority, proportionality, administrative law, national law.*

Introduction

These exigencies are the criteria of taking the most adequate measures in order to attain the objectives, the necessity of taking the measures to obtain the results desired and the claim of proportionality in strict meaning, through which we can assert if the measure taken is not excessive in order to obtain the results. We consider as being necessary to restate the considerations based on which the instances of administrative contentious perform the control on the procedure of declaring public unity, based on Law no.33/1994 on expropriation on the grounds of public utility. The appealed administrative act has to be evaluated based on criteria as the involvement of a public interest, necessity in a democratic society, non prejudicial and non discriminatory.

The adjustment of the triple proportionality criteria to the European exigencies

At the level of the national legislation, the principle of proportionality is not regulated expressly as a principle applicable to the relations of administrative law.

We have to mention that currently, the principle of proportionality cannot find itself a complete approach at national level, resembling to the one within the European Union of the German law. Thus, at the level of the Union, the principle of proportionality is applied regarding the measures adopted for the fulfillment of the community obligations or in case of the derogation of these obligations, according to the Union's law. In case our country has to apply a regulation of the Union, transposed in internal frame, this regulation has to comply with the conditions regarding the proportionality, respectively *to be adequate to reaching the objective followed and not surpass what in necessary in order to reach the objective.*

Within the member states, the principle of proportionality is found in few states mentioned under this form (Germany), usually being analog to the principle of reasonability, respectively a reasonable relation between the purpose and the means (Great Britain), a balance between the costs and advantages or between the political interest and the private

[*] Lecturer Ph.D. at "Danubius" University of Galati, Romania, Faculty of Law, e-mail: livia_goga@yahoo.com
[**] Professor Ph.D. at "Danubius" University of Galati, Romania, Faculty of Law, e-mail: vasilicanegrut@univ-danubius.ro
[***] Lawyer – Galati Bar, Romania, e-mail: gabigurita@yahoo.com

one (France). Germany seems to present the best example of applying the triple criteria of proportionality borrowed subsequently by the law of the European Union and poured then within the other member states. (Great Britain, Italy).

At constitutional level, we find such regulations regarding the proportionality of the measures in the content of art. 53 regarding the *abridgement of certain rights or liberties* for certain considerations related to the protection of public interests, but in the conditions in which the measure is necessary in a democratic society, if it is proportional with the situation that determined it, is applied in non discriminatory manner and without bringing prejudice to the existence of the right or the liberty. Also art. 44 regarding the *right to private property,* mentions that "no person can be expropriated but for a cause of public utility, established according to the law, with righteous and prior reparation".

Law no. 33/1994 on expropriation for a cause of public utility establishes the procedure of expropriation, delimited in first instance administrative, pre contentious, respectively in the judicial stage. Both stages are preceded by the declaration, by law, of the character of public utility by the Government, for the works of national interest, respectively by the County Councils and Local Council of Bucharest for the works of local interest. In what concerns the control of the acts of authority the public utility was declared with, they cannot be analyzed by the instances of administrative contentious except for reasons of *legality* and *not opportunity* the latter being asserted by the administrative authorities

If we analyze the content of art. 53, we will find the criteria of the necessity of the measure and proportionality in strict meaning. Regarding the non discriminatory, as mentioned before, within the Jurisprudence of the court of Justice[1] *the principle of non discrimination* is analyzed from the perspective of the *principle of proportionality* more exactly the discrimination must be *corresponding, necessary and proportional in strict meaning* and has to be performed in stages. Such an analysis of equality does nothing more than generate more transparency and judicial security for the relations of administrative law. For this reason, the[2] asserts that opening the community competition in public procurement requires a growth in the guarantees regarding the transparency and non discrimination, this is the reason why the Union must impose means of appeal effective and fast in case dispositions of the Union's legislation in public procurement matters or regulations of internal law on the application of this legislation

From this point of view, given the criteria mentioned also in the content of art. 53 of the Romanian Constitution, it imposes to restate the considerations based on which the instances of administrative contentious perform the control on the procedure of declaring the public utility. The appealed administrative act therefore has to be appreciated from the perspective of the criteria listed, respectively *if a public interest exists, if this measure is necessary in a democratic society, if it is proportional with the situation that determined it, if it is or not discriminating or brings prejudice to the existence of the right or liberty.*

The control of these conditions are found within the considerations of legality and not opportunity, given the fact that the procedure of expropriation is quite vast and from the motivation of the administrative authority none of the mentioned elements must be missing. More than that, such a control performed by the national instances should take over some of the rigor of the court of justice of the EU, if not the German Courts, given that the constitutional provisions are quite permissive.

---

[1] CJCE, connected causes C-55/07 and C-56/07, *Michaeler and others in* CJCE, *Repertoriul Jurisprudenţei Curţii de Justiţie şi a Tribunalului de Primă Instanţă*, Luxemburg, Ed. CURIA, 2008-4B, p. I-3147, pct. 37.
[2] CJCE, Decision on January 17, 2008, *Commission/ Portugal*, C-70/06, Rep. p. I-28, pct. 33.

De lege ferenda, it is imposed that in the content of Law no. 33/1994 the principle of proportionality should be introduced as a principle of procedural law regarding the expropriation, so that the instances can be pronounced on legality bases, on opportunity grounds.

Still, about a process of adoption of the principle of proportionality in the matter of administrative law in Romania, under the influence of the EU law we can talk from the perspective of the process of harmonization of the Romanian legislation with the one of the European Union. Therefore, in 2006, the EGO no. 34/2006 was adopted, *on the awarding of the public procurement contracts, public works concession and service concession contracts*[1], which transposed a series of European directives, among which Directive no.*2004/18/CE on the coordination of the procedure of awarding the supply and service contracts.*

Until the amendments brought by EO no.19/2004[2], in EO no.34/2006 it was provisioned that one of the principles that represent the basis of awarding public procurement contracts is represented by the *principle of proportionality* together with other principles such as non discrimination, equal treatment, transparency, efficiency in using the funds and liability, following that these principles would be improved through a Government Decision. After the amendment, art. 179 in EGOno.34/2006 *imposed, as an obligation, to the contracting authority the compliance with the principle of proportionality* in the cases in which the criteria of qualification and selection are mentioned, namely that the criteria will have to have specific connection with the object of the contract that will be awarded. To this end, the level of minimal criteria requested in the awarding documentation, respectively the documents that prove the fulfillment of such requirements have to be limited solely to those strictly necessary in order to ensure the fulfillment of the contract in optimal conditions, the latter being evaluated according to the value, nature and complexity of the contract.

Conclusions

Given the propagation of the principle of proportionality through the European administrative law, we cannot but hope for the way in which a control of the legality of awarding the public procurement contracts will be accomplished, if not in front of the National council for the settlement of appeals, at last in front of the instance of administrative contentious, from the perspective of the triple criteria of proportionality, specific to the German law.

Bibliography:

CJCE, connected causes C-55/07 and C-56/07, *Michaeler and others in* CJCE**,** *Repertoriul Jurisprudenţei Curţii de Justiţie şi a Tribunalului de Primă Instanţă*, Luxemburg, Ed. CURIA, 2008-4B, p. I-3147, pct. 37;

CJCE, Decision on January 17, 2008, *Commission/ Portugal*, C-70/06, Rep., p. I-28, pct. 33.

[1] The Ordinance was published in the Of. M. of Romania, Part I, no. 418 on May15, 2006 and was approved with amendments and completions by law no. 337/2006, with subsequent amendments and completions.

[2] For example, through Decision no.1355 on November 9, 2006 of the Bucharest Court of Appeal, Section VIII administrative contentious, the court held that it can decide regarding the compliance with the principles established by law, asserting the decision of the administrative organ as being a condition of legality of the public procurement procedure.

EUROPEAN MIGRATION POLICIES

Nicolaie Iancu*

Abstract

The author's purpose is to provide a brief overview of the European migration policies that have sometimes led to the emergence of certain political dilemmas. Several considerations were made regarding the policies in this field, which may be divided into four categories: labour migration policy, migration control policy, the asylum and protection systems, respectively, integration policies.

Keywords: *policy, migration, asylum, protection, labour, integration.*

Introduction

European governments and electorates are now facing major challenges which, in a way, explain the ambivalent attitude towards the phenomenon of immigration: a tendency to encourage it, while there are also signs of rejection, economic opportunism and disappointment with the results of the integration processes, and the examples could go on.

The conflicts sometimes shift to the internal scene, given the fact that, in many European countries, the number and the economic and political power of ethnic groups are increasing, leading to new pressures and incentives to include the interests of ethnic minorities in the economic and social policies, and these tendencies often clash with populist movements. In this respect, the specialty literature highlights the fact that governments will insist on a stricter "screening" of the immigration flows, in order to increase the number and quality of "wanted" immigrants while firmly blocking the entrance of the "unwanted", even if this category includes, besides illegal migrants and refugees, asylum seekers and humanitarian cases[1].

I.*Labour migration policy.* In many countries, there is a serious conflict between the economic and demographic arguments to encourage and expand labour migration and public opposition to immigration increase. The European states have dealt with this problem in different manners. In most cases, governments have managed to include in their legislation certain measures for the liberalization of labour circulation or programs to attract labour; most of these were for highly skilled migrants, in the form of point systems, controlled recruitment procedures in certain sectors or professions, or by facilitating access to employment for foreign students graduating from national education institutions.

These programs were implemented in addition to the existing common provisions applying to skilled migration that were already present in most European countries: individual work permits, knowledge test employment, or intra-company transfers.

However, explicit attempts to expand these programs have been contested politically, and the most widespread way of promoting them was to "sell" liberalization "to pack" with promises for a stricter screening of other migrants, of refugees and other categories that generate no economic profit[2]. Governments have considered it appropriate to introduce as an alternative or in addition certain guarantees that these programs are temporary and will not be

* Ph.D. Candidate, Lecturer, AGORA University, Faculty of Law and Economics, e-mail:niancu2009@yahoo.com

[1] Boswell, Christina (2005), *Migration in Europe*, Policy Analysis and Research Programme of the Global Commission on International Migration, http://www.gcim.org/attachements/RS4.pdf.

[2] Boswell, Christina (2005), *op.cit.*

permanently established (for example, the German Green Card program). In other cases, governments avoided political conflicts by implementing the liberalization programs in a less transparent manner, through acts and decrees that did not require parliamentary sanction and, consequently, drew less media attention. Another tactics was to tolerate substantial volumes of illegal migration or periodic adjustment programs, in order to meet the demand for poorly and medium-qualified labour on the domestic market (e.g., in France, Greece, Italy, Portugal and Spain). Trying to cover their additional labour needs, many of the industrial countries "closed" their eyes to the use of irregular migrants as labour. The practices of tolerance towards this category, as well as the implementation of periodic adjustment programs for unauthorized workers may, in certain respects, be regarded as constituting a factual liberalization of the global labour market[1]. However, the Global Commission on International Migration considered that the resort to adjustment programs demonstrates a lack of coherence between national policies on migration and, respectively, on the labour market. Adjustment has never been a preferred instrument of economic policy or of labour market intervention, it is rather a means of last resort used in the case of illegal migrants whose presence has become uncontrollable by other means. Adjustment programs are controversial, for the most part, with a distinction between those who argue the benefits of adjustment (as a response to the realities of illegal migration flow increase and the expansion of underground economy) and those with a traditional approach regarding the right of the state to control the entry, stay and return of migrants, and respectively the dynamics of the international labour market[2].

It can be said that none of these compromises is commendable and, most certainly, they do not represent a sustainable solution to the problems of labour shortages. Moreover, even in countries where programs encouraging the increase of labour migration have obtained a certain degree of political consensus, such reforms will have controversial effects too, such as economic, demographic, social changes brought on by migrants, that will require further labour market opening, including for an increasing number of low-skilled immigrants.

But the limits of Union competences are governed by the principle of conferral. This means that the Union shall act only within the powers it has been granted by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. The exercise of Union competences is governed by the principles of subsidiarity and proportionality[3].

II. Migration control policy. The migration control policies raise intractable dilemmas for the European countries, the governments' attempts to control the illegal movement, stay and work facing serious impediments. The implementation of strict internal controls in order to prevent irregular stays would require a certain degree of state monitoring and intervention, which is unacceptable in liberal democratic countries, especially in those with a tradition of citizens' control over state authority. Also, strict controls of the border are expensive and can cause serious delays at border crossing points, adversely affecting tourism and commercial activities. Moreover, as the smuggling and human trafficking networks

---

[1] GCIM (2005), *Migration in an Interconnected World: New Directions for Action*. Report by the Global Commission for International Migration,
http://www.gcim.org/attachements/gcim-complete-report-2005.pdf.

[2] International Labour Organization (2009), *Regularization and Employers' Sanctions as Means towards the Effective Governance of Labour Migration. Russian Federation and International Experience*,
http://www.ilo.org/public/english/region/eurpro/moscow/info/publ/regularization_en.pdf.

[3] Elena-Ana Nechita, *Libera circulație a persoanelor în spațiul Uniunii Europene (The Free Circulation of People within the European Union Territory)*, AGORA University Publishing House, 2010, pp.10-11.

adopt ever more sophisticated methods, these checkpoints must keep pace with the changes and be modernized and equipped accordingly.

In the case of the Schengen countries, this form of internal border control is, however, excluded, as a result of the abolition of internal border controls. Internal controls and border controls are also constrained by the Member States' non-return obligations (the principle of non-refoulement)[1]. If irregular migrants or residents seek asylum, a series of rights and procedures for their temporary protection are put in place until the resolution of their application, making the deportation or expulsion of such persons from the territory of the States concerned very difficult.

While the States have tried to circumvent these commitments through readmission agreements, accelerated procedures for asylum, restriction options are limited. Attempts to control irregular workforce are facing a quite different set of constraints caused by the conflict with business interests pressing in order to ensure a cheap labour supply.

This interest explains to a large extent the very low rate of sanctions against employers in many countries. But there are also ethical constraints preventing a too severe punishment for the employment of illegal workforce and for illegal residence. Once these people have benefited from a long residence time, for humanitarian and practical reasons, expulsion measures are not preferred, this argument for a lengthy stay being sometimes a reason to regulate their status. These considerations, combined with the interests of employers to keep workers cheap and effective, have often supported the idea of adjustment programs, or of an "adjustment" of their status, on a case by case basis.

On the other hand, these practices carry with them the germs of other problems, especially the possibility that these adjustment procedures act as a pull factor for future migrants.

III. Asylum systems. Cooperation on justice and home affairs is related to the right of free movement of persons, so that there is a common interest for[2]: the rules on crossing the external borders of the Union, asylum policy, immigration policy, the fight against drugs, international fraud, customs cooperation, judicial cooperation in criminal and civil matters, etc.

The EU asylum policy is embodied in a large-scale and long-term international refugee protection regime, which complicates and affects the development and adoption of the EU legislation. Fundamentals of this legal regime are based on the creation of the UN High Commissioner for Refugees (UNHCR) in December 1949 and the adoption of the first legislative instrument, the Geneva Convention on Refugees in 1951[3]. As signatories to the Convention, all EU Member States undertake to provide refuge to anyone who:

- has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion;
- is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;

[1] UNHCR (1997), *Note on the Principle of Non-Refoulement*, http://www.unhcr.org/refworld/docid/438c6d972.html [accessed on 13 December 2010].

[2] Elena-Ana Mihuţ, *Procesul decizional în cadrul cooperării judiciare şi poliţieneşti (The Decision-Making Process within Judicial and Police Cooperation)*, in The Romanian Journal of Legal Medicine, no. 6/2006, Year VIII, p.43.

[3] Supplemented by the New York Protocol in 1967.

- or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it[1].

Despite the fact that this convention is the cornerstone of international refugee protection, not all EU Member States were willing to interpret and apply the Geneva Convention in the same way, sometimes even violating the spirit of this agreement or being at odds with the official recommendations of the High Commissioner for Refugees. This has created different levels of protection and an unequal sharing of responsibilities, most Member States having a series of internal measures, particularly with regard to the refugee status (which confers full legal protection and access to social security and to labour market work) and so on. Furthermore, the Geneva Convention protects and strengthens the principle of national sovereignty, thus complicating the EU legislation.

Since the early '80s, European states have used the repertoire of possible restrictions on the asylum systems to its maximum extent – or, more briefly, have tried to simply abandon the Geneva Convention of 1951. Thus, social assistance and accommodation for asylum seekers have been radically reduced and in some cases eliminated; the asylum seekers have been dispersed into well-determined areas, often with a strict containment regime; access to reception centers was restricted; the requests for asylum were evaluated by special accelerated procedures, with restrictions on granting visas, by taking into account the rules of the so-called "safe countries" of origin or of transit, which have restrained access to asylum systems. Despite all these changes, asylum systems fail to fulfill two major objectives: supporting those who genuinely need protection, and conducting an effective screening able to deter those who do not actually need this protection[2].

The Member States are obliged to inform and consult one another in areas of interest and to establish cooperation between the relevant departments in these areas[3].

Creating an area of freedom, security and justice achievable by combating crime is part of the objectives of the third pillar[4]. The Community programs provide financial opportunities for initiatives aimed at encouraging cooperation and involvement of institutions and similar organizations in different Member States and acceding candidate countries[5].

The evolution of the EU asylum policies can be summarized by the following phases[6]:

---

[1] Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, convened by the General Assembly on 14 December 1950. Entered into force on 22 April 1954, in accordance with art. 43. Romania ratified the Convention on 4 July 1991 by Law no. 46, published in The Official Gazette, Part I, no. 148 of 17 July, 1991.

[2] Boswell, Christina (2005), op.cit.

[3] Philippe Manin, *Les communautés européennes. L'Union Européenne*, 3 édition, Edition A. Pedone, Paris, 1997, p. 281.

[4] Article 29 of the TEU provides that "the Union's objective is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in police and judicial cooperation in criminal matters". Within this framework, the Union shall apply the following general principles: 1) absence of controls on persons at internal borders and development of a common policy on asylum, immigration and external border control, based on solidarity between the Member States and which is fair towards citizens of the Member States, 2) to ensure a high level of security through measures for preventing crime, racism and xenophobia, as well as by combating them, 3) to facilitate access to justice, especially by mutual recognition of judicial and extrajudicial decisions in civil matters, and 4) the involvement of national parliaments in controlling the measures taken.

[5] Elena-Ana Mihuț, *Metodologia investigării infracțiunilor (Methodology of the Investigation of Criminal Offences)*, AGORA University Publishing House, Oradea, 2007, p. 3.

[6] Hatton, T. (2005), *Asylum Policy in Europe*, http://web.mit.edu/cis/www/migration/dec05workshop/presentations/Hatton_dec9_2005_CIS.pdf.

4.1. Independent policies until the 1990s. They aimed at:

a. restricting access to territory, sanctions for carriers, creation of the special areas; visa requirements, etc.

b. reforms in procedures for determining asylum (safe third country regime);

c. improving the analysis process (increased speed, granting humanitarian status, deportation, etc.).

d. treatment of asylum seekers during processing (rules of dispersion or detention, access to employment and other social benefits, etc.).

4.2. (Partial) Policy harmonization between 1999 and 2004 (Phase I of the CEAS – Common European Asylum System)

Following the treaties of Maastricht and Tampere, policies converged towards a first stage of harmonization, with the minimum standards for reception conditions, qualification for the refugee status, asylum procedures, sharing the financial burden in accordance with the European Fund for Refugees[1].

4.3. Developing a common European asylum system since 2004 (Phase II of the CEAS) Since Stage I only achieved a partial harmonization, phase II envisages a much deeper political integration. The proposals included the establishment of offshore processing centers, common processing centers within the EU, establishing a European Asylum Agency, increasing the share of contribution to the European Refugee Fund[2]. Despite progress in the last decade, these policies and measures continue to be the object of criticism, both from human rights activists and groups of refugees – due to the gaps in the care system, and from a part of the population and mass media – who consider them as a "pampering" for the immigrants who have abused the generous and comfortable asylum system.

Here we can discern one of the most pronounced sources of conflict between national, European or international rules on human rights and refugees, on the one hand, and restrictions requested by a part of the public opinion, on the other. The problem is compounded by the fact that most asylum seekers are dependent on the "services" offered by smugglers and traffickers to get into Europe. This means that only those who have the necessary resources (financial capital, social, physical and psychological endurance) may try to access the asylum system in Europe independently, but, in most cases, this group does not includ people that really need protection[3].

IV. Policy integration and citizenship acquisition. Integration of migrants is not a new item on the European agenda. Many EU measures in the fields of employment, social protection, equal opportunities and anti-discrimination include explicitly articulated elements of social integration of immigrants. However, only less than a decade ago, the European Commission proposed to develop a coherent policy and a framework for migrant integration. Considering that, until recently, national governments strongly defended their exclusive competence in the sensitive area of the integration policy, it is surprising that the Member States explicitly accepted the development by the European Commission of a holistic framework for the integration of migrants.

It is known that integration is one of the areas where European approaches are extremely divergent, national points of view being based on patterns of thought rooted in national identity, citizenship and the role of the state. In this respect, the dilemmas of policy

---

[1] Hatton, Timothy J.; Williamson, Jeffrey G. (2005), *Refugees, Asylum Seekers and Policy in Europe*, CEPR Discussion Paper No. 5058, http://ssrn.com/abstract=775844.

[2] The European Parliament resolution of 10 March 2009 on the future of the Common European Asylum System (2008/2305 (INI)).

[3] Boswell, Christina (2005), *op.cit.*

integration in Europe do not have their source so much in the tension between the protection required by populists, economic considerations and the norms and institutions of the rule of law, as in the competition between individual values and beliefs about what it means to be a participating member of society and the way society and the authorities can encourage people to achieve this type of participation[1].

We must admit, however, that this approach of the type European identity versus the diversity of migrants undergoing a more or less effective process of integration is not accepted by all researchers. For example, they consider that Europe is far from being a model for promoting integration. Marked by national, cultural and ethnic diversity, the EU is also confronted with a fundamental problem, namely, social economic and political inequality between states, between regions and cities within each state and between individuals and groups, which leads to the emergence of a permanently disadvantaged class or the so-called pseudo-citizens, the excluded[2]. Secondly, even in welfare society, new configurations of patterns of inequality can be observed; global capitalism has imposed class structure remodeling through flexibility, poor living conditions and low-paid jobs, so that there is a difference in the degree of "integration" of EU citizens: there is a huge difference between a top manager in a large company and a part-time worker in a restaurant, even though both are part of the "included" as opposed to the "excluded"[3]. Clearly, these forms of inequality, against the background of EU diversity, must be addressed together with issues of migrants' integration. Issues such as economic integration and employment, access to public goods, ethnic and cultural diversity, social and political participation should be the key public policy objectives.

We may distinguish three main approaches to integration, which took shape after World War II, regarding the European treatment of immigrants[4]:

- the multicultural approach, involving tolerance towards cultural and religious diversity, an anti-discrimination legislation and easy access to citizenship;

- the social citizenship approach, giving immigrants a type of quasi-member status, enjoying full social and economic rights (*denizenship*[5]), but limited access to full citizenship;

- the republican approach, which allows easy access to citizenship, but with the obligation for the citizens themselves to give up certain ethnic or religious characteristics when they enter the public sphere.

However, all three models have been criticized in the past decade because they have dealt with integration challenges improperly.

On the one hand, there are the positions of those who consider integration as only a normative category and not a practical one; the various "models of integration" available throughout the European Union do not describe and do not explain a process, a development, when migrants arrive in a new society. Rather, these models present an ideal situation, the result of a process that requires political support. Whether we refer to the French republican model, or the British multicultural model, they are both idealistic views of the country's society and less useful in describing how integration takes place in everyday society. Each nation-state seeks to defend and preserve its own model and, sometimes, to transpose it to the

---

[1] Idem.

[2] Martiniello, M. (2006), "Towards a Coherent Approach to Immigrant Integration Oolicy(ies) in the European Union", in *Migration and European Integration: the Dynamics of Inclusion and Exclusion*, by Robert Miles and Dietrich Thränhardt, editors, pp.48-49.

[3] Ibidem.

[4] Boswell, Christina (2005), *op.cit.*

[5] More on *denizenship*, in the following paragraphs.

European Union. In other words, the lack of academic and scientific consensus – even an approximate one - regarding integration is the lack of consensus on the European ideal of integrating migrants into society[1].

Another reason for this criticism relates to the disappointment with the apparent failure of integration of second- or third-generation immigrants. Many of these critics point to disappointingly low levels of social interaction between the ethnic and the non-ethnic, a lack of attachment to the norms and values of host societies and poor performance in education or employment. One explanation may be the reduced emphasis placed on the official-language learning in many European countries, for which reason France, Germany, Netherlands, United Kingdom, Norway have recently introduced more stringent measures to promote the learning of the host country's language by immigrants, or by those who acquire the citizenship of that country.

Another reason for public distrust of the existing approaches to integration is the problem of the integration of the Muslim residents of European countries. Since the early 1990s, and especially after September 11, 2001, Islamic religious belief and practice have been interpreted as incompatible with the democratic standards and liberal human rights in European countries. This has often led to populist measures, the stigmatization of Muslim communities in Europe and pressure on giving up some of their specific insignias.

One explanation for the inefficiency of this type of integration lies in our lack of understanding that the processes of formation and affirmation of ethno-cultural identity and the socio-economic processes of exclusion and exploitation are deeply connected. Those who are excluded from the labour market are often those whose identity and culture are not considered as legitimate or are even perceived as a threat in Europe. Ethnic, racial and religious discrimination, on the one hand, and socio-economic discrimination, on the other, often coincide, as shown by the example of migrants from Muslim countries.

In conclusion, immigration creates certain tensions in terms of social policy and highlights the shortcomings of liberal welfare systems in Europe.

First, it raises difficult questions about what should be included in the integration process: membership should be limited to current members (the logic of democracy), or extended to certain non-citizens (based on economic considerations or on human rights principles)?

Secondly, if the strategy chosen is exclusion, as in the case of illegal immigrants or asylum seekers whose applications are rejected, how can this be done without jeopardizing civil liberties, human rights and economic interests?

And thirdly, if the approach is towards inclusion, how could the states strike a balance between space diversity and the motivation of participation in the existing socio-political structures[2]?

All these problems regarding the integration of migrants in the destination countries are becoming more and more important and pressing, given the fact that foreign-born population is growing, and this growth is no longer just a long-term trend, but is significant from one year to another. In some countries, the increases are fulminant: Spain, Italy, Ireland, Portugal (see table below).

[1] Martiniello, M. (2006), *op.cit.*
[2] Boswell, Christina, (2005), *op.cit.*

Table 4. The percent of foreign-born population in several selected European countries

Country	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Austria	470,1	474,2	514,9	507,3	557,3	584,6	624,6	662,0	695,4	682,8
Belgium	450,5	454,6	456,7	489,1	499,3	512,1	535,9	569,8	498,6	473,8
Denmark					154,4	161,0	167,1	175,3	188,1	202,7
Spain	645,1	804,4	1085,5	1448,4	1832,6	2240,7	2782,0	3229,6	3719,8	4132,6
Finland					81,3	87,6	96,0	102,1	112,8	124,2
France					2855,8	3052,9	3025,6	3146,6	3308,6	3332,8
U.K.								3081,0	3340,0	3678,0
Greece	286,7	266,6	290,3	338,2	349,4	402,7	421,7	400,2	426,6	477,7
Hungary	68,7	66,8	55,2	54,8	77,0	85,2	78,9	73,8	73,7	89,9
Ireland	128,8	135,8	153,3	170,8	185,9	187,6	232,4	287,3	339,6	443,2
Italy							1907,2	2094,6	2245,0	2546,5
Luxem-bourg	72,6	75,5	79,0	79,8	84,1	89,	89,8	91,3	98,3	98,7
Nether-land	684,2	895,3	867,9	932,0	906,0	929,1	968,1	931,4	959,4	989,4
Norway	124,2	138,1	139,9	153,3	163,2	166,4	173,5	186,9	817,0	215,3
Poland						58,8	55,9	50,9	43,2	51,7
Portugal	232,7	276,9	302,2	321,2	349,2	379,3	495,5	417,1	444,0	497,5
Sweden	428,3	445,5	448,7	442,5	452,8	461,4	497,8	521,6		
Total	3591,8	4033,8	4393,7	4937,4	8548,3	9398,6	12062,2	16021,4	17300,1	18036,6

Source: OECD, International Migration Outlook 2010, http://www.oecd.org/document/57/0,3343,en_2649_39023663_45634233_1_1_1_1,00.html, accessed 2 November 2010

The situation of citizenship acquisition in 2008. The introduction of EU citizenship more than 10 years ago has confirmed and "legalized" three main levels of citizenship, or rather three types of EU citizens, according to the civil rights, socio-economic rights and political rights they enjoy. The first category includes citizens of a Member State who live within the state borders of that State, they are the only ones who enjoy their full civil, socio-economic and political rights. This is what we call full citizenship, even though, in reality, some of these rights are effectively nonexistent, as a result of the redistribution of the economic, social and political resources in society.

At a lower level, citizens of EU Member State residing in a Member State other than that of which they are nationals are mainly deprived of their political rights (the right to vote and be elected at a local and European level) and sometimes of their civil ones (i.e., not all of them enjoy the total freedom of establishment in another EU country), being conditioned by elements of financial and social security. Finally, even if this category of EU citizens are largely protected by EU law, full equality between these citizens and EU citizens (belonging to the first category mentioned above) is not yet achieved.

A third category of people living in the EU is actually divided into two subcategories:

- *Denizens* or "residents", citizens of a third state, legally settled in Europe. T. Hammar defines them as "temporary workers who should have returned to their home states, but did not, extending their stay in the host countries. This subsequently created a new group

that acquired a secure residence status, but not full citizenship, this new statute preventing access to full citizenship". Hammar assigns this new group – whose members are not foreign citizens in the true sense but are not naturalized citizens of the host country either – the name of "inhabitants" or "denizens". Hammar defines three gateways into a new country, the first being represented by short-term work and residence permits, the second by the residency status regulation, the granting of permanent work permits and residence, with no time restrictions, and the third and final gateway, by naturalization (full citizenship) in the host country[1];

- The second sub-category, *the margizens*, enjoy extremely limited civil, socio-economic and political rights. In many cases, they have almost no rights, living illegally in a Member State. We may also note the emergence of a growing category of temporary workers, intermediate between "inhabitants" and margizens, some of them in quite good positions, while others are severely marginalized. However, "inhabitants" (*denizens*) and *margizens* are grouped in the same category, because both groups suffer from similar mechanisms of exclusion from the cultural and political space of "Europeanism"[2] or of *citizenship*.

Conclusions

- The migration phenomenon is a challenge and an opportunity for the Member States to complete their workforce;
- Immigration creates certain tensions in terms of social policy;
- Each Member State shall develop strategies and implement policies that guarantee the observance of civil, socio-economic and political rights;
- the Member States are obliged to inform and consult one another in areas of interest and to establish cooperation between the services that have expertise in certain areas: the rules on crossing the external borders of the Union, asylum policy, immigration policy, integration policy, the fight against drugs, transnational crime.

Bibliography:

Elena-Ana Nechita, *Libera circulaţie a persoanelor în spaţiul Uniunii Europene* (*The Free Circulation of People Within the European Union Territory*), Agora University Press, 2010, pp. 10-11;

International Labour Organization (2009), Regularization and Employers' Sanctions as Means towards the Effective Governance of Labour Migration. Russian Federation and International Experience,

http://www.ilo.org/public/english/region/eurpro/moscow/info/publ/regularization_en.pdf;

European Parliament resolution of 10 March 2009 on the future of the Common European Asylum System (2008/2305 (INI));

UNHCR (1997), Note on the Principle of Non-Refoulement, http://www.unhcr.org/refworld/docid/438c6d972.html;

European Parliament resolution of 10 March 2009 on the future of the Common European Asylum System (2008/2305 (INI)).

[1] T. Hammar, in *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration*, (Aldershot, Avebury, 1990), quoted by Ece Ozlem Atikcan, *Citizenship or Denizenship: The Treatment of Third Country Nationals in the European Union*, Sussex European Institute, Working Paper No 85, http://www.sussex.ac.uk/sei/documents/working_paper-citizenship_or_denizenship.pdf

[2] Martiniello, M. (2006), *op.cit.*

Elena-Ana Mihuţ, Metodologia investigării infracţiunilor (Methodology of the Investigation of Criminal Offences), AGORA University Publishing House, Oradea, 2007;

Martiniello, M. (2006), "Towards a coherent approach to immigrant integration policy (IES) in the European Union", in Migration and European Integration: The Dynamics of Inclusion and Exclusion, by Robert Miles and Dietrich Thränhardt Publishers, pp. 48-49;

Elena-Ana Mihuţ, Procesul decizional în cadrul cooperării judiciare şi poliţieneşti (The Decision-Making Process within Judicial and Police Cooperation, in The Romanian Journal of Legal Medicine, no. 6/2006, Year VIII, p. 43;

Hatton, T. (2005), Asylum Policy in Europe;

http://web.mit.edu/cis/www/migration/dec05workshop/presentations/Hatton_dec9_2005_CIS.pdf;

Hatton, Timothy J., Williamson, Jeffrey G. (2005), Refugees, Asylum Seekers and Policy in Europe, CEPR Discussion Paper No. 5058, http://ssrn.com/abstract=775844;

L'Union Européenne, 3 édition, Edition A. Pedone, Paris, 1997;

T. Hammar, in Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration (Aldershot, Avebury, 1990), quoted by Ece Ozlem Atikcan, Citizenship or Denizenship: The Treatment of Third Country Nationals in the European Union, Sussex European Institute, Working Paper No 85,

http://www.sussex.ac.uk/sei/documents/working_papercitizenship_or_denizenship.pdf.

COMMUNITY LEGAL RULES ON COMPETITION AND EUROPEAN COMPETITION POLICY

Judeu Viorina Maria[*]
Bologa Gabriela[**]

Abstract

Treaty on U.E. includes competition among EU principles, specifying mandatory EU states to adopt an economic policy in accordance with the principles of open market economy based on fair competition. U.E. policy competition aimed at protecting the benefits arising from the operation of competitive markets, while the national barriers that have been raised about the competition between Member States.

Keywords: *Community, legal rules, business field, competition.*

Introduction

The paper presents the internationalization of business life as to achieve community goals and objectives, Union action shall include, inter alia, a system to ensure undistorted competition on the domestic market. The central objective of European competition policy is to ensure unity of the common market and avoid monopolization of market sectors. Monopolization of the market can take place by agreement or merger.

The internationalization of business life is a powerful reality that requires a certain World Trade Organization and articulation of the various competition rules in force in the world. [1]

Competition policy is a component of industrial policy at EU level functioning of the Commission Directorate General for Competition, which aims to influence the EU's internal industrial structures the control of the associations of companies, joint stock companies and minority acquisitions or actions to prevent the formation of industrial cartels. [2]

For interpretation of the Treaty on EU, concluded that the notion of competition does not have legal qualifications, the Community Treaties, although they include many provisions relating to competition (EU Treaty, art. 3 g).

To achieve community goals and objectives, Union action shall include, inter alia, a system to ensure undistorted competition on the domestic market, although competition is not an end in itself but an instrument for achieving the objectives of general community. [3]

EU competition policy aims at creating real competition in the common market through measures relating to market structure and the behaviour of its actors in order to foster innovation, reduce production costs, increase efficiency and thus increasing competitiveness of European economy.

Competition in the U.E. is governed by the Treaty C.E. [1] and the Treaty C.E.E.A. [1]

---

[*] Canditate Ph.D. Lecturer, AGORA University, e-mail: viorina@univagora.ro
[**] Ph.D. Lecturer , AGORA University, e-mail: gabi_fiat@yahoo.com

1. Voicu M. *Politicile comunitare în Constituţia Uniunii Europene*, Lumina Lex, Bucharest, 2005, p.79-80.
[2] Ionescu V.R. *Tratat de Economie europeană,* Didactică şi Pedagogică Publishing House, Bucharest, 2004, p.59.
[3] Diaconu N, Marcu V. *Drept comunitar. Partea specială. Politicile comunitare*, Publishing House Lumina Lex, Bucharest, 2003, p.101.
1 art. 85 (81)-94 (89) from Capitolul I - Regulile de concurenţă, title V: Normele comune privind concurenţa, fiscalitatea şi apropierea legislaţiilor; art. 101(96)-102(97) which are under obligations of Member States to

Community legal rules on competition can be framed around two main areas: addressing business rules and regulations to conduct the Member States or public authorities. These relate to:

- ban on restrictive agreements and anticompetitive practices: EU Treaty incompatible with the common market provides any agreements between companies, decisions by associations of undertakings and concerted practices which are likely to affect trade between Member States or have as their object or effect the prevention, restriction or distortion of competition within the common market, under penalty nullity of law [art. 85 (81) ¶ 1 and 2];
- prohibition on abuse of dominance: the abusive exploitation of a dominant position in the common market or a substantial part of it performed by one or more companies is incompatible with the common market and prohibited, as far as trade between Member States can be affected [art. 86 (82)]. Practically, this means preventing the exploitation of the economic strength of a company over others;
- control of mergers of companies: to meet competition, complete the single market conditions, it is necessary to take intervention measures for the control of mergers of companies [Regulation no. 4064/89/C.E.E. Council U.E.];
- State aid control: Member aid granted in any form or through State resources which distorts or threatens to distortion of competition by favouring certain undertakings or outputs, as far as it affects trade between Member States, be incompatible with the common market [art. 92 (87)]. In an interview in 2009, Neelie Kroes, European Commissioner for Competition is to highlight the importance of state aid in the current financial crisis. He shows that in 2005-2008, all Member States have improved regulations regarding such aid. Moreover, the share of state aid decreased from 2% or more of GDP in 80 years, from 0.6% in 2009. The main beneficiaries of state aid will continue to be energy and environment, if we ignore the global crisis.

In 2009, the European Commission General Block Exemption Regulation has adopted a document which provides the possibility for Member States to grant aid 26 does not require specific approval by the Commission. These benefits relate to: aid to SMEs for innovation and R & D sector, R & D aid granted large companies, venture capital aid for environmental protection, regional development and entrepreneurship, including innovative new business sector;

- application of competition rules in the public sector: the case of companies which have been granted special or exclusive rights, Member States cannot take any measure contrary to the rules, the EU Treaty [art. 90 (86)].

In conclusion, U.E. policy competition aimed at protecting the benefits arising from the operation of competitive markets, while the national barriers that have been raised about the competition between Member States. Competition policy has U.E. is based on the Treaty of Rome in art. 85 and 86 respectively.

Objectives of competition policy, although not established *in terminis*, the Treaty of Rome, can be summarized as: more wealth and consumer protection, technical progress, environmental protection, economic prosperity of the Union and its citizens, cooperation for

---

eliminate any disparities between the laws, regulations or administrative, which distorts competition in the market, p.79.

[1] Chapters 5 and 6, Title I - on nuclear energy industry competition, 50.

the strengthening of companies economic and social protection of SMEs, the integration of the regional connotations, social or sectorial.

The central objective of European competition policy is to ensure unity of the common market and avoid monopolization of market sectors. Monopolization of the market can take place by agreement or merger.

European Commission supervises the actions governments of member states that could distort the "rules" by the measures discriminate against some businesses, promoting public enterprises or private companies' assistance. In some cases, incidents are resolved by changing competition competition policy states or companies involved. In other cases, the Commission calls for a fine that could exceed 75 million Euros.

Starting in 1989 was authorized to examine and to block large-scale mergers. Supervision of the Commission is carried out by the European Court of Justice and the Court of First Instance. Commission has DG IV (DG IV), which is concerned with promoting competition policy.

The basic mission of the Directorate General for Competition (DG IV) is to establish and to implement a coherent competition policy in the European Union. The power of the execution and control of DG IV Community competition involves law implementation. Also, DG IV is concerned with EU international policy competition as a partner of industrial countries (USA, Japan, Canada etc.) or as an advisor for the developing countries (e.g. Central and Eastern European States).

Decisions are prepared by the Directorate General for Competition (DG IV) who reports the Commissioner responsible for approval of such decisions being made by simple majority.

Procedure: any agreement which is inconsistent with the Treaty, to be notified to the European Commission. According to art. 81 and 82, companies can hope for a "negative resolution" of the incident, which means that after examining the case, the Commission will not take action against companies involved, with exemptions. The Commission has broad investigative possibilities. It can do business without ad preventive control documentation. Before making a final decision, the Commission and Member States give companies the opportunity to explain and justify their actions. The detection of anticompetitive behaviour, the Commission may impose a fine of about 10% of income (circuit) annually.

Companies can appeal the decision of the Commission to the European Court of Justice which, in most cases, reduces the amount of the fine. European legislation gives priority to national law competition and directly applicable in Member States.

European Parliament Committee shall evaluate the activities and developments in this field by publishing an annual report. Council of Ministers authorizes block exemption and makes changes in the legal basis of the policy.

In the same context, acts and national authorities entrusted with powers in this field (in Romania, the Competition Council in the field is).

Competition policy principles were formulated in accordance with specific texts of the Treaty and refer to:

- ban concentration practices, monopolistic agreements and measures that affect trade between Member States and restrict free competition within the Community;
- transparency in the decisions related to anti-competitive behaviour;
- discrimination to any participant in undertaking economic exchanges;
- prohibit the use of a dominant position as an advantage in the common market;
- control of aid to national companies, especially in order to avoid bankruptcy and to prevent certain problems;
- preventive control of mergers and merger of companies;

- liberalization of services (electricity, transport, telecommunications), considered strategic sectors by opening them to competition from other Member States;
- a competitive international stability;
- Cooperation between various national and international competition authorities in implementing the legislation.

The ban on dominance

In the text of the Treaty of Amsterdam (1999), competition is subject to art. 81 and 82. These articles deal with ensuring free competition within the EU, the European Commission is responsible for law enforcement in this area.

In this context, the European Commission is working with member governments. Member States still have the right to develop their own competition policy. United Kingdom, for example, after completing the European Single Market, competition policy has kept the domestic commercial transactions.

Article 81 refers to the restrictive practices which may affect trade transactions between EU Member States Paragraph 1 of this article amending agreements "which may affect trade between Member States..." and continues by listing specific types of agreements are prohibited. These agreements aimed at fixing the price level influence the market or the imposition of restrictions on supply.

Article 81 (3) refers to agreements beneficial, "which contributes to improving the output or the distribution of goods or to promoting technical and economic progress, while consumers benefit," agreements that do not distort market competition.

Basically, art. 81 focuses more on the effects of restricting competition than the form of these restrictions.

All agreements are subject to art. 81 are examined by the European Commission. It works with organizations specialized in the field and Competition Commission in the UK.

European Commission can fine companies with anticompetitive practices by up to 10% of their turnover. In turn, companies have the right to appeal to European Court of Justice.

The European Commission has managed to limit the actions of cartels in the single market, achieved significant successes against price fixing and quantitative restrictions.

Article 82 concerns the situation of dominant firms and those close to monopoly position and lists the abusive practices affecting competition in the market:

- imposing direct or indirect purchase or selling prices or other unfair trading conditions;
- limiting the output of the outlets or technical development to the detriment of consumers. Granting trading partners of goods and services equivalent unequal benefits, thereby causing a disadvantage to compete;
- the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Rome Treaty does not define explicitly the notion of a dominant position or how you can reach such a market position or market share must have an economic order to be considered as a dominant. [1]

[1] Mihai E. *Concurenţa economică. Libertate şi constrângere juridică,* Lumina Lex Publishing House, Bucharest, 2004, p.112-113.

Thus, the definition of dominance is a creation of the Community case-law, leaving it up to the European Court of Justice, through the interpretations and decisions in concrete cases heard and resolved to present a valid universal acceptance in the Community of the notion of dominance.

Reference point in defining the concept of dominance was the ruling United Brands, the European Court of Justice ruling, when solving the case, that "the dominant economic force is a position held by a company that gives the possibility to prevent the maintenance of competition effective in that market, ensuring the possibility of independent behaviour in a significant extent, both over its competitors and its clients and, ultimately, to consumers. This definition focuses on the dominance of a seller, but it is fully applicable in the case of dominant position held by a buyer.

Dominant position is not and should not be permanent, because the situation a company can vary from a normal to a dominant position and vice versa, depending on fluctuations in the levels of the relevant market or business structure. [1]

Community law and, therefore, French law and adopt Romanian competition mainly behavioural analysis method to determine the market position of one or more firms.

U.S. antitrust law and German law, under the strong influence of the Harvard School have adopted market structure analysis method, reflected, inter alia, the establishment of legal presumption of domination.

In Continental Can case is resolved; the European Commission described the dominant position as that situation where the entrepreneur can launch on their own independent action, regardless of competition, suppliers or buyers.

Dominance was defined in another case solved by the European Court of Justice, as the position of economic power enjoyed by a contractor and that allows it to maintain a given market without taking into account the competition, and independent power to bear, without taking into account competition, customers and consumers.

How a trader can enter the market and how businesses can be new entrants captured by those already existing, indirectly promoting their development and achieve market dominance, have received special attention from the European Court of Justice and European Commission (U.S. EuroInfo Centre, 2003).

According to the EU Treaty, dominance is assessed in all the Community market or a substantial part of it. Article 82 of the Treaty provides that any abuse by one or more economic agents are in a dominant position in the common market or a substantial part thereof, is prohibited as long as they may affect trade between Member States.

Given the above, we define dominance as a situation where economic power held by a company allows it to impede competition in the relevant market. In other words, dominant market position allows a company to influence the overwhelming conditions where there is competition.

- The most common manifestations of abuse of dominant position are: impose, directly or indirectly, purchase or selling prices, tariffs or other unfair contract terms and refusing to deal with certain suppliers or customers;
- limiting production, markets or technical development to the detriment of users or consumers;
- application to trading partners, of unequal conditions to equivalent transactions, thereby causing some of them, a competitive disadvantage;

[1] Manolache O. Regimul juridic al concurenţei în dreptul comunitar, All Publishing House, Bucharest, 1997, p.90.

- the conclusion of contracts subject to acceptance by the other clauses stipulating additional benefits, either by their nature or according to commercial usage, have no connection with the subject of such contracts;
- making imports without competitive bids and negotiating technical and commercial standard, the products and services that determine the general level of prices and tariffs in the economy;
- practice of excessive prices and engaging in predatory pricing in order to eliminate competitors or export sales below cost of production, coverage differences by imposing domestic consumer prices increased;
- operation state of dependency which is a separate undertaking to such agent or agents and which does not have an alternative solution under the same conditions and contractual relations break for the sole reason that the partner refuses to comply with conditions of trade unjustified.

Conclusions

Dominance translates to other participants in economic life by the existence of an alternative: the weaker competitors will have to align the policy of strong economic operator, the partners will be obliged to address, and consumers will bear the pressures of lack of effective competition on prices, quality and commercial terms. Basically, art. 82 does not address the exact content you can abuse a dominant firm. For this reason, authorities discovered an abuse must demonstrate how it affects competition unjustified trading conditions.

Bibliography:

*** - Eurostat, Regional GDP per inhabitant in the EU27, in EUROSTAT News Release no.19/2009;

Voicu M., *Politicile comunitare în Constituţia Uniunii Europene*, Lumina Lex, Bucharest, 2005;

Ionescu V.R., *Tratat de Economie europeană,* Publishing House Didactică şi Pedagogică, Bucharest , 2004;

Mihai E., *Concurenţa economică. Libertate şi constrângere juridică,* Publishing House Lumina Lex, Bucharest , 2004;

Diaconu N, Marcu V., *Drept comunitar. Partea specială. Politicile comunitare,* Publishing House Lumina Lex, Bucharest , 2003;

Manolache O., Regimul juridic al concurenţei în dreptul comunitar, Publishing House All, Bucharest, 1997;

*** Normele comune privind concurenţa, fiscalitatea şi apropierea legislaţiilor; Art. 85 (81)-94 (89) Chapter I- Regulile de concurenţă, title V: Art. 101(96)-102(97) which are under obligations of Member States to eliminate any disparities between the laws, regulations or administrative, which distorts competition in the market, Chapters 5 and 6, Title I- on nuclear energy industry competition.

THE LEGAL STATUS OF COMPLEMENTARY CONCEPTS OF FREEDOM AND LIABILITY

Maftei Jana [*]
Coman Varvara Licuţa [**]

Abstract

The different meanings of freedom lead to exacerbated events, thus there were required legal, at conceptual level administrative and social corrections, also. Consequently, the concept of liability was imposed in the legal practice to counter the grand demand of freedom, defined, at a certain moment, as assumed and implemented responsibility in the social practice. Their complementarity should be reconsidered regarding from the perspective of contemporary mentalities.

Keywords: *exacerbation; liability; coercion; citizenship.*

Introduction

The analysis and research in relation to concepts as freedom and legality, responsibility or liability are of interest both from a legal perspective, in terms of protecting and guaranteeing the rights and fundamental freedoms in the light of current legal civilization. Considered "a ball of confusion and misunderstandings" (Karl Jaspers) freedom is interconnected with the juridical world and generates throughout intense legal debates a great number of views, nuances and clarification of terminology and practical approaches in the various branches of law[1]*. In this paper we intend to highlight the link between the concepts of legality, freedom and responsibility from a legal perspective, taking into consideration the multiple valences of the individual's social manifestation.*

1. Legality - correlative concept to freedom and responsibility

We live in a society in which the human existence stands forefront individual autonomy and free will. Setting the limits and reporting on individual freedom is a subject that raises the attention in several ways, based on cultural awareness and culminating with their manifestation in any other circumstances. Freedom is a synthetic concept regarding only the human being unconditionally this meaning not the possibility to choose without condition but the choice as an expression of a will endowed with unlimited and arbitrary powers, but in the rule of law, the duties associated with the organic society members of the community they belong[2] to in all areas of social life. In Heidegger's opinion: "The supremacy of law in most of social life manifestations, including the conquest of science, is a goal for the rule of law, particularly today, when technological age led to a" twist " in the vocation of the true human spirit"[3].

[*] Associate Professor Ph.D. "Danubius" University from Galati, Law Faculty, e-mail:janamaftei@univ-danubius.ro
[**]University Assist Ph.D. in Progress, "Danubius" University from Galati, Law Faculty, e-mail:varvara.coman@univ-danubius.ro

[1] *Apud* Ioan Craiovan, *Tratat elementar de TGD*, All Publishing House, 2001, p. 333.

[2] Coman Varvara Licuța, Maftei Jana, Negruț Vasilica, Matei Dorin, Costache Mirela Paula, Negruț Alexandra, *„The Principle of Human Liberty and its Relation with Bioethics and Biolaw",* Annals of DAAAM for 2010 & Proceedings of the 21st International DAAAM Symposium, Volume 21, No. 1, ISSN 1726-9679; ISBN 978-3-901509-73-5, Published by DAAAM International, Viena, Austria, EU, 2010, p. 1255-1256.

[3] Wlodzimierz J. Korab-Karpowicz, *Heidegger, The Presocratics, and the History of Being*, in *Existentia: An International Journal of Philosophy,* vol. 11, 2001, pp. 491-502.

In order to approach the concepts of freedom and responsibility, we must first explain the concept of legality.

The legality of the doctrine was defined as a fundamental principle of law under which any subject of law must respect and enforce laws and other normative or individual acts[1]. This way, legality assumes respecting of the prescribed conduct by complying with the rule of law, providing a climate of respect for values and of the social rules.

Citizens are free to express and undertake any kind of acts, except the ones prohibited by law. Mandatory compliance with legal normative takes primarily the form of constitutional principle, but takes and specific features from each branch of law.

Compliance with the law is imperative for both individuals and legal entities within a society.

The guarantees of legality consist of a number of factors which ensure the compliance with the law. These guarantees can be objective or subjective, general or special, operating cumulatively and ensuring the rule of law, promoting legality.

The society as a whole cannot exist without the rule of law, without the need for security and justice, but in order to achieve this goal, the fulfilment of conduct laid down by legal rules should be complemented by the compliance with moral, religious, political, reaching thus what we call social harmony.

The legality of legal acts must ensure hierarchy and the supremacy of the fundamental law inside this hierarchy and its finality is respecting the rights and freedoms of citizens.

Freedom means to allow people within a society to choose consciously to comply or to violate a rule, a rule of law. Conduct's legal limits are determined by rules of law, each individual being able to understand the importance of legal prescription and to adopt a certain behaviour depending on its content, freely and consciously.

2. Freedom

In the current social context is obvious that the two concepts: freedom – responsibility are virtually impossible to separate responsibility because "a free society will not function and will not survive without its members to have the position resulted from their actions and to accept it as such"[2].

Freedom, the foundation of the human condition, is an element of maximum philosophical, social and political resonance presenting at the same time profound implications in the legal issues[3]. Generically, liberty goes beyond the area of freedom, but the most pertinent of its forms usually take the form of legal aspects. Funding this legal concept is and will be determined by the great changes which of the human society, especially the European space and the last two centuries.

The logical-legal sphere of the concept perceived as the foundation of law, the principle of liberty, includes individual freedom, the protection and safeguarding fundamental rights and freedoms, the interdependence of freedom and democracy, achieving a state of freedom of oneself and at the same time, the freedom of all other individuals. The relation between freedom and the human being was highlighted in a noteworthy opinion: "It

[1] Humă, Ioan, *Teoria generală a dreptului*, „Danubius" Academic Foundation Publishing House, Galați, 2009, pp. 150-152.
[2] Hayek,Friedrich A. *Constituția libertății*, European Institute, Iași, 1998, p. 93.
[3] Mihai, Gheorghe, *Fundamentele dreptului. Dreptul subiectiv. Izvoare ale drepturilor subiective*, Vol. IV, All Beck Publishing House, 2005, p. 90.

requires freedom to be treated according to its purpose, and not as something that has nothing to do with the essence and existence of the human being"[1].

Along with the natural social, political, moral, religious, conceptual[2] constraints of human experience, the concept raised the question if the man can be free: "Who amongst us can say that he is really free in all his actions? But inside each of us lives a deeper entity, in which the free human being expresses"[3].

Result of a long and complex process of social evolution, the individual freedom is the quintessence of the values established and promoted by the contemporary society. The principle proclaiming individual freedom as a fundamental condition for its access to an authentic human essence emerges from Greek antiquity, being present at Socrates, Plato and Aristotle[4].

Unlike Plato for who the problem of freedom is analyzed in terms of the possibility of its manifestation, Aristotle will report freedom to the man's status of moral being and to the responsibility incoming from his acts[5] its research is meant mainly to clarify the relationship between will and freedom, between free will and subject to external constraints. This way, are considered voluntary actions depending in one way or another of our decision, whose principle is in ourselves. Involuntary actions are "acts committed under constraint or in ignorance".[6] Aristotle considered that "the act is committed by constraint is the act whose principle is outside, being of such nature that the one who gives or the one who supports do not contribute to it in any way"[7].

The will be reported only to action, but only to that committed by human beings. Any action aims a specific purpose and is done by several means. Our goals are considered to be a certain good, but not always what the individual considers to be good is a real good.

By reporting freedom to the main factors of social constraint another perspective of it is borne. Thus starting from accepting the idea that a certain constrain is absolutely necessary regarding individuals from the institutions involved in the maintenance of order and social peace, the question will be how far this constraint to go is and what its rational limits are.

3. Legal liability

Responsibility involves compliance of social normative freely, not complying with the prescribed conduct generating liability. Social liability takes into consideration the human behaviour when they have the liberty to act and choose freely.

Any deviation from the normative entails a liability. The nature of the rule violation determines the nature of liability form: moral responsibility, religious, political or legal means for the individual to bear the consequences of failure to comply with those rules of conduct.

Legal liability is therefore a specific form of social responsibility and is directly related to other forms of liability. It attracts an obligation to support a legal sanction for violation of a rule of law and the framework through which state coercion is performed.

Legal liability is thus a special legal relationship (constraint) whose content is state law to hold accountable who violated the rule of law applying the sanction provided for

---

[1] Humă, Ioan, *Op. cit.* pp. 152-155.
[2] Miroiu, Mihaela ş. a. *Filosofie*, Didactic and Pedagogic Publishing House, Bucharest, 1993, p. 43 şi urm.
[3] Steiner, Rudolf, *Filozofia libertății* (trad.), Princeps Publishing House, Iaşi 1993, p. 123-124.
[4] Bobică, N.N. *Filosofia construcției europene*, Didactic and Pedagogic Publishing House Bucharest, 2008, p. 96.
[5] Bobică, N.N. *op.cit.* p. 97.
[6] Aristotel, *Etica nicomahică*, III, 1, Scientific and Enciclopedic Publishing House, Bucharest, 1988, p. 50.
[7] *Ibidem.*

standard duty violated and the guilty person to respond to crime and to submit to the penalty imposed by law[1].

This form of liability is the most serious form of social responsibility involving all the rights and correlative obligations that are emerging, according to the law, with violation of legal rules in force, violation of which entails legal sanction, the latter being subject to liability even legal.

The antisocial phenomenon generating breaches has various causes, which are often the causes of economic, social, influence of a certain social environment, lack of education, attitude and psychological causes. Most violations of laws and regulations have economic motivation, however, poverty is one of the triggers of such behaviour. Generally, poor economic situations almost always generates another very important factor in terms of breach of law, it is lack of education.

Also, there are psychological factors not to be neglected. They, of particular importance in terms of social importance. In many cases, it was found, for example, that crime is not only based on the low level of living, but also psychological problems, offenders with a "historical" trauma (physical, mental, etc.).

Liability is based on a number of principles applicable to all forms of liability. These are: the principle of liability for acts committed with guilt, the principle of personal responsibility, the principle of fairness of the sanction, the principle of accountability celerity.

The condition for the legal liability to exist is that a normative of law to be broken with guilt. Only in the conditions when the limits established by social normative the problem of juridical liability can be raised.

The guilt is a subjective condition of liability, this assuming the ability recognition of those concerned to act with discernment, to act consciously, knowing the limits of freedoms imposed by the rule of law.

The guilt involves two forms: the intention and fault. The intention may be direct, when the person acts deliberately to produce the effect, or indirect, when the person knows the consequences that entails violation of the rule of law, but not given importance.

The fault is the guilt of the person who does not foresee the consequences of his act, but ought to know it.

However, legal liability may be removed in certain situations. There are situations where, because of their particularities, remove liability: self-defence, state of emergency, physical and moral constraint, if fortuitous, irresponsibility, drunkenness involuntary minority perpetrator, error of fact.

Depending on the purpose, liability may be meant to sanction or to restore. It also may take the form of property liability. It operates when prejudices the physical or juridical individuals (contractual liability) or by committing a wilful injury causing prejudice (civil offense) to each other and outside any contractual (tort liability or contractual).

The purpose is to protect social values. The purpose of the legal system is the enhancement of human conduct, as a subject of law, having as landmarks values as liberty, equality, justice, etc.

The limits of the social existence of the human being are determined by liberty, as social value, from two angles. On one hand, the human being has the power to act freely, limited by the understanding of the necessity to establish some possible goals. On the other hand, the personal liberty is limited by the liberty of the other.

---

[1] Mazilu, Dumitru, *Teoria generală a dreptului*, All Beck Publishing House, Bucharest, pp. 305-307.

Freedom, social human value, is at the confluence of human relationships. The personal freedom of each individual, as subject of law, is influenced and constrained by the amount of rights and freedoms of others, but also the limits set by the rule of law.

Legal aspects of freedom is shown as a prerogative which the law gives to the holders of law, under which the individual - as a subject can have a certain conduct and may require certain conduct from another entity under the protection of legal norms, the trichotomy hypothesis-available -penalty serving to maintain the state of freedom in communion.

Conclusions

Freedom of individuals to choose their behaviour depending on the limits imposed by law generates two types of behaviour. The one in which the individuals accept their liberty limits, respecting the social model, or the case when the individuals choose consciously to break the social rules, entailing criminal liability.

Being responsible means understanding and respecting the legal limits, not for the desire to comply with certain rules or norms, but of understanding the social order, in understanding the need for order and safety that is society. Without this order, how can a society grow?

Violation of social norms can be based on economic factors, psychological, lack of education, social environment. Regardless of the factors that led to the decision of individuals to violate social norms, it will be, will have to answer for his deed. Thus, liability justifies its existence in relation to legality.

Liability is more than required to support a legal sanction; it is to achieve the state constraint.

We conclude that social harmony is based on free-legal-liability relationship.

Bibliography:

Coman Varvara Licuța, Maftei Jana, Negruț Vasilica, Matei Dorin, Costache Mirela Paula, Negruț Alexandra, *„The Principle of Human Liberty and its Relation with Bioethics and Biolaw”,* Annals of DAAAM for 2010 & Proceedings of the 21st International DAAAM Symposium, Volume 21, No. 1, ISSN 1726-9679; ISBN 978-3-901509-73-5, Published by DAAAM International, Viena, Austria, EU, 2010;

Humă, Ioan, *Teoria generală a dreptului*, “Danubius” Academic Publishing House, Galați, 2009;

Bobică, N.N., *Filosofia construcției europene*, Didactic and Pedagogic Publishing House, Bucharest, 2008;

Mihai, Gheorghe, *Fundamentele dreptului. Dreptul subiectiv. Izvoare ale drepturilor subiective*, Vol. IV, All Beck Publishing House, Bucharest, 2005;

Wlodzimierz J. Korab-Karpowicz, *Heidegger, The Presocratics, and the History of Being*, in *Existentia: An International Journal of Philosophy,* vol. 11, 2001;

Craiovan, Ioan, *Tratat elementar de teoria generală a dreptului*, All Publishing House, Bucharest, 2001;

Mazilu, Dumitru, *Teoria generală a dreptului*, All Publishing House, Bucharest, 2000;

Hayek Friedrich A., *Constituția libertății*, European Institute, Iași, 1998;

Miroiu, Mihaela ș. a., *Filosofie*, Didactic and Pedagogic Publishing House, Bucharest, 1993;

Steiner, Rudolf, *Filozofia libertății* (trad.), Princeps Publishing House, Iași 1993;

Aristotel, *Etica nicomahică*, III, 1, Scientific and Enciclopedic Publishing House, Bucharest, 1988.

THE GLOBALIZATION OF NARCOTERRORISM IN THE POST 9/11

Petrică-Mihail Marcoci[*]
Diana-Camelia Boroi[**]

Abstract

Narcoterrorism is the activity of terrorist groups who use narcotics trade as an alternative to finance their activities. To perform daily activities, terrorist organizations need money for weapons, computers, training, transport, etc. Drug trade is a very profitable and difficult to identify source of money. Narcotics such as opium, heroin or cocaine are produced easily and cheaply. However, because they are illegal, and as a result in small quantities, these groups can obtain high profits from them that they can further use to commit attacks.

Keywords: *drug trafficking, terrorist organizations, the Revolutionary Armed Forces of Columbia, Al Qaeda, Afganistan, Hezbollah, failed states.*

Introduction

The events of 9/11/2001 have completely changed the approaches, strategies and policies, both at global, regional and local levels. What formerly seemed impossible, attacking the U.S. on its own territory by a terrorist entity, had occured! The political, economic and global military actor was facing a first, previous potential attacks having occurred during the second world war when, as was later seen after accessing military archives, the German submarines had approached New York so much that they had filmed the night lights of " the Big Apple".

The fall of communism, globalization and the reducing possibility of political systems to fund terrorist organizations, have forced the latter to become corporatized, to identify by themselves financing and business opportunities, deepening their insidious and secret nature.

International pressure on Islamic terrorists and extremist-terrorist groups in general and on the countries that finance terrorism in particular, increased steadily after the Al Qaeda terrorist attacks of 11 September 2001 on the World Trade Center and the Pentagon. Governments have taken measures to ban and control financial operations of terrorist organizations or NGOs used as a front for them.

Consequently, in this context, terrorist groups have had to shift to different regional or local markets in search of opportunities for "business" which allows operational efficiency, but in this case they had to frequently connect with local organized crime, incorporating a highly complex criminal mosaic, dangerous for both the national security of states and the global political balance and stability.

Conceptually narcoterrorism means "terrorist acts carried out by groups that are directly or indirectly involved in the cultivation, production, transmission and distribution of illicit drugs"[1]. In this paradigm, narcoterrorism includes both terrorist actions that

[*] Ph.D. Assistant Professor, Police Academy "Alexandru Ioan Cuza"- Romania, The Department of Crimes investigation, e-mail: ijjs@univagora.ro.
[**]*M.Sc. Student, ijjs@univagora.ro
[1] According to a definiton of DEA (Drug Enforcement Administration).- www.**justice.gov**/**dea.**

organizations involved in drug trafficking commit and, indirectly, the involvement in drug trafficking operations of terrorist organizations.

The U.S. and other Western countries, victims of drug trafficking, have become targets of terrorist organizations interested in selling drugs and subsequently in creating sophisticated and hidden mechanisms of laundering money used to give logistical support or to commit attacks.

In a functionalist approach, we must admit that narcoterrorism is etiologically rooted in the economic globalization and in facilitating access to global financial systems for organizations that are virtual screens that conceal the final destination of funds. Likewise, offshore jurisdictions, with their extremely fragile systems of controlling financial and business operations have been a carousel of money laundering used by terrorist organizations.

The danger of narcoterrorism has a dual nature: on the one hand, because it involves creating networks that produce and sell substances that are dangerous to public health in different countries, and on the other hand, because large amounts of money coming from these activities fund supreme forms of public safety threats.

The post 9/11 experience in narcoterrorism is related to the failure of primary approach and analysis of the phenomenon, to the imposibility of decrypting early warning signals that terrorist organizations have given involuntarily, to the flawed policy orientation in the area of intelligence and last, but not least, to the belated understanding of the concept of "failed states" and the danger which they induce in the international security environment.

The states that are most exposed to narcoterrorism occupy relatively leading places among failed states[1], as follows: Afghanistan (7th), Yemen (13th), Colombia (44th), Sri Lanka (rank29), Uzbekistan (39th), etc.[2] and thus explaining the axiological contradiction between the public and legitimate power and authority and the mafia cartel or terrorist group.

Structurally, narcoterrorism presents two types: politically-religious terrorism -the Afghan Talibans, Al Qaeda, the Islamic Movement of Uzbekistan, the Islamic Jihad and anti-state political terrorism manifested especially in the countries of South America and Central America - the Revolutionary Armed Forces of Colombia (FARC), the Sendero Luminoso Maoist guerrillas in Peru, different narcoterrorist groups who commit various forms of attacks in Brazil, Mexico, Venezuela, Panama, Ecuador and Paraguay.

While Islamic narcoterrorist organizations view the weakness of the state in which they operate as an operational advantage which does not generate political purposes of taking control of these states, the South American narcoterrorist groups have this very purpose, to take over the power or to influence political decision. To this end, South American narcoterrorism appeals to Marxist ideologies which they consider as adjuvant to the action of political terrorism, though the financial component of this "political struggle" comes first South American drug barons creating genuine exclusive regions for themselves.

Instead, Islamic terrorist organizations have completely separated the drug-related component from the operational-terrorist component, drugs being just an easy source of income. In principle, opium (and its derivatives) and cocaine increase their price at least 70 times while travelling from the farmer that produces the "raw material" to the final consumer in Western countries. Consequently, this "business opportunity" is unavoidably speculated by the terrorist organizations, which thus get huge funds that are absolutely uncontrollable by the financial and tax authorities of the countries where they operate.

---

[1] The Failes States Index (FSI) is an annual ranking of the most vulnerable stated compiled by the Fund for Peace and published by the Foreign Policy magazine.

[2] According to FSI on 2010.

Thus, on a global black market that today might in our opinion add up to about 150 billion dollars, probably at least 7-8 billion represents primary income, directly or indirectly, for the narcoterrorist organizations, and these amounts partly invested in financial and commercial legal circuits probably generate other 1-2 billion dollars per year. To compare, we assume that the September 11 attacks required amounts between $ 500,000 and $ 2 million to be carried out[1].

How terrorist groups and cartels get their income varies, depending on the groups involved. For example, FARC, a terrorist group in Colombia, collects fees from the poor farmers who grow poppy or coca plant, and from those who produce drugs on the territory they control. Others, like the former Taliban rulers of Afghanistan, prefer to perform themselves narcotics trafficking. It is estimated that the Taliban earned between 40 and 50 million dollars in fees related to the sale of opium.

In addition, terrorist organizations and those involved in trafficking narcotics use similar methods for profit and fundraising. These include informal transfer systems such as hawala and the Black Market Peso Exchange (BMPE). It is believed that the $ 5 billion of the funds transferred annually by BMPE is a cover for terrorist funds movement. BMPE is active in Colombia, the Dominican Republic, Guatemala, Haiti and Venezuela.

Unlike drug trafficking, terrorism does not necessarily produce money. In terrorist organizations, money leaves the organization toward ordinary soldiers (and their families), unlike what happens in the world of drug trafficking (which is based on customers paying drug dealers, which in turn pay the brokers, who pay providers, who pay importers, who pay exporters). The money comes from donors[2], from blackmail victims, from robberies or illicit market transactions (including drugs).

In the drug business, cash is often the factor that determines how large the organization is, the limiting factors are the people who sell, those who buy, the availability of drugs (not in the least low, but sometimes unavailable to those who in other circumstances would buy) and the possibility of making relatively safe transactions.

In contrast, terrorist organizations may be constrained by money. Its amount varies enormously depending on their ability to seek or obtain money or to steal or manage it. One issue would be the size of the effect obtained by reducing substantially the money available to various terrorist groups from drug trafficking. Profits from drug trafficking are extremely important both for the financing of the FARC group in Colombia and the Peru Paramilitary forces that oppose FARC. Also, according to statements of Spanish officials, the terrorist attacks in March 2004 on trains in Madrid, which killed nearly 200 people and injured 1400 others, were financed by gains from the sale of hashish (a derivative of marijuana) and ecstasy (MDMA)[3].

Neither is Europe immune to narcoterrorism. Thus, narcoterrorist groups in Europe include the Basque Fatherland and Freedom (Euzkadi Ta Azkatasuna - ETA) of the Basque region of Spain. ETA and its members have been involved in a series of attacks and other crimes closely connected to organized crime and terrorism from drug trafficking to money laundering.

---

[1] Chris Baker, *Putting a Price Tag on Terror*, Washington Times, Nov. 18, 2001 (500,000 $ estimation), The Canadian Foundation for Drug Policy, *How Drug Prohibition Finances and Otherwise Enables Terrorism*, page 1 (2 million $ estimation).

[2] Undoubtedly, some donor funds terrorist activities intentionally. Some of them can be fooled by requests for charity. Others may find themselves somewhere in between: humanitarian assistance that could help or support terrorist activities, such as funding assistance for the families of killed terrorists.

[3] Dale Fuchs, *Spain Says Bombers Drank Water from Mecca and Sold Drugs*, New York Times, April 15th 2004.

British authorities suspected the Northern Ireland Liberation Army (IRA) of links with drug trafficking coming from the Middle East, allegations that could not be completely proven, nor categorically refuted.

The activities of the Kurdistan Workers Party (PKK) also included money laundering and drug trafficking. PKK is involved in taxing drug loads and protecting drug traffickers in the region of Southeastern Turkey.

In the Middle East, Hezbollah is increasingly involved in drug trafficking. Currently, the group is smuggling cocaine from Latin America into Europe and the Middle East, after having previously smuggled opiates from the Bekaa Valley in Lebanon, although poppy cultivation in this region has lost importance in recent years. In the early years of the third millennium, Hezbollah has constantly cooperated with the PKK to export narcotics into Europe. It is estimated that Hezbollah involvement in drug trafficking and other illegal activity may increase as funding from sponsor states decreases, as was the case with Iran.

In Central Asia, Afghanistan continues to produce about 80% of the total poppy crop, the source of heroin. The lack of viable agricultural alternatives and of international support programs for this economic sector in Afghanistan will certainly lead to a continuation of poppy cultivation with all the problems that arise thereof. After the industrial processing of opium in laboratories in Afghanistan and Pakistan, heroin is exported mainly to Europe and Russia.

One of the groups in Central Asia, drawn from Al Qaeda, is the Islamic Movement of Uzbekistan (IMU), a militant Islamic organization. IMU is self-financed mostly from drug trafficking, as it controls the main trafficking routes of Central Asia. IMU has deviated security forces by involving them in armed clashes on the southern border with Uzbekistan and Kyrgyzstan in the summer months due to its role in trafficking narcotics. Other known routes used by the IMU are the Surkhandarya and Batken regions. Specialists consider that success in the fight against IMU lies in the "increasing the ability of the regions to control the drug trade in that territory. However, this will depend on the situation in Afghanistan. "

In another part of Central Asia, Kashmiri militant groups are suspected to parcticipate in drug trade to finance their activities because of their proximity to main areas of production and refining, as well as to trafficking routes. In all regions of South Asia and the former Soviet Union, the vicinity to cultivation and production areas, combined with the infrastructure provided by the smugglers, also encouraged mutually beneficial relationships between terrorist groups and drug trafficking organizations.

In this context the justified question arises as to what the dynamic of narcoterrorism will be. Can it be stopped or its effects be limited? Is it possible that 10 years after September 11th, 2001, the world will again witness an attack with implications at a global level?

Unfortunately, forecasts are not at all optimistic. The world has changed in these 10 years, the only things that have stayed the same being the inertia of political decision makers who ignore the signals that the Third World permanently gives, but in a hardly detectable range for the western eye, and the certainty that such an event will not be able to happen again.

Effective policies of intervention at the source, international programs of cooperation against drug trafficking; money laundering and terrorist financing can be the key to success. Moreover, the lack of a uniform political vision on the states that fail and can generate terrorism and instability is becoming a crucial problem of the third millennium. Former U.S. Secretary of State Henry Kissinger recently said that "the Obama administration does not have a clear sense of the kind of world they would like to see and how they want to make it come about". But, in such a situation, the states that are the source of narcoterrorism should enjoy genuine and effective international assistance - from the socio-economic one to intelligence, police and military cooperation through programs well joined together, focused on clearly defined goals and especially, that properly assess the time factor.

Conclusions

It must not be forgotten that in theory, violence is the expression of pent-up personal frustrations, which is most often induced by poverty. The fight against narcoterrorism is part of the war against poverty in the source states and which aims at reducing the supply of psychotropic substances in the target countries. The war on terrorism has failed to completely destroy the logistic and financial support infrastructure of terrorist organizations. It is now becoming the task of politicians, police and intelligence structures, as well as the fiscal, financial and banking ones to reach this objective which is equally difficult and important.

Bibliography:

Dale Fuchs, *Spain Says Bombers Drank Water from Mecca and Sold Drugs*, New York Times, 15 apr. 2004;

Chouvy, Pierre-Arnaud, *Narco-terrorism in Afghanistan*, Terrorism Monitor, no. 10/2004;

Chouvy, Pierre-Arnaud, *Drugs and the Financing of Terrorism*, Terrorism Monitor, Volumul 2, October 2004;

Chris Baker, *Putting a Price Tag on Terror,* Washington Times, Nov. 18, 2001;

The Canadian Foundation for Drug Policy, *How Drug Prohibition Finances and Otherwise Enables Terrorism;*

http://www.cocaine.org/colombia/farc.html;

http://www.interpol.int/Public/FinancialCrime/MoneyLaundering/hawala/default.asp;

http://www.narcoterror.org.

METHODOLOGICAL FEATURES REGARDING THE INVESTIGATION OF BANKRUPTCY CRIME

Petrică-Mihail Marcoci[*]
Diana-Camelia Boroi[**]

Abstract

In a period of acute financial and economic crisis, as the one we are crossing right now, bankruptcy is one of the most common crimes in terms of its committing potential. Beyond strict legal issues, state organizations, whether they are the one of administrative or judicial control, they must adjust the mechanisms of control and discovery of facts which might lead or generate bankruptcy actions in order to ensure the credibility and sanitation of the economic environment and to prevent manifestations of fraudulent behaviors in the field of flows payment resulting from lawful commercial acts.

Keywords: a*ssets, insolvency, insolvent, bankruptcy, non-existent debts, records forging*.

Introduction

Law 85/2006 defines insolvency as that condition of the debtor's patrimony that is characterized by the insufficiency of funds available for paying certain, liquid and contingent debt. So, the insolvency procedure applies to the debtor that can't pay his outstanding debts because of the lack of liquidity. Only the debtor's debts that consist in money are circumscribed in this area. Therefore, the procedure will not apply if the debtor, although he has liquidity, does not pay his outstanding debts. In this case, the creditors must follow the enforcement procedure available under the common law. The court should consider the real cause of the unpaid debts by the debtor.

The delimitation between insolvency and the debtor's insolvency must be made also in relation to the debtor's refusal of payment:

a) insolvency and the debtor's insolvency. Insolvency is different from insolvent because, while insolvency is that condition of the debtor's patrimony which expresses the debtor's inability to pay its outstanding debts due to the lack of liquidity[1], insolvent is a state of financial imbalance of the debtor's patrimony, in which the liability value is greater than the value of assets. It is possible that the value of the assets far exceed the value of liabilities, and yet, due to the lack of liquidity, the debtor is unable to pay its outstanding debts, the debtor being insolvent, although its patrimony is solvent.

b) The insolvency and the debtor's refusal of payment. Insolvency can not be confused with the simple non-payment of the outstanding debts. The debtor is not insolvent if he refuses to pay because of certain exceptions that he thinks they are based on good faith.

The crime of bankruptcy is defined by law in terms of the following[2]:

a) forge, steal or destroy the debtor's records or hide a part of its property assets;

[*] Assistant Professor Ph.D. "Alexandru Ioan Cuza" Police Academy, Bucharest. e-mail: ijjs@univagora.ro.
[**] M.Sc. Student, e-mail:ijjs@univagora.ro.
[1] See art. 3, Par. 1 of Law no. 85/2006.
[2] art. 143 Par. 2 of Law no. 85/2006.

b) show non-existent debts or present undue amounts in the debtor's records, any other act or in the financial statement, each of these facts being committed in the creditors fraud;

c) alienate, in the creditors fraud, in case of the debtor's insolvency, some of the assets.

The social value that has special protection by incriminating this type of fact is mainly represented by the social relations regarding the normal commercial behavior in contractual relations that may suffer distortions when the debtor of a financial obligation conceals or disposes parts of its assets that can be used to settle, in part, the debts owed to the creditors, as in the meaning of Law no. 85/2006.

Under art. 3 point 5 of the quoted normative act, the debtor is the individual or the legal entity of private law, which is part of one of the categories envisaged by art. 1 of Law no. 85/2006, whose patrimony is insolvent in the sense described above.

Depending on the normative way in which the offense is presented, the material object of the bankruptcy is represented, depending on case, by the debtor's records, the debtor's books, other documents and as well as by financial statements or some of the assets of any kind.

The active subject of the bankruptcy crime is not expressly qualified by the criminality rule. However, most of the times, the subject is the debtor itself. The participation is possible in all its forms.

In connection with the offense analyzed, we must admit that if the conditions set by the law are fulfilled, the legal entity can be held by the criminal law for committing it. In other words, if the legal entity:

a) is legally constituted;

b) has the ability to respond in terms of criminal law, not being in either of the exceptions set in the art. 19¹ Criminal Law. (the state, public authorities and public institutions engaged in an activity that can not be the object of a private domain does not respond in terms of criminal law);

c) if the fact was committed by the individual in order to achieve the object of activity or for the interest of the legal entity;

d) and if the fact was committed with the guilt required by the law for the respective offense it may be taken into consideration the criminal liability of this legal entity for committing the bankruptcy.

The passive subject of the crime is the state because it is responsible for ensuring the conduct of the commercials relations in terms of legality. In addition, the passive subject is the person damaged by the offender's activity, in this case the creditor or the debtor's creditors.

In fact, the passive subject of the offense is as stated in the doctrine that person who holds the social value to whom it had been undermined by committing the offense, has suffered through it was done[1].

The material element of the offense is the fact that physical activity, the manifest as form of an action or prohibited inaction and it is described through the incriminating text of that crime[2].

The material element of the objective side of the offense consists of:

- the forgery, steal or destruction of the debtor's records;

[1] L. R. Popoviciu, *Drept penal. Partea generală*, Pro Universitaria Publishing House, Bucharest, 2011, p. 100
[2] L. R. Popoviciu, *Drept penal. Partea generală*, Pro Universitaria Publishing House, Bucharest, 2011, p.101

- the hide of a part of the assets of the debtor's fortune;

- the appearance of non-existent debts or the presentation in the company records, in any other act or in the financial statements, of some undue amounts;

- the alienation, in fraud of the creditors, in case of the debtor's insolvency, of a significant part of the assets.

The essential requirement for achieving the constitutive content of the offense is determined by the condition that the actions must be committed for the purpose of defrauding the creditors by illegally lowering the value of the assets held by the insolvent debtor.

The alienation in fraud of the creditors means the alienation of some assets belonging to the company at lower prices than the real ones, in order to defraud them; in this way it is caused a decrease in the recovery opportunities of the claims held by them. The alienation must have as object a part of the assets, regardless of its size.

The immediate result of the crime is the decrease of recovery possibility of the creditors of a part or all sums of money owed by the debtor. Underlying, but, the immediately result must be considered in relation to the way of making the normative variants of incrimination.

The causal link results from the commission of the offence itself, in the case of showing non-existent debts or appearance in the debtor's books, in any other act or in the financial statement of not owed sums of money. In the other normative variants, the causal link between the incriminated action and the result must be proven.

In the field of the subjective side, the offense is committed with direct or indirect intent, the fault being completely excluded.

The preparatory acts and the attempt are not incriminated by the law text. The offense is considered consumed when adopting behaviors which disrupts the development of the commercial activity.

Normally, given the personal features of the bankruptcy, the notification of the prosecution is done, in principle, by the creditors who were defrauded by the illegal activity of the offenders [1.]

Among the activities that are necessary in order to prove the existence of the crime and guilt of the offenders, we include:

- The analysis of the company activity

The company activity, the specific of the object of activity, the commercial circuits in which it becomes part, the internal regulations of organization and operation of the company can provide an overview of the previous or present situation in which it appears the insolvency situation.

Therefore, before going to any other activity, the prosecution must carry out a documentation on the society where occurred the crime, the following data can be retained [2:]

- The nature of the society, being established the link between production and trade, the conditions of goods delivery to users, the required documentation, etc.;

- The manner and places of supply with raw materials, the relationships with the suppliers, how such expenses are discounted etc.

- The method of keeping the incoming and outgoing goods in or out the company, the fixed assets and inventory objects, people with responsibilities on this line;

---

[1] V. Berchesan, N. Grofu, *Investigarea criminalistică a infracţiunilor de evaziune fiscală şi bancrută frauduloasă*, Ed. Little Star, Bucharest, 2003, p. 198.

[2] V. Berchesan, N. Grofu, *Investigarea criminalistică a infracţiunilor de evaziune fiscală şi bancrută frauduloasă*, Ed. Little Star, Bucharest, 2003. p. 199.

- the security system and the way in which the society controls the goods on their outside of the company's assets;

- the normative acts that regulate the society activity.

- The organization of the investigative activities

The investigation of bankruptcy involves a significant volume of activities, given the wide range of issues that must be analyzed and translated into legal issues, the problems that are urgent, as well as the patterns and elements which are subsidiary to the investigation. In general, the investigation of bankruptcy, involves writing a research plan that must show the operational priorities, the normal evolution of probation, the issues that have to be clarified on both objective and subjective plan in relation to the investigated offense. In plano, each of the issues included in the research plan should meet one or more prosecution activities [1]

- Checking and lifting objects and documents

Lifting objects and documents is the criminal proceeding and forensic tactics activity by which the prosecuting authority or the court provides objects and documents that can serve as evidence in criminal proceedings.

Criminal investigation body knows the objects and documents relevant to the cause, has data and information about their existence and, moreover, about where the goods or documents are concerned, as well as the people who detain them[2].

Criminal procedure law shall establish an obligation for judicial bodies to raise objects and documents not only when clearly they are evidence, but also when can be considered that they might become *evidence.*

The phrase "company records" must be understood as: the books and records of the company's management [3] and business records[4].

Accounting records, which must be checked and lifted in case of fraudulent bankruptcy are justifying documents that lie in the underlying financial accounting records, the accounting records required (general ledger, stock ledger, ledger), trial balances, annual financial statements.

Management records of the company are the management report, the cash registry, stock files, stock records, assets register.

Business records are the corporate records specific to certain forms of society: the register of shareholders, register of associates, register of shares, the register of general meetings, board deliberations and meetings register and deliberation and control register of auditors and others[5]

Finally, must be verified and lifted the documents referring to assets selling below market price quotation, placement of goods or cash in bank accounts or undeclared deposits, acquisition of movable or immovable property in the period under review [6.]

To obtain documents from the bank should be considered legal regulations in the incident field. Or in this case we deal with the strictness of banking secrecy and its enforceability against third parties, including prosecution bodies.

---

[1] V. Berchesan, N. Grofu, *Investigarea criminalistică a infracţiunilor de evaziune fiscală şi bancrută frauduloasă*, Ed. Little Star, Bucharest, 2003. p. 199.

[2] V. Berchesan, *Cercetarea penală - îndrumar complet*, Icar Publishing House, Bucharest, 2001, p. 284.

[3] Stipulated by Law no. 82/1991 republished.

[4] Stipulated by Law no. 31/1990 republished.

[5] V. Berchesan, N. Grofu, *Investigarea criminalistică a infracţiunilor de evaziune fiscală şi bancrută frauduloasă*, Ed. Little Star, Bucharest, 2003. p. 201.

[6] V. Berchesan, *Cercetarea penală - îndrumar complet*, Icar Publishing House, Bucharest, 2001. p. 289.

In principle, information about operations carried out on behalf of individuals or legal entities can be transmitted only to the owners or their legal representatives, and in criminal cases at the request of the prosecutor or the court where legal proceedings had started.

- Searches

Search is the work of criminal prosecution forensic tactic, which consists of looking for - on a person, at home or place of work - objects, values or documents whose existence or ownership is denied to discovery and administration of the necessary evidence to solve the criminal case fairly[1].

In cases of fraudulent bankruptcy the search is aimed at:

- Discovery of falsified corporate accounting records or those stolen by the offender;
- Identification of places where were hidden movable objects representing the essence of concealing or disposition in fraud of creditors;
- Discovery of documents showing liquidities placed in certain bank accounts or placement of goods in warehouses, which are not covered by company documents;
- Discovery of documents showing the alienation of the assets of the company: purchase contracts, invoices, tax payment, acts of donation, etc.[2]
- Discovery of documents or copies thereof, that were used to commit the crime of fraudulent bankruptcy: inventory lists, documents certifying the costs of consulting, advertising, excessive sponsorship or with no real coverage; participation titles, participation interests, claims in respect of shares, investment securities, etc.
- Discovery of other documents that may be related to the cause: issued checks; credit cards, commercial paper; personal notes on hidden assets disposed to sharing them with other participants; addresses, phone numbers, which can establish criminal links between certain people; names of banks and bank accounts; documents certifying fictitious private signature loans [3].

During the search, the prosecution must identify movable and immovable goods on the property of the perpetrator, goods that will be mentioned in the content of the minutes of search. Precautionary measures will be taken on these goods, which are unavailable to recover damages caused to creditors.

- Layout of expertises

In fraudulent bankruptcy, the main types of expertise that can be arranged, are:

- graphic expertise;
- judicial-accounting expertise.

With a graphic expertise, the prosecution addresses to a forensic laboratory or a specialized institute expertise to carry out the expertise[4], as specialists will be appointed by the head of that institution. In this case, parties are entitled to request the appointment of an expert recommended by each of them to participate in the expertise.

In order to ascertain the existence of damage, its extent and the mechanism of production is required the knowledge of specialists. In these cases is necessary to request an accounting expertise.

---

[1] Romanian Criminal Procedure Code, art. 119, Par. 2.
[2] V. Berchesan, *Metodologia investigării infracţiunilor*, vol. I, Paralela 45 Publishing House, Piteşti, 2000, p. 289.
[3] V. Berchesan, N. Grofu, *Investigarea criminalistică a infracţiunilor de evaziune fiscală şi bancrută frauduloasă*, Ed. Little Star, Bucharest, 2003.. p. 203.
[4] Romanian Criminal Procedure Code, art. 119 par. 2.

Accounting expertise in the prosecution phase, can be ordered only if criminal proceedings were started, otherwise it will be out of court and is not enforceable against the parties.

The judicial body sets objectives and formulates questions for the expert only in the presence of the parties. These are warn that are entitled to request appointment of an expert recommended by each of them, at their own expense.

Auditing expertise resolves only the objectives indicated in the order and only for the set period. The object of an accounting expertise can be extended only with the approval of the prosecution body which ordered it [1].

For fraudulent bankruptcy auditing expertise should [2]:

- Establish the fraudulent procedures that led to the occurrence of insolvency;
- Establish the illicit facts by which was determinately reduced the company's assets;
- Specify the assets sold and the difference of price from their real value;
- Record the amount of the hidden active and how it was achieved;
- Specify the direct consequences of creditors' fraudulent maneuvers;
- Mention those who are responsible for fraudulent maneuvers [3].

- Identifying and hearing witnesses

For the crime of fraudulent bankruptcy, witnesses can be identified among the following categories of persons [4]:

- Persons employed in companies that are in insolvency, which, although they had no liability for property or documents that formed the subject of forgery, theft, destruction, concealment or alienation, know about the illegal activity of the perpetrator;
- People who have performed different operations in connection with the company's property, which was later hidden or disposed of;
- Persons whose names were drawn on different pieces of fictional documents and may not be legally considered accomplice in bankruptcy;
- People who know about the circumstances and the price at which the company's assets were sold;
- People who can provide relationships about hiding of goods and places where they were transported, with the sums that were deposited by the defendant at various banks and, eventually, the bank accounts in which the cash was placed;
- People who bought from the perpetrator goods that are the object of the criminal activity;

In relation to the category of persons out of which witnesses are identified, shall be determined the theme and tactics for listening [5].

Issues that must be clarified by hearing witnesses differs from case to case in relation to the modus operandi used by the offender. From the witness statements should result:

---

[1] V. Berchesan, N. Grofu *Investigarea criminalistică a infracţiunilor de evaziune fiscală şi bancrută frauduloasă*, Ed. Little Star, Bucharest, 2003.. p. 208.

[2] V. Berchesan, N. Grofu *Investigarea criminalistică a infracţiunilor de evaziune fiscală şi bancrută frauduloasă*, Ed. Little Star, Bucharest, 2003.. p. 208..

[3] V. Berchesan, *Metodologia investigării infracţiunilor*, vol. I, Paralela 45 Publishing House, Piteşti, 1998, p. 289.

[4] V. Berchesan, N. Grofu, *Investigarea criminalistică a infracţiunilor de evaziune fiscală şi bancrută frauduloasă*, Ed. Little Star, Bucharest, 2003.. p. 209.

[5] V. Berchesan, N. Grofu, *Investigarea criminalistică a infracţiunilor de evaziune fiscală şi bancrută frauduloasă*, Ed. Little Star, Bucharest, 2003.. p. 210.

- How the company records were stolen, people involved in theft and places where they were taken;

- Destination of the asset and how it was highlighted in accounting and management documents;

- Who and how destroyed the records or other documents of the company;

- Assets sold, people who bought them, the purchase price and documents drafted on this occasion;

- How were hidden parts of the active, indicating deposits and people who knew about the circumstances in which the goods were placed in those deposits;

- Amounts of money resulting from the crime and their destination, indicating banks and bank accounts in which they were placed;

- People who have helped the perpetrator of the offense and how was helped;

- Other people who know about the offense committed and the circumstances in which they found out about it [1].

Conclusions

In assessing witness statements should be taken into account the position and the possible interest that could be involved. Positive practice of the prosecution shows that real and truthful statements can be obtained from witnesses identified among people who did not have any liability with regard to goods which formed the subject of crime.

All presented characteristics form a framework and a distinct pattern of judicial investigation of the crime of fraudulent bankruptcy, its ultimate aim being the creation of a competitive economic environment, transparent and legally conformist in the sense that extremely risky behavior in business management plan shall not find a palliative in transferring assets to open a new business to the detriment of creditors of a company arrived in the state of insolvency.

Bibliography:

Law 31/1990 with amendments published in the Official Gazette no. 1066 of 17.11.2004 and updated by the Emergency Ordinance no. 37/2011 - for the amendment of Law no. 82/1991 and for amendment to other incident legislation;

Law no. 85/2006 on insolvency proceedings published in the Official Gazette, Part I, no. 359 of 21.04.2006;

V. Berchesan, N. Grofu, *Investigarea criminalistică a infracţiunilor de evaziune fiscală şi bancrută frauduloasă*, Little Star Publishing House, Bucharest, 2003;

V. Berchesan, N. Grofu, *Investigarea criminalistică a infracţiunilor de evaziune fiscală şi bancrută frauduloasă*, Little Star Publishing House, Bucharest, 2003;

V. Berchesan, *Cercetarea penală - îndrumar complet*, Icar Publishing House, Bucharest, 2001;

V. Berchesan, *Metodologia investigării infracţiunilor*, vol. I, Paralela 45 Publishing House, Piteşti, 2000;

V. Berchesan, *Metodologia investigării infracţiunilor*, vol. I, Paralela 45 Publishing House, Piteşti, 1998.

L. R. Popoviciu, *Drept penal. Partea generală*, Pro Universitaria Publishing House, Bucharest, 2011

[1] V. Berchesan, N. Grofu, *Investigarea criminalistică a infracţiunilor de evaziune fiscală şi bancrută frauduloasă*, Ed. Little Star, Bucharest, 2003.. p. 210.

JUDICIAL REHABILITATION INTO THE ROMANIAN CRIMINAL LEGISLATION

Marian Alexandru[*]

Abstract

The judicial rehabilitation is complex. Indeed, while the legal rehabilitation usually operates for convictions to less serious punishments, the judicial rehabilitation may be acquired for any type of conviction. As opposed to the characteristic of creating the most frequent method by which consequences restrictive of those rights generated by criminal sanctions are judicially removed, the judicial rehabilitation is the main and typical form of rehabilitation.

For the acquirement of judicial rehabilitation, many conditions are foreseen, and their fulfillment, in most of the cases, unanswerably proves that the former convict reconsidered his life, that he deserves to be reintegrated among honest citizens.

Key words: *judicial rehabilitation, Romanian criminal legislation*.

Introduction

The judicial rehabilitation is a form of rehabilitation that may be granted upon request of the convict or of his close relatives by the Court of Justice (ope judiciis)[1]*, by motivated decision, following the verification of fulfillment of those conditions foreseen by law of which the effect is the future cancellation of all decays, interdictions and incapacities that occurred and that were the grounds for conviction*[2].

1. Concept and characterization. Conditions regarding conviction

The judicial rehabilitation is a form of rehabilitation that may be granted upon request of the convict or of his close relatives by the Court of Justice (ope judiciis)[3], by motivated decision, following the verification of fulfillment of those conditions foreseen by law of which the effect is the future cancellation of all decays, interdictions and incapacities that occurred and that were the grounds for conviction[4].

In comparison with the legal rehabilitation, the judicial rehabilitation is more complex. Indeed, while the legal rehabilitation usually operates for convictions to less serious punishments, the judicial rehabilitation may be acquired for any type of conviction. As opposed to the characteristic of creating the most frequent method by which consequences

---

[*] Ph.D. Prosecutor, Office of the Court of Appeal Constanta, e-mail: marian_alexandru_ct@yahoo.com

[1] A. Ungureanu, *Drept penal român partea generală*, Lumina Lex Publishing House, Bucharest, 1995, p. 433.

[2] I. Cozma, *Reabilitarea în dreptul penal al Republicii Socialiste România*, Scientific Publishing House, Bucharest, 1970 page 155, C. Bulai, *Instituţii de drept penal. Curs selectiv pentru examenul de licenţă*, Trei Publishing House, Bucharest, 2005, page 433; Gh. Nistoreanu, A. Boroi, *Drept penal. Partea generală*, All Beck Publishing House, Bucharest 2002, page 325, V. Dongoroz and collaborators, *Explicaţii teoretice ale Codului penal român*, general part, volume II, Academic Publishing House of Socialist Republic of Romania, Bucharest, 1970, p. 409.

[3] A. Ungureanu, *Drept penal român partea generală*, Lumina Lex Publishing House, Bucharest, 1995, p. 433.

[4] I. Cozma, *Reabilitarea în dreptul penal al Republicii Socialiste România*, Scientific Publishing House, Bucharest, 1970 page 155, C. Bulai, *Instituţii de drept penal. Curs selectiv pentru examenul de licenţă*, Trei Publishing House, Bucharest, 2005, page 433; Gh. Nistoreanu, A. Boroi, *Drept penal. Partea generală*, All Beck Publishing House, Bucharest 2002, page 325, V. Dongoroz and collaborators, *Explicaţii teoretice ale Codului penal român*, general part, volume II, Academic Publishing House of Socialist Republic of Romania, Bucharest, 1970, p. 409.

restrictive of those rights generated by criminal sanctions are judicially removed, the judicial rehabilitation is the main and typical form of rehabilitation[1].

Judicial rehabilitation is a form of rehabilitation to be granted the request was condemned by the court after verifying the conditions laid down by law[2].

For the acquirement of judicial rehabilitation, many conditions are foreseen, and their fulfillment, in most of the cases, unanswerably proves that the former convict reconsidered his life, that he deserves to be reintegrated among honest citizens. In relation to the peculiarity that it is only granted following a careful verification regarding the fulfillment of all conditions that illustrate the perfection of the process related to social re-classification of the former convict, as the judicial rehabilitation must be seen as the typical form of rehabilitation.

In order to acquire the rehabilitation, the former convict is bound to promote a certain judicial procedure, during which the competent Court of Justice verifies the extent to which he fulfills the legal conditions to be granted the rehabilitation.[3] Only after the judgment of the rehabilitation petition, the court of justice, by its decision, disposes the future cancellation of those decays and interdictions to which the applicant was submitted due to the conviction suffered. For the same considerations, the rehabilitation terms in regulating the methods related to judicial rehabilitation are longer and fluctuant in relation to the punishment applied to the convict applying for rehabilitation.[4]

Due to its special weigh, the judicial rehabilitation is vastly regulated by provisions of art. 135-139 of the Criminal Code, which foresees the grant and efficiency terms, as well as certain issues related to grant, petition, rehabilitation. These provisions the sole reference points for the judicial rehabilitation, since there are no special cases to grant the rehabilitation.[5]

In order to tackle the rehabilitation petition or grant, it is imperiously necessary to have a final criminal conviction. Nevertheless, only the existence of a final conviction decision is not enough to be able to request the Court of Justice for rehabilitation grant. For this, it is also necessary that the punishment applied to the convict have been executed or ceased in one of the methods foreseen by law.[6]

Our criminal legislation is not in charge of regulating the petition that the punishment applied to the rehabilitation petitioner cease by execution or any other method. Also true is the fact that when dates are settled as of which the rehabilitation terms start, the criminal code solves – implicitly – the issue tackled. Thus, in art. 136 of the Criminal Code, we can see that the rehabilitation terms start to be effective as of the date when the execution of punishment ended, as of the date when it was recorded or as of the date when the criminal sanction was reprieved. I consider that by these provisions the following was implicitly foreseen: in order to apply for, and to grant the judicial rehabilitation, it is imperatively that the punishment applied to the convict must have ended by one of the legal provisions.

Although art. 136 of the Criminal Code does not foresee in express manner, although it is obvious that if the execution of the punishment ceases as a result of

---

[1] V. Dobrinoiu, Gh. Nistoreanu and collaborators, *Drept penal partea generală,* Didactic and Pedagogic R.A. Publishing House, Bucharest, 1992, p. 368.
[2] L. R. Popoviciu, *Drept penal. Partea generală*, Universitaria Publishing House, Bucharest, 2011, p. 383.
[3] G. Antoniu, M. Popa, S. Danes, *Codul penal pe înţelesul tuturor,* Political Publishing House, Bucharest, 1988, p. 133.
[4] V. Dongoroz and collaborators, op.cit. p. 409.
[5] C. Bulai, op.cit. p. 433; V. Draghici, *Drept penal. Partea generală*, Pro Universitaria Publishing House, Bucharest, 2008, p. 528.
[6] I. Cozma, op.cit. p. 157.

intervention of amnesty related normative decree, the rehabilitation term shall start as of the date of the related law or decree.

The indispensable necessity to put an end to the punishment comes from the conception regarding the social role of the rehabilitation institution in allotting full social reintegration to the former convicts that were reeducated and that proved that they deserve to be exempted from all consequences that obstructs their freedom and that they felt due to the conviction. Indeed, since the punishment was not executed (because the execution is the main modality to put an end to criminal sanctions), it is less probable that the reeducation process of the former convict have been occurred.[1]

Regarding the secondary means to put an end to the punishment, an issue was tackled: if the persons convicted, who have been exempted from the execution of criminal sanctions, may or not obtain the judicial rehabilitation.

If regarding the putting an end to the punishment by reprieve, it is generally accepted that it does not affect the grant of rehabilitation, when prescribing the execution of punishment, there were serious reserves in making possible the procurement of judicial rehabilitation.

In supporting such claim, an argument was invoked, the one that in case of prescription, it was seldom that the convict ran from executing the punishment, which not only that proves that he does not want to be reeducated but, on the contrary, it proves a consistently anti-social behavior.

In supporting the thesis that judicial rehabilitation must be granted even if the punishment ended by prescription, some arguments may be invoked, especially based upon practical aspects.

Thus, although there is no denial that there are cases in which certain convicts benefit from the prescription of the punishment, avoiding to execute it for years, it is exaggerated to believe as being an absolute identification and to conclude that anytime we are talking about punishment execution the people avoid to execute it. [2]

In addition, it would not be fair to exclude from the benefit of rehabilitation those individuals that suffered easy punishments and without avoiding the execution of their punishment benefited from prescription, especially if we take into account the fact that for the most serious convictions, if the punishment is executed, the rehabilitation may be generally granted.

We believe that a certain reason stood as grounds for the provisions of our criminal code, which distributed the issue tackled by means of the express provisions contained in art. 136 of the Criminal Code.

Indeed, foreseeing that in the case of punishment prescription, the rehabilitating terms start from the date when the prescription is fulfilled, the criminal code regulates that if the criminal sanction ended by prescription, the judicial rehabilitation may be granted.

2. Terms following the expiry of which the judicial rehabilitation may be requested and granted

The results of those actions related to the convict's reeducation and betterment, which started during the execution of the punishment, must also be consolidated following the release from detention. It is the main explanation for the requirement to pass a certain period of time from the end of punishment, so that the judicial rehabilitation be granted.

[1] I. Comza, op.cit. p. 158 – 159.
[2] Idem.

In addition, as the judicial rehabilitation is based upon the convict's good conduct following his release from detention, it is necessary for a certain passage of a period of time as of the end of punishment to prove that he changed his attitude towards law and rules of social life. A correct conduct during the execution of the punishment only does not represent a sufficient guarantee that the convict is fully reeducated.

Nevertheless, as not all infractions have an identical seriousness – although each of them taken separately supposes the existence of a high social danger – for the entire social reeducation and integration of different convicts, we cannot have a unique time period. From this reason, with the purpose of granting the rehabilitation, it is necessary to have differentiated terms fixed.[1]

The basic criterion in settlement of such terms is the seriousness of the punishment, since it reflects in a determined manner both the social danger of the act committed as well as subjective elements that characterize the doer and that had been taken into account by the Court of Justice upon the individualization of the punishment.

Pursuant to art. 135 of the Criminal Code, the rehabilitation terms have a fixed period settled according to the seriousness of the conviction, to which a fluctuating period is added, which equals half of the period of punishment in prison applied to the convict.[2]Thus, one part of the rehabilitation term in case of judicial rehabilitation is absolutely determined by each of the four categories foreseen in art. 135 of the Criminal Code, and the other part of the term is relatively determined according to the punishment sentenced by the conviction decision. Thus, each conviction has its own rehabilitation term, which may be found our with precision.[3]

It is, for sure, an extremely equitable regulation. As the criminal acts are differentiated by their seriousness, reason for which there is a possibility that the punishments applied for this be individualized according to the real seriousness of each act, in the case of rehabilitation term, this is individualized according to the punishment sentenced. Thus, the fixed part of the rehabilitation term settled by law for each of the four categories, is of 4 years for the first category (art. 134 letter a), of 5 years for the second category (art. 135 letter b), of 7 years for the fourth category (art. 135 letter d). To each of these fixed parts of the rehabilitation term, the relatively fluctuant part of the term is added, which equals half of the period for the punishment sentenced. If by means of the fixed part of the term a first individualization is made in relation to the category of conviction, by the second part of the term, we get a complete individualization of the rehabilitation term according to the length of the punishment sentenced, thus obtaining a differentiated reasonable term that each convict benefits from in an equitable manner, as this terms gives him the possibility to redress himself and to re-adjust to the honest life and to be able to obtain the rehabilitation upon its expiry date.[4]

Thus, in the case of convictions to prison that lasts for more than a year, but up to five years, the rehabilitation term is of 4 years plus half of the period for the punishment applied (art. 135, ¶ 1, letter a of the Criminal Code).

For the conviction to prison between 5 and 10 years, the judicial rehabilitation term is of 5 years plus half of the period for the punishment sentenced (art. 135, ¶ 1, letter b of the Criminal Code).

---

[1] V. Dongoroz and collaborators, op.cit. page 410; C. Mitrache, *Drept penal român parte generală,* fifth edition reviewed and amended. Legal Universe, Bucharest, 2006, p. 340.
[2] C. Bulai, op.cit. p. 437.
[3] V. Dongoroz and collaborators, op.cit. p. 411.
[4] Idem.

In case of convictions to prison for more than 10 years, the judicial rehabilitation term is of 7 years plus half of the period for the punishment sentenced (art. 135, ¶ 1, letter c of the Criminal Code), of 7 years plus half of the period for the punishment sentenced if the punishment on life sentence was changed or replaced with imprisonment (art. 135, ¶ 1, letter d of the Criminal Code).

This rehabilitation term that fluctuates according to the category of conviction may sometimes be reduced pursuant to provision of the last paragraph of art. 135 of the Criminal Code. This is a provision that is also found into the guiding lines of the Criminal Code: avoidance of certain unchangeable solutions in settlement of certain cases that are not always similar as well as the search for solutions as different as possible, which correspond to the reality of facts as much as possible. Thus, we may have cases when the person that requests for the rehabilitation had an exceptional conduct, he performed merit acts, so that the rehabilitation term fixed by the law is obviously too long. In such exceptional cases assigned by the legislator himself, the General Prosecutor can shorten the rehabilitation term. This is a remedy that the law provides in order to create a concordance between the diversity of reality and the right incidence of the rehabilitation institution.[1]

Our criminal code does not foresee, among the terms or expressions of which the meaning was explained in title VIII of the general part, the expression of "exceptional cases" so as to deduce the time when the diminishment of the rehabilitation term may occur. Anyway, the notion of "exceptional cases" imposes that the diminishment of the rehabilitation term be granted with great exigency and only in taking into account special reasons.

The following cases may be considered as exceptional: the cases in which the petitioner for the rehabilitation behaved in a very special way to the workplace, acquiring very important results into his activity, he saved human lives or other important social values during natural disasters, if he is a professional into his field of activity, and the consequences of the conviction suffered could impede his framing in certain workplaces or other exceptional cases.[2]

Indeed, the cases in which it is indicated to grant the diminishment of rehabilitation terms cannot be stated, as the competent institution is about to assess it from case to case, taking into account the real grounds to this regard.

In our legal literature there had been contradictory mentions regarding the settlement of the rehabilitation term if the petitioner had been condemned for many transgressions in real contest, being applied an additional punishment.

The first opinion, the one pertaining to Ion Cozma and M. Costin, the following was asserted: upon calculation of rehabilitation terms we must take into account the basic punishments and not the punishment resulted following the application of the additional punishment foreseen by law, in case of infraction contest, since the additional punishments do not have their own existence and neither execution that is independent of basic punishments. In consequence, the period of the rehabilitation term, given a certain case, must be fixed in relation with the harshest punishment, in which all others were mingled together, without taking into account the applied additional punishments, following the existence of infraction contest.

Such point of view was criticized by Gheorghe Daranga, as he asserts that in the case of conviction for infraction commitment in real contest, the rehabilitation term must be

[1] I. Cozma, op.cit. p. 172.
[2] Idem.

calculated in relation with the punishment resulted from the application of the additional punishment, since this is the factor that expresses from legal point of view the social danger that the transgressor represents. [1]

Even if the petitioner executed one punishment only, for many infractions committed in real contest, the Court of Justice must examine the rehabilitation request in relation with every conviction mingled together. If the term of rehabilitation is about to be sentenced, it is deemed that we must take into account the conviction that results from the application of the additional punishment foreseen at art. 34 of the Criminal Code. Indeed, we cannot intermingle the compulsoriness of fulfilling the docket conditions of the rehabilitation for each of the convictions suffered by the petitioner (for example, remedy of the prejudice incurred by commitment of each of the infractions in contest) with the settlement of the rehabilitation term in case of many convictions[2] and when, according to the principle of indivisibility, the rehabilitation cannot be obtained but at the same time for all punishments applied to the same convict. In such a case, a unique rehabilitation term is about to be settled in relation to the punishment which, according to the conviction decision, is about to be executed by the related person. This also results from the fact that diminishment of the punishment due to a partial reprieve or its partial execution, as a result of probation, is not relevant regarding the settlement of the rehabilitation term, but only in determining the date when this term shall start.

Nevertheless, it is possible that in case of conviction by one final decision for two punishments with incarceration for two concurrent infractions, among which one is susceptible of law and the other of judicial rehabilitation, the court of justice shall admit the rehabilitation related petition and by the same decision it may ascertain the intervention of legal rehabilitation for one of the infractions and it may dispose the judicial rehabilitation for the other concurrent infraction.[3]

Calculation of the term for both forms of rehabilitation

The legal or judicial rehabilitation terms are terms of substantial law and they are calculated pursuant to provisions of art. 154 of Criminal Code, which foresee that the month and year are fulfilled one day before the date when it started to be valid. [4]

In calculating the rehabilitation terms, an important role is played by the settlement of that date when it started to be valid (dies a quo) and the fulfillment date (dies ad quem).[5] By provisions of art. 136 of the Criminal Code, there are regulations that settle the date at which the legal or judicial rehabilitation term start to be valid, according to the nature of the punishment and the way in which the punishment is executed.

Firstly, the law provides that the rehabilitation terms are calculated as of the date when the main punishment executed ended or as of the date when it was prescribed (art. 136, ¶ 1 of the Criminal Code). In case of convictions at fines, the terms shall start to be valid as of the moment when the fine was paid off in full or when its execution had been cleared in any other manner (art. 136, ¶ 2 of Criminal Code). In case of total reprieve or reprieve for the rest of the punishment, the term shall start as of the date of the reprieve act (art. 136, ¶ 3 of Criminal Code).

---

[1] The same point of view with M. Basarab, op. cit, p. 394.
[2] I. Cozma, op.cit. p. 170.
[3] M. Basarab, op.cit. p. 394.
[4] C. Bulai, A. Filipas, C. Mitrache, *Instituţii de drept penal. Curs selectiv pentru examenul de licenţă*, Trei Publishing House, Bucharest, 2005, page 272; M. Basarab, op.cit. p. 395.
[5] C. Bulai, op. cit, page 437; V. Dongoroz and collaborators, op cit. p. 412.

Settlement of the initial moment (dies a quo) when the rehabilitation term starts to be valid is used to determine the final moment (dies ad quem), that is the date at which the rehabilitation term is considered as fulfilled to operate the legal rehabilitation or to apply for the judicial rehabilitation.

As the period of rehabilitation terms is foreseen in art. 134 of Criminal Code (for legal rehabilitation) and in art. 135 (for judicial rehabilitation), the knowledge over the moment when such terms start to be valid and their duration lead to determining the final moment of such terms.

The initial moment of the rehabilitation term is important for both the former convict that is about to benefit from rehabilitation, who has to know the moment when his conduct becomes relevant to acquire legal or judicial rehabilitation, as well as for the courts of justice, in charge of verifying if, in the case of judicial rehabilitation, legal conditions for grant of rehabilitation had been fulfilled. [1]

As the normal manner in which the punishment ends is represented by its real execution, provisions of art. 135 of the Criminal Code studies such kind of putting an end, disposing that, in case of punishments with incarceration, the date when the execution ends is also the date when the rehabilitation term starts. The punishment is considered as effectively executed into the day when the convict is set free for good, and in case of the execution of prison at the workplace, this day is the one that follows the last day of work. [2]

Thus, the day when the execution ended is, at the same time, the day when the rehabilitation term is about to be valid. Therefore, by the word "date" used to appoint the moment when the rehabilitation term is about to start, we shall understand the "day" when the main punishment is executed. The law refers to the execution of the main punishment, making abstraction from complementary punishments, of which the execution shall start following the end of the main punishment with incarceration.[3]

When the convict was released on probation, the rehabilitation term shall start as of the date when the full execution of the punishment is about to expire, and not from the date of probation[4], taking into account that pursuant to art. 61 of the Criminal Code, in case of probation, the punishment is considered as executed only if in the time interval between the release from detention place and until the fulfillment of the punishment period, the convict did not commit any infraction.

Taking into account that only from the passage of a time interval equal to the time interval pertaining to punishment with prison that the convict had to execute when he was on probation and only under the reserve of fulfilling the condition foreseen at art. 31 of Criminal Code – the punishment is considered as ended irrevocably, we also assert that the rehabilitation term could not start previously.[5]This is the reason why we conclude that in case of probation, the term foreseen by art. 135 of Criminal Code starts to be valid as of fulfillment of the period related to prison punishment, of the execution of which the convict was exempted by the effect of such a measure.

Another special case is the one in which the final punishment applied equals to the time in which the convict was under preventive arrest. The question is: what is the date when

---

[1] V. Dongoroz and collaborators, op.cit. p. 412.
[2] I. Pascu, V. Draghici, *Drept penal. Partea generală. Examinarea instituţiilor fundamentale ale Dreptului penal, potrivit dispoziţiilor CODULUI PENAL ÎN VIGOARE şi ale NOULUI COD PENAL*, Lumina Lex Publishing House, Bucharest, 2004, page 596; C. Bulai, A. Filipas, C. Mitrache, op.cit. p. 273.
[3] C. Bulai, op.cit. p. 438.
[4] M. Basarab, op.cit. p. 396.
[5] I. Cozma, op.cit. p. 176.

the rehabilitation term starts to be valid, starting with the date when the preventive arrest ceased or starting with the date of sentence related to conviction decision, if such dates are different. Given that the preventive arrest had been equal in time with the punishment of the sentenced imprisonment and there is no other punishment left to be executed, the rehabilitation term shall start to be valid as of the date when the imprisonment decision was final, even when the release took place before the sentence of such a decision because by this decision the following was identified, in relation to the period of preventive arrest: the punishment applied is executed.[1]

In case of change of a punishment into a punishment less severe, the rehabilitation term starts to be valid as of the date when the execution of such punishment ended, but its duration shall be determined in relation to the initial punishment settled by the court of justice.

An important aspect is the correct settlement of the date from which the rehabilitation terms starts to be valid, if the petitioner suffered more successive convictions and when he will not be able to get the rehabilitation but simultaneously for all punishments applied to him (an obvious exception is the one related to those punishments for which he obtained the legal rehabilitation).

In such a case, it is obvious that the rehabilitation term shall start as of the date when the last punishment ended. This means to solve the problem debated had been envisioned by our legal literature as well as by the judicial practice. Thus, Vintila Dongoroz sustained that in case of punishments successively executed, the term shall be fixed following the harshest conviction and shall be valid as of the end of the last punishment[2]; a certain solving of the problem takes into account the indivisible and personal character of the rehabilitation. If the last of these convictions had been sentenced with the conditioned suspension of the punishment execution, the rehabilitation term for previous convictions starts as of the date when the trial term was fulfilled.[3]

In case of many successive convictions suffered at intervals shorter than the rehabilitation terms foreseen by art. 135 of Criminal Code, for each of the punishments applied, it is obvious that the rehabilitation can only be granted following the expiry of the longest rehabilitation terms settled for the related convictions, which shall start as of the date when the last punishment ends.

Nevertheless, there may be cases when - starting with the end of one or many punishments suffered by a certain person, a time interval is passing, which is greater than the rehabilitation term deemed in relation to the most serious of the punishments executed and later on, against the person involved - a new conviction is sentenced. The question is: if the rehabilitation term for the first conviction is longer than the one calculated in relation to the last punishment applied to the petitioner, is the hereinabove mentioned solution operable, in the sense that the rehabilitation term is settled in connection to the harshest conviction and shall start as of the date when the last conviction ended? Professor Ion Cozma is reluctant regarding the justice of the thesis that in a certain case, a rehabilitation term than other than the one settled in relation to the last conviction may be operated.[4]

---

[1] M. Basarab, op.cit. p. 396.
[2] V. Dongoroz, op.cit. p. 741; A. Ungureanu, *Drept penal român partea generală*, Lumina Lex Publishing House, Bucharest, 1995, p. 439.
[3] V. Draghici, op.cit. p. 530; G. Antoniu, C. Bulai, *Dicţionar juridic penal*, Scientific and Encyclopedic Publishing House, Bucharest, 1976, p. 259.
[4] I. Cozma, Note 11 to dec. pen. No. 2288/1966 of the former Regional Court of Justice of Bacau.

In principle, if the rehabilitation term expired and the condemned person was not applied a new criminal sanction, the requirements ensuing from provisions of art. 135 of the Criminal Code are fully fulfilled. When following the expiry of such a term a new conviction is sentenced against the same person, it is just the grant of rehabilitation for the first punishment that is impeded - due to the indivisible and personal character of the judicial rehabilitation – but the legal case of the rehabilitation term fulfillment for the first conviction is not removed.[1] As this requirement is satisfied when the second conviction is sentenced, the problem related to its fulfillment shall not be tackled anymore on the occasion of submitting the rehabilitation petition with the purpose of exempting the convict from the restrictive consequences that ensue from both punishments.

In consequence, if we take into account the hereinabove mentioned case, the period of the rehabilitation term is about to be calculated according to the seriousness of the last conviction and shall be valid as of the date when the last punishment ceased. Against such a point of view we could assert that granting the rehabilitation does not suppose only the fulfillment of a term but also the fulfillment, on the entire period of time, of certain conditions foreseen in art. 137, meant to present that the convict reeducated himself and he may be reintegrated with full rights into the social life.

If the hereinabove mentioned thesis was accepted, the legal requirements would obviously be eluded, since the court of justice related to the rehabilitation term would be in the case in which it could not be able to verify anymore the fulfillment of the hereinabove mentioned conditions on the period related to the rehabilitation term which corresponds to the harshest punishment, but on a shorter period of time, determined by the previous conviction, according to a more reduced hypothesis.[2]

In case of second offences post condemnatory, the rehabilitation term shall start as of the date when the execution of the main punishment ended, which is settled pursuant to art. 39 of the Criminal Code.

Another problem regarding the calculation of rehabilitation terms is the one related to the date from which these terms are calculated if the petitioner suffered more convictions for contest infractions. Irrespective of the fact that additional punishments were applied or not, the main punishment ended. If the end took place in executory manner, the term shall start as of the end date of the execution of the punishment resulted from the fusion, if it was increased or not by the application of additional punishments pursuant to art. 34 of the Criminal Code. If during the execution of the punishment resulted following the application of additional punishments foreseen by art. 34 of Criminal Code, an act of reprieve occurs, by which the convict is exempted from the execution of all punishments mingled together, the justification for the execution of additional punishments shall disappear. In such a case, the submission date for the rehabilitation petition shall start as of the date when the harshest punishment is reprieved, without taking into account the additional punishments.[3]

As the prescription is another method in which the execution of punishment ceases, the final part of the first paragraph of art. 136 of Criminal Code foresees that in such a case, the start date of the rehabilitation term is the date when the terms prescribed for execution of punishment are fulfilled.

The terms prescribed for execution of the main punishment are foreseen in art. 126, 129 and 130 of the Criminal Code. When the rehabilitation is requested regarding the

[1] I. Cozma, op.cit. p. 181.
[2] G. Antoniu, C. Bulai, op. cit, p. 259.
[3] I. Cozma, op.cit. p. 179.

prescribed conviction, we must take into account the convict's behavior during the prescribed term.[1]

The course related to prescription for execution of the punishment ceases if the convict commits another infraction (art. 127, ¶ 1 of Criminal Code).

When the main punishment is the fine, the rehabilitation, the rehabilitation term of 3 years shall start as of the moment when the fine was executed or its execution was ended in another way. Thus, in such a case, the day when the entire fine was recorded or the day in which the last installment ceased to be executed in other manners, is the day when the rehabilitation term starts to be valid. [2]

The provision of the last paragraph of art. 136 of Criminal Code regulates the start of validity in terms of the rehabilitation term if we are talking about reprieve. The start date for the rehabilitation term shall depend upon the effects that the reprieve causes. In case of reprieve for the other part of the punishment, since the effects immediately trigger the cessation of the punishment's execution, the start date of the rehabilitation term is the reprieve date. In case of partial reprieve, as the execution continues to be effective, the start date of the rehabilitation term shall be the date when the execution of the reduced punishment ends. If the reprieve refers to facts pending on the roll, the rehabilitation term shall start as of the date when the final decision was taken regarding the conviction[3] to the punishment reprieved, which occurs following the reprieve, since it is only from this date that the reprieve causes extinctive effects involved.[4]

There are no differences under such aspects between unconditioned reprieve and the conditioned reprieve, in case of conditioned reprieve, when its revocation did not interfere, the rehabilitation term starts from the reprieve date. In such cases, the rehabilitation term goes parallel to the final term for conditioned reprieve.[5]

By the reprieve date we understand the publishing date of the decree by means of which the reprieve is granted, since by the reprieve act, the convict obtains a right that must be immediately used, even upon its mentioning into the document attesting it.

Conclusions

If the punishment executed is the result of accumulation of two punishments, following the revocation of conditioned reprieve, the rehabilitation term is calculated by taking into account the time period of the harshest punishment and not the punishment arithmetically calculated.

In supporting such a solution, the fact that the convict executed two punishments on a cumulative manner, pursuant to special regulations into the clemency deed, does not justify the calculation grounds for the rehabilitation terms as being the period of both punishments arithmetically cumulated, since they did not lose their individuality, as they were executed one after another, and not as a unique punishment resulting from the whole; different conditions of rehabilitation could also exist, according to the period of each

[1] V. Dongoroz and collaborators, op.cit. p. 413.

[2] G. Antoniu, C. Bulai, *Practică judiciară penală*, volume II, general part, article 52 – 154 Criminal Code, Romanian Academy Publishing House, Bucharest, 1990, p. 256 – Trib. NEAMT County, dec. pen. No: 468/1983; C. Bulai, op.cit. p. 440.

[3] G. Antoniu, C. Bulai, op.cit. p. 256; RRD no. 3/1988, p. 72 – Trib. Suprem, Criminal section, dec. no. 1015/1989 "Collection regarding the legal practice in criminal matters. Criminal law. Criminal procedural law", Bucharest Court of Appeal, Rosetti Publishing House, 2001, p. 75 – 76.

[4] V. Draghici, op.cit. p. 530.

[5] C. Bulai, A. Filipas, C. Mitrache, op.cit. p. 274; C. Mitrache, op.cit. p. 343.

punishment.[1]When the reprieve's effect is the change of a punishment into another one less harsh, the rehabilitation term shall start when the execution of that punishment ends (art. 136, ¶ 1 of the Criminal Code), although the period of the rehabilitation term shall be settled according to the initial punishment decided by the court of justice.

Bibliography:

Popoviciu L. R., *Drept penal. Partea generală*, Universitaria Publishing House, Bucharest, 2011;

Draghici V., *Drept penal. Partea generală*, Pro Universitaria Publishing House, Bucharest, 2008;

Mitrache C., *Drept penal român parte generală,* fifth edition reviewed and amended. Legal Universe, Bucharest, 2006;

Bulai C., *Instituţii de drept penal. Curs selectiv pentru examenul de licenţă*, Trei Publishing House, Bucharest, 2005;

Bulai C., Filipas A., Mitrache C., *Instituţii de drept penal. Curs selectiv pentru examenul de licenţă*, Trei Publishing House, Bucharest, 2005;

Pascu I., Draghici V., *Drept penal. Partea generală. Examinarea instituţiilor fundamentale ale Dreptului penal, potrivit dispoziţiilor CODULUI PENAL ÎN VIGOARE şi ale NOULUI COD PENAL*, Lumina Lex Publishing House, Bucharest, 2004;

Nistoreanu Gh., Boroi A., *Drept penal. Partea generală*, All Beck Publishing House, Bucharest, 2002;

Ungureanu A., *Drept penal român partea generală*, Lumina Lex Publishing House, Bucharest, 1995;

Ungureanu A., *Drept penal român partea generală*, Lumina Lex Publishing House, Bucharest, 1995;

Dobrinoiu V., Nistoreanu Gh. and collaborators, *Drept penal partea generală,* Didactic and Pedagogic R.A. Publishing House, Bucharest, 1992;

Antoniu G., Bulai C., *Practică judiciară penală*, volume II, general part, article 52 – 154 Criminal Code, Romanian Academy Publishing House, Bucharest, 1990;

Antoniu G., Popa M., Danes S., *Codul penal pe înţelesul tuturor,* Political Publishing House, Bucharest, 1988;

Antoniu G., Bulai C., *Dicţionar juridic penal*, Scientific and Encyclopedic Publishing House, Bucharest, 1976;

Cozma I., *Reabilitarea în dreptul penal al Republicii Socialiste România*, Scientific Publishing House, Bucharest, 1970;

Dongoroz V. and collaborators, *Explicaţii teoretice ale Codului penal român*, general part, volume II, Academic Publishing House of Socialist Republic of Romania, Bucharest, 1970.

[1] A. Ungureanu, op.cit. p. 439; G. Antoniu, C. Bulai, op.cit. p. 257 – 258.

MINORITY IN INTERNATIONAL LEGAL REGULATIONS

Marian Alexandru[*]

Abstract

The transgression related phenomenon among minors raises specific prevention and combat issues, due to many factors that lead to the adoption of a transgression related behavior by minors.

The juvenile criminality is an interest topic not only for specialists in education and protection, but also for those situated into the field of criminal law, criminology, sociology, philosophy, biology; in addition, it is an interest topic for many governmental and nongovernmental organizations, as well as for preoccupations of certain people with humanitarian particular initiatives.

Key words*: juvenile criminality, International Legal Regulations, minors.*

Introduction

The transgression related phenomenon among minors raises specific prevention and combat issues, due to many factors that lead to the adoption of a transgression related behavior by minors – segment of population extremely vulnerable, who are into the stage of personality development, easy to be influenced and receptive to external stimuli (positive and negative).

1. International provisions applicable to minor transgressors

The transgression related phenomenon among minors raises specific prevention and combat issues, due to many factors that lead to the adoption of a transgression related behavior by minors – segment of population extremely vulnerable, who are into the stage of personality development, easy to be influenced and receptive to external stimuli (positive and negative).

The evolution of juvenile delinquency into the contemporary context, even with certain differences from one country to another, due to frequency, tendencies and forms of action, continues to maintain in alert even the most competent international bodies, especially the United Nations, and on our continent, European Council.

The juvenile criminality is an interest topic not only for specialists in education and protection, but also for those situated into the field of criminal law, criminology, sociology, philosophy, biology; in addition, it is an interest topic for many governmental and nongovernmental organizations, as well as for preoccupations of certain people with humanitarian particular initiatives.

The preoccupations into the international community for the acknowledgement of different needs and children vulnerability as human beings have developed even from the first decades of the last century.

Thus, in 1924, to the 5th Congress of League of Nations, there was a statement adopted in five points regarding the children rights, known under the name of "Geneva Statement". An extended version was approved in 1948 by UN General Meeting and in 1959 a statement was adopted regarding the ten basic principles over the child wealth and protection.

[*] Ph.D. Prosecutor, Office of the Court of Appeal Constanta, e-mail: marian_alexandru_ct@yahoo.com

On the first international Congress for combat, prevention and treatment of defaulters of 1955, a series of minimal rules were adopted for jails and prisoners. These recommendations refer to young people and settle the principle of separating the "young prisoners" from the arrested adults, and they had been approved by the Economic and Social Council by resolution no. 603/C (XXIV) as of July 31st 1957.

The International Convention for Civil and Political Rights of 1966 has reiterated such principles, forbidding the death sentence for the persons found guilty of a crime committed when they were under 18 (art. 6.5.). The convention contains protection measures applicable to all persons on trial or arrest and it foresees that "in case of young people, the legal procedure shall be carried out so that their age is taken into account, as well as their will to rehabilitate (art. 14.4)". The convention – referred to as the Pact over Civil and Political Rights in the specialized literature – brings new principles and legal guarantees against the abusive exercise of public power, among which we can also enumerate the special procedures for minors who committed transgressions (art. 14.4) and the penitentiary status for minors (art. 10.2 letter b).

The convention against torture and other punishments or cruel, inhuman or degrading[1] treatments represent another important moment into the process of elaborating and regulating into the international legislation the treatment to those who are into the execution of an incarceration related punishment.

2. Regulations of the United Nations Organization

The United Nations Organization, an international organization headquartered in New York, adopted an active position into the field of criminal law and criminal justice.

As it was emphasized into the specialized literature, the United Nations Organization promotes "a reform process of criminal law" regarding minor defaulters.

Every five years, the United Nations Organization organizes the International Congress for defaulters' combat, prevention and treatment. The main body of the United Nations Organization with duties into the field of criminal law and criminal justice is the Economic and Social Council (E.C.O.S.O.C.), seconded in carrying out its specific activities by the regional Economic Commissions and by many other functional commissions and sub-commissions or specialized institutes made of experts, as well as by a series of other permanent or ad-hoc committees, such as the following:

The European Institute for Criminality Prevention and Control affiliated to the UN in Helsinki, Finland; UN Institute for Criminality Prevention and Defaulters' Treatment in Asia and Far East; UN African Institute for Criminality Prevention and Defaulters' Treatment, etc[2].

The first UN Congress for Crime Prevention and Defaulters' Treatment held in 1955, exemplified hereinabove, was followed by other congresses, among which we enumerate: the second UN Congress for Crime Prevention and Defaulters' Treatment held in 1960, which, among others, was in charge of new forms of juvenile delinquency, of mass – media impact over juvenile delinquency short – time incarceration, in some cases, as well as minors; the fifth UN Congress for Crime Prevention and Defaulters' Treatment, of which the topic was "Crime prevention and control – the challenge of the last 25 years", emphasizing

[1] The Convention was adopted and open to signature by the General Meeting of United Nations, by the Resolution 39/46 as of 10 December 1984. Romania ratified the Convention of November 9th 1990 by Law no. 19/1990 (Official Gazette no. 112 as of October 10th 1990).

[2] O. Brezeanu, *Minorul şi legea penală,* All Beck Publishing House, 1998, p. 68.

the efforts in finding certain sanctions which substitute the incarceration punishment, at least for the defaulters that do not affect the public peace and security, etc.

3. Beijing Regulations

In the period 14th – 16th May 1984, Beijing (China) was the host of the International Reunion for the organization of the seventh UN Congress, during which the following was discussed and settled: the project related to the set of minimum regulations regarding the administration of justice for minors, recommended by the preceding Congress and sent to the Reunion by the Economic and Social Council. These regulations – referred to as Beijing Regulations – had been adopted by the seventh UN Congress for Crime Prevention and Defaulters' Treatment held at Milan (Italy) in the period 26th August – 6th September and then approved by UN on the occasion of the 96th plenary session held on November 29th 1985, by the Resolution no. 40/33.

According to these regulations, in settlement of the cases with minor transgressors, it is common to resort to extrajudicial means, using, as much as possible, the communitarian services or other competent services, in order to avoid the negative effects of the legal procedure applied to minors. This protection is also extended over other acts committed by minors, considered by adults as being related to delinquency (absence from school, lack of discipline at school and in family, public insobriety), as well as over young adults who are defaulters, according to the age limit settled by each national legislation. The protection of minors' private life, as well as protection of young people from harmful effects of publishing in media certain data regarding their status, is also an important issue of such regulations[1].

Such regulations represent the first attempt to regulate a criminal sub-system focused on the peculiarities of the minor defaulter, on his need to socialize and to reinsert himself into the community. The document is divided in six parts.

Resolution 40/33/1985, by which such regulations were approved, settles at point 17.1 a series of guiding principles that act over the judgment and decisional act regarding the minor defaulter:

a) the decision must always be directly proportional not only to personal circumstances and needs of the defaulter, but also to the needs of the society;
b) no restrictions shall be brought to the minor's personal freedom and their limit (to the smallest extent possible) shall be made according to a close examination;
c) the individual incarceration shall only be applied if the minor is deemed as guilty of commitment of a crime against another person, or in second offence, or if there is no other convenient solution;
d) The minor's wealth must be the determinant criterion in examining his case by the competent authorities[2].

Annex to Resolution no. 40/33/1985 foresees at art. 1.3. that the members states must be involved with the purpose of taking positive measures that will ensure a complete involvement of all existent resources (especially family, voluntary persons, as well as other groups of the community, such as schools and other communitarian institutions), aiming to promote the minor's wealth and, in consequence, to reduce the intervention of the law (by decrease of the malfeasant phenomenon), so that the person involved be treated efficiently, in a fair and human manner in his conflict with the law and moral and social precepts.

[1] O. Brezeanu, op.cit. p. 73.
[2] A. L. Andrut, Combaterea delicvenţei juvenile – preocupare comună a statelor membre ale Uniunii Europene, in, Dreptul Magazine no. 4/2008, p. 256.

The art. 5 to the annex refers to two of the most important objectives of justice for minors, that is the insurance of the minor's wealth and the principle of proportionality. This principle is used to moderate the punitive sanctions and it is generally related to the seriousness of the delinquency committed. For juvenile defaulters, it is not only this seriousness that has to be taken into account, but also the personal circumstances that led to the commitment of such an act foreseen by the national criminal law[1].

At the level of Beijing Regulations, there is a visible conflict between the traditional, repressive criminal philosophy and the restitutional criminal philosophy, between rehabilitation and punishment proportional to the seriousness of the act committed, between assistance and repression, between the individual's protection and the community's protection.

Beijing Regulations oblige, by means of art. 18.1, to the regulation of a series of sanctions the more extended and flexible, so that the institutionalization be taken into account as the last solution. The following are recommended: supervision decisions, evidentiary hearing, community work, compensation and restitution, criminal fines, group counseling and group therapy, educational centers.

4. United Nations' Convention regarding the child's rights

One thing to notice is the fact that "Beijing Regulations" have also been mentioned into the preamble of the "Convention regarding the child's rights" adopted by UN General Meeting in November 1989, of which the conclusions contain the recommendation that in all decisions related to children, either they are taken by public or private social protection institutions, or by Courts of Justice, administrative authorities or legislative bodies, the priority that shall be taken into account is the uppermost interests of the child.

Romania ratified the United Nations' Convention regarding the Human Rights, by Law no. 18 as of September 28th, 1990. As a result, in 1993, the National Committee for Child Protection was founded, in charge of monitoring and promoting the Convention's application, and in the period 2-4 June 1994, the Romanian government in collaboration with the National Committee for Child Protection (C.N.P.C.) and the organization "Save the children" organized an international attendance conference with the following topic "Romania and UN Convention regarding the Child Rights".

The UN Convention regarding Human Rights is considered a revolutionary document. Among the major innovations of the Convention we enumerate the following: principles and standards used in justice for minors. Thus, art. 37 includes the principle according to which the incarceration must be perceived as the last method that one has to resort to, and the arrest should be disposed for the shortest possible period[2].

5. Riyadh principles and United Nations' Regulations for the protection of minors of whom the freedom had been obstructed

Adopted as a result of debates held on the occasion of the eighth Congress of the United Nations regarding the criminality prevention and treatment applied to the transgressor (Havana, 1990), by Resolutions no. 45/112 and 45/113 as of 14 December 1990, the principles and regulations come in completion of standard of minimal regulations in case of minors.

---

[1] A. L. Andrut, op. cit, p. 257.

[2] National Institute of Magistracy, *Justiţia pentru minori. Studii teoretice şi jurisprudenţă. Analiza modificărilor legislative în domeniu*, Universul Juridic Publishing House, Bucharest, 2003, p. 89 – 90.

The United Nations' Guide regarding the prevention of juvenile delinquency, also called as Riyadh Guide, is divided in seven sections. The first section – Basic Principles – includes a series of principles that conditions the efficiency in preventing juvenile delinquency, among which the most important are mentioned hereinafter:

a) children and young people shall be considered as partners, and not as an object of socialization or control;
b) the implementation of the Guide shall be made in consensus with the principle of ensuring the child's wealth;
c) prevention policies for juvenile delinquency shall be progressively execute the de-penalty and de-indictment of those behaviors pertaining to that child that does not create prejudice into its development and those behaviors that do not cause damage to the others.

The United Nations' Regulations for protection of incarcerated minors take into account the specific rights and needs of children and they are meant to stop the effects regarding incarceration, by ensuring the respect towards Human Rights at Minors' Chapter.

The set of rules for minors mark an important stage into the reform process in Criminal Law promoted by the United Nations regarding transgressors – minors.

UN Committee for Child's Rights elaborated in 2007 the General Comment no. 10 "Child's Rights in Juvenile Justice"[1]. The Committee emphasized the efforts of EU member states to found juvenile justice systems, pursuant to provisions of UN Convention. Nevertheless, the attention is drawn over the fact that many states, which adhered to UN Convention still have many things to fulfill to reach full conformity with its provisions, for example, regarding development and implementation of certain measures that would involve minors that are in conflict with law outside the judiciary process, compliance with their procedural rights as well as using incarceration as an exceptional measure only, since the main purpose is to reintegrate the minor into the society.

6. Regulations pertaining to Council of Europe

Council of Europe, the second international body that involves in an active manner into the problems tackled by juvenile delinquency, dates from 1949 and is headquartered in Strasbourg.

Council of Europe drafted many recommendations regarding the aspects tackled by juvenile delinquency, such as:

- Recommendation no. R (85) 11 over the victim's position into the criminal trial (Strasbourg 1985);
- Recommendation no. R (86) 4 over the violence in family (Strasbourg 1986);
- Recommendation no. 1065 of the Parliamentary Meeting of Council of Europe regarding trade and other forms of children exploitation (Strasbourg 1987);
- Recommendation no. R (87) adopted by the Council of Ministers on 17 September 1997 regarding the organization of criminality prevention;
- Recommendation no. R (87) 7 over the principles regarding spread of violent, brutal or pornographic video-programs (Strasbourg 1989);
- Recommendation no. R (91) 11 of the Committee of Ministers over sexual exploitation, pornography and prostitution as well as over the children and young adults' traffic, adopted on 9 September 1991.

[1] Adopted by the Committee for Child's Rights, at the 44th session carried out at Geneva as of 2nd of February 2007.

Every 5 years, Council of Europe carries out criminal political conferences into the field of juvenile delinquency. At present, an important place in principle related orientation of Council of Europe is represented by the idea of de- indictment of facts committed by minors and avoidance, as much as possible, of the judicial procedure used to sanction those facts committed by minors, by transforming certain transgressions in administrative deviations or transgression of civil law, so that criminal procedures shall not avoided.

Combat of juvenile delinquency represents a preoccupation of all European countries, which have to cope with the increase of violent acts committed by minors, increase of second offence, drug traffic among minors, racial and xenophobic violence, but also with an increase into the number of crimes committed by minors, with other minors are their victims[1].

Conclusions

In our country, we realize that the authorities prove a lack of continuous and active preoccupation into the alarming increase of juvenile delinquency phenomenon, as the emphasis must be put on minors' preventing to commit transgressions by means of updated and appropriate policies and which should involve the entire society into the process of forming the minors' personalities and their adopting a behavior in accordance with current legal and social norms.

An important step into the direction of law – breaking combat was the adoption of Law 272/2004 regarding the protection and promotion of child's rights, normative document that represents the legal frame regarding the compliance with, promotion and guarantee of child's rights.

In practice, it is necessary to implement, at least partially, the European programs for juvenile delinquency prevention and combat and for a normal integration into the society of transgressors and transgressors' victims, as the entire activity must be governed by the guiding principles contained into the international treaties and covenants regarding the protection of minors' rights.

Bibliography:

Andrut A. L., *Combaterea delicvenţei juvenile – preocupare comună a statelor membre ale Uniunii Europene,* in, Dreptul Magazine no. 4/2008;

National Institute of Magistracy, *Justiţia pentru minori. Studii teoretice şi jurisprudenţă. Analiza modificărilor legislative în domeniu*, Universul Juridic Publishing House, Bucharest, 2003;

Boroi A., Ungureanu G. S., *Sistemul sancţionator al minorilor într-o viziune europeană*, Criminal Law Magazine no. 2/2002;

Brezeanu O., *Minorul şi legea penală,* All Beck Publishing House, 1998;

The Convention was adopted and open to signature by the General Meeting of United Nations, by the Resolution 39/46 as of 10 December 1984. Romania ratified the Convention of November 9th 1990 by Law no. 19/1990 (Official Gazette no. 112 as of October 10th 1990).

[1] A. Boroi, G. S. Ungureanu, *Sistemul sancţionator al minorilor într-o viziune europeană*, Criminal Law Magazine no. 2/2002, p. 30.

INTERNATIONAL CONTEXT OF REGULATIONS IN THE AREA OF THE SPECIAL CATEGORY OF PERSONS WITH DISABILITIES

Alina-Gabriela Marinescu[*]

Abstract

The Preamble of the Charter of Fundamental Rights of the European Union states that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity, etc". These values are unanimously recognized for all categories of persons, including for the persons with disabilities.

Key words: *dignity, rights, persons with disabilities, inclusion in work, discrimination.*

Introduction

The policy of the European Union on human rights emphasizes the civil, political, economic, social and cultural rights[1]*. Also, it aims the promotion of rights of women and children, as well as the rights of minorities, immigrants or of special categories of persons, as, for instance, the rights of persons with disabilities.*

I. National and international approaches on rights recognized and guaranteed for persons with disabilities

Since 1970, the UN Organization has adopted a series of declarations on the rights of persons with disabilities, 1981 being proclaimed by the UN General Assembly as the international year of persons with disabilities. Also, it was decided that 3 December to be the International Day of Persons with Disabilities, celebrated under the aegis of the UN.

In the Union, the establishment of a framework meant to allow persons with disabilities to enjoy their rights represents a long term objective of the communitarian strategy for the active inclusion of such persons. The Action Plan for this special category is the center of the European Disability Strategy.

In this regard, the European Commission aims concrete results in the area of employment, accessibility and autonomy.

Proposing to approach different aspects of handicap from the perspective of human rights, EU promotes active inclusion of persons with disabilities and their full social participation. Persons with disabilities represent almost one sixth of the world population of working age[2]. Though, the employment rate among them is very low. From this reason, the unemployment of persons with disabilities is double given the unemployment registered among other categories of active population.

If it would be more supported, millions of Europeans with disabilities could integrate or reintegrate on the labor market. Lisbon Strategy on Competitiveness and Labor Market aims the increment of the low level of employment of persons with disabilities.

Starting from the orientations of the European Strategy for Employment, Member States elaborates their own policies in this area. They report annually to the European

---

[*] Lecturer Ph.D. University of Pitesti, Faculty of International Relations, History and Journalism, email: alina.marinescu74@yahoo.com

[1] E. Valcu, *Drept comunitar institutional. Curs universitar*, 2nd Edition, reviewed and amended, Sitech Publishing House, Craiova, p.110-111.

[2] European Social Charter (revised) ratified by Romania by Law 74/4 May 1999.

Commission on national initiatives in the labor market area, including on the initiatives for persons with disabilities.

EU policies in the area of social protection and inclusion support Member States in drafting policies in the area of social inclusion and services, medical care, by offering to persons with disabilities more chances in finding and keeping a workplace[1].

For the Council of Europe are permanent preoccupations[2] the protection of victims, social reintegration of delinquent or reconciliation between the victim and its aggressor, which must be individualized also in the case of persons with disabilities.

An equal access to a quality education and the possibilities of lifelong learning offers to the persons with disabilities the possibility pt fully participate in society and to improve their life standards.

Among other, the European Commission encourages the inclusion of children with disabilities in the traditional systems of education. Also, it has launched a series of educational initiatives for persons with disabilities[3]. We mention in this regard the European Agency for the development of education for persons with special needs, as well as a study group on handicap and lifelong learning. A series of communitarian programs, as the program for lifelong learning, aims the integration of education and formation of persons with disabilities in the traditional educational system.

Persons with disabilities must enjoy the possibility to independently choose and control their daily life, as well as the other types of population. Also, care and support services must be better adapted for the needs of these special persons.

Our national legislation[4] settles the following categories of rights for persons with disabilities:

- health protection – prevention, treatment and recovery;
- professional education and training;
- occupation and adaptation of the workplace, professional orientation and reconversion;
- social assistance, *i.e.* social services and social performances; The right to social assistance in the form of social performances shall be granted upon request or *ex officio*, for persons possessing a handicap degree certificate who is on the list of the institution or upon request, for persons who submit their file for the first time. The right to social assistance in the form of social performances is offered upon request. The application together with the mentioned documents, for social benefits and facilities, is submitted by the person with disabilities/legal representative/tutor/personal assistant/ personal professional assistant.
- dwelling, arrangement of the surrounding personal life environment, transport, access to the physical, informational and communicational environment;
- spending of free time, access to culture, sport, tourism;
- legal assistance, etc.

The *categories of beneficiaries* of social performances and facilities for persons with disabilities are:

---

[1] Recommendation No R (87) 22 of the Committee of Ministers to Member States on the screening and surveillance of elderly persons.

[2] Nechita Elena-Ana, *Criminalistică. Tehnică şi tactică criminalistică,* Pro Universitaria Publishing House, Bucharest, 2009, p. 102.

[3] Council Recommendation of 27 July 1992 on the convergence of social protection objectives and policies (92/442/EEC).

[4] Law No 448/2006 regarding the protection and promotion of the rights of disabled persons, republished, and Decision No 89/2010 for the modification and amendment of the Methodological Norms of application of Law No 448/2006, approved by Government Decision No 268/2007.

- Adults possessing a handicap degree certificate issued by the evaluation commission of adult persons with disabilities or a valid decision issued by the superior evaluation commission of adult persons with disabilities.
- Children possessing a valid handicap degree certificate issued by the child protection commission.
- The person who care, survey and maintain a child with disabilities.
- The person with disabilities who care, maintain and survey a child (with or without disabilities) and has no incomes besides those stated by Art 57 Para1 Point 1), namely the monthly indemnity offered regardless of other incomes, different for each degree of handicap.

II. Major issues facing persons with disabilities in Romania

A recent report of the Romanian Academic Society shows that, in Romania, persons with disabilities face major obstacles in their employment. In addition, sub-evaluation of work capacity and the lack of professional qualifications lead to a vicious circle of exclusion of the labor market of over 80% of the persons with disabilities. Those who succeed to employ denounce different forms of discrimination from their employers or co-workers.

The employment rate of disabled persons is significantly lower than the general population, thus jus 12,7% of the disabled persons aged between 18 and 55 years have a workplace, at a distance of more than 57 percentage points from the employment rate of the general population of the same pattern of age. The unemployment rate is twice bigger for these persons, even if, in the past few years, was registered a positive dynamic of the employment rate of disabled persons. The main factor influencing the employment of disabled persons is education, and from this perspective, the Romanian educational system creates major disadvantages for this category of persons.

In a different context, another study emphasized that limited enrolment and abandonment of school is seven times, respectively twice higher for disabled persons than for general population, the most disadvantaged group regarding access to education being formed by persons with serious physical, somatic or visual disabilities, coming from rural. The quality of education in segregated education or education at home is being perceived as weaker and weaker.

Also, persons with disabilities have significantly lower incomes than the general population, the net average salary being almost 65% of the national average. The most invoked reason by the disabled persons for which they do not search for employment regards medical issues. The conditioning of receiving social performances due to labor capacity proves to be a counter-incentive for retuning on the labor market.

From the perspective of employers, were noted, at least on theory, positive reactions regarding this category of employees, but more reticence regarding their actual employment. The reasons invoked by employers include preoccupation for a lower productivity, the necessity of a more careful supervision and the high probability of absences caused by medical issues. Yet, employers with experience on disabled persons have not confirmed these fears; on the contrary, they mentioned a powerful motivation of these persons in performing professional duties.

Discrimination represents another major issue faced by persons with disabilities. The poll registered an extremely low percentage of respondents who have felt discriminated. Though, it must be noted the high number of non-respondents, that reaches 70% of the Roma women with disabilities. The higher incidence belongs to discrimination in public spaces, by neighbors and on employment.

III. The role of church in improving the debated issue

If at the national level policies and strategies for persons with disabilities must be implemented, the church can manifest in this regard by activities aiming social inclusion, medical assistance and social services for elderly persons, persons with handicaps, as well as for every person found in need by involving all decision makers, central and local administration authorities.

Through these actions performed by church shall contribute to the increment of the degree of tolerance of citizens for persons with disabilities and to the change persons' mentalities.

We thus hope that it will contribute to reduce the risk of social marginalization or exclusion of persons with disabilities, as well as to the consciousness of all citizens that disabled persons are a resource insufficiently used, and certainly not a burden.

Conclusions

We consider that for the existence of a state of law is not enough just a legal mechanism guaranteeing the rigorous respect of the law, but is also necessary that this law have a certain content, inspired by the idea of promoting human rights and freedoms in the most authentic liberal spirit and of a large democracy, rights guaranteed for all categories of persons, including those with disabilities.

On the other hand, any society must prove tolerance for persons with disabilities promoting policies to change mentalities.

Last but not least, European Union recognizes and respects the right of persons with disabilities to benefit of measures insuring their autonomy, social and professional integration, as well as the participation to community's life.

Bibliography:

Nechita Elena-Ana, *Criminalistică. Tehnică şi tactică criminalistică,* Pro Universitaria Publishing House, Bucharest, 2009;

Curs universitar, 2nd Edition, reviewed and amended, Sitech Publishing House, Craiova;

Law No 448/2006 regarding the protection and promotion of the rights of disabled persons, republished, and Decision No 89/2010 for the modification and amendment of the Methodological Norms of application of Law No 448/2006, approved by Government Decision No 268/2007;

European Charter of Fundamental Rights adopted on 7 December 2009;

European Social Charter (revised) ratified by Romania by Law 74/4 May 1999;

Council Recommendation of 27 July 1992 on the convergence of social protection objectives and policies;

Recommendation No R (87) 22 of the Committee of Ministers to Member States on the screening and surveillance of elderly persons.

THE RELATION BETWEEN THE STATE AND LOCAL AUTHORITIES IN THE APPLICATION OF EU LAW[1]

Mătușescu Constanța*

Abstract

This paper aims to approach a series of aspects related to the relations established between the state and sub national authorities in the application of EU law, in the context of the current debates taking place in Romania regarding decentralisation and the administrative-territorial reorganisation.

Keywords: *EU law, institutional autonomy, decentralisation, local authorities, responsibility.*

Introduction

The application of EU law in the national law systems of Member States has received an increased attention in the last decades. The institutional autonomy that Member States have and their legal responsibility in case of infringement of EU law, regardless which state institution was at the origin of the infringement, rises, however, a series of issues as regards promoting the principles of decentralisation and local autonomy on a national level.

Public administration – a national prerogative

The obligation of applying the EU law belongs mainly to Member States. The state needs to ensure the effective and uniform application of EU law on its territory.

According to art. 4.3 from the Treaty on EU, 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

The community's loyalty clause means states need to acquire the necessary means to fulfil the obligations that incur them according to EU law.

However, according to the Court of Justice, in using their competencies, states benefit from institutional and procedural autonomy, which means they remain the ones deciding the conditions in which primary and derived law is applied in their legal systems.

Absent from the constitutive community treaties, but considered a fundamental principle of EU law order system[2], the principle of institutional autonomy of Member States - that gives states the freedom to choose the authorities in charge with applying EU law, is the result of EU jurisprudence that identified this principle in the *International Fruit Company*[3] case and then later reiterated it numerous times, confirming its importance. Thus, the Court considers that "when the dispositions of the treaty or of the regulations acknowledge rights to Member States or impose them obligations of applying EU law, the issue of knowing the

[1] This work was supported by CNCSIS-UEFISCSU, project number PN II-RU, code 129, contract 28/2010

*Ph.D. Lecturer, Valahia University of Târgoviște, The Faculty of Law and Social And Political Sciences, constanta_matusescu@yahoo

[2] Laurent Malo, *Autonomie locale et Union européenne*, Bruxelles, Bruylant, 2010, p. 369.

[3] CJEU, 15th December 1971, *International Fruit Company*, Cases 51-54/71, Rec. p.1116.

manner in which these rights and the compliance to these obligations is trusted by Member States to certain authorities depends only on the constitutional system of each Member State".[1]

Therefore, it does not depend on EU law if the application of legal instruments adopted by EU institutions is in the hands of the legislative or executive authorities of Member States, if it is trusted to central or local authorities or even to agents or bodies more or less autonomous from the state or from local authorities. Member States can even trust a natural or legal entity of private law with the application of EU law, provided that it has the means to ensure that this natural or legal entity complies with its mission respecting EU law[2]. It is indeed considered that "it is up to Member States' authorities, be it central authorities, authorities of a federated state or other territorial authorities, to ensure compliance with EU rules within their competencies".[3] The Court concluded that this principle is applicable even in matters in which the EU is exclusively competent.[4]

It's not only the choice of competent internal administrative authorities, but also that of the competent national jurisdictions that is subjected to the principle of institutional autonomy[5], the Court stating that "it is up to the legal system of every Member State to designate the competent jurisdiction for settling litigations involving individual rights, derived from EU law order, inferring though that Member States are responsible for ensuring that these rights will be effectively protected, in all cases".[6]

The institutional and procedural organising of a state thus needs to always be compatible with EU demands. The necessity to ensure a uniform application and to guarantee an efficient protection of rights that flow from EU rules means that regardless of the independence level of the bodies trusted with applying the legislation or policies of the Union, the state needs to remain responsible towards the Union for the effectiveness of this application and for respecting the principles and rules established in treaties, in the jurisprudence of the Court of Justice of EU and in derived law. [7] At the same time, Member States incur liability for damages caused to individuals as a consequence of an infringement of EU law, as concluded in the *Francovich*[8] decision and in the jurisprudence following and based on it[9], regardless which is the state body author of the infringement.[10]

The administrative organising of EU Member States is thus a national prerogative, object of states exclusive competency. A natural extension of the institutional and procedural autonomy principles in a jurisprudential manner is the inclusion in the Lisbon Treaty of the obligation of respecting the national identity of Member States. According to art. 4.2. of

---

[1] Idem.

[2] Jacques Ziller, *Exécution centralisée et exécution partagée*, in *L'exécution du droit de l'Union, entre mécanismes communautaires et droits nationaux*, coordinated by Jacqueline Dutheil de la Rochere, Bruxelles, Bruylant, 2009, p. 126.

[3] CJEU, June 12, 1990, RFG / Commission, Case C-8/88, Rec. p I-2321 and following, point 13.

[4] CJEU, *Sukkerfabriken*, Case C-151/70, Rec. p. 1.

[5] CJEU, 19th December 1968, *Société Salgoil Ministère du commerce extérieur de la République italienne,* Case C-13 /1968, Rec. p. 661.

[6] CJEU, 9th July 1985, *Percarlo Bozzetti / Invernizzi SpA*, Case C-179/1984, Rec. p. 2301, point 17.

[7] Jaques Ziller, op.cit. p. 127.

[8] CJEU, 19th November 1991, *Francovich and Bonifaci*, Cases C-6/1990 and C-9/1990, Rec. I-5402

[9] The principle of states' liability for infringement of EU law is acknowledged since the 1960's, as CJEU jurisprudence expressed conclusions in the line of obliging states to damage repair. In the *Humblot/ Belgium* case (C-6/60 ECR 559), the Court considered that if she "concludes in a decision that a legislative or administrative rule coming from a Member State's authorities does not comply with EU law, this state is obliged, according to article 86 from the ECSC Treaty, to revoke the act in question and repair the illicit effects that it caused".

[10] CJEU, 5th March 1996, *Brasserie du pêcheur* and *Factorame*, Cases C-46/1993 and C-48/1993, Rec. p. I-1029.

TEU, "The Union respects Member equality in relation with the treaties, as well as their national identity, inherent to their fundamental political and constitutional structures, including their local and regional autonomy (...)".

The absence of EU rules regarding the administrative organising of Member States and the express mentioning in the Lisbon Treaty of the obligation to respect their national identity as regards their political and constitutional structures[1] (what doctrine calls "national identity clause"[2]), gives every state full control of their constitutional and administrative way of organisation. The Union can't even influence the repartition of competencies between the state and sub-national authorities, neither can it impose a state a change in its form of government.[3] At the same time, this disposition of the Lisbon Treaty leads to a vast diversity in the ways of organising decentralised administrations in Member States.

Integration effects on the administrative organising of the state

Despite Member States' autonomy regarding their political and constitutional organising, the process of European integration led to a series of *transformations as regards the relations between national institutions, the administrative organising of the state and the responsibilities of public administration.*

It is considered by doctrine[4] that there are three main ways through which the European Union influences national public administrations. Firstly, there is the important role that national administrations have as agents responsible with the application of EU rules. Secondly, the European integration has a considerable influence on national public policies, Member States' administrations facing the possibility of having to change or give up certain existing public policies, as a result of decisions taken on the European level, having to adapt certain traditional instruments of governing or having to reorganise structures and procedures. A third influence regards the adaptation process of national administrations as a consequence of its practical involvement in the European decision-making process, by creating structures and mechanisms that are aimed to optimise this representation process.

As the European integration process progressed, an important part of the decisional power has been transferred to the supranational level, in parallel with an increase in local autonomy and thus of local authorities' power, which led to confusing states' political and law systems. The role of national states has decreased in favour of a coalition of sub-national and supranational forces, ending it's monopole on the link between internal and international policies. The necessity to define the relations between national authorities and the other two levels of authority has thus appeared, although the power of the state has not considerably weakened, as it developed new governing instruments through which it can position itself in the centre of the relation with both supranational authorities and sub-national ones. If internally, these instruments meant mainly delegating authority from the central to the local level (through administrative *deconcentration*), on the European level a type of governing has been developed, one that guarantees the co-operation between the different levels of authority via the concept of ***governing on multiple levels*** defined as representing a *set of*

[1] Mainly as a response to some Member States' fears that their national identity will be diluted once the European integration process progresses (Marie-Claire Ponthoreau, *Constitution Europeéenne et identites constitutionnelles nationales*, the VIIth World Congres of the AIDC, Athens, 11-15 June 2007, http://www.droitconstitutionnel.org/athenes/ponthoreau.pdf).

[2] Laurent Malo, op.cit. p. 349.

[3] Francois Xavier Priollaud, David Siritzky, *La constitution européenne.* – *Texte et commentaires*, Paris, La Documentation française, 2005, p. 43.

[4] Hussein Kassim, *The European Administration: Between Europeanization and Domestication*", in Governing Europe, Oxford Scholarship Online Monographs Publishing, 2003.

principles and instruments of decision making, in the presence of multiple actors and decision-takers in the EU: European institutions on the EU level, national governments and parliaments on the Member States' level (national level), regional and local authorities on a sub-national level, as well as other actors, such as private interest groups, social partners, civil community.[1]

That being said, paradoxically, neither the process of Europeanization, nor the administrative decentralisation led to a diminishment of national authorities' interventions, as they continued to have the main coordinating role, both as regards ensuring a certain cohesion between local authorities, and in the sense of ensuring a uniform application of EU law.

While national authorities no longer have the competence to apply EU law in transferred domains, as an effect of decentralisation, they still have the power to coordinate the application of European policies and to control decentralised authorities, the existence and well functioning of a centralised coordination system of various ministries and/or of different regional and local bodies being an essential condition for a good application of EU law by Member States, as the European Commission states. [2]

Liability for applying EU law and its effects on the internal repartition of competencies

The extension of EU competencies and the multiplication of EU policies led to a significant increase in the number of EU laws that are applicable to all subjects of law under Member States' jurisdiction.[3]

Local authorities, just like any other subject of internal law of Member States, are obliged to respect EU regulations that concern them[4]; they also have the right to invoke the aforementioned regulations in their favour or in their defence in front of national courts or even, in certain cases[5], in front of the European court. However, local authorities have a special position as agents responsible with the application of EU law. As regards the loyalty obligation that imposes states to guarantee the uniform application of EU law on their territory, local authorities are public authorities whose actions can incur the state's liability in front of the European jurisdiction, actions that, just like any other component of the administration, need to give priority to the application of EU law when national dispositions are contrary. European jurisprudence admits the possibility for local authorities to directly apply EU law, meaning to apply this law without it having been previously transposed on a national level. According to the Courts' jurisprudence, "*administrations, including regional ones, have the obligation to apply the dispositions of art. 29, ¶ 5 from the Directive 71/105 of the Council, leaving national dispositions that are contrary to EU law, unapplied"*.[6]

Inappropriate application of an EU law by a local authority will incur the state's liability, and not that of the local entity, without having the possibility to invoke the

[1] White paper on European governence, COM (2001) 428.
[2] Idem.
[3] The Council's and Parliament's regulations that have a direct effect and the directives with sufficiently precise dispositions can create rights for Member States nationals, rights that can be invoked in front of national jurisdictions. Same for numerous decisions of the Commission that can influence the decisions or behaviours of these subjects of law in their competency domain (such as in the domain of competition or the proposals regarding the uniformity of private law).
[4] Considering that 50% of EU's legislative documents regard local authorities, according to the Committee of the Regions.
[5] As regards, for example, state aid.
[6] CJEU, 22 June 1989, *Fratelli Constanzo*, Case C-103/1988, Rec. p. 1839.

autonomy of the respective local authority.[1]This responsibility of the state for regional and local authorities led to a tendency of *centralisation* of competencies of applying EU law[2] which considerably reduced the freedom to act of local authorities that ended up under the control of the state in all their EU related competencies. Under the supervision of the Union's institutions, the state became a sort of "guardian" of local authorities. In other words, the European integration has more of a centralising effect rather than one in favour of decentralisation and local autonomy, from the point of view of the mechanisms of application of EU law.

The administrative decentralisation process in Romania and the application of EU law

For Romania, European integration was the main factor of change for the socio-political system after 1989, a process that meant adapting to European standards and full mobilisation of administrative, economical, political and social capacities, all aimed to optimise the Europeanization process. "The Europeanization of Romanian public administration had, till now, an irregular course, concrete effects being relatively invisible, despite some projects for administrative reforms and a legislation that sought and continues to seek to align itself to European standards".[3]

The process of European integration cannot be seen as directly favourable to administrative decentralisation in Romania. As it is observed by doctrine[4], in Romania, like in most states that recently joined the EU, the accession process led mostly to the consolidation of the executive power, by establishing a "supreme executive", and less to that of the legislative or regional actors' power. Moreover, in the accession process, the EU hesitated to give recommendations on institutional design, focusing more on procedural recommendations that, in a way, conditioned the institutions to become more democratic and to, at their turn, disseminate democratic practices.

Romania continued to remain a state with an emphasised administrative centralisation, in which the management of important public services, such as education, health, public order, transport, is mainly in the care of national authorities (central level), making the sharing of responsibilities between the national and local level difficult. The state, via its ministers, agents, autonomous administrations and deconcentrated structures, still controls a multitude of aspects of the socio-economic life. Moreover, the state considers local authorities and their budget as an extension on a local level of the national administration and the national budget.

Two observations can be made as regards the Romanian state's attitude regarding the need to apply EU law. Firstly, *there is a lack of effective co-operation between central and local authorities as regards the application of EU rules,*[5] as the state prefers to strengthen its central role through the competencies given to the deconcentrated authorities in

[1] Recent jurisprudence of the CJEU acknowledges the possibility for local authorities disposing of an important autonomy to share responsibility together with the state (the *Konle* decision from 1st June 1999, C-302/1997, Rec. p. I-3099; *Haim* decision, 4th July 2000, C-424/1997, Rec. p. I-5123; *Unión General de Trabajadores de La Rioja* decision, Causes C-428/2006 to C-434/2006).

[2] Laurent Malo, *op.cit.* p. 411-412.

[3] Amanda Bosovcki, *Administrația publică în România între europenizare și rezistență la schimbare,* in Sfera Politicii, no. 131 – 132, p. 76 – 88 (http://www.sferapoliticii.ro/sfera/131-132/art12-bosovcki.html).

[4] Heather Grabbe, *Puterea de transformare a UE, Europenizarea prin intermediul conditiilor de aderare în Europa Centrala si de Est,* Epigraf Publishing House, Chisinau, 2008, p. 221.

[5] Constanța Mătușescu, *Considerații privind aplicarea dreptului Uniunii Europene la nivelul autorităților locale,* in RRDC no. 2/2010, p. 110 – 121.

this domain. But, deconcentration, as the well known professor Ioan Alexandru[1] rightfully states, is not just a "controlled decentralization" like some authors believe, but more of a "disguised centralization", since public deconcentrated services, functioning under the prefect's authority, have no organic relation with the local authority, doing nothing other than implementing public policies of the central authorities. Also as regards the implementation of the European policy that refers directly to local authorities – the cohesion policy, Romania chose a *centralised model for implementation,* in which the operational programmes are managed by ministers and implemented by deconcentrated authorities, and not a decentralised model, successfully applied in other states that can now pride themselves with outstanding performances in fund absorption (Spain, Portugal or Sweden), in which the management attributions of regional policies are shared between central or regional or local authorities. Today, the collaboration between counties, Regional Development Agencies and the competent ministries remains very vague.[2] The limits of this model have been emphasised by the recently discovered malfunctions in the use of structural funds by local authorities (mainly by city halls and County Councils), having as consequence the suspension of payments for the respective programs by the European Commission.

On the other hand, *the recently triggered decentralisation process did not integrate the issue of application of EU law by entities benefitting from local autonomy.* The evolution, on a European level, of the conception regarding the executive function of the state as regards the application of EU law and the necessity for a strong co-operation between all levels of administration, is too vaguely found in the proposals for administrative reforms formulated in Romania.

As regards administrative decentralisation, a process of reflection has recently started regarding spatial development and, implicitly, regarding *regional* development in Romania, mainly aiming to connect the issue of spatial development to the conceptual frame, the territorial and physical support and the time frame taken into consideration in the EU zone. It is believed that the current framework for applying and evaluation of the regional development policy, represented by the eight development regions, is not the most appropriate in this sense. Moreover, the structural premises for harmonious development of territories, in the current European context, question current counties' capacity to be true agents of economical development. The options taken into account aim to either maintain the administrative organisation on two levels, current counties having to organise themselves in bigger administrative-territorial units, like today's development regions, or the establishing of a third level, a regional one, that would ensure a better consideration of specificities and of the level of economical development of the national territory.[3]

Without doubt, the consolidation of the regions and the state decentralisation continue to be fundamental to the European political construction and the most appropriate way to keep up with the world's economical, social and cultural transformations. On the other hand, there is an undoubted necessity for an administrative reform in Romania, but this *represents an internal decision and does not derive from a political orientation of the European Union.* The administrative reorganisation should lead to a better management of

[1] Alexandru I. *Consideratii privind necesitatea modernizarii administratiei*, in Drept Public Magazine no. 2/2007.
[2] As it also results from the Report of the Presidential Comission on the Analysis of the Political and Constitutional system in Romania.
[3] This idea results also from the document – *Conceptul strategic de Dezvoltare Teritorială România 2030* (CSDTR). It was elaborated as basis for the correlation between a territorial development strategy and the ongoing process of European fund absorption. The fundamental objective of the Strategic Territorial Development Concept is 'Romania's integration in the EU through the affirmation of regional-continental identity, the increase in spatial cohesion and the lasting territorial development'.

European funds, but in Romania's current state, the issues that arise are diverse and do not only regard the establishment of new administrative levels, but mainly a repositioning of competencies and responsibilities between the central and local level of authority. The real stake is thus the decentralisation, meaning the transfer of competencies from the state level to the smaller territorial structures, closer to local authorities, but still big enough (as population, surface) to be economically competitive.

Local authorities in Romania demand, besides emphasising the internal process of decentralisation, a closer consideration of their interests by central state authorities. We cannot currently discuss of a real and systematic co-operation on a national level between the government and local authorities in defining strategies and positions regarding European affairs. Not even the recent establishment of the Ministry of European Affairs seems to resolve this situation, considering that at least for the moment, the minister in charge with coordinating European affairs is not dealing with the *local level of applying EU law.*

As regards the application of EU law, the administrative reform that is prefigured in Romania can raise a series of extra complications in the relations between central and local authorities, as the influence of material law of the EU on local authorities depends on the defined competencies that the national legislation gives them. As a result, the extension of local authorities' competencies raises their sensitivity to the application of EU law and thus the risks of noncompliance, with the consequence of incurring the states' liability towards EU institutions. Facing this perspective, it is necessary to find a balance between the obligations and responsibilities that flow from EU legislation, on the one hand, and the national system's own principles of repartition of executive competencies, on the other. Strengthening the administrative guardianship that the government applies through the prefect can be a solution in this matter, but not a sufficient one, as local authorities' rulings can be suspended or cancelled through this mechanism, but they cannot be forced to act, which can be necessary in order to comply with EU obligations. As regards the degree of decentralisation (including financially) that will be achieved as a consequence of implementing the foreseen reforms in the Romanian administrative system, *mechanisms of responsibility of local authorities for the financial consequences of infringements that they cause to EU rules* can be established, following the model, for example, that has been established in the domain of European funds, by adopting the Emergency Ordinance no. 66 from 29th June 2011 regarding the prevention, reporting and sanctioning of malfunctions in obtaining and using of these funds and/or of afferent national public funds. [1]

Conclusions

Although EU Member States are acknowledged full independence in their choice of internal organisation for the effective and uniform application of EU law on their territory, the obligation of result that they incur from this point of view and the impossibility to prevail from their internal organising to justify an improper application of EU law led to an increased supervision of the state on its local authorities, often affecting their autonomy levels. In Romania, this issue can become problematic, considering that the transformations that happen regarding the internal repartition of competencies as a result of decentralisation or foreseen administrative reform, are not in agreement with EU law.

[1] Published in Monitorul Oficial al României no. 461 from 30th June 2011.

Bibliography:

Laurent Malo, *Autonomie locale et Union européenne*, Bruxelles, Bruylant, 2010;

Constanța Mătușescu, *Considerații privind aplicarea dreptului Uniunii Europene la nivelul autorităților locale,* in RRDC nr. 2/2010;

Jacques Ziller, *Exécution centralisée et exécution partagée, in L'exécution du droit de l'Union, entre mécanismes communautaires et droits nationaux*, coordinated by Jacqueline Dutheil de la Rochere, Bruxelles, Bruylant, 2009;

Heather Grabbe, *Puterea de transformare a UE, Europenizarea prin intermediul condițiilor de aderare în Europa Centrală și de Est*, Epigraf Publishing House, Chisinau, 2008;

Amanda Bosovcki, *Administraţia publică din România între europenizare şi rezistenţă la schimbare,* in Sfera Politicii, nr. 131-132/2007 ;

Ioan Alexandru, *Considerații privind necesitatea modernizării administrației,* in Drept Public Magazine, no. 2/2007;

Hussein Kassim, *The European Administration: Between Europeanization and Domestication",* in Governing Europe, Oxford Scholarship Online Monographs Publishing House, 2003.

ALTERNATIVE CARE FOR THE MINOR DEPRIVED OF THE FAMILY ENVIRONMENT

Ilda Melo[*]

Abstract

Alternative care is provided to be a social and legal solution for children's welfare when for different reasons they are deprived of the family environment. In this paper will give the social and legal overview of foster care, as a new alternative care in the Albanian reality, its advantages in the backgrounds of the Albanian reality and the state's role.

Key words: *foster care, foster family, guardianship, minor, standard, service.*

Introduction

The human rights, their observance and protection in the evolving human society comprise now the basic principles on basis of which the corpus of the international law is built up. Among them, recently it is always noticed a greater emphasize on protection of children rights, recognized by law, since the moment of their birth, but unable to be exercised by them until they become adult. There are the parents of the child who, by exercising their parental responsibilities, are able to achieve their rights and accomplish their duties acting like his legal representatives. But we often can be found in a situation when these children are outside the parents care because of the inability of their natural parents to exercise the parental responsibility.

Legal framework of foster care service

The lack of parent care and consequently of the legal representative in relation to third parties put at stake the minor to achieve his rights. Finding the alternative care for them is one of the great challenges for the society.

In the Albanian reality, after the years 90', we are found evermore before the negative consequences derived from social phenomena faced by the Albanian society nowadays. Unemployment, extreme poverty especially in rural or mountain areas, immigration, social familiar conflicts, divorces comprise some of the social phenomena, which have negatively influenced on increase of the number of children remained outside the parent care.

Mostly, they are placed under the informal care of their relatives at best or are found abandoned in the street, thus exposed toward criminality and prostitution at worst.

Unfortunately we don't have any accurate records related to the number of children outside the parent care who are under informal care. The majority of them are under care of their relatives which de facto take care of the minors, without having the legal custody over them. Another part of them, due to unchecked immigration of people from mountain areas to urban populated areas, results to be still unregistered in the civil registry office.

Accordingly, these categories can not benefit from social services provided. Regarding the minors' care records in the formal system, the State Social Service estimates that, in comparison with other countries of the region, Albania has a small number of children living in residential institutions but the phenomenon has a tendency to get higher, meanwhile the children categories have changed as well. In 1994, the number of children

[*] Dr. Law Faculty, Tirana University, Civil Department, e-mail: ildamelo@yahoo.com

under residential care was about 400 and the majority of them were abandoned children since birth and biological orphans. Records in 2011 indicate that the number of children in children's care institutions is increased thrice in comparison with the year 1994 and that the majority of the children are "social orphans"[1] and "children with social problems".

The increasing number of minors outside the parents care and the social issues borne by this phenomenon obliges the Albanian lawmaker and executive structures to reform the social custodial system. Based on the child's highest interest principle, UN Convention on the child rights lays emphasis on taking of appropriate executive and administrative decisive measures for protection of rights of the children outside the parents care.

The Albanian lawmaker has applied this principle through legal provisions in legislation starting from constitutional provisions. art. 54 and 59 of the Albanian Constitution provides for the assurance of a special protection for social vulnerable categories such as mothers or children, elders etc. The Albanian lawmaker has selected the guardianship among other alternative forms of caring, such as adoption, as a legal solution for protection and representation of minors in relation to the third parties. The legal adjustment of this institute is treated in provisions of the Family Code and by-laws for its enforcement.

The new Family Code of 2003 brings a rage of innovations with regard to social care system toward the minors outside the parent care in Albania. Among them, we can mention the introduction for the first time of the foster care for minors outside the parents care in foster families, as one of the legal guardianship forms.

The Foster Family Concept[2] is also a new concept introduced in the Albanian legislation (art. 266 of Family Code) as an alternative family from that of origin for minors outside the parents care.

The establishment of the minor in a family, whose members have not any blood or gender link with the minor, may comprise the right familiar environment for growth and education for as long as the family or their parents solve the problems.

This form of care in any case is a legal provisional solution, mostly applicable for children who live in families with social problems. But taking into account that the natural family is the best familiar environment for growth and development of the child, this alternative form of care has as a primary purpose the preparation of the child to return to the family of origin in the moment when, this family has succeeded to solve the problems that have caused the inability to take care of the minor.

If this is not possible, this form of care will serve as a provisional solution until a permanent solution as may be the adoption of the minor, his establishment under the care of relatives or preparation for an independent living once he reaches the adulthood.

In the historical view, the guardianship of the minors is called "kindness of strangers". A form of the informal fostering was traditional among the Celtic and Nordic people which involved te placing of children in each others families. The form of formal fostering was meant in France in 1450, for infants moved out of the huge residential nurseries and placed mainly in the countryside with nurses. They were paid by the State and expected to keep children at least up to the age of 12. This form of fostering was practice even after the Second World War with the full practices of the formal form of fostering.

In Albania, we do not have any genuine experience regarding the establishment of minors under the care of foster families. There has existed the popular form, mostly informal,

[1] Social orphans are considered the minors outside the parent care, whose natural parents live but due to physical or financial reasons are not able to take care of them.

[2] Article 266 of FC: "Foster family is an alternative family decided by the court in order to provide the child with a familiar environment, conditions for good growth, physical care and emotional support".

of guardianship provided from the relatives of the minors remained outside the parent care, and this is due to traditional customs inherited especially in the mountain areas of the country.

Actually the forms of alternative care provided for in provisions of the Albanian legislation are supplemented, in order to be more flexible toward the needs and features of personality of the minor remained outside the familiar environment, such as kinship provided from relatives, foster families, community organized in form of family houses (SOS village), form of care provided in day care centers (few hours a day, mainly as a support to vulnerable families), residential care provided from public or private care institutions etc. Among the abovementioned forms, the foster care is given an increasingly higher priority, given the advantages borne in comparison to forms of care provided from relatives and particularly from institutional care.

We can mention as follow:

- Better fulfillment of the their personal needs,
- Include the family of origin in their talks with the child and encourage visits in order to help sustain the child identity and self- esteem.
- Help the child overcome possible emotional or behavioral difficulties.
- Collaborate with social work services to help prepare the child for the return home or, exceptionally, a move to adoption or independence.

In the Albanian reality this type of service is at an experimental stage. In the legal aspect, it is established a better legal grounds by way of provisions in the family code but we should assert that provisions though innovative remain generic in the legal regulation of this service. The lack of by-laws that provide forms, means and procedures to be followed up and what's more important, its monitoring procedures compromise seriously the process. Actually the challenge to be faced by the Albanian lawmaker is to complete the legal package, which will enable to provide the necessary basis for implementation of this alternative care form.

Role of the Albanian State in providing this service

For purpose of accomplishing the obligations derived from the Association Stabilization Agreement (ASA) signed in June 2006 with the European Union, coming into force in 2009, on the framework of drafting social and economic policies, the Albanian government approved the National Development and Integration Strategy. An Integral part of this strategy is the Sectorial Strategy of Social Protection and the action plan for its implementation. In this aspect, the Policy Document on Guardianship of vulnerable Children lays emphasis on promotion and implementation of new alternative forms of care of minors outside the parent care, as it is the establishment of minors under the care of foster families[1].

Foster care service in substance comprises the provision of a special protection of minors from the government, when their parents are not able to exercise the parental responsibility. The success of this service lays down in the well-coordinated cooperation of his direct actors: the minor, family of origin and foster family under the supervision of indirect actors of this service, providers of the foster care service and the court.

Even in this aspect the Albanian experience has not many to tell. By referring to the experience of the countries where this service is applied, such as offices and departments of social aid and service attached to municipality/commune, community social centers,

[1] Decision of the Council of Ministers no. 1104, dated 30.07.2008, on some additions of the decision no. 80 dated 28.01.2008 of the Council of Ministers, on approval of the Sectorial Strategy of Social Protection and the action plan for its implementation.

organizations or agencies licensed for providing this service, and the juvenile court in the minor's residence.

It is envisaged that such similar structures at local levels together with the state Inspectorate of social services, ministry of finance and ministry of labor, social affairs and equal opportunities enable at central level the implementation of the right legal procedures for establishment of the minor under care of the foster family.

Provision of monitoring and control system of foster care service in foster families, approved recently, close somehow the gap in the Albanian legislation. It is provided that control and monitoring, being necessary elements of the process in support of assurance of children welfare, will be the duty of the "provider of foster care service". They aim at observing the extent of fulfillment of the child needs, provision of psycho-social support for the foster family and its members, as well as for the child placed under guardianship as well.

Provision of complaint procedures against actors that are part of this service, i.e. children, biological families or foster families and any other third person acting in the name of the child at the service provider and further in court or prosecutor's office, comprises a safety element for the minor from abuses or violation of their rights.

Conclusions

In order that this process succeed in its goal, that is the temporary and optimal replacement of a familiar environment for good growth, education, normal development of the minor personality, we should make legal amendments in the actual legislation and in the following administrative measures. This service cannot be provided without the financial support of the state and private providers of this service. Actually, there has not been approved any payment for the foster families, and this will put at risk the success of this service.

We suggest as necessary the amendments in Law no. 9355, dated 10 March 2005, "on economic aid and social services" including, except the service provided form the residential centers, the service provided from foster families, as part of the system of social care services for which the state is liable to provide the necessary financial support.

The legal tendencies indicate the importance paid to the managing role of the provider of the foster care service. We suggest that it is necessary to take the administrative measures for enhancement of professionalism of the social employees, deemed as essential for the positive impact this service.

Bibliography:

Official statistics of the state social service 1994-2011;

Order of the Minister of Labor, Social Matters and Equal Opportunities no. 830, dated 14.4.2008 on implementation of the standards of the social care services for children in public and non-public residential institutions, standards that are defined by DCM no 659, dated 17.10.2005, on standards of the social care servile for children in residential institutions.

Decision of the Council of Ministers no. 1104, dated 30.07.2008, on some additions of the decision no. 80 dated 28.01.2008 of the Council of Ministers, on approval of the Sectorial Strategy of Social Protection and the action plan for its implementation;

Evaluation of the Care Service to the Children and of institutions for children without the parent care – research report financed by UNICEF, Albania, October 2005;

Family Code of the Republic of Albania, 2003;

Constitution of the Republic of Albania approved in 1998;

Convention of the Un Assembly "On Children's Rights", approved in 1989, ratified by the Albanian Assembly on 1992.

THE INCRIMINATION OF THE TRAFFICKING IN MIGRANTS IN THE NATIONAL AND INTERNATIONAL LEGISLATION

Camelia Şerban Morăreanu*

Abstract

During recent decades, the migration flows towards the industrialized countries were based on a variety of causes and factors, among which we can mention:armed conflicts, famine, natural disasters, flagrant violations of human rights, deplorable economic conditions, etc. The knowledge of the migration phenomenon-often accompanied by numerous criminal facts and deeds-determined the countries to take actions in order to understand and to control it. In the present study, we have proposed a brief review of those forms of illegal migration, against which, both internationally and internally, a number of legal instruments have been developed with a view to incriminate and to sanction them.

Keywords*: migrants, trafficking, crime, legal instruments.*

Introduction

In approaching the issue of the criminal forms of migration, we must distinguish two notions, respectively legal migration and illegal migration.

Legal migration[1] *is the form widely accepted by all the countries of the world, as it can be controlled in number of people and jobs, in which respect, countries enter into agreements, treaties and conventions by which they provide facilities to the workers who migrate legally and by which they commit to respect the legal employment conditions and social protection as for their own citizens.*

Illegal migration *is the alternative commonly used by people who do no use the legal path to go abroad. A component of human trafficking, illegal migration represents a very extended and uncontrollable phenomenon, due to criminal networks and to the ingenuity of the criminals. To all these, differences in the legislation of the source, transit or target countries are added, which hinder the battle of the authorities to fight this phenomenon. One cannot omit the contribution of the migrants who, in order to attain their goal, or under traffickers' threats or indications, deny any connection with the persons or the criminal groups.*

UNO statistics show that the profits obtained from international trafficking in human beings- including international procurement, trafficking of the beggars, of the handicapped and of children as well as illegal migration- from the beginning of the XX-th century to the present, had been higher than by nearly 50% than the profits obtained from the international trafficking of stolen vehicles and with 25% higher than those obtained from drug trafficking.

* Lecturer Ph.D. University of Piteşti; Prosecutor – The Prosecutor' Office of the Court of Appeal Piteşti, e-mail: cameliamorareanu@yahoo.com.

[1] Elise Vâlcu, *Brief considerations on the legal status of nationals of the third states in the European space-Theoretical aspects on the innovations in the area, in 2010*, in Revue Europeenne Du Droit Social, no.7/ 2010, pp.43-61; Elise Vâlcu, *Introducere în dreptul comunitar, Curs pentru studenţi*, Sitech Publishing House, Craiova, 2010, pp. 53-59;

1. Legal instruments on trafficking migrants

United Nations Organization is the main international body which, appreciating the seriousness of the trafficking in migrants, manifested its interest and elaborated a series of legal instruments. Among these, the following documents present the greatest relevance to this study:

a) United Nation Convention against the Transnational Organized Crime, adopted in New York on the 15-th of November 2000[1];

b) The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nation Convention against Transnational Organized Crime, adopted in New York on the 15-th of November 2000[2];

c) The Protocole against the Smuggling by Land, Sea or Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted in New York on the 15-th of November 2000[3].

The last mentioned protocole presents the greatest importance for the study under debate, therefore, we shall analyze this legal international instrument and the modality it incriminates the trafficking in migrants.

Noticing that, despite the efforts of other international bodies, there is no universal instrument having as its object all aspects of the trafficking in migrants, there has been decided by the Resolution no. 53/111 of the UN General Assembly from the 9-th of December 1998, to create a special intergovernmental committee, mandated to elaborate a general international convention against transnational organized crime and mainly, to examine the possibility of elaborating an international instrument against the trafficking in migrants.

Starting from the invitation of UN General Assembly addressed to the member states through the Resolution no. 54/212 from the 22-nd of December 1999, which was intended to strengthen the international cooperation against illegal migration and to reduce the benefits of those concerned, and considering that the addition of an international instrument against illegal trafficking of migrants to the United Nations Convention against transnational crime will help to prevent and combat this type of criminality, A Protocole against the Smuggling of Migrants by Land, Sea and Air had been adopted in Palermo, on the 12-th of December 2000. The Protocole was opened for signature, in Palermo, between the12th and the15-th of December 2000, and then to the United Nation Headquarters, in New York, until the 12-th of December 2002.

Starting from the reality of a considerable increase in the activity of the organized criminal groups in trafficking illegal migrants and in other related criminal activities, which seriously undermine the countries of the world, the Protocole against the Smuggling of Migrants by Land, Sea and Air aimed at being an useful tool in the creation of interregional, regional and subregional organizations with a view to solve the problem of illegal migration.

According to the art. 2 from the Protocole, its object refers to the prevention and combat of the illegal trafficking of migrants, as well as to the promotion of the cooperation among the member states to that end, while protecting the rights of the migrants involved in the respective traffic.

---

[1] Ratified by Romania through Law no. 565 from the 16-th of October 2002, published in the Official Gazette no. 813 from the 8-th of November 2002.

[2] Ratified by Romania through Law no. 565 from the 16-th of October 2002, published in the Official Gazette no. 813 from the 8-th of November 2002.

[3] Ratified by Romania through Law no. 565 from the 16-th of October 2002, published in the Official Gazette no. 813 from the 8-th of November 2002.

As it is defined by the Protocole, the term "smuggling of migrants" denote the fact of ensuring the illegal entrance in a state of a person who is neither a citizen nor a permanent resident of the respective state with the aim of obtaining a financial benefit or other material benefits, directly or indirectly.

The Protocole recommends to the signatory states to adopt the legislative measures with a view to establish them as *criminal* (when the acts had been committed intentionally, in order to obtain a financial benefit or other material benefits, directly or indirectly):

a) the smuggling of migrants;

b) the following acts committed with the aim of permitting the illegal trafficking of migrants:

- the making of a fraudulent travel document or identity card;
- providing or possessing such document;
- allowing a person who is neither a citizen nor a permanent resident to remain in a certain state without complying with the legal necessary conditions of residence.

Also, the protocole recommends the signatory states that each of them should adopt legislative measures in order to establish as *criminal* the following:

a) subject to the basic concepts of its legal system, the act of attempting to commit one of the offences stated above;

b) to act as an accomplice to an offence mentioned above;

c) to organize the committing of one of the offences mentioned above or to instruct other persons to commit the offence.

Also, each state must adopt legislative measures in order to establish as *aggravating circumstances* the following:

a) endangering or the risk of endangering the life or the safety of the migrants;

b) inhuman or degrading treatment applied to migrants, exploitation included.

It is to be mentioned that, according to the art. 5 of the Protocole, the migrants are not subject to criminal liability for being the object of the offences mentioned above.

2. The incrimination of the traficking of migrants in the internal legislation

In order to prevent and stop the smuggling of migrants, the UN member states have rallied to the international legislation in the field, elaborating and promoting normative acts which developed the responsibility of governmental and nongovernmental institutions to this effect. The large number of the institutions involved in preventing and combating this phenomenon, underlines the special interest of the respective states in this area.

Apart from the fact that it is often associated with other acts related to organized crime (drug smuggling, weapons, terrorism), illegal trafficking of migrants can endanger the socio-economic balance of the countries and even their peace and security through overthrowing the balance of forces between the structures of controlling the legality and public order and the part of the population misdirected to criminal activities.

Most times, these offences are committed by an organized criminal group. *In the eye of the law*[1]*, "an organized criminal group" can be defined as a structured group, made up of three or more persons, which acts coordinately for a period with a view to commit one or more serious offences, in order to obtain a financial benefits or other material benefits directly or indirectly.*

[1] art. 2, par. 1, let. a from Law no. 39 of the 21st of January 2003 on the prevention and combat the organized crime, published in the Official Gazette no. 50 from the 29-th of January 2003 with subsequent modifications and completions.

Trafficking in migrants (as well as trafficking in human beings) are regarded as transnational crimes. *As regards the crime which falls into this category it can be stated that:*

- Either it is committed on the territory of a state or outside its territory,
- Either it is committed on the territory of a state but it is prepared, planned and controlled (partly or entirely) on the territory of another state,
- Either is committed on the territory of a state by a criminal organized group which develops criminal activities in two or more states, or it is committed on the territory of a state, but the result is produced on the territory of another state.
- Taking into account this characteristic of the crime of smuggling migrants, after the ratification of the legal international instruments mentioned above, Romanian has moved to adopt certain specific normative acts which should implement the provisions stipulated by UN, internally.
- It has been considered the incrimination of the trafficking of migrants committed exclusively on the Romanian territory but also the incrimination of the trafficking of migrants committed on the territory of other states by Romanian citizens or by persons without Romanian citizenship but residing in Romania.

2.1. The incrimination of the trafficking of migrants committed on the Romanian territory

Early legislative interventions include the amendment by Act 39 of 2003 on preventing and combatting the organized crime[1] of the art. 71 of the Government Emergency Ordinance no. 105 from the 27-th of June 2001 as regards the state border of Romania[2].

Following this amendment, the crime of trafficking migrants committed in Romania sanctions the recruitment and the guidance of one or more persons with a view to cross the state border fraudulently as well as the organizing of such an activity.[3] From the incriminating text, it can be noticed that the crime can be committed in many alternative modalities, respectively, through the recruitment, the leading, the guidance and the organizing of any such activities with a view to cross the Romanian border fraudulently. Regardless of the alternative modality committed, the punishment is 2-7 years imprisonment.

The offence also stipulates additional aggravating forms.

The first sanctions the recruitment, leading or guidance which are likely to endanger the life or the security of the migrants or their submission to an inhuman degrading treatment. This form of aggravated crime is punished with a 5-10 years imprisonment.

The second aggravated form refers to the recruitment, leading or guidance of one or more persons with a view to cross the state border fraudulently, if the act resulted in the death or the suicide of the victim. In this case the punishment is 10-20 years imprisonment.

It is to be mentioned that the Emergency Ordinance also refers to the sanction of the attempt to the crime stipulated as a specified form and to the offence stipulated as the first aggravated form.

Also as a sanction for those who commit the offence of trafficking migrants is represented by the confiscation of goods and values which have been served or were designed to serve the traffic or which have been obtained through the committing of the offence, (if the goods and values belong to the offender). This measure is stipulated in the art. 73 from the Emergency Ordinance no. 105 from the 27-th of June 2001 on the state border of Romania.

---

[1] Published in the Official Gazette no. 50 from the 29-th of January 2003.
[2] Published in the Official Gazette no. 352 from the 30-th of June 2001.
[3] According to the par. 1 from OUG no. 105 from 2001 on the state border of Romania.

2.2. The incrimination of the trafficking in migrants committed on the territory of other states by Romanian citizens or without Romanian citizenship but residing in Romania

Another important legislative intervention came after the signing of international documents adopted by UN on trafficking in migrants is the modification made by the Law no. 252 from the 29-th of April 2002[1] upon the art. 2 from the Emergency Ordinance no. 112 from 30 august 2001 concerning the punishment of the acts committed outside the country by Romanian citizens or by persons without Romanian citizenship but residing in Romania[2].

If the art. 71 from the Emergency Ordinance no. 105 from the 27-th of June iunie 2001 on the state border of Romania incriminates the trafficking of migrants committed on the Romanian territory, the Emergency Ordinance no. 112 from 2001 (subsequently amended and supplemented) refers to the trafficking of migrants committed outside the territory of the country by Romanian citizens or by persons without the Romanian citizenship but residing in Romania.

Consequently, the art. 2 from this ordinance establishes as a crime the act of the Romanian citizen or of the person without Romanian citizenship but residing in Romania, who recruits, leads or guides one or more persons with a view to cross the border of a foreign state fraudulently or who organizes one or more such illegal activities. It also appears that this offence can be committed in many alternative modalities, respectively, the recruiting, leading, the guidance or the organizing of any of these illegal activities with a view to cross the state border of a foreign state. Regardless of the alternative modality committed, the punishment is 2-7 years imprisonment.

It is to be mentioned that the emergency ordinance also includes the sanction of the attempt to the offence stipulated in the specified form and to the offence stipulated in an aggravated form.

It is worth mentioning that the Emergency Ordinance no. 112 from 2001 also sanctions the initiation or the establishment of an association with a view to commit the offence stipulated in the art. 2 or the the joining or support of any form of such an association. This act is punished with a 3-10 years imprisonment.

As in the case of the crime of trafficking migrants stipulated by the Emergency Ordinance no. 105 from the 27-th of June 2001 on the state border of Romania, the goods and values which served or were destined to serve the committing of the offences sanctioned by the Emergency Ordinance no. 112 from 2001 or which have been obtained through the committing of such offences (if they belong to the offender) shall be confiscated.

In addition to criminal sanctions and confiscation, the Romanian citizen who is convicted for one of the offences stipulated by the Emergency Ordinance no. 112 from 2001 will be refused the issuance of a passport, or where appropriate, the right of using the passport shall be suspended for a period of 5 years.

Conclusions

The legislative amendments presented proves not to deter the smugglers of migrants. Statistics show that the main "suppliers" continue to be the south-eastern areas of Europe, Romania included. Without claiming that we have covered the whole range of modalities used by migrant smugglers, we enumerate some of the methods identified in the judiciary practice*:* the obtaining of the transit and entry visa, collectively for tourism, followed by an

[1] Published in the Official Gazette no. 307 from the 9-th of May 2002.
[2] Published in the Official Gazette no. 549 from the 3-rd of September 2001.

illegal stay in the country; the use of forged or counterfeit passports or visas; the obtaining of the residence visa, motivated by business activities or the request for the asylum seeker status; the use of two identity documents, a valid passport for entry and another for the exit; hiding in the international means of transport-car, rail, boats.

Since the phenomenon of the trafficking in migrants seems to be very difficult to eradicate, we consider that a tightening of the legislative intervention consisting of severe punishments, is absolutely necessary.

Bibliography:

Elise Vâlcu, *Brief considerations on the legal status of nationals of the third states in the European space - Theoretical aspects on the innovations in the area, in 2010*, in Revue Europeenne Du Droit Social no.7/ 2010;

Elise Vâlcu**,** *Introducere în dreptul comunitar***,** *Curs pentru studenţi*, Sitech Publishing House, Craiova, 2010;

Law no. 39 from the 21st of January 2003 on the prevention and combat of organized criminality published in the Official Gazette no. 50 from the 29th of January 2003;

United Nations Convention against Organized Transnational Crime, adopted in New York at the15th of November 2000 ratified by Romania through Law no. 565 from the 16th of October 2002 published in the Official Gazette no. 813 from the 8th of November 2002;

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nation Convention against Transnational Organized Crime, adopted in New York on the 15th of November 2000 ratified by Romania through Law no. 565 from the 6th of October 2002 published in the Official Gazette no. 813 from the 8th of November 2002;

Law no. 252 from the 29th of April 2002 for the passing of the Emergency Ordinance of the Government no. 112/2001 on the sanctioning of certain acts committed outside the Romanian territory by Romanian citizens or by persons without Romanian citizenship residing in Romania published in the Official Gazette no. 307 from the 9th of May 2002;

The Protocole against the Smuggling by Land, Sea or Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted in New York on the 15th of November 2000 ratified by Romania through Law no. 565 from the16th of October 2002 published in the Official Gazette no. 813 from the 8th of November 2002;

The Emergency Ordinance no. 105 from the 27th of June 2001 on the state border of Romania published in the Official Gazette no. 352 from the 30th of June 2001;

The Emergency Ordinance no. 112 from the 30th of August 2001 on the sanctioning of certain acts committed outside the Romanian territory by Romanian citizens or by persons without Romanian citizenship residing in Romania published in the Official Gazette no. 549 from the 3rd of September 2001;

The Resolution no. 54/212 of the United Nations General Assembly from the 22nd of December 1999;

The Resolution no. 53/111 of the United Nations General Assembly from the 9th of December 1998.

CONTROL ORDERS IN THE FIGHT AGAINST TERRORISM: THE UK PERSPECTIVE

Emmanouela Mylonaki[*]

Abstract

For many decades, states have been engaged in a persistent fight against those deemed "terrorists" at both national and international level. The UK in particular has been determined to control and confront terrorists, made evident by the adoption of numerous legal instruments and counter-terrorism mechanisms. The present article investigates one of the most controversial and complex legal instruments adopted by the UK, namely control orders.

Keywords: *control orders, prevention, investigation, terrorism*.

Introduction

The purpose of the article is to contribute to the debate on the actual necessity of the system of control orders and the essential contours of such a system. The paper is divided in two sections. The first section presents the system of control orders since its original inception in the UK. The second section focuses on the recent proposals for the abolition of control orders and their replacement with the so-called TPIMs (Terrorism Prevention and Investigation Measures). To this end, the TPIMs regime is examined in order to determine whether there is a change in approach, the applicable tests and how the new system could engage more effectively with the investigative process. The article might be of particular relevance to those interested in learning more about UK's system of control orders, providing food for thought for other countries adopting measures of prevention and counter-terrorism.

I. The Introduction of Control Orders in the UK

A control order was defined by the Prevention of Terrorism Act 2005, section 1(1) as an order "*against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism"*. Since its introduction in the UK, the control order scheme contained a number of restrictive measures such as the use of electronic tags, home curfews, strict restrictions on the use of mobile phones or public transport, measures that could be imposed by the Home Secretary as a means of preventing terrorist activities of "those dangerous individuals who cannot get prosecuted or deported, but who cannot be allowed to go on their way unchecked because of the seriousness of the risk that they pose to everybody else in the country" (Rt Hon Charles Clarke MP, Hansard, HC Debates, 23 Feb 2005: Column 339). Likewise, the system of control orders allowed restrictions to be imposed - up to 12 months - upon individuals for whom there were reasonable grounds for suspecting that they had been involved in terrorism related activities. The mere fact that the decision for a control order to apply rested with the Home Secretary rather than with a court decision, in conjunction with the fact that the controlee has had no right to know the evidence against him, were the triggering factors for the strong objections against the scheme of control orders.

[*] Senior Lecturer in Law, Director of Postgraduate Programmes, London South Bank University, Law Department, UK. e-mail: mylonake@lsbu.ac.uk

The aforementioned restrictions and obligations imposed upon individuals have been criticised by human rights organisations that argued that "control orders combined the injustice of punishment without trial with the insecurity of allowing terror suspects to roam around communities or disappear" (www.justice.org.uk). The conflict between the application of control orders and art. 5 and 6 of the ECHR has been the main point of critique against the UK control scheme. (Joint Committee on Human Rights Twelfth Report Session 2005-06 Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9), Order 2006 HL 122/HC 915).

Since the introduction of control orders in the UK, opinions have been divided regarding their necessity and future application. The Independent Reviewer of Terrorism Legislation Lord Carlisle concluded that control orders remain necessary in those small numbers of cases where the suspected person represents a risk to the national security and for whom prosecution is unrealistic.[1] His view is further reinforced by the Government retention of control orders until 31st December 2011[2] and until a replacement system will become fully effective. According to the Independent Reviewer, the control orders system is fair and balances national security and civil liberty,[3] by filling a gap between prosecution and other alternatives such as deportation.[4] Such a view, however, is not shared by others who advocated for the replacement of the control orders scheme with a new system in which a court could impose restrictions and where the test should be raised from "*reasonable grounds to suspect"* an individual is involved in terrorism to "*reasonable grounds to believe"* an individual is engaged in terrorist activity.[5]

Despite support for the application of control orders to a limited number of cases for purposes of national security, the International Bar Association Task Force on International Terrorism argues that control orders should only be imposed post-conviction following trial on terrorism offences and the criminal standard of proof should apply.[6] One could argue that any risk at the investigative stage should be controlled by restrictions on bail and further restrictions are only justified following fair trial. However, post-conviction orders have no real application to serious terrorist cases where sentences of 30 – 40 years might be expected.[7] This could imply that their use would be directed against those involved in terrorist activity to a lesser degree and for whom the predicate offence does not amount to conspiracy. This would be targeting orders at those convicted for example of possession offences. But this is a changed rationale to reserving control orders to the small minority of cases of significant public risk and invites net-widening. In any case, Liberty and others have

[1] Lord Carlisle, Fifth Report of the Independent Reviewer Pursuant to Section 14 (3) of the Prevention of Terrorism Act 2005 1 February 2010 at page 34.
[2] SI 2011 No. 716, The Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2011, In force 11 March 2011.
[3] Lord Carlisle, Sixth Report of the Independent Reviewer Pursuant to Section 14 (3) of the Prevention of Terrorism Act 2005 3 February 2010 at page 21 para 49.
[4] Ibid, at page 24 para 61 and page 32 para 82.
[5] Lord MacDonald, Review of Counter-Terrorism and Security Powers Cm 8003 pages 10 – 11 at para's 12 – 13.
[6] E S Bates et al, *Terrorism and International Law A Report of the IBA Task Force on Terrorism* (2011 Oxford University Press) page 137 at para 3.132 and page 248 at para 7.18.
[7] For example see R v Barot (Dhiren) [2007] EWCA Crim 1119; [2008] 1 Cr App R (S) 31: minimum term of 30 years imprisonment for terrorist plot to commit mass murder was appropriate and court gave guidance on appropriate terms of imprisonment in cases of inchoate terrorist offences.

argued that the availability of an increased range of offences to prosecute terrorism should encourage increased prosecution and therefore control orders should be abolished.[1]

One of the problematic parameters related to the application of the existing scheme of control orders is the fact that it does not provide an answer to the following question: what is a State to do when faced with individuals believed to be engaged in terrorist activity for whom there is insufficient evidence to prosecute?[2] On the one hand, the system operated with the purpose of protecting the public from risk without enabling evidence gathering for purposes of eventual prosecution.[3] The unavoidable consequence of such a system is the restriction of individuals, leading to their emasculation and therefore inability to engage in terrorism related activity that may give rise to sufficient evidential grounds.[4] This overlooks not only the issue of prosecution of the suspected terrorist, but challenges the notion of control orders as a national security tool.[5]

II. Towards a More Flexible Regime of Control Orders?

The strong criticisms against control orders led to their recent review in January 2011 through which the UK government proposed to reduce the current number and scope of various measures attached to orders. The proposed TPIMs represent a less intrusive scheme of measures where the preventative aims of an order are short-term and where investigation is the imperative.[6] More specifically, the new regime replaces lengthy curfews with overnight residence, while also relaxing the restrictions on movement, association and communication of those suspected of terrorism activities.[7] If one considers the terrorism threat imposed by certain individuals, it seems logical to exclude those individuals from certain places, prevent them from travelling overseas and obliging them to report to the police.[8] Schedule 1 of the Terrorism Prevention and Investigation Bill provides an exhaustive list of types of restrictions or requirements that may be imposed on an individual. In fact, these measures resemble the bail conditions imposed by courts in criminal proceedings.[9] However, it is evident that the key features of the new Bill are characteristic of counter-terrorism measures, centred on prevention and not on investigation.[10] By taking out those particularly restrictive measures, common to control orders in the past, for example curfews, and by making these an exception to be only applied in conditions of emergency sanctioned by the Parliament,[11] the norm is to impose conditions broadly analogous to those a court applies in criminal proceedings. However, the new regime involves a wide range of restrictions which are imposed upon the person without prior trial, and the evidence against him remains secret from him and his lawyers, thus making the control orders to operate outside the criminal

---

[1] Liberty, '*From 'War' to Law Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers* 2010' Chp 1 Control Orders pages 28 – 29 para's 40 - 41 http://www.liberty-human-rights.org.uk/pdfs/policy10/from-war-to-law-final-pdf-with-bookmarks.pdf accessed 03 April 2011.
[2] Lord MacDonald, Review of Counter-Terrorism and Security Powers Cm 8003 page 9 at para 5.
[3] Ibid, page 9 at para 5.
[4] Ibid, page 9 at para 3.
[5] Robin Simcox, *Control Orders Strengthening National Security* (2010 The Centre for Social Cohesion), page 106.

[6] HM Government, Review of Counter-Terrorism and Security Powers Review Findings and Recommendations Cm 8004 page 41 at para's 23 and 24.
[7] Ibid, at para 26 v, 26 vi, 26 vii.
[8] Ibid, page 42 – 43.
[9] Corinna Ferguson, '*Comment: Rebranding Injustice'* (2011) LS Gazette, 3 Feb 10 (2).
[10] Matthias Borgers and Elies van Sliedregt, '*The Meaning Of The Precautionary Principle For The Assessment Of Criminal Measures In The Fight Against Terrorism* [2009] 2 (2) Erasmus Law Review 171 at 182.
[11] Subra note 14, para's 27 and 28.

justice system. To the present day, there is no evidence that suggests that that the new regime will facilitate a more effective investigative and prosecution of terrorism offences and it is therefore questionable to what extent they may effectively contribute to the collection of evidence that may lead to prosecution. According to the UK Home Office Counter-Terrorism Review, "control orders can mean that prosecution and conviction becomes less not more likely and this is the case with the new regime. In fact, it seems more logical that evidence could more easily be gathered when the suspect person is not aware that he is the subject of a police investigation". Thus, it seems that one of the central problems of the old system remains unresolved.

The UK Terrorism Prevention and Investigation Measures Bill, which is expected to receive the Royal Assent by December 2011, increases the safeguards available to the suspected individual, by raising the applicable test from *suspicion* to *belief*. The difference between suspicion and belief is significant, but not substantial. The difference is understood with reference to Lord Brown in *R v Saik* [1], as suspecting something is "to believe only that it may be so" and not "to believe it to be so". Besides raising the applicable test, the proposed Bill retains the power of the Home Secretary to impose an order, while allowing the High Court to automatically review a case with the power to either quash or revoke the measures.[2] Whilst greater judicial scrutiny is envisaged, the Government recommendations omit any proposal for ongoing judicial scrutiny during the 2-year lifetime of the order. Instead, it is proposed that the police will continue to have an ongoing duty to review the "conduct" of a person subject to an order and to inform the Home Secretary of the prospects for prosecution.[3] It is intended that TPIMs will have a dual purpose, since the measures are to take effect either to disrupt terrorist activities or to facilitate investigation.[4] Undeniably, the Bill's provision for an increased role of the High Court may enhance the legitimacy and regulation of the system. On the other hand, such an increased court oversight may conflict with the principle of separation of powers between the executive and judiciary. Drawing upon the Australian scheme of control orders by which the courts are also responsible for making non-derogating orders,[5] it has been argued by reference to *Thomas v Mowbray*[6] that risk assessment is outside the capacity of the courts.[7] Walker dismisses the idea that judges cannot deal with anticipatory risk, on the grounds that they routinely make risk assessments in deciding bail applications and sentencing decisions.[8] Therefore, it may be argued that whilst respecting the constitutional independence and competency of the executive, provision should be made for ongoing review of a case by the court at all stages of the police investigation for the purpose of determining whether to continue the application of an order upon a specific individual.

The new proposed scheme of control orders demonstrates a change of approach towards a less intrusive and a more clearly defined system, with the removal of the forced relocation and lengthy curfews as the tightest preventive measures. The UK scheme of

---

[1] [2004] EWCA Crim 2936 at para 120.
[2] HM Government, Review of Counter-Terrorism and Security Powers Review Findings and Recommendations Cm 8004 page 42 at para 26 i, 26 iii.
[3] Ibid, page 42 at para 26 ii.
[4] Ibid, page 42 at para 26 ii.
[5] Criminal Code Act 1995 s104.1 as inserted by the Anti-Terrorism Act (No 2) 2005 Schedule 4.
[6] [2007] HCA 33, 237 ALR 194.
[7] D Meyerson, '*Using Judges to Manage Risk: The Case of Thomas v Mowbray'* (2008) 36 (2) Federal Law Review 209 at page 229.
[8] C. Walker, '*Keeping Control Of Terrorists without Losing Control of Constitutionalism'* (2007) 59 Stanford Law Review 1395 at 1409 and 1420.

control orders aiming at protecting from the risk and anticipatory risk of terrorism is still regarded as a necessary mechanism to deal with suspected terrorists. The increased and complex threat of terrorism since 2000 has triggered measures that justified – to a certain extent, the onerous and intrusive measures applied up to date and advocated against the total abolition of control orders. Despite the evident progress towards the replacement of the old rigid regime of control orders with a more flexible and well balanced scheme, it is still questionable how the proposed Bill will maintain a balance between its preventive and its investigative scope. What is further needed at the present stage is to ensure that investigation is actively progressing towards prosecution.

Conclusions

Recent arguments against control orders suggest that the proposed new scheme is just a re-branding of control orders. However, such arguments fail to acknowledge the reality of removing some of the most objectionable measures of the old scheme, such as the lengthy curfew and forced relocation. The exclusion of such measures from the new proposed scheme mirrors the court's approach to proportionality in terms of the minimum measures commensurate to risk and is therefore a welcomed change of approach, as evidence towards a more proportional scheme. However, the issues that remains unresolved is how to legitimately control individuals suspected of being involved in terrorist activity for whom there is not sufficient evidence to prosecute. What is clear at this stage is the need for the development of a mechanism that actively reviews the progress of an investigation in order to enable the investigation and prosecution of a case, rather than to merely prevent a terrorist activity.

Bibliography:

E S Bates, *Terrorism and International Law A Report of the IBA Task Force on Terrorism*, Oxford University Press, 2011;

Corinna Ferguson, *Comment: Rebranding Injustice*, 2011, LS Gazette, 3 Feb 10 (2).

R. Simcox, *Control Orders Strengthening National Security*, 2010, The Centre for Social Cohesion;

M. Borgers and Elies van Sliedregt, *The Meaning Of The Precautionary Principle For The Assessment Of Criminal Measures In The Fight Against Terrorism* [2009] 2 (2) Erasmus Law Review 171 at 182;

D Meyerson, *Using Judges to Manage Risk: The Case of Thomas v Mowbray*, 2008, 36 (2) Federal Law Review 209;

C. Walker, Keeping Control Of Terrorists Without Losing Control Of Constitutionalism, (2007) 59 Stanford Law Review 1395.

MATERIAL COMPETENCE OF COURTS IN RESOLVING LABOR DISPUTES. THEORETICAL AND PRACTICAL ASPECTS

Onica Chipea Lavinia[*]

Abstract

The scientific approach aims to address the institution of material competence of the courts in resolving labor conflicts both from theoretical perspective and also from a practical perspective, practical, precise, applicative.

Keywords*:* *material competence, court (of law), court unlimited jurisdiction, undoubted rights, possible rights.*

Introduction

1. Competent bodies to resolve conflicts of rights - individual labor disputes[1]

Individual work in conflict resolution courts have exclusive jurisdiction, being eliminated special powers of various bodies, in turn renounced[2]*: commission of judges, superior administrative body, collective leadership body, etc.. Competent labor dispute only courts returned only in 1992.*

2. Material competence of the court in resolving labor disputes

As a result of changing the Civil Procedure Code, *the court has been given unlimited jurisdiction* in respect of rights conflict resolution at this time individual labor disputes.[3] After the amendment of Law no.304/2004 on judicial organization, in 2005[4] the establishment of specialized courts to quit work and social security idea what was regarded "as being very positive" because it effectively ensured the greater specialization of judges in labor law and respectively (...) social security by maintaining their stability mentioned courts."[5] It works but the courts, sections or panels for reasons of conflict of labor and social insurance.

Thus, material competence in conflict resolution is determined by individual work of art. 2 point 1 letter. c Code of Civil Procedure *that the judge in first instance courts labor*

---

[*] Ph.D. Lecturer, University of Oradea, Department Law and Public Administration, laviniachipea@yahoo.com.

[1] Nr.40/2011 Law amending the Labor Code,, respectively 62/2011of social dialogue, the expression of rights conflict has been replaced by the individual labor disputes.

[2] Ticlea, Al., *Tratat de dreptul muncii*, Legal Universe Publishing, Bucharest, 2007, pp.919-921.

[3] Court of Justice, United Sections, Decision no. II of 31 March2003, published in the Official Gazette, Part I, no. 455 of 25 June 2003, pp.214, 215.

[4] Law no. 304 of 2004 on judicial organization regulate the time of its adoption as an option, not mandatory, the establishment of specialized courts for labor law. Specialized courts were courts without legal personality, which can operate in the counties and in Bucharest and usually county headquarters in the city.

Specialized courts were to take cases for the Court in areas to be established. Although the original formulation of the draft law envisaged the establishment of 14 specialized courts until 2005, after this time limit was removed, providing for just that by 2008 will be established labor courts. A subsequent amendment of Law no. 304 completely eliminated in 2004 but mandatory establishment of specialized courts, it remains only a possibility.

5 Beligrădeanu, S, *Consideraţii de ansamblu şi observaţii critice referitoare la tribunalele specializate de muncă şi asigurări sociale, precum şi la asistenţii judiciari, în lumina Legii nr. 304/2004 privind organizarea judiciară* , The right no. 9 / 2004, p.13.

6 Law no. 251/2006 published in Official Gazette no. 574 of July 4, 2006.

7 Beligrădeanu, S., *Consideraţii – teoretice şi practice- în legătură cu Legea nr. 188/1999 privind Statutul funcţionarilor publici*, The right no. 2/2000, p.17.

disputes, except by law in the jurisdiction of other courts. Also, judging processes and applications for administrative, except as by law the jurisdiction of other courts and the Bucharest Tribunal has jurisdiction to find that the representatives of employer associations and trade union federations and confederations, including the civil servants.

We believe that changes to the Labor Code and Law no express repeal. 168/1999 ended the controversy by including express conflicts of exercise of the rights and fulfillment of obligations on the report of service of civil servants in the category of individual labor disputes, their power is so assigned jurisdiction to resolve labor.

3. Exceptions. Resolving conflicts of rights (individual labor disputes) by other courts. Court. Court of Appeal. High Court of Cassation and Justice

A. Court of unlimited jurisdiction

After the abolition of legal commissions (which were established by Law no. 59/1968), the court of jurisdiction has become the main body of work, according to article 1 point 1 of the Code of Civil Procedure and Article. 21 of Law no. 92/1992 on judicial organization, judging all processes and applications other than those provided for by law within the jurisdiction of other courts, thus having general jurisdiction.

In relation to labor disputes, however, that her pre-eminent position was lost, according to Government Emergency Ordinance no. 138/2000 amending and supplementing the Code of Civil Procedure, for the court, that is, as I mentioned before, the main labor tribunal.

Thus, according to the laws, now, the court resolved, exceptionally, in the first instance[1]:

- Labor disputes book on: rectification entries made in books work, refusal of such entry or not delivering workbook by the employer (Article 8 of Decree no. 92/1976 on the employment record[2]), including the reconstruction of seniority[3] (Article 17 paragraph 2 of Decree no. 92/1976);

- Calls for the establishment of conditions for representation at the level of trade union organizations (Article 17 paragraph 2 lit. H of Law no. 130/1996), provision has been amended by Law no.62/2011 social dialogue. Thus, according to Article 51, paragraph 2, the performance by representatives unions conditions are constant, at their request, the court granted them legal status by submitting to the court documents referred to in Article 52. The provisions referred to be correlated with those of 14 of the same law which stipulates that, for the acquisition by the union drive at the legal personality, special agent of the founding members of the union, setting out in minutes, you must apply for enrollment to the court in whose jurisdiction it is located.

- Requests for authorization to operate as a corporate credit union employees and their registration as legal entities (Law no. 122/1996 on the legal status of unions of employees);

As a common law court, the court has jurisdiction to address the demand for costs when they are asked about separate fund later and not with labor disputes, in which it was

[1] Ticlea Al., *Dreptul muncii. Curs universitar*, Legal Universe Publishing Law, Bucharest, 2007, pp.431-432.

[2] According to article 8 of Decree no. 92/1976 on theemployment record, in force in accordance with art.298 of the Labour Code by 1 January 2009, in case of refusal to complete and release the cessation workbook, the holder may apply to thecourt in whose jurisdiction unit is within 30 days.

[3] Ploieşti Court of Appeal, Department of labor disputes and social security nr.77/2007 decision in Schmutzer, G.,G., *Jurisprudenţă. Dreptul muncii 2006-2008* , Editura Moroşan, Bucharest, 2008, pp.297-299.

incidental, and thus the provisions of Article .17 of the Code of Civil Procedure,[1] and the complaint against the official finding of infringement, if not closing individual employment contract in writing, in accordance with Article 16 of the Labor Code.[2]

As a rule, labor disputes to which we referred, is subject only to appeal court ruling.

B. Jurisdiction of the Court of Appeal in respect of individual labor disputes

In relation to labor disputes, the Court of Appeal had jurisdiction to hear the material in the first instance, the request made by the management unit to suspend the strike for a period not exceeding 30 days from the date of commencement or continuation of it, if this were would endanger life and health. Provision does not appear in the text of the Law no. 62/2011 social dialogue. More normative act that makes explicit reference to the possibility that during the negotiations during the strike continues, between its organizers and the management unit to settle claims that conflict is the subject of collective bargaining, the two parties may agree a temporary suspension of the strike, without the participation of judicial organs.

As the court of appeal judges in panels for labor and social security cases, appeals against judgments of the courts in labor disputes, including the following request for termination of the strike settlement.[3]

C. Jurisdiction of High Court of Cassation and Justice in individual labor disputes

In the matter of individual labor disputes, the High Court of Cassation and Justice judge: appeals against judgments of courts of appeal in cases of service relations of public servants in central public authorities[4] and institutions, appeals against decisions of the Superior Council departments that to settle the disciplinary action on judges or prosecutors sanctioned,[5] following complaints against the decisions of appeals judges, prosecutors and other staff of the judiciary on how establishing labor rights, etc.

The interest of the law, the High Court of Cassation and Justice pronounced decisions aimed at unifying the judicial practice and employment legislation[6].

4. Legal practice in Bihor county. The object of labor disputes: certain rights / rights possible

We considered appropriate to complement theoretical perspective on materials competence of the court in resolving labor disputes in legal practice with concrete examples from Bihor county. Summarized in this case, the courts have been invested to solve a case

---

[1] Court of Appeal Galati, department labor disputes and social security, Decision no. 15/R/2007, the Romanian Journal of Labor Law, nr.5/2007, pp.209-210;

[2] High Court of Cassation and Justice, Administrative and Fiscal Litigation Section, Decision no. 1078/2008, the right nr.2/2009,p.253, by Law no. 40/2011 Article 16 of the Labor Code was amended to establish mandatory form for completion by the individual employment contract valid.

[3] According to the provisions of art.198 of Law social dialogue,jurisdiction to hear the application calling off the strike is for the court in whose jurisdiction the court is that the unit said strike.

[4]According to Article 4 of the Code of Civil Procedure, High Court of Cassation judges: appeals against decisions of courts of appeal and other decisions in cases provided by law and any other matters within its jurisdiction by law, for details see Tabârca, M., Buta, G., *Codul de procedură civilă comentat şi adnotat cu legislaţie, jurisprudenţă şi doctrină*,, Legal Universe Publishing , Bucharest, 2007, pp.90-96.

[5] Article 3 point 1 of the Code of Civil Procedure, in conjunction with 109 of Law no. 188/1999 on the status of civil servants.

[6] Art. 36 of Government Emergency Ordinance no. 27/2006 on wages and other rights of prosecutors and judges and other staff in the justice system, published in the Official Gazette, Part I, no.314 of 7 April 2006, approved by Law no. 45/2007, published in the Official Gazette, Part I, no. 169 of 9 March 2007.

concerning the question of their competence that material from that qualified as certain, that as possibly the dispute.

Thus, in this case[1], the Court upheld the plea of incompetence Bihor material and therefore has declined in favor of Oradea Court, jurisdiction to hear the action brought by plaintiffs TM, SM, MM, SM, MEF, TM, PCE, KC, CMM, RG, PFC, LMG, PR, KS, BV, from defendants MJ, CAO, TSM and M.F.P. To rule this way, the court held that the substantive claims by action recorded in this instance, have sued as a defendant, the MJ, CAO, TSM and MFP and requested the following: ordered defendants to pay sums of money representing the value of vouchers provided by Law no. 142/1998 for the last three years and until the entry into and continued legality, order the defendants to pay gift vouchers provided by Law no. 193/2006, Government Decision no.1317/2006 and Law. 417/2006, of its publication in the Official Gazette up to date and further, ordered the defendants to pay the money owed updated by taking into account inflation and indexation index semester, ordered defendants to pay costs . As grounds for their request, the applicants have shown the court that the capacity of civil servants in Bihar Court, that they are employees of this institution and that this position gives them the legal provisions set out in the previous paragraph, the right to receive meal tickets and gift vouchers. Also they claimed that they are entitled to obtain the value of tickets required and under the provisions of art. 41 paragraph. 2 and Art. 53 of the Constitution, Article 5, paragraph 3 of the Labor Code and art. 4 of the European Convention on Human Rights, texts prohibiting any discrimination between employees in terms of social protection.

Court, in public session on 22.03.2007, observing different legal grounds invoked by the applicants to justify the request of the proceedings and considering the reasons set out in the act of procedure set out, that they can live together in the same judicial approach , claimed the plaintiff to choose between the two legal bases. On 16/05/2007, the applicants were evident in writing that the court based its action on the idea of discrimination.

The court, noting the choice made by the plaintiffs, relied on its own initiative under article 137 of the Code of Civil Procedure, except for lack of jurisdiction of the court in processing the application material that was seized.

Against this solution applicants appealed, criticizing it on the ground that the dispute arising from the employment contract which they have with the employer, in this case it is therefore a labor dispute, jurisdiction to hear back in the first instance, the tribunal. Analyzing judgments of the Court Bihar, folds of Appeal found, rightly, that it is illegal for the following reasons: The applicants have applied for the defendants to pay the value of vouchers provided by Law no. 142/1998[2], tickets that are due in employees as defendants. Court of Appeal considers that the provisions of law are common discrimination referred to the sentence under appeal, but special regulations established by the Labor Code and the provisions of art. 2 points c of the Code of Civil Procedure, which, in respect of conflicts of jurisdiction in favor of court, shall work, the first instance. Thus, art. 248 paragraph 1 of the Labor Code provides that trial of labor disputes is for the courts established under the Code of Civil Procedure. Article 2 point 1 letter c of the Code provides that courts judge in the first instance, labor disputes, except by law in the jurisdiction of other courts. In the same spirit, art. 36, paragraph 3 of Law no. 304/2004 on judicial organization provides that the courts operate sections or as appropriate, specialized and labor disputes

[1] For example XXI/2006 decision that ruled on the meaning of the provisions of art.81 of Law. 168/1999 on the settlement of labor disputes, establishing where disposal can be ordered with reference, see Ticlea, Al, *Dreptul muncii. Curs universitar, ed.cit*., 2007, p.434.

[2] Law no. 142/1998 regarding the granting of vouchers, published in Official Gazette no. 260 of July 13, 1998.

cases and social security. Under provisions other, there are conflicting (litigation) or requests for work relations, which are judged in first instance courts and courts of appeal.

For these reasons, under Article 312, Civil Procedure Code will allow the applicant's appeal, the Court will sentence Bihar house, which will have to refer the case to the competent settlement in the first instance.

Starting from the solutions of the two courts rule in the case considered we think that if the breach or failure to analyze the provisions of Law no. 142/1998 on granting vouchers and Law respectively. 193/2006 regarding the granting of gift vouchers and nursery vouchers[1], Government Decision no. And Law No. 1317/2006. 417/2006,[2] may be subject to a labor dispute. According to Law no. 142/1998 employees within companies, state and budgetary sector and the cooperative units and other natural or legal persons employing staff by signing an individual contract of employment may receive an allowance of food individual, given as vouchers, fully supported, the cost of the employer. According to art. 1, paragraph 1 of law, providing vouchers is not a legal obligation. Based on criteria established by Law no. 142/1998 are set specific terms for granting vouchers (depending on financial resources) by collective agreements. On public authorities and institutions are established, usually annually, by state budget law, the conditions that allow or not to grant vouchers[3]. A similar regime vouchers have gift vouchers and nursery vouchers.

Thus, we believe that these tools, which are part of other income for eligible employees with pay may be granted under the law and especially understanding of the parties, subject to negotiations. There is thus a vocation of employees at meal vouchers or gift vouchers or possibly as a right, not sure, we find the condition for a conflict at work, specifically the rights. So, the laws invoked by employees of the case cannot be considered a labor dispute and otherwise no longer a question of material competence of the court settlement. Basing his action on any idea of discrimination, employees have available the way the common law, the appeal to the competent court to resolve the request.

Conclusions

Analysis of legal provisions materials incidents matter jurisdiction of the courts in resolving labor disputes highlights the unlimited jurisdiction of the court and only the exceptional competence of the court, the Court of Appeal that the High Court of Justice and Cassation in cases expressly and exhaustively covered by the law.

Law 40/2011 of social dialogue bring a major change provisions, by broadening the scope of jurisdiction of courts, including the report of service of civil servants in the category of labor disputes, which may be solved through labor jurisdiction.

---

[1] Law no. 193/2006 regarding the granting of gift vouchers and nursery vouchers, published in the Official Gazette, Part I, no. 446 of May 23, 2006, as amended by Law no. 343/2006 amending and supplementing Law no. 571/2003 regarding the Fiscal Code(published in Official Gazette of Romania, Part I, nr.662 of 1 August 2006);

[2] Government Decision no. 1317/2006 approving the Methodological Norms for applying Law no. 193/2006 regarding the granting of gift vouchers and nursery vouchers, published in Official Gazette no. 823 of October 6, 2006; Law no. 417 of 2006 approving Government Ordinance no. 2 / 2006 on the regulation of labor rights and other rights of civil servants for 2006, published in Official Gazette no. 951 of 24 November 2006;

[3] Decision no. 102/2003 of the Constitutional Court, published inthe Official Gazette, Part I, no. 201 of March 27, 2003, showed that in all cases, individual food allowance in the form of vouchers, shall be granted only if: there is an individual contract of employmentwith the employer that the employee providing the vouchers, the employer has the financial capability vouchers to support costs;

The case highlights an important aspect subjected analysis on territorial jurisdiction of the court in resolving labor disputes as a qualification that is certainly not a right as possible, or simply a vocation to the dispute.

Bibliography:

Ștefănescu, I., T., *Tratat teoretic și practic de drept al muncii,* Legal Universe Publishing, Bucharest, 2010;

Beligrădeanu, S., *Considerații critice asupra diversității nejustificate a reglementării legale privind competența materială a instanțelor judecătorești în domeniul soluționaării conflictelor de muncă,* The Right no.10/2009;

Ticlea, Al., *Soluționarea conflictelor (litigiilor) de muncă ale funcționarilor publici*, in Romanian Journal of Labor Law, no. 6/2009.

Tabârca, M., Buta, G., *C, Codul de procedură civilă comentat şi adnotat cu legislaţie, jurisprudenţă şi doctrină*, Legal Universe Publishing , Bucharest, 2007;

Țiclea, Al., *Tratat de dreptul muncii*, Legal Universe Publishing, Bucharest, 2007;

Ticlea Al., *Dreptul muncii. Curs universitar*, Legal Universe Publishing Law, Bucharest, 2007;

Țiclea, Al., *Competența soluționării litigiilor de muncă în cazul funcționarilor publici*, in Romanian Journal of Labor Law, no. 1/2006;

Beligrădeanu, S., *Considerații de ansamblu și observații critice referitoare la tribunalele specializate de muncă și asigurări sociale, precum și la asistenții judiciari, în lumina Legii nr. 304/2004 privind organizarea judiciară*, The Right no. 9/ 2004;

Beligrădeanu, S., *Considerații – teoretice și practice- în legătură cu Legea nr. 188/1999 privind Statutul funcționarilor publici*, The Right no. 2/2000.

THE PROMULGATION OF THE ENABLING LAW

Tudor Oniga*

Abtract

The objective of this article is to make a succinct analysis of the issues that may arise in the legislative procedure finished with the promulgation of an enabling law by the President of Romania and, particularly, whether the President is compelled or not to promulgate a law and the consequences of a potential refusal of promulgation.

Key words: *law, enabling, promulgation, term, President.*

Introduction

Taking into account the role, place and importance of the Parliament in the nowadays constitutional climate of the rule of law, and making reference to the fundamental law text, especially the provisions of art. 61 paragr. (1) of the Romanian Constitution, according to which "the Parliament is the supreme representative body of the Romanian people and the sole legislative authority", we might conclude that the representation and the enactment would have priority within the current functions of the Parliament[1]. Certainly, other parliamentary functions are equally important even if they are only deduced from the constitutional text, only that the legislative function of the enactment function is the first to be recalled when reviewing the functions of various representative Assemblies.

Acts of Parliament

In the light of its legislative function, as "a specialised form of its general competence by virtue of which the debate of general political matters of the nation are finished by adopting a rule of law, as an expression of the general will in regulating certain social rapports"[2], the House of Deputies and the Senate, as stipulated by art. 67 paragr. (1) of the Constitution, passes laws, carries resolutions and motions, in the presence of the majority of their members. The law, as main legal act of the legislative body, although the legislation in force does not define it, is a legislative act, a unilateral act of will of the Parliament[3], for the purpose of producing legal effects. As we try to define it, in our opinion the law is the legislative normative act resulted upon the deliberation of the legislative body set up following free, periodic and correct elections, passed under a certain technique and procedure previously established, subsequently promulgated and officially published, and which expresses general behaviour rules, impersonal, repetitive and compulsory, having the most important legal force and whose violation leads to specific sanction from the public power. The content and form of the law are conditioned by the particularities and the specificity of the field that is to be regulated.

---

* University Lecturer Tudor Oniga Ph.D. "Dimitrie Cantemir" Faculty of Law, Cluj-Napoca, tudor_ oniga@yahoo.com

[1] In details about the state's functions, G. Vrabie, *Consideraţii privind funcţiile statului român*, in the "Studii şi cercetări juridice" Magazine, no. 4/1981, p. 23 et seq.

[2] I. Muraru, M. Constantinescu, *Drept parlamentar românesc*, "Actami" Publishing House, Bucharest, 1999, p. 121.

[3] From the perspective that the law is the will of the legislative authority, see: Couderc et Becanne, *La loi méthode du droit*, Dalloz, 1994.

The Laws of Enabling – Type of Ordinary Law

The Constitution consecrates itself the types of laws in our constitutional system, i.e.: constitutional laws, organic laws and ordinary laws[1]. But examining art. 115 paragr. 1 of the fundamental law which stipulates that "the Parliament may pass a special law enabling the Government to issue ordinances in fields outside the scope of organic laws", we question the legal nature of this enabling law as we are talking about a "special law" without stating its constitutional, organic or ordinary nature. One may wrongfully believe that a new category of laws is being introduced this way, the enabling laws, as distinctive law in regard to the previously analysed ones. But the enabling laws are nothing but a species of the ordinary laws, specially denominated to emphasise on their importance within the larger context of the institution of legislative delegation. The coming into effect of the enabling law, as type of ordinary law, is the outcome of a long and complicated process that, in our opinion, implies three main phases: a) the first phase, pre-parliamentary, of governmental nature, has as purpose the adoption in a Government session of an enabling bill; b) the second phase, parliamentary, ends with the passing of the bill by the Parliament, and at this moment we are talking about an enabling law; c) the third phase, post-parliamentary, completes the entire process and implies the promulgation of the law by the President of Romania and the entering into effect of the enabling law.

Characteristics of the Enabling Law

This analysis insists on the promulgation of the enabling law, presenting some of its particularities. As known, after the passing of the 5 and respectively 2 days when the Constitutional Court may be seized regarding an objection of unconstitutionality, the law is sent for promulgation. The promulgation shall be given by the President of Romania within 20 days at the most after the receipt of the law[2]. Seizing the Constitutional Court with an objection of unconstitutionality interrupts the period of 20 days, stopping thus the promulgation of the law. The terms of 5 and respectively 2 days are not of lapse, as the Constitutional Court can be also seized after their elapsing provided that the President would have not promulgated the enabling law. Taking into account that the President is compelled to promulgate the law within 20 days from its notification, in theory the terms of 5 and respectively 2 days may be prorogued up to maximum 20 days.

A stringent problem is also the one of the manner in which these terms are calculated: whether to calculate or not including the non-business days. The Constitutional Court has claimed that these terms, respectively 5 days and 2 days are "terms that refer to the development of constitutional relationships between public authorities and, consequently, unless otherwise expressively stated, the non-business days are not to be taken into consideration for the calculation"[3]. This position is arguable because pursuant to art. 14 of Law 47/1992 republished, "the jurisdictional procedure set by this law is completed by the rules of civil procedure to the extent in which they are compatible with the nature of the procedure before the Constitutional Court". But the civil procedure does not leave room for interpretation, evincing the fact that terms are calculated per non-business days, the first and the last day not being taken into account. Only that in this case the solution adopted by the Court was mainly based on the prerogative set by its organisation and functioning regulation, according to which "the compatibility is decided exclusively by the Court" and not reported

[1] art. 73, ¶ (1) of the Constitution.
[2] In the French constitutional system the term is of 15 days. In Hungary, the term is of 15 days as well.
[3] Decree no. 233 of December 20th, 1999, published in the Official Journal of Romania, I, no. 638 of December 28th, 1999.

to the civil procedure. As for the term of 20 days for promulgation, we believe that it is a lapse term as its fulfilment makes the subjects of law entitled to seizing fall from the benefit of law. Furthermore, the fulfilment of the 20 days term makes the law come into force even in the absence of promulgation which, doctrine says, it is "an instrument of valuation of the presidential function"[1], "an operation of verifying and authenticating the law"[2]. It was considered that "to claim the contrary it would mean that the President's prerogative to promulgate the law would be a *pocket veto* making the law inoperative by postponing the promulgation *sine die*", which we deem as inadmissible. If the enabling law did not come into force, this would be equal to a refusal to apply the law, thus converting the promulgation into ratification[3]. We wouldn't be an exception in the field of constitutional democracies if these rules were applied, as other European democracies use them as well exactly for the purpose of covering all the situations that may arise during the process of passing laws. For example, within the procedure of promulgating laws in the Irish constitutional system, the President of the Republic may refuse the promulgation, the effect being the re-examination of the law by the Parliament. If the legislative reapproves the law in the same form, it will come into effect even if the President opposes again, therefore even in the absence of promulgation. In Lithuania, in light of art. 71 of the Constitution, if the President refuses to promulgate a law within 10 days from its receipt after its adoption by the Parliament, it shall come into effect after it is signed and promulgated by the Parliament's Speaker. The contrary thesis has also been supported, considering that "promulgation is not a discretionary measure, the chief of the State being compelled to promulgate the law if it was passed legally"[4], and the term of 20 days for the promulgation would not be a lapse one, the entering into force in the absence of the promulgation meaning that "the Parliament would substitute the President in exercising a constitutional competence lying exclusively with him".[5]

Promulgation of the Law

Upon receipt of the enabling law for promulgation, the President of Romania has 3 possibilities: a) to promulgate the law within the term of 20 days. After promulgation, the enabling law is submitted in certified copy to the Secretary General of the Chamber of Deputies who within 24 hours at the most from its receipt rules its publication[6]; b) To request the Parliament, one single time, the re-examination of the law[7]. The request may be founded on matters concerning the opportunity of the regulation, its drafting of even constitutional objections[8]. Regardless of the objections, the Parliament is obliged to re-examine the

[1] Mella Elisabeth, *La promulgation dé la Constitution*, în "Revue du droit public", Paris, Éditions juridiques associées, no. 6/2002, p. 1705-1730.

[2] I. Deleanu, *Instituţii şi proceduri constituţionale*, Servo-Sat Publishing House, Arad, 2003, p. 598. It was equally decided that the promulgation "is not an actual statutory act, but an authentic ascertainment, considering that the law pas definitively passed by the Parliament, according to the constitutional procedure" (R. P. Vonica, *Introducere generală în drept*, Lumina Lex Publishing House, Bucharest, 2000, p. 380).

[3] The ratification of laws is specific to constitutional monarchies.

[4] I. Muraru, *Drept constituţional şi instituţii politice*, Actami Punlishing House, Bucharest, 1998, p. 419.

[5] M. Constantinescu, I. Vida, *Promulgarea legii*, in The Law Magazine, no. 6/2000, p. 11.

[6] Laws have priority in the publishing process against any other acts of different public authorities. In this respect, art. 5, ¶ (1) of the decree mentioned in the aforementioned note stipulates: "the laws, the other acts of the Parliament and of the each of the two Chambers, the decisions of the Constitutional Court pronounced upon the verification of the constitutionality of the laws prior to promulgation, the decrees, messages and other acts of the President of Romania addressed to the Parliament, emergency ordinances and Government's ordinances enter the publishing process by the care of the self-governing administration, in this order of propriety, before any other acts.

[7] art. 77, ¶ (2).

[8] T. Drăganu, *Drept constituţional şi instituţii politice*, Lumina Lex Publishing House, Bucharest, vol. II, 1998, p. 122.

enabling law[1]. As the law is not promulgated and it has not come into force, the Parliament has a discretionary right in this respect, materialised through the possibility that following the re-examination the law be amended and/or completed not only in respect to the President's objections or be adopted under the same form, thus rejecting the objections mentioned in the re-examination request or, as an ultimate solution, to take into consideration the opportunity of renouncing to the regulation. The re-examination request makes that the initial term of 20 days for the promulgation become inoperative, being replaced, pursuant to the constitutional precepts[2], with a term of 10 days starting the receipt by the President of the re-examined law. The term of 10 days becomes active only if the Parliament did not renounce at the regulation. The re-examination of the enabling law upon President's request first takes place in the Senate as it was the first Chamber seized. The re-examination request is put on the Senate's agenda within maximum 30 days[3]. After the Senate had examined the request, according to the legislative procedure, it is sent to the Chamber of Deputies which, based on the rapport of the permanent commission seized on the matter of the bill of enabling law, will decide upon the request within 30 days[4]. If the Parliament has re-examined the enabling law, it will send it to the President of Romania for promulgation. The President cannot require another re-examination of the law, instead the Constitution gives him the right to seize – it is a faculty – the Constitutional Court with an objection of unconstitutionality[5]. In the legal literature it was considered that "with the procedure of the re-examining the law, the bill or the legislative proposal is sent back"[6]. We believe that in this case there is no distinction between a bill or a legislative proposal and a law. After the parliamentary phase, what is sent for promulgation it is a law and not a bill or a proposal. The President of Romania can promulgate only laws but not bills. It is equally true that when speaking about "the sending back of the law", the Constitution itself makes the same mistake but in reverse. The correct sentence would have been "the sending back of the bill of the legislative proposal", as we can speak of a law only at the moment when the Parliament has definitively pronounced itself on the bill or the legislative proposal; c) To ask the Constitutional Court to pronounce itself on its constitutionality. This request may be materialized either before a possible request of re-examination of law, or subsequently, as the virtual unconstitutional texts may be adopted by members of the Parliament during the re-examination process as well. If the Constitutional Court's decision is in favour of the constitutionality of the law, the enabling law can be sent for promulgation. Similarly, the initial term of 20 days is replaced with a term of 10 days starting from the date when the Constitutional Court receives the decision. A decision of unconstitutionality of the enabling law has legal effects that are deeper than the request for re-examination addressed by the President, because the parliament will be compelled to re-examine the provisions of law ascertained as unconstitutional and to harmonize them with the stipulations of the decision[7].

The mere sending for re-examination of the law cannot stop the legislative process, on the contrary it continues it within a complementary procedure which leads to a new review of the previously adopted laws, and if the Constitutional Court is seized we may talk

[1] Generally speaking, the re-examination shall take place in each Chamber separately, either in common session, as the case may be, depending on the regulated object.
[2] art. 77, ¶ (3) of the Constitution.
[3] art. 141 of the Senate Regulation.
[4] art. 135 of the Chamber of Deputies Regulation.
[5] art. 146, ¶ (1).
[6] I. Brad, E. Veress, *Procedura întoarcerii legii reglementată de art. 75 din Constituţia României*, in The Law Magazine no. 3/2005, p. 97.
[7] art. 147, ¶ (2) of the Constitution.

at most, until its decision, of a suspension of the legislative process and in no circumstances of its cessation.

Conclusions

The abiding question is the one of knowing whether the President of Romania is or is not compelled to promulgate a law, including an enabling law, if it was passed within the limits and under the conditions set by the legislation in force. As previously mentioned, opinions are divided. In our opinion, the only possibility taken from the constitutional texts is to create the possibility for a law which was passed in the parliament to become effective after the expiry of the 20 days that the President has to promulgate it, obviously in the absence of taking use of this prerogative. Unfortunately, the body of our fundamental law does not come up with a solution for such a promulgation refusal, therefore in the nowadays constitutional environment, such a conflict between the Parliament and the President could not be solved but by the Constitutional Court. Only that this constitutionality conflict cannot be solved in a reasonable period of time, especially when we're talking about a law enabling the Government to adopt ordinances during the period of parliament holidays, which could lead to a possible institutional and constitutional blockage with severe consequences for the functioning of the rule of law under normal conditions.

Bibliography:

I. Brad, E. Veress, *Procedura întoarcerii legii reglementată de art. 75 din Constituţia României,* în Revista ,,Dreptul" nr. 3/2005;

I. Deleanu, *Instituţii şi proceduri constituţionale*, Editura ,,Servo-Sat", Arad, 2003;

Mella Elisabeth, *La promulgation dé la Constitution*, în ,,Revue du droit public", Paris, Éditions juridiques associées, nr. 6/2002;

R. P. Vonica, *Introducere generală în drept*, Editura ,,Lumina Lex", Bucureşti, 2000;

M. Constantinescu, I. Vida, *Promulgarea legii*, în Revista ,,Dreptul" nr. 6/2000;

I. Muraru, M. Constantinescu, *Drept parlamentar românesc*, Editura ,,Actami", Bucureşti, ediţia 1999;

I. Muraru, *Drept constituţional şi instituţii politice*, Editura ,,Actami", Bucureşti, 1998;

T. Drăganu, *Drept constituţional şi instituţii politice***,** Editura ,,Lumina Lex", Bucureşti, vol. II,1998;

Couderc et Becanne, *La loi méthode du droit*, Dalloz, 1994;

G. Vrabie, *Consideraţii privind funcţiile statului român*, în Revista ,,Studii şi cercetări juridice", nr. 4/1981.

WOMEN'S RIGHTS AND THE NATIONAL MINORITIES

Otovescu Frăsie Cristina [*]

Abstract

When they are less integrated in the society, the women from the ethnic minorities are more vulnerable to different forms of violence and exploitation from men, unlike the women that belong to the majority society.

Key words: *ethnic minorities, women, legislation, education, social integration*

Introduction

The women that belong to the ethnic minorities are in disadvantage to the women that belong to the majority. That's why, there must be drawn policies for the social integration of the women from the ethnic minorities that should encompass measures to combat the discrimination and to facilitate their access to dwellings, to having a job, to education, health and social services and to promote the respect for the fundamental rights.

The right of the national women minorities

At European level, under the dispositions of the *Treaty regarding the European Union and the Charter of fundamental rights*, are stipulated the rights of the women who belong to some ethic minority groups. Although art. 21 from the *Charter of Fundamental Rights of the European Union* forbids any form of discrimination based on the belonging to a national minority, practically, many ethnic minority communities that live in EU are affected by discrimination, social exclusion and segregation. Discrimination must be eliminated in all the countries of the European Union, especially Romania, both in school and at the working place.

The women that belong to the ethnic minorities are in disadvantage to the women that belong to the majority. That's why, there are policies regarding the social integration of the women from the ethnic minorities that encompass measures of fighting against discrimination and facilitate the access to dwellings, to having a working place, education, health and social services and to promote the respect for the fundamental rights.

Through a proper education is desired a better inclusion on the labor market and, in such a way, raises the life quality.

In Romania, after 1989, is noticed an obvious tendency of proliferation regarding the illiteracy. The phenomenon concerning the growth of the illiteracy took place in parallel with the decreasing of the interest for the participation to the school activities. Some statistic data indicates the fact that, generally, 14.5% of the Rroma men didn't go to school, while the percent of the uneducated women was higher of 23.5%. Also, 17.3% from the Rroma children of 7-16 years old had never been to school. The low rate of implication of the Rroma children in the educational system is considered to have multiple economic and cultural motivations[1].

[*] Assist. prof. Ph.D. Faculty of Law and Administrative Sciences, University of Craiova; Departament: Public Law and Administrative Sciences, Coordinator of Department of Human Rights Studies at Social Institute *Oltenia*, University of Craiova, e-mail: otocris@yahoo.com

[1] F. Buhuceanu, *Statutul social al minorităţii rome*, in Social Assistance Magazine, No. 4-5/2002, p. 168.

For a better integration, the legislation referring to migration and asylum[1] should be improved to promote even more the integration of women from the ethnic minorities. Referring to the social inclusion of these women, there are programs of the institutions or NGOs through which is desired the avoiding of the multiple discrimination, the stereotypes, the stigmatization and the ethnic segregation.

The women[2] that belong to the ethnic minorities are subjected to a multiple discrimination and are more vulnerable to the social exclusion and poverty and to extremely serious infringements of the human rights[3].

In the Romanian society, many Rroma people[4] can't hire with a legal working contract because they don't have any identity cards. Even the Rroma with identity cards have difficulties when employing. In a presentation film, realized on the Prelungirea Ferentari street from Bucharest, a Rroma woman tells about an experience she had when she wanted to become employed: "I first went there dressed as poorly as I was. Where from to get a nicer piece of clothes to wear? I went plainly, as I were" "and when that lady saw me, she didn't want to hire me. She refused although I told her I had four children and I was poor". "Then, I went the second time, because a Romanian woman advised me. She had told me: «Try to dress nicer, put some lipstick on... Do whatever it is necessary not to have such a blackly tint to show that you are a gypsy». So, that Romanian girl spoke to me plainly. I went home, I asked a girl I knew: "give me something to wear" she gave me and then I put on some lipstick and I returned: Lady, I said, please, I ask you from the bottom of my heart to hire me. It was as if I weren't the same one and she immediately gave me an application form to fill in and I got hired"[5].

In a recent study published recently, the United Nations Development Program (UNDP), named *Faces of Poverty, Faces of Hope*, was mentioned that 35% of the Rroma women from Romania, with the age between 25-54 years old, are not employed, representing a 4 times bigger percent than that of the majority women. These differences are given by the low level of education, the lack of professional grounding and qualification but also by the discrimination coming from the employers. Women don't represent an explicit point on the agenda of the national and international institutions, not even on that of the political parties. That's why it is not recommended the creation of programs that might offer hiring opportunities and to increase the quality level concerning the Rroma women's life[6].

An important aspect for the future generations is the active participation of women in the society and their successful integration because this will have an impact on their children's education.

At the same time, the rapid reaction of civil communities and of the authorities having responsibilities in terms of identifying, investigating and combating crime[7] will allow a decrease in the number of women that are victims of crime.

---

[1] For more details see Elena-Ana Nechita, *Libera circulaţie a persoanelor în spaţiul Uniunii Europene,* AGORA University Press, Oradea, 2010, p. 115-116.

[2] Maria Pescaru, *Asistenţa şi protecţia socială a familiei,* Tiparg Publishing House, Piteşti, 2011, p. 14.

[3] For example, the human beings traffic.

[4] Maria Pescaru, *Ibidem*

[5] Source: www.bbc.co.uk

[6] General presentation on the human rights situation regarding the Rroma minority from Romania transmitted to the European Commission for the Country Report on 2006, the Center of the Rroma people for Social Intervention and Studies, "Împreună" Agency of Community Development, p.24.

[7] Elena-Ana Mihuţ, *Câteva consideraţii cu privire la cele patru libertăţi de circulaţie fundamentale şi evoluţia infracţionalităţii transfrontaliere în* Criminalitatea transfrontalieră la graniţa dintre prezent şi viitor, coordinated by: Ovidiu Predescu, Elena-Ana Mihuţ, Nicolaie Iancu, T.K.K. Publishing House, Debrecen, Hungary, 2009, p. 175.

The districts with a share of the urban population over the country average are Hunedoara (75.9%), Braşov (74.0%), Constanţa (70.2%), Cluj (67.2%), Sibiu (65.8%), Brăila (64.1%). In the last ten years (1992-2002) has been noticed a slightly increase of the urban population share in the districts Alba, Dolj and Ilfov. In the same time, the rural population registered a numeric growth in ten districts, especially in Iaşi (8.6%), Constanţa (7.4%), Vaslui (6.0%), Galaţi (4.5%) and Bacău (4.1%).

At the census from March 2002, the structure of the population, according to the ethnic group, had the following configuration:

ETHNIC GROUP	2002	
	PERSONS	%
TOTAL	21.698.181	100.0
Romanians	19.409.400	89.5
Hungarians	1.434.377	6.6
Rroma (Gypsies)	535.250	25
Germans	60.088	0.3
Ukrainian -Ruthenian	61.353	0.3
Russians-Lipovans	36.397	0.2
Turks	32.596	0.2
Tartars	24.137	0.1
Serbians	22.518	0.1
Slovakians	17.199	0.1
Bulgarians	8.092	*
Croatians	6786	*
Greeks	6513	*
Jews	5870	*
Czechs	3938	*
Polish	3671	*
Italians	3331	*
Armenians	1780	*
Other ethnic groups	18950	0.1
Undeclared	5935	*

*) *under 0.05%.*

The statistic data show that the persons who declared themselves “Romanians” at the census are of majority, representing 89.5% from the country’s population (in Bucharest, 97% from the population are Romanians) and the number of the persons who declared another ethnic group was 10.5% from the whole population, the proportion regarding their share being relative at the census from 1992. The number of the Romanian ethnic population decreased with 4.9% in the last decade, while the number of the other ethnic group population reduced with 4.7%. We must mention that in the heading “other ethnic groups” were included the Chinese people (2.249 persons), the Csango people, (1.370 persons), Macedonians-Slavs (731 persons), Albanians (520 persons), Krashovani (207 persons), Slovenians (175 persons), the Gagauz people (45 persons), etc.

The most numerous foreign ethnic groups that live in Romania are the Magyars (6.6% from the total number of the country’s population) and the Rroma/gypsies (2.5%). The ethnic minorities that registered an increase regarding the number of their members in 2002 confronted by 1992 are the Rroma (with 134.163 persons), the Turks (with 2746), the Croatians (with 2701), the Greeks (with 2573) and the Italians (with 1975). On the other side,

other ethnic groups registered decreases, some of them significant ones, regarding their number: the Hungarians (with 190.582 persons), the Germans (with 59.374), the Serbians (with 5.890), the Ukrainians (with 4.411), the Jews (with 3.085), the Slovakians (with 2.395), the Russians-Lipovans (with 2.209), the Czechs (with 1.859), the Bulgarians (with 1.7590), the Polish (with 561), the Armenians (with 177).

In 29 districts, the share of the Romanian population is over the average of the country. The most numerous ethnic minority – the Hungarians – has a high share in the districts Harghita (84.6%) and Covasna (73.8%), where it represents a majority and, in other districts, the share varies between 20% and 40% from the total number of the population (in the districts Mureş – 39.3%, Satu-Mare – 35.2%, Bihor – 25.9% şi Sălaj – 23.1%).

The structure of the population according to the mother tongue is in concordance with the ethnic structure, 91% declaring that the mother tongue is the Romanian language and 9% saying they speak other than Romanian; 6.7% from the entire population indicated the Hungarian language as their mother tongue and 1.1% declared the Rromanes language. Other maternal languages were declared by 267.664 persons (1.2%), preponderantly being the German, Ukrainian, Russian-Lipovan, Turkish, Tartar and Slovakian language.

The data gathered from the census from 2002 are important fro the further understanding of the linguistic minorities from Romania, as we can notice from the below table:

MATERNAL LANGUAGE	**2002**	
	PERSONS	**%**
TOTAL	21.698.181	100.0
Romanians	19.741.356	91.0
Hungarians	1.447.544	6.7
Rromanes	241.617	1.1
Germans	45.129	0.2
Ukrainians	57.762	0.3
Russians	29.890	0.1
Turkish	28.714	0.1
Tartars	21.482	0.1
Serbians	20.377	0.1
Slovakians	16.108	0.1
Bulgarians	6.747	*
Croatians	6.355	*
Greeks	4.146	*
Czechs	3.339	*
Polish	2.755	*
Jewish (Yiddish)	1.100	*
Other maternal language	18.415	0.1
Undeclared	5.345	*

*) *under 0.05%.*

We must remember that the number of people who declare the Romanian language as being their mother tongue is bigger with 332.000 persons than the number of those who considered themselves Romanians. A similar situation was noticed in the case of the persons who declared the Hungarian as their mother tongue, being with 13.000 more persons than the number of those registered as Hungarians. Using the data gathered from the same census, that from March 2002, we are able to establish the typology of the population from Romania, according to their religious belonging. From the total number of the

population, 99.8% declared their belonging to a certain religion or confession, situation that was almost unimaginably before 1990, when the communist politic regime struggled to eliminate the religious beliefs (appreciated as obscurantist and unhealthy for the humans' conscience). Only 0.1% (23.1 thousand of people) from the entire population declared themselves without religion or atheist.

The religious majority is made of those who considered themselves as orthodox (86.7%), the orthodox religion having a long historical tradition in our country[1]. From the religious minorities can be noticed, as share, those that belong to the Romano-catholic church (4.7%) and to the reformed religion (3.2%). The distribution of the persons according to their religious belonging is suggestive in the below table:

RELIGION	**2002**	
	PERSONS	**%**
TOTAL	21.698.181	100.0
Orthodox	18.806.428	86.7
Roman-catholic	1.028.401	4.7
Greek-catholic	195.481	0.9
Reformed	698.550	3.2
Pentecostal	330.486	1.5
Baptist	129.937	0.6
7th Day Adventist	97.041	0.4
Unitarian	66.846	0.3
Moslem	67.566	0.3
Evangelist	46.029	0.2
Old rite Christian	39.485	0.2
Evangelic Lutheran Synod-Presbyterian	26.194	01
Evangelic of Augustan religion	11.203	0.1
Mosaic	6.179	*
Other religion	106.758	0.5
Without religion and atheists	23.105	0.1
Undeclared	18.492	0.1

*) *under 0.05%*

From the data presented so far, result that, in 2002, in the Romanian society, we had a majority of urban population (52), feminine gender population (51.2%), Romanian population (89.5%) and having as mother tongue the Romanian language (91%) and also an orthodox religion population (86.7%). Generally, our society befits especially from the ethnic, linguistic and religious point of view, by an accentuated homogeneity, comparing to other societies that are characterized by heterogeneous properties. Such general homogeneity traits justify, once more, the legitimacy of the 1st article from the Romanian Constitution that stipulates that "Romania is a national, sovereign and independent, unitary and indivisible state".

[1] For more details about spiritual life, see Mihai Vladimirescu, *Dimensiunea culturală a vieţii spirituale*, University of Craiova Annals, Teology Series, vol.II, 1998, p. 64-68.

Conclusions

The social relation between minority and majority enjoys a special interest among the researchers and specialists, but not less important and worthy to be examined are the interactions between minorities (less studied), their specific social problems, the image about theirselves and the majority of the minority groups, the social perception of the minorities in different socio-cultural contexts and historic moments. Any analyze of the mentioned problems must start from the premises regarding the existence of the minority and majority groups and also from the necessity of living together in a unitary and multicultural society.

Acknowledgment

This work was supported by the strategic grant POSDRU/89/1.5/S/61968, Project ID 61968(2009), co-financed by the European Social Fund within the Sectorial Program Human Resources Development 2007-2013.

Bibliography:

Maria Pescaru, *Asistenţa şi protecţia socială a familiei,* Tiparg Publishing House, Piteşti, 2011;

Elena-Ana Nechita, *Libera circulaţie a persoanelor în spaţiul Uniunii Europene,* AGORA University Press, Oradea, 2010;

Elena-Ana Mihuţ, *Câteva consideraţii cu privire la cele patru libertăţi de circulaţie fundamentale şi evoluţia infracţionalităţii transfrontaliere în* Criminalitatea transfrontalieră la graniţa dintre prezent şi viitor, coordonatori ştiinţifici: Ovidiu Predescu, Elena-Ana Mihuţ, Nicolaie Iancu, T.K.K. Pulishing House Debrecen, Hungary, 2009;

F. Buhuceanu, *Statutul social al minorităţii rome*, in Social Assistance Magazine, No. 4-5/2002;

M. Vladimirescu, *Dimensiunea culturală a vieţii spirituale*, University of Craiova Annals, Teology Serie, vol. II, 1998;

General presentation on the human rights situation regarding the Rroma minority from Romania, transmitted to the European Commission for the Country Report on 2006, the Center of the Rroma people for Social Intervention and Studies, "Împreună" Agency of Community Development;

Treaty regarding the European Union;

Charter of Fundamental Rights of the European Union;

www.bbc.co.uk.

CROSS CLAIM IN THE NEW CIVIL CODE

Adriana Pascan*

Abstract

When analyzing the right to property and its restrictions, an important component is represented by the historical and, later, the political one. In time, the political thought makes a mark on the understanding and concretization of the right to property.

Key words: *cross claim, property, servitude, civil code*.

Introduction

The task of solving the conflicts of interests in the society and establishing an equitable balance between different individuals and different social groups, in the conditions of the limited material resources through the reports of "assuming" material goods by actual subjects has returned to the institution of the right to property.

The doctrine[1] has remained consistent in refusing to equalise the property, as economic relation and the right to property as judicial relation.[2]

General considerations

The economic approach was at the beginning a reflex or a component of the religious way of thinking comprised in texts with sacred value, resulting from this frame of moral-religious thinking and philosophical- political only in the modern times, in antiquity the dominant perception over the natural order and social organization being a fundamental religious one.

The doctrine[3] is unanimous in recognizing that the property has been, is and will continue to be a constant and universal fact in all the states and in all times and proximity a reality felt more or less intense depending on the age and environment.[4] "No less, the right to property, *locus communis* "at the crossroads on the judicial concepts, theories and ideas" has its premises and finality in the human freedom and safety, complementary features in the judicial order and which cannot be dissociated".[5]

The property relations represent the most important element in the set of production relations, together with the activity exchange between humans, as the basis of the rest of the production relations as the individual property is an indispensable condition of freedom.[6]

Definition and content

The property[1] represents a social relation of proximity[2] being at the same time an economic relation of property, acknowledged as a proximity relation between people for the

---

*Ph.D. Lecturer, "Danubius" University of Galati, Faculty of Law, e-mail:adriana.pascan@univ-danubius.ro.

[1] C. Bîrsan, *Drept civil. Drepturi reale principale*, All Beck Publishing House, Bucharest, 2001, p. 29.

[2] C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a drepturilor reale,* 2nd Edition, University Publishing House in Bucharest, 1988, p. 27.

[3] C. Bîrsan, P. Perju, M. M. Pivniceru, *Codul civil adnotat*, volume I, Hamangiu Publishing House, 2008, Bucharest, p. 114.

[4] O. Ungureanu, *Reflecţii privind abuzul de drept şi inconvenientele anormale de vecinătate,* Acta Universitatis "Lucian Blaga", Sibiu, no. 1-2/2003, Rosetti Publishing House, Bucharest, 2004, p. 35.

[5] V. Stoica, *Drept civil. Drepturile reale principale*, volume I, Humanitas Publishing House, Bucharest, 2004, p. 71.

[6] D. Alexandresco, *Drept civil român*, Tom I, National Publishing House, Iaşi, 1900, p. 110.

material goods as a condition of their existence[3], of assuming the material premises of a production process that also creates a particular behavior for the neighbors[4]. "Good proximity entails at least two duties: first, the neighbor will not prejudice the neighbor and second, the neighbor will not inconvenience the neighbor in an intolerable manner"[5]. When this property is protected and guaranteed by the coercive force of the state, it becomes a property relation, namely the right to property and is part of the economic basis of every human society[6] the jurisprudence having the creative role and difficult task to conciliate the legitimate interest of the proprietor with social interest, when the discussion regards the proximity relations based on laws, regulations, customs and jurisprudence[7].

The right to property in the doctrine and legislation

The primitive nomad people living from hunting and less from breeding did not possess the instinct of freehold[8] as the latter came to life when passing from the nomad stage to the pastoral one. The defense instinct, in the precarious primitive form in which dominated the collective property of the entire group of individuals forming the tribe or, later, the village was more powerful than the instinct of property.

We subscribe to the opinion underlined by the literature[9] according to which the original fundament of the land law is the connection between the human group and the land they occupy, the pact between the spirit of the earth and the first occupiers. They acquired rights and transmit these rights to their descendents.[10]

The literature indicated that from "the idea of the proprietor's monopole over his asset derives the idea of third parties exclusion, including the public authorities, from exerting the attributes belonging to the righteous owner of the private property right". Therefore, the exclusivity operates not only towards the third parties but also towards the state. Also, the exclusiveness is in relation with the right of photographic reproduction, the

---

[1] I. Dogaru, T. Sâmbrian, *Drept civil român. Teoria generală a drepturilor reale,* Tratat, volume II, Europa Publishing House, Craiova, 1966, p.80.

[2] G. Boroi, L. Stănciulescu, *Drept civil. Curs selectiv. Teste grilă,* 2nd edition, All Beck Publishing House, Bucharest, 2003, p. 209

[3] D.C. Florescu, *Dreptul de proprietate şi alte drepturi reale principale,* Titu Maiorescu University Publishing House, Bucharest, 2002, p. 71

[4] "Solomon in his *Instructions*, said «My neighbour close to me means more than my brother far away» (27, 10); Cicero (De Officis, I, 18). Therefore, proximity is found in the example of negative fraternity: do not harm each other and go through each other, reference after O. Ungureanu, quoted.

[5] O. Ungureanu, quoted, p. 35.

[6] D. C. Florescu, quoted, p.71.

[7] O. Ungureanu, Cornelia Munteanu, I. C. Rujan, *Evoluţia istorică şi fundamentele filosofice, juridice, sociologice, economice şi teologice ale proprietăţii asupra pământului, in* Pandectele Române, no. 5/2005, p. 108.

[8] "Eden", one of the few words kept from Sumerian language, defined the cultivated and fertile land, in contradiction with the water (sea, rivers) and prairie surrounding it. As redundancy (doubling a concept), historically "the garden of Eden" became the mythological reflex of the terrestrial paradise in the west- Mediterranean territory", I. Geiss, *Istoria Lumii din preistorie până în anul 2000,* All Educational Publishing House, Bucharest, 2008, p. 45

[9] O. Ungureanu, C. Munteanu, quoted, p. 111.

[10] "The idea of private property- in the opinion of some authors- would be in religious. It is claimed that in the Greek and Italian societies each family had its sacred hearth and its ancestors. The family is connected to the sacred hearth of earth; a tight connection is established between the family and land. Each family, with its gods and cult had to have a place of their own on earth, isolated residence, a property. On the other side, the idea of property slowly extended from the small mound of earth where the dead rested, to the filed surrounding the mound; the land in which the dead rested was inalienable and indefeasible. Therefore, due to the sacred hearth which was immovable and the permanent grave, the family took over the land; the land was somehow combined and penetrated by the religion of the ancestors. It was said that in the beginning the right to property was guaranteed by the religion and not by the law. - In F. De Coulange, *Cetatea antică. Studiu asupra cultului, dreptului şi instituţiilor Greciei şi Romei,* volume I, Meridiane PH, Bucharest, 1984, p. 90-102.

proprietor having the right of image over his assets.[1] Therefore, "the real estate has a new intangible property attached: the right to exclusive exploitation of image reproduction".

The limitations of this character appear when there is a disjunction of the right to property[2]. In this case, the monopole over the asset is broken, the attributes of the right to property being divided between the holders of the disjunction with the mention that the bare property, as disjunction of the right to property maintains the vocation of reuniting all the initial attributes after the cease of the disjunctions.[3] We agree that in case of the common property we do not find ourselves in the situation of limiting the exclusive character of the right to property but in reality, we are only talking about an apparent limitation as the holders of the right to common property have the possibility to exert together all the attributes of the right to property.[4]

The literature also indicated that the "exclusive character of the right to property operates mostly in the relations with the public authorities or, in other words, in the vertical relations".

According to the Constitution, the property is inviolable and this aspect is in tight connection with the exclusive character of the right to property both in the relation with third parties but especially in the relations with the state. Therefore, the titular is protected against any interference of the state in the scope of the right to private property that could have as consequence the loss or restriction of this right, besides the cases expressly provisioned by the Constitution such as the expropriation, use of the basement of buildings, confiscation, according to art. 33, ¶ 3, 4 and 9 in the Constitution. Another case in which, in special conditions, provisioned in legal norms, the public authorities can breach the monopole of the proprietor regarding the exertion of the attributes of his right can appear when performing a search during a criminal trial or forced execution in a civil trial.

We can conclude therefore that the proprietor is the only one who has the right to exploit the asset in any form he wishes.

The servitude entails the existence of two funds belonging to different proprietors. The right to servitude is that real right and perpetual in the virtue of which a fund is imposed, named servant or served or dominated a certain task in the favor of another fund named dominant fund belonging to another person that the one holding the served fund.

The new Civil Code thoroughly regulates the cross servitude (cross claim), legal servitude[5] existing in case of a no through place and in case the land over which the servitude is to be constituted is property in severalty, the summoning of all the co proprietors is absolutely necessary as this assignment implies a restraint of the right to property and because the servitude cannot be divided, it cannot be established but with the unanimous consent of all the righteous holders of the right to property over the locked down estate.

---

[1] The exploitation of the asset in photography brings prejudice to the right of usage of the proprietor. Cassation Court, Civ. 1e, 10 mars 1999, în H. Capitant, Fr. Terre, Y. Lequette, Les grands arrets de la jurisprudence civile, 11e ed. Dalloz, Paris, 2000, p. 327. Acc. to O. Ungureanu, C. Munteanu, quoted, p.164.

[2] G. Boroi, L. Stănciulescu, quoted, p. 212.

[3] V. Stoica, quoted.

[4] G. Boroi, L. Stănciulescu, quoted, p. 212.

[5]Legal servitudes (article 607-610 Civ. Code, art. 611-623 New Civ. Code) are those established by law in the interest of the colectivity or the privates, such as: cross servitude, giving the proprietor of a no through place without public exit, the right to cross on the neighbouring property; distance servitude over certain works; servitude of view, imposing the proprietor of a fund not to open windows facing the land of the neighbour if a certain distance is not maintained.

In the meaning of the old Civil Code, "no through place" in the meaning of the law is a place without public exit (art. 616 Civil Code)[1]. The text referred to the absolute impossibility for public exit[2]. The new civil code, in art. 617, ¶ 3 expressly states that the cross claim is indefeasible and ends at the moment when the dominant fund acquires access to the public road.

Also, the servitude for the maintenance of the electric and sewage lines ends by prescription, theses lines not being enlightened for long since the constitution of the right, so that without the lines, the servitude for them doesn't exist either.[3]

Conclusions

The new Civil Code provisions, in art. 621, under the title *"Other legal limitations"* that "(1) The proprietor is obliged to allow the passage, through his funds, of the utilities networks serving neighbor funds or funds of the same area, namely water pipes, gas pipeline or similar, canals and underground or air electric lines as well as any other installations or materials with the same purpose. (2) This obligation subsists only for the cases in which passing through another way would be impossible, dangerous or very expensive. (3) In all cases, the proprietor has the right to fair compensatory financing. If new utilities are in discussion, the compensation must be prior. (4) The buildings, yards and gardens are exempted from this cross claim if the object of the claim consists in pipelines and underground canals, in case these are new utilities".

Bibliography:

C. Bîrsan, P. Perju, M. M. Pivniceru, *Codul civil adnotat*, volume I, Hamangiu Publishing House, Bucharest, 2008;

I. Geiss, *Istoria Lumii din preistorie până în anul 2000,* All Educational Publishing House, Bucharest, 2008;

O. Ungureanu, Cornelia Munteanu, I. C. Rujan, *Evoluţia istorică şi fundamentele filosofice, juridice, sociologice, economice şi teologice ale proprietăţii asupra pământului, in* Pandectele Române, no. 5/2005;

V. Stoica, *Drept civil. Drepturile reale principale*, volume I, Humanitas Publishing House, Bucharest, 2004;

O. Ungureanu, *Reflecţii privind abuzul de drept şi inconvenientele anormale de vecinătate,* Acta Universitatis "Lucian Blaga", Sibiu, no. 1-2/2003, Rosetti Publishing House, Bucharest, 2004;

D. C. Florescu, *Dreptul de proprietate şi alte drepturi reale principale,* Titu Maiorescu University Publishing House, Bucharest, 2002;

C. Bîrsan, *Drept civil. Drepturi reale principale*, All Beck Publishing House, Bucharest, 2001;

C. Alunaru, *Servitutea de trecere în dreptul civil român*, in Dreptul no. 8/1993;

C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a drepturilor reale,* 2nd Edition, Bucharest University Publishing House, Bucharest, 1988;

Studiu asupra cultului, dreptului şi instituţiilor Greciei şi Romei, volume I,. Meridiane PH, Bucharest, 1984;

[1] Maintaining the cross servitude was not imposed anymore when the estate representing the dominant fund was not a no through place anymore, in the meaning of article 616 in the Civil Code.

[2] See Cr. Alunaru, *Servitutea de trecere în dreptul civil român*, in Dreptul no. 8/1993, p. 15-27

[3] Court of Appeal Cluj, Civil section, decision no. 1880 in September 14 2001.

D. Alexandresco, *Drept civil român*, Tome I, National Publishing House, Iaşi, 1900, p. 110;

I. Dogaru, T. Sâmbrian, *Drept civil român. Teoria generală a drepturilor reale,* Tratat, volume II, Europa Publishing house, Craiova, 1966.

PREVENTING AND FIGHTING AGAINST (INTRA) FAMILY VIOLENCE

Maria Pescaru*

Abstract

Judicial remedies represent, nowadays, in the majority of the countries facing the seriousness of the (intra) family violence, one of the main specialists' concerns in their attempt to find new forms of preventing and discouraging the acts of aggression. Thus, the degree of laws' inadequation with regard to the victims' protection and of firmer penalization of the aggressors had as a result, in many countries, the fact that the reform of the legislative and judicial system in this domain became an absolute priority. This situation is true for Romania as well.

Key words*: violence, aggression, penalization, legislative system.*

Introduction

In the last decade, in several countries, the concerns to prevent and combat (intra) family violence have multiplied, drafting programs and strategies of different treatment or victim assistence and of raising public awareness about the scale and seriousness of this social problem. In this sense, numerous organizations and institutions actively involved in solving this issue have arisen and a series of measures to better protect victims and stronger prosecute aggressors have been initiated. On the other hand, there were introduced several reforms in the legal system, medical system, other operational institutions able to intervene in cases of family crisis or prevent such cases.

Current Concerns in Preventing and Combating (Intra) Family Violence

The process of socialization of violence is perpetuated from one generation to another, continuing throughout the life of individuals and future generations by sending the same distorted message that violence is a way and even a "solution" to solve the problem of violence itself.

To end this "cycle", perpetuated over several generations, community education programs became widespread in recent years, in various countries, and they aim to change people's attitudes and prejudices and, in parallel, the crystallization of some currents favorable to support, combat and prevent violence between family members. "To implement these programs, various organizations have been contacted by new or different categories of volunteers (recruited from among victims and even of some ex-aggressors), and actions of coordination between state authorities and representatives of institutions or civil society were initiated."[1]A particularly important role was that of education in schools or universities and the diffused one through the mass media channels, also the common effort to reduce domestic violence and the preventive operational measures to combat this problem of wide spread communitary interest. One of the most significant legal actions was to provide law courts to decide bans regarding the abuse of a family relative against another family relative, prohibiting harassment and threats against the victim, order the abuser to pay damages for victim or its financial support. "On the other hand, certain existing legislation has been

*Ph.D. Lecturer, University of Piteşti, Department of Sciences and Methods, mariapescaru@yahoo.com

[1] Popescu C. *Agresivitatea şi condiţia umană,* Tehnical Publishing House, Bucharest, 2001, p. 102.

redefined, in order to achieve a more precise determination of the responsibility of aggressors and victims' interests."[1]

The degree of effectiveness of these laws has depended and depends, however, on the way they are applied and the attitude and mentality of administering justice. In several countries, the police or the judges are characterized, themselves, as the victims of discriminatory attitudes, as, for example the case of Islamic countries, where women do not receive fair treatment in the judiciary act.

Therefore, to effectively and efficiently implement laws that guarantee protection for victims in many countries, various institutional innovations have been introduced in this field. It may be mentioned, in this context, the case of some countries in South America (Brazil, Colombia, Uruguay, Peru, Costa Rica, Argentina), where special police stations by women detective were set up whose main tasks consisted in reporting cases of abuse against women and victim assist Although it was proposed initially that the police stations should have a wider responsibility in regard to counseling, legal advice and helping the victim, this has not materialized, which has been translated into limited effectiveness in terms of assistance, as such, the victims. On the other hand, involvements of these special sections have not generated a larger scale of penalties imposed on agressors, because of the obstacles imposed by law. However, despite these limitations, this form of innovation has discouraged many cases of aggression, because of fears that the agressors will be reported to the department and will enter, therefore, the attention of authorities.

Another innovation, more recent,largely widespread in Western countries, was a coordinated intervention by the community, convergence strategy to implement the actions initiated by the police, judges, doctors, social workers or other relevant groups or organizations, as the development of a concerted community reaction to the scale and seriousness of family violence.

"Similar intervention strategies have been developed in Canada, where prevention of (intra) family violence is a major objective of authority policy."[2] As another example, in England, in London, there is a distinct strategy of intervention in domestic violence cases, since the community has the following resources:

- A police special policy through which agressors can be charged with the crime of violence against wives;
- An intensive training of police regarding their involvement in cases of aggression;
- A service that provides family support and consultation 24 hours a day, intervention in crisis situations;
- An emergency shelter for women and children victims;
- Counseling for battered women in order to provide legal and emotional support;
- A treatment group for husbands who assault their wives.

"Such EU strategy is based on the idea that criminalizing the domestic violence can not be successful if the punishment of agressors is reduced without complementary social policies developed to raise public oppinion and authorities about the seriousness of this phenomenon".[3] Unfortunately, in countries where resources are scarce or absent, these concerns have only sporadic, without being confined to a comprehensive policy to prevent

[1] Sânziana, Simona, *Violenţa în familie- prezentată în presa din România*, Lumen Publishing House, Bucharest, 2006. p. 98.
[2] Muntean Ana, Popescu Marciana, Popa Smadanda, *Victimele violenţei domestice copiii şi femeile,* Eurostampa Publishing House, Timişoara, 2001, p. 112.
[3] Giddens, Anthony, Tradus de Radu Săndulescu, Vivia Săndulescu, *Sociologie*, All Publishing House, Bucharest, 2000, p. 443.

the whole community to be trained. It is, as we believe, the case of our country where, despite efforts to be appreciated, there is still a global strategy to prevent domestic violence.

Policies addressing the occurrence of a strong criminal justice system in cases of (intra) family violence can not be detached from those pursuing education and public authorities, in order to prevent this widely generalized phenomenon in contemporary societies.

At the same time, changes to be made in the criminal justice system must take into account the need to standardize information on defining and treating cases of violence within the family. Beyond these changes, modifying attitudes of the authority is an important objective, so that they can become aware of themselves, that violence in the family group is a national priority.

Although prevention of (intra) family violence has become in recent years, a priority of coordinated intervention strategies targeting the community, very few programs for national prevention were developed, the efforts and initiatives having, in particular, a local character. The most prevention programs in the various countries aimed and aim to further education, particularly education for children and adolescents in the spirit of nonviolence to resolve conflicts in nonviolent ways and forms. Sexual education aiming at preventing rape and sexual abuse cases is a part of these programs.

Other programs initiated, especially by the feminist movement[1], have proposed and continue to aim at changing stereotypes about masculinity and feminism, which is manifested in the mass media, or through various cultural clichés, which make the woman a victim of the aggression committed in or outside the family.

In many countries, special public or civic education programs are applied today, some even running through the mass media, which aim at preventing violence among family members and the public awareness of risk factors or causes to commit aggression in family environment[2].

In turn, the scientific research provides important information regarding the most appropriate ways to combat and prevent (intra) family violence, highlighting the main risk factors faced by the victims, the main characteristics of persons likely to be abused and the aggressors, the circumstances of the assault situations (environments at risk, determinants of aggression, predisposing or precipitating factors).

In this collective effort, in which the entire community is engaged, the actions of the police from different countries have become more effective, to the extent that their intervention in situations of aggression, have become more timely and the number of cases of arrest of the agressors has increased. An important role it was exercised in this regard, by the pressures from advocates of victims who demanded a more adequate protection to reiterate them and avoid aggression.

In Western countries, especially the beneficiaries of a comprehensive system of resources and logistical resources were developed and implemented special programs to support victims and aggressors treatment. Even if the efficacy of these programs is not clear yet, the estimates being inconsistent with each other, and even if they are not included in only a minority of abusers, some studies show that treatment has changed the conduct of several men who, though they continued abusing their partner mentally or emotionally, they have dropped physical assaults as such.

---

[1] For more details about woman's rights, see Cristina Otovescu Frasie, *Drepturile omului în societatea contemporană*, Scrisul Românesc Publishing House, Craiova, 2009, pp. 99-111.
[2] *Ibidem.*

Although the treatment appears to reduce physical violence exercised by those enrolled in such programs, other than the following treatment variables appear to be more important in this trend. One of these variables is represented by justice, even to the extent that more aggressors are afraid that if they persist in their acts of violence, the measures decided by the courts will be more severe than the requirement of following a treatment program, up to imprisonment. On the other hand, the feelings of shame to public opinion fear that the family will be stigmatized, is also an important variable that should not be ignored.

In conditions in which such treatment programs are not implemented in Romania yet, a detailed analysis of the goals, objectives, models and their degree of effectiveness, I think, extremely useful for Romanian specialists to provide information and assessment can serve as benchmarks for an eventual deployment in the future,of these forms of treatment in our country.

Considered, once as a private matter, (intra) family violence is reconsidered now, to be defined in several countries as an offense criminalized and punishable by law, like any act of violence committed outside the family. This definition allowed to exercise a more rigorous control of the problem and allowed the courts of various countries, to issue special orders regarding the obligation of following a treatment. In this regard, the extent to which subjects are repeat offenders under court supervision or remaining unpaid after application of treatment programs is an important indicator of both the evidence measure effectiveness and efficiency during the treatment of evidence.

Counselling is an intervention in which the specialist assists the victim in the process of revealing important aspects of the problem rationally. This type of intervention achieves the status of the individual giving motivational and confidence in his abilities, and at the same time, helps the individual to organize ideas, descovering strengths and weaknesses of the respective situation, and to form a hierarchy of strategies and priorities which are to be followed by the recipient.

The systematic intervention in cases of domestic violence involves couple counseling and family terepia. With regard to marriage counseling, it is prohibited in many U.S. states and in British Standards it is contraindicated in the initial intervention, but considers it appropriate in a later stage of treatment, under specific circumstances. In many other countries, with working standards for cases of family violence, the marriage counseling is permitted, if the man initially followed a program for abusers and he has not committed acts of aggression for at least one year. Woman's desire to remain with the abuser is seen as a necessary reason but not sufficient to begin marriage counseling or family therapy. It required an initial assessment to determine levels of risk and determine which of the couples the right candidate for the potential systematic intervention is.

Identifying acts of violence in the family. Phenomenon of awareness of family violence

The abuse against woman in the family is a relatively new phenomenon came to the attention of the human sciences, and researchers who contribute to better understanding and subsequent intervention, need a broad definition of the phenomenon to redirect it under any name we've generally found it, the phenomenon is the same.

Case Study: The phenomenon of family violence in Craiova

In the survey of Craiova perception on the phenomenon of family violence, research method consisted of:

- the opinion survey based on:

a) administered questionnaire (in the case of general questionnaire)

b) self-administered questionnaire (in the case of the optional questionnaire)

- statistical analysis of collected data

Through this study, we identify family violence and awareness of the family violence phenomenon.

The investigation technique was represented in the questionnaire:

a) a general one, addressing a sample of 600 respondents, which included 21 free and pre-formulated questions with answers;
b) an optionalone, and which aimed strictly at the collection of information on respondents' family in order to capture the incidence of domestic violence in Craiova.

Table. no. 1: Manifestations of domestic violence, physical abuse

	1. Are the following acts manifestations of domestic violence in your opinion? *C1. Physical abuse by men against woman (beat)*	
1	Yes	96.3%
2	No	3.7%
	TOTAL	100%

Emotional abuse is the most common and is found as part of all forms of abuse. While the foregoing and accompanies other forms of abuse and isolation that can occur through: insults, threats, intimidation, killing livestock favorite personal deprivation of essential needs (food, sleep). If this violence seems less criminal, easier on the victim, its emotion-term effect is devastating to the self-esteem and confidence of the victim, psychologically, there are a variety of abusive situations such as irony and wicked games, humiliation, neglect, jealousy, threats, bullying, isolation, victim blaming, labeling, imposing dependency, hitting the wall or table with his fist by the partners.

The problem of sexual abuse in the family is a subject that gives way to many controversies, is the subject of investigations and social sciences and humanities.

Table no. 2: Manifestations of domestic violence, sexual abuse

	3. Are the following acts manifestations of domestic violence in your opinion? *C3 Sexual abuse by man against woman (harassment, rape)*	
1	Yes	95.8%
2	No	3.7%
3	NS/NR	0.5%
	TOTAL	100%

Table no. 3: Manifestations of domestic violence, child abuse

	4. Are the following acts manifestations of domestic violence in your opinion? *C4. A method of children education*	
1	Yes	81.5%
2	No	17%
3	NS/NR	1.5%
	TOTAL	100%

Research shows that the trauma of children who grow up in an atmosphere of violence, even if they are not direct victims, is more intense and more profound impact and lasting only for children who are direct victims of abuse and neglect by parents. In a family where violence is at home, children grow up in an atmosphere in which their basic needs (need for security, love) are deeply neglected and parental functions can not be met.

To be efficiently, an appropriate strategy in the prevention and amelioration of family violence must be based on clear objectives and be supported effectively by human and logistical resources, both governmental character, and the governmental nature.

Conclusions

From this perspective, legislative initiatives aimed at more appropriate protection for victims and harsher punishment of perpetrators, the occurrence of strong (but protected from abuse) authorities, including the police, ease conflict situations, more active involvement social assistance in cases of (intra) family violence, the development of national prevention and education programs to teach children and young people to resolve conflicts through nonviolent means, the design of actions to assist victims and treatment for abusers, are just some of the measures that the premises could be a major strategy at national level, to combine and prevent this phenomenon, which manifests itself in our country with such acuity. The protection of victims of (intra)family violence is a sensitive family in Romania, where support is a beginning work, and passing legislation in the field facing much resistance, considering that family life should not stand under the Penal Code.

Bibliography:

Pescaru Maria, *Asistenţa şi protecţia drepturilor copilului.* University of Piteşti Publishing House, Piteşti, 2010;

Otovescu, Frasie, Cristina, *Drepturile omului în societatea contemporană*, Scrisul Românesc Publishing House, Craiova, 2009;

Sânziana, Simona, *Violenţa în familie- prezentată în presa din România*, Lumen Publishing House, Bucharest, 2006;

Muntean Ana, Popescu Marciana, Popa Smadanda, *Victimele violenţei domestice copiii şi femeile,* Eurostampa Publishing House, Timişoara, 2001;

Popescu C., *Agresivitatea şi condiţia umană,* Techincal Publishing House, Bucharest, 2001;

Giddens, Anthony, Translated by Radu Săndulescu, Vivia Săndulescu, *Sociologie*, All Publishing House, Bucharest, 2000.

TRAFFIC AND ILLEGAL CONSUMPTION OF DRUGS

Maria Pescaru*

Abstract

The content of the study includes phenomena as traffic and illegal consuming of drugs producing traumatisms no matter the affiliation to a group, race, sex or age. Shock induced can affect drammatically life of even destroy it. Abuse and illegal traffic of drugs are simmilar to a disease destroying society's mental and moral health.

Keywords: *drugs, traffic, consuming, consequences, behavior.*

Introduction

Over the last years, drugs' disaster has represented the most complex, profound and tragic phenomenon of the contemporary world, in the conditions in which annually, million of dollars and hundred of thousands of persons are driven into this death marriage called" The illegal drug traffic and consuming". In the perspective of the years to come, the extent of this phenomenon is extremely concerning, also because there isn't a clear statistic of the production, traffic, consuming and of the number of the persons deceased because of drugs. The criminality created by drugs, by its social, economic, medical, cultural and political consequences causes serious prejudices, not only to state's concerns, but also to the ones of the society, of many particular persons, attempt to citizens' life and health, influence in a demoralizing way people's consciousness and behavior.

Drugs-terms, notions and classification criteria

The concern shown by the specialists in this matter (doctors, psychologists, sociologists, teachers, journalists from different state organisms, specialists co-opted into non-governmental organizations) is fueled, firstly, by the growing all over the world of this problematic and by the more rapid erasing of the distinction existent in a recent anteriority, between the producing countries, consumers and of transit. An eloquent example, from this point of view, is constituted by problematic's escalade into Romania, beginning with 1990, when illegal traffic and drug consuming surpassed all specialists' forecasts, in this way, from a country of "transit" it became a "drug consuming" one[1].

The social alarming issued from the proliferation of drugs, without a precedent, leads to the unpleasant idea that the adopted battle strategies against this phenomenon, generally speaking, by the world community and by Romania's government, especially, proved to be inefficient.

At present, illegal drug traffic is a very profitable criminal activity, with super-national characteristic, that acts in conformities with law's market economy, having as immediate purpose the charging of consuming centers, and as finality obtaining enormous benefits, which righteously supposes, state's concern of orienting, in an efficient way, its own policy in the anti-drug battle, for its own citizens 'health protection and the salvation of socio-moral values. But, every state (even social collectivities inside a country) has certain" particularities", given by the geographic positioning, traditions, religion, culture and last but not least, by drugs' diversity and availability, at a certain point. These specificities have to be

* Ph. D. Lecturer, Sociology and social services department, The University of Pitesti, mariapescaru@yahoo.com

[1] Cristina Otovescu Frăsie, *Protecţia internaţională a drepturilor omului*, Didactic and Pedagogic Publishing House, Bucharest, 2008, p. 159-166.

correlated with the quality of the preventing and punitive measures taken by state organs with these sorts of attributions. This is why, at the orientation of our policy, one has to take into consideration "the profile" of the illegal drug dealing existent in Romania, in report with other numerous factors. Or, this supposes, first, a careful and complex analysis and materialization, of the three vectors that constitute the structure of the phenomenon into discussion which is-*the drug-the individual-the society.*

The scientific strictness and the wish to avoid some inadequacies impose us to make a presentation of the main specialty terms with which we are going to operate and to explain the notions used with them, in the conditions in which, with reference to heroin, cocaine, Ecstasy and other compounds with similar effects over the human body, the use of terms like drugs, dopes, psychotropic substances and narcotic substances, can, at a certain point, generate confusions in certain situations. According to the Explanatory Dictionary of the Romanian language (ed. 1996), the term "drug" defines a substance of a vegetable, mineral or animal origin, which is used for the preparation of some medicines and as "dope", the term "dope" defines a "medicamentary substance which inhibits the nervous centers, provoking a state of physic and psychic inertia, and which, after being used for a long time, leads to the habit and the necessity of increasing doses; substance which, by repeated usage, leads to the phenomenon of habit", the term "psychotropic" refers to a "medicine with an action over the mind", and the term "narcotic" refers to a "substance, medicine that provokes narcosis- state characterized by the lose of consciousness, muscular relaxation, the diminution of sensitivity and reflexes, provoked artificially by the action of narcotic substances over the nervous centers, especially in surgical interventions".

The definitions of these terms, which in most cases are used as being synonymous, have a general feature, but not comprehensive for the chemical components that represent the object of this paper. The first attempts to a unitary approach at international level of the illegal drug traffic and consuming – both as concerns the terminology and the policy towards these phenomena- date from the beginning of the 20th century. Thus, the Shanghai conference, from 1909, that reunited 13 deputations of some countries actively involved in the opium trade (USA, China, Great Britain, France, Germany, Italy, Holland, Portugal, Austro-Hungary, Russia, Japan, Siam and Persia) aimed at the establishing of some criteria concerning this activity. Further, in the framework of the Haga conference in 1912, new rules were established concerning the opium, morphine, cocaine and codeine trade, being accredited and accepted the idea of the necessity for a control of using these substances for medical purposes. At the initiative of Nations' Society (the predecessor of the United Nations Organization), in 1925 took place the Geneva conference, in the framework of which new rules concerning the trade and use of opium and previous reminded substances (among which were included cannabis and heroin) were established and was laid the foundation for a "Permanent central committee", that was going to take care of the surveillance of putting in practice the new established rules. Further, in the period 1931-1953, six conferences at national level took place that aimed at solving the problem of illegal drug dealing and consuming, being attempted control's unitary approach and of phenomenon's eradication. The results of these steps constituted the grounds of Dopes Unique Convention, adopted in New York at 30 March 1961 and modified through the Protocol of 1972, which constitutes the basement of dopes' prohibition and control system. In this context, for the first time a series of terms were defined, concerning the aimed domain, unanimously accepted.

United Nations Convention over Psychotropic Substances from Vienna in 1971 enlarges the institutional framework concerning the domain and imposes a series of administrative constraints related to illegal drug traffic and trade with the aimed substances.

The addiction

Man's capital sin has been and is good and evil knowledge. In his tireless effort to differentiate good from evil, he had to make certain experimenting. For example, he found out that some plants ingested in their natural state, or gone through processing forms, gave him a singular, fortifying pleasure, a state of calm, a delightful state of oblivion or of reverie, in other words, the escape from the daily basis and the entrance into "the artificial paradise".

Was this a good thing or a bad one? Over the long history of these experimenting, man believed to have discovered real friends, who made him feel good, and be happy.

Millenniums have had to pass, until man could understand, that is, he has probably established a causal connection between liquor consummation or the use of plants with toxic elements and some forms of psychic, behavioral or physical turmoil.

The development of medicine's and social sciences allowed the research, both of bio-chemical composition of drugs and alcohol, and their effects over the human body, over his personality and of human relationships.

In the alienated conditions of the contemporary society, the consuming of drugs and alcohol seems to become a necessity. In spite of the fact that the propaganda for some governmental or non-governmental formations, religious ones, etc, leads a real war against this disaster, most people, especially those with a poor material situation, those who perform predominantly physical job, as well as young people morally confused, are convinced that alcohol gives force, virility, as well as it is sustained that drugs give the supreme satisfaction: the escape from the stressing and aggressive reality.

Eventually, these "friends" have been insinuated into man's life, tireless pleasures, oblivion and /or all forms of ephemeral joy seeker, who doesn't understand that the "friends" have become dangerous aggressors, both for the individual and for the society.

In other words, alcohol and drugs tend to modify both human's condition and man's wonderful destiny. Certainly, addicts expansion 'speed, with drugs and alcohol represent the most dangerous thing for the human condition, on the one hand, by the degenerative effects of humanly biological structure, on the other hand, by the power of proliferation of aggressively and violence in the contemporary society.

The addictions seem to be the cancer that kills not only drugs consumer's organism, but especially his psychic, through the tragic disorganization of human personality.

The Expert Community of Worldly Health Organization defines the addiction as *"a psychic and sometimes physical state, resulted from an interaction between a living organism and a psycho-active product, characterized by behavioral modifications, by other reactions that always contain an invincible desire to use the drug permanently or periodically, with the purpose of feeling the psychic effects and of escaping from isolation".*

The drug is a psychotropic substance of a natural or industrial origin, having or not a therapeutical application, used abusively and addictively with an un-medical purpose, for euphorically or hallucinatory effects. So, the drug is ingested in order to obtain an "artificial paradise", as Ch. Baudelaire said it, or "miserable miracles"- H. Michaux.

Drug's effect doesn't depend only on its psycho-pharmaceutical properties, on the dosage, on the administrating manner, on the frequency of use, especially, on subject's psychic structure, on individual and social reactions, on the previous psychotropic experience, on health's status, on what it is expected to be obtained from the drug.

If drugs have initially been considered taboo, they later became a totem, loved and adored as a deity. A proof in this sense is represented by the very rapid growth of the hype mania among the adolescents.

The processes from chemistry lead to the diversification and sophistication of the old active substances under "innocent" forms, the so-called "sweet drugs", and "light drugs". They are sold in attractive packing and their use has become a fact of modernity or of expressing personality's hypertrophy, as it used to be tobacco smoking.

The drug addict conduct constitutes a perversity that satisfies completely the personal need (seeking for pleasure, the avoiding of suffering), by the regular and imperious absorption of one or more toxic products. This perversity is alike the sexual ones in the measure in which it presents the fundamental feature, that is regression to a partial pleasure.

The evolution scheme of drug consuming from the first administration up to the stage of serious addiction is:

a) They begin using the drug seeking for the good disposition called euphoria, or seeking for new sensations, or imitating the fellow creatures who assure them that *"it's worth trying".*

b) They take the drug, obtaining or not the sensations they expected. This is the phase of the so-called "recreational use".

c) Eventually, the administrated quantities train risks that endanger individual's functioning as a member of society or his own health.

Ex: The public danger that a hashish smoker who is driving a car represents, the risk represented by an alcoholic husband with intolerable ulcerous pains that are under anesthesia by ingesting alcoholic extract.

There is also the phase of "*drug abuse".*

d) After a while, in the case of consuming a great number of substances, it is observed an organism adapting, which makes necessary the administration of a bigger drug quantity in order to obtain the same effect.

This represents the "*tolerance"* installation phase illustrated by individuals who "*have a resistance to alcohol".*

e) The appearance, finally, of the incapacity of interrupting drug consuming willingly signals the fact that the individual is already in the "addiction" stage.

f) If the administration is, however, suddenly interrupted, they will go through suffering with mental and physical symptoms, distinct for each substance composition. This is the *"abstinence syndrome"* or of "withdrawal" (weaning).

The apparition of the abstinence syndrome when the drug is interrupted is the sign of "*the physical addiction".*

- There are also cases of drug addiction to which it isn't distinguished any kind of abstinence syndrome, although the individual desires and seeks the drugs with the same ardor. In this situation we're talking about *"psychic addiction***"**, that includes only an imperious need for using the drug, thus to keep consuming it.

Thus, the physique and psychic addictions are forms of the general phenomenon of drug addiction. The drug class with the most spectacular ability to captivate and induce addiction is the class in which are included the opium, morphine, heroin, codeine and other natural derivatives or of synthesis.

The features, evolution and the tendencies manifested by the illegal drug traffic

Drug dealing presents a series of general features from the numerous investigations effectuated by national and international organisms responsible with the prevention and repression of this scourge of the contemporary world. The commercial and organized feature of the illegal drug traffic is given by the law of demand and offer and by the fact that the obtaining of bigger and bigger profits from it is the only purpose of drugs' network of transport and sell. The clandestine characteristic is illustrated by the fact that those who command this dealing are unknown to the bigger part of the common trafficking, camouflaging their illegal activities in certain actions permitted by the law. The intermediates in this dealing are chosen function of the movement possibilities that their profession or quality offers, using frequently fake identities. The profits obtained from the drug business are generally placed in countries whose banks allow the practice of anonymous bank accounts and guarantee their privacy.

The taking into account of the risk is another feature, for which reason the itineraries and the operation ways used vary function of certain predicted or known difficulties. Indirect and longer routes are preferred, if they present a bigger measure of security, the intermediates are changed if they could be discovered, and sometimes even crossed out if they "talk too much". The connection with the criminal environment represents another important characteristic of the illegal drug dealing. There are numerous cases in which drug dealers have connections with specialized organized gangs in prostitution's exploitation, of clandestine games, as well as in falsifying and placing of false coins. On the other hand, former hold-up specialists or panders reconvert in drug dealers.

Individual trafficking is one last feature of the international drug dealing[1]. Numerous persons originated from drug-producing areas effectuate on their own small drug transportation, especially cannabis leaves or resin and psychotropic substances. Along the history, drug phenomenon has had an ascending evolution from the simple use in medical and therapeutically purposes by healers, in ancient period to its cultivation, producing and commercialization by criminal networks belonging to organized crime, in the contemporary period.

On an international plan over the last years has appeared the idea of liberalization of narcotics' control, in order to attempt more permissive forms of control, like for example the un-incrimination for small possessions of drugs for personal use, the possibility of prescribing these substances to drug addicts, by doctors, or drug selling without restrictions. This kind of suggestions has been promoted by doctrinarian scholars in the juridical domain from Holland and certain states from the USA. The formulated propositions aimed at the un-incrimination for possession of drugs for personal use and the consuming of a small quantity of drugs, while commercialization would be still considered an offense. In practice, this would lead to purchasing of drugs from the streets. It is also promoted the idea that doctors could have the legal possibility to prescribe dope substances to those known and registered as drug addicts. Also, legalizing has to represent the complete abolition of governmental control and to allow free selling or manifestations of this monopoly just like in the case of alcohol and the setting up of increased taxes, age restrictions, etc. The risks associated with moderate drug consuming have been greatly exaggerated. The last decades research have shown that all types of narcotics affect the health, causing addiction and not being able to realize a moderate consuming, as the organism continues to demand the drug, even if it's harmful.

It is wrong to punish the disease in itself. In legislation the operations and the use of drugs are the one incriminated, and not the addiction in itself. At the International Convention of United Nations concerning Drugs [2]it has been shown that they can only be used for medical and scientific purpose. Drugs' use for personal purpose, in recreational, religious purposes, or in order to cause hallucinations isn't permitted, as the un-medical drugs include also major risks both for the individual and for the society.

Drugs prohibiting made it be more interesting, just like in the case of the forbidden fruit.

The reason for which drugs are considered exciting is that they cause pleasant effects, at least in the beginning, creating in time the addiction that pushes the consumer to purchase at any price its source of pleasure. The fact that addiction is hard to counteract is an important reason for drug controlling. Drugs control has created an enrichment possibility and has generated serious offenses which would disappear if drugs were legalized. Profits are possible by generating addiction to drug addicts who are willing to pay enormous sums of

[1] Cristina Otovescu Frăsie, *op.cit.* p. 168-170.

[2] The unique dopes' convention, from New York at 30 march 1961, emended through the Geneva protocol from 25 march 1972, to which Romania adhered by the Decree no. 626/1973, The Official Bulletin, part 1, no. 213/ 1973.

money in order to purchase drugs and satisfy their needs. A free market would make even more people become drug addicts, creating bigger profits to producers.

If the society were to eliminate these necessities through education, treatment and penal sanctions, the criminal organizations would be deprived of profit. By the legal prescription of drugs for addicts under medical control, society would take them off the black market's circuit and would free them of the need to commit crimes in order to pay their drugs. Some countries have tried to implement this system, through the prescription of drugs to addicts, being able to consume as they wanted, but the results were catastrophic. Social isolation is the direct result of drug consuming and their purchase becomes anterior to any other need, diminishing the interest towards society. The free commercialization would mean that more and more people would be rejected from the society.

Drug control has had a decisive role. The spreading of drugs and the increase of the possibilities of purchasing them lead to an increase of the number of addicts, who only by strict operations could be kept under control. Nobody can estimate the level that drugs consuming could reach if they were to be legalized.

Drug addicts' treatment and readapting are important not only for the individual, but also for all society's sectors. This task that has to be modeled function of each particular case has to appeal to all treatment modalities that are proof, each in its cultural context, that tend to drug addicts' social readapting and to the fixing of mechanisms for preventing the backsliding of the individual and of the family.

The treatment programs consistently have to surpass the psychic problems related to drug addiction and at the same time to give psychological and social advice that the drug addict needs in order to be able to live without the drug.

In order to formulate a treatment strategy the existent national and international networks have to make use of the readapting programs and the systems of tracking down, where this kind of rules are established: the continuing of the development of readapting systems for the drug addicts that have proved their quitting by the finance of the activities involving the responsibility towards specific anterior needs; the putting in practice of drug addicts' treatment systems, simultaneously, as systems of care for the mental and psychical health; the encouraging of non-governmental organizations, of religious groups and of private organizations and local institutions to collaboration for the support of the treatment programs and in case there is a connection, encouraging treatment programs doesn't appeal to the administration of drugs.

Conclusions

Aspects dealt with point out the main guide marks defining the framework of manifestation specific to these phenomena in the actual socio-political and international context. Authorities' duty in the domain concening the discovery and blocking the sources of subsidising traffic and illegal consumption of drugs are becoming more and more difficult. Necessity to develop cooperation activities at regional and iternational levels to fight angainst these negative phenomena becomes obvious.

Beside the necessary steps consisting in achieving a greater compatibility in the field of drug consumption, European Council studies the opportunity of harmonizing these directives in all member states.

Bibliography:

Otovescu Frăsie, C., *International protection of human rights*, Didactic and Pedagogic Publishing House, Bucharest, 2008;

Banciu, Dan, *Crime and criminality, bench-marks and jurist-sociological approaches*, Lumina Lex Publishing House, Bucharest, 2005;

Liteanu, Traian; Stefan, Teodoru; Stoica, Constantin: *Drug dealing, Bench-marks, dimensions and perspectives*, Ani Publishing House, Bucharest, 2005;

Radulescu, M. Sorin, *Juvenile delinquency in contemporary society*, Lumina Lex Publishing House, Bucharest, 2003;

Ogien, Albert, *Deviance's sociology,* Polirom Publishing House, Bucharest, 2002;

Miclea, Damian, *The knowledge of the organized crime*, Pygmalyon Publishing House, Ploiesti, 2001;

Dopes unique convention, closed in New York at 30 march 1961, emended by the Geneva protocol from 25 march, 1972, to which Romania adhered by the Decree no. 626/ 1973, The Official Bulletin, Part 1, no. 213/1973;

Matza, D, *Delinquency and drift,* John Wiley Publishing House, New York, 1964.

NOVELTY ELEMENTS REGARDING TO OFFENCES AGAINST PROPERTY PASSING-BY TRUST

Monica Pocora[*]
Mihail-Silviu Pocora[**]
Dragu Creţu[***]
Tache Bocănială[****]

Abstract

Law No. 286/2009[1] *has adopted New Criminal Code which introduces many novelty elements, among some offences against property passing-by trust. In this regard, is necessary to realize some steps to clarify the concepts and structure, for correctly using by the practitioners.*

Key words: *abuse, bankruptcy, patrimonial exploitation, fraud.*

Introduction

Generally, the problems occured by offences against property, were often subject of attention criminal law specialists. Offences against property are those which, along the offences against person, affect directly and immediately the individual interests. This fact was destined to cause an increase of investigation activity of this offences category. Although, the case law is substantial in this matter, there is the tendency to determine various controversies, pointed out by those involved in justice administration and sometimes disjointed by theorists.

The problems occured by offences against property can not be considered exhausted and a new research is adequate owing to problems complexity, observed in connection about them.

Inclusively the structure of title including incriminations created in order to protect individual property is subject to controversy.

In olden Romanian doctrine was proposed the recognition of three categories of offences against property: *theft facts* (theft, robbery, piracy and concealment), *facts realized by fraud* (offences such as, breach of trust, fraudulent management, fraud, peculation and acquiring the found asset) and the facts of arbitrariness (offences such as, destruction, disturbance of ownership)[2]. The result is corresponding to some foreign[3] criminal law; the offences against property know other systematization[4].

For example, the Italian Criminal law distinguishes offences against property as based on violence against person or assets, or is based on fraud.

Faced with this situation, both the Romanian legislator since 2009 has chosen to abandon monolithic structure of the title, offences against property and opted for a

[*] Ph.D. Lecturer, "Danubius" University of Galati, monicapocora@univ-danubius.ro
[**] Ph.D. Candidate, "Al. I. Cuza" Police Academy, silviupocora@yahoo.com
[***] Ph.D. Lecturer, "Danubius" University of Galati, dragu.cretu@univ-danubius.ro
[****] Ph.D. Lecturer, "Danubius" University of Galati, tache.bocaniala@univ-danubius.ro
[1] Published in the Official Gazzette of Romania, Part I, no. 510 din 24 iulie 2009.
[2] V. Dongoroz and colab. *Explicaţii teoretice ale Codului penal*, vol. III, p. 449.
[3] Jean Pradel, A. Varinard, *Les Grandes arrêts du droit pénal général*, 5-ème édition, Dalloz, Paris, 2005.
[4] G. Antoniu, *Ocrotirea penală a patrimoniului în dreptul comparat*, in R.D.P. no. 2/2000, p. 125-168.

systematization of incrimination rules of Title II of Special Part of new Criminal law, in four Chapters. The systematization was based on facts situations that can be found assets, as a patrimonial entity, and depending on illicit actions character or nature that can change these facts situations, but regardless of their owner. These chapters are: Chapter I, which defines theft offences, Chapter II includes robbery offence in first paragraph, qualified robbery and piracy, Chapter III includes incriminations of some offences against property which were committed passing-by trust, in Chapter IV were included property fraud committed by IT systems and electronic ways of payment and Chapter V includes destruction and disurbance of ownership offences. Special Part of New Criminal law, in Title II, Chapter III, has an increased interest, because it provides incriminations of some offences against property, which were committed passing-by trust. Among these, are found also offences stipulated by the Criminal law in force, such as: breach of trust (art. 238), fraudulent management, acquiring the found asset and fraud, but also offences against property, whose illicit actions are based on passing-by trust, namely, breach of trust by creditors frauding (art. 239), insurances fraud (art. 245), abduction of public auctions (art. 246), and patrimonial exploitation of vulnerable individual (art. 247).

New incriminations are justified in social reality, because they want to punish offences which have become increasingly frequent in recent years. Regarding *abduction of public auctions*, the practice of recent years has proved that, in many cases, the participants at a public auction have used various fraudulent maneuvers, in order to enstrange from public auction any potential participants thus altering the adjudgement price.

Through incrimination of *exploitation of vulnerable individual*, it wants to repress some actions which proliferated in recent years and sometimes caused devastating social consequences for persons who became victims, almost daily reported in press cases of some mature persons or with a poor health status which become on the brink of losing their homes as succession of such patrimonial disproportionate agreement.

In this context, is very important that new rules of incrimination has to be appproach more carefuly, so their wording to be deciphered and correctly interpreted, according prove to idea they will gain practical efficiency.

On the brink of adopting New Criminal Code, the scientific approach of offences against property passing-by trust, is mainly to understand the legislator volition regarding the meaning of some terms, but also to understand the necessity of legal protection of heritage, especially criminal protection of it.

It is also important to observe the Law of implementation of the New Criminal Code, being currently in a draft form, because through it, can be determine the way of correlation of New Criminal Code with special legislation actually in force. This correlation consists in fact, in expressly abrogation through Law of implementation of incrimination rules that have been assumed by the special part of new legislation.

Trying to analyse these offences, it is necessary the reporting to existing offences in Criminal Code in force or in Law no. 85/2006, on insolvency procedure. Between offences already existing in Romanian Criminal law, namely, breach of trust, fraudulent bankruptcy, fraudulent management, fraud and acquiring the found asset, it can be see that the legislator has not totally represent the content of incrimination text in the New Criminal Code.

Thus, the breach of trust offence introduces as a new element the provision that movable asset has to be entrust under a title and with a precise purpose, as opposed to actually provision according to which the assett can be held with any purpose. Also, it introduces a new material element, a using action of the asset, alongside the appropriation and disposal.

The offence of *fraudulent management* stipulated by the new law eliminates both condition according the damage has to realize with dishonesty and the situation where the asset is state property. Instead, it introduces an aggravated stipulation which order a

qualification of the perpetrator, namely, when the offence is committed by the judicial administrator, the property liquidator debtor, or by the representative of them.

The *fraud* in the New Criminal Code is maintained only the first paragraph and aggravated according to, is punished more severely, respectively, the fraud committed by using false names or qualities, or other fraudulent means. As the same time, are repealed par.3-5, which refers to inducing or maintaining a person in error upon the execution or signing an agreement, issuing a check on a credit institution or a person, well knowing for its exploitation are no enough supply, both the fraud with extremely grave consequences.

Conclusions

Although the New Criminal Code is intended to be an improvement of actually Criminal law, we believe that some incrimination text has ambigous content. Thus, we can see that breach of trust offence by creditors frauding is supposed invocation of fictitious documents (by material element), which can mean either an offences concourse (if we talk about a false document), or a complex offence. In relation of these matters, we believe that penalty is too low (imprisonment not exceeding 3 years or fine). Patrimonial exploitation of vulnerable individual associates the vulnerability state with age and dependency relationship of debtor to the creditor, or we think that *age* is more generally term (for example, one person of 35 years old is no vulnerable), and the debtor dependence of creditor may have as cause, a family relationship or affinity and can not be associated with vulnerability (in case of such relationship, there may even confused with other offences, such as fraud or breach of trust). Thus, we would add the phrase "*due to age*", the term of "*olden*" or even make a supplement with "*minority*".

Bibliography:

Alexandru Boroi, *Drept penal, Partea specială*, according with the New Penal Code, CH Beck Publishing House, Bucharest, 2011;

Valerian Cioclei, *Drept penal. Partea Specială. Infracţiuni contra patrimoniului*, CH Beck Publishing Hourse, Bucharest, 2011;

Tudorel Toader, *Drept penal român. Partea specială*, Vth edition revised and upgraded, Hamangiu Publishing House, Bucharest, 2010;

Jean Pradel, A. Varinard, *Les Grandes arrêts du droit pénal général*, 5-ème édition, Dalloz, Paris, 2005;

G. Antoniu, *Ocrotirea penală a patrimoniului în dreptul comparat*, in R.D.P. nr. 2/2000;

V. Dongoroz şi colab., *Explicaţii teoretice ale Codului penal*, vol. III, Bucharest, 1971.

ACTUALLY AND PROSPECTIVE JUDICIAL-CRIMINAL DIMENSIONS OF JUDICIAL LIABILITY CONDITIONS

Monica Pocora[*]
Mihail-Silviu Pocora[**]
Georgeta Modiga[***]

Abstract

To infringe the legality in a law state is to be liable to legal responsibility. To corroborate the judicial liability conditions, in general, with judicial-criminal aspects, especially, may determine an approach of emerged outcomes. Also, due to modifications appeared by Law no. 286/2009 on the Criminal Code. Therefoe, this study aims to discuss the novelty elements in matters of criminal liability, as a part of judicial liability.

Key words: *illicit, injury, culpability, justification, non-attributable.*

Introduction

Criminal responsibility, the fundamental part of Criminal law, alongside with offence and punishment, present characteristics destined to individualize in relation with other forms of judicial responsibility. Judicial responsibility is a specific form of social responsibility that consists in all rights and obligations arising due to committed some illicit facts and represents the realization frame of state coercion by application of legal sanctions destined to ensure the rules of law. To be involved the judicial liability, generally, is required to be combined certain conditions. New Criminal Code introduces some novelty elements regarding the content of some of them.

The conditions of judicial liability, generally, represent all significant factors that must be combined simultaneously, both in terms of illicit act and the author, for creating the necessary framework of its sanction, in relation with his conduct. For legal liability attract, it is necessary to combine the following conditions:

- To exist an illicit behavior (action) – is represent the foundation of liability objective; in absence of exteriorization the dishonesty, the legal liability can not materialize. The term of "*judicial fact*", refers both to the legal subject behavior in matters of social relationships, but also the judicial rules disregarded by the behavior about.

The action constitutes the common way to achieve the illicit behavior. Inaction constitutes the abstention from an action that the person is obliged by law to do it. Passivity (inaction) is not a simply non action, but is a action by omission that is a person behavior who ignores the burden-some rules (for example, not paying a debt within prescribed time).

There are situations, within law infringed, combined both the action elements and those of inaction (for example, the material element of infanticide offence can be realized both by action and by inaction).

If the rule is prohibitive, the illicit behavior consists in the prohibited rule itself, if the rule is burden-some, then the inaction determines penalty application. The controversies

[*] Ph.D. Lecturer, "Danubius" University of Galati, monicapocora@univ-danubius.ro.
[**] Candidate to Ph.D. "Al. I. Cuza" Police Academy, silviupocora@yahoo.com.
[***] Ph.D. Lecturer, "Danubius" University of Galati, georgeta.modiga@yahoo.com.

arise within disposals rules, which offer to legal subject the possibility to choose one behavior from several possible.

- To exist an baneful outcome of namely illicit behavior – according to the legal nature of offence, the effects can be material (for example, offence committed by violence), these are result offences, or non material (such as, insult offence, abrogated by Law no. 278/2009, actually incriminated and put it out of sanction in accordance with Law no. 286/2009).

It is also distinguished danger offences category, such as driving vehicle in intoxicated state, destined to people transportation. The outcome especially in case of material offences, present a particular importance as proven element for illicit action, starting from its producing moment, has to established committed act.

This is reason in some form of criminal or civil illicit area, although manifested a certain activity, the absence of material outcome is able to be equated with offence absence or attempted existence.

- To exist a causal relationship between illicit behavior and harmful outcome – in social plan is acting what Immanuel Kant named *causality through freedom*. Under liability, the cause is individual conscious attitude that behavior has as effect, danger state or threat, produced by social relationship damaged or harmed, promoted or protected by law rules. So, the cause of judicial liability is state of social insecurity produced by law disregarding. Establishing this relationship is often difficult, reason for resorted to using the terms such as "*cause*" and "*conditions*". Consequently, the prejudice cause is that factor which can determine directly and immediately result producing, and the factor which influenced, favoring outcome, is considered that had condition role in damage producing.

If harmful outcome has not occurred, existing just as a possibility generating by negative behavior and determining social risk, the judicial liability is not canceled. The illicit fact without harmful outcome is called *attempt*. According to the Criminal Code in force, the attempt means to execute the criminal decision New Criminal Code replaced the term of "*decision*" with "*intention*". The modification is timely so, express emerged the impossibility of attempted acts in case of offences by fault.

- The subject of judicial liability girlish to exercise the state constraint through application judicial sanctions. Producing of illicit act involves the judicial liability. There are also, situations when some people are liable even not committed illegal acts (for example liability for others act). Subject of judicial liability can be both, individual or juridical entity). *A first condition* that is necessary to discharge an individual is ability to be liable which has to include simultaneously natural and legal attributes. *The second condition* through individual becomes subject of judicial liability is her capacity to acting like a freedom being, to act knowingly, to propose specific outcomes and to decide on appropriate actions for them achievement.

In settlement of criminal liability of juridical entity has been maintained the principles based on liability in actually criminal legislation. Thus, criminal liability of juridical entity is involved for offences committed by achievement of its activity object or in its interest. As regards the individualization of penalties applicable to juridical entity, were introduced some modifications, so the fine penalty will be applicable even to juridical entity based on day-fine system.

- To exist guilty of the subject who caused the illicit act –guilt is an individual mental attitude towards a fact socially dangerous committed by it and the consequences of these facts. Any human action or inaction is characterized not only by material characteristics but is also a manifestation consciousness and volition. The existence of guilt involves the ability to be liable. Currently, the guilt is refers either to intention or fault, provisions maintained even by new law, but a major modification occurred to offence significance is repealed the

social danger and replaced it with *attributable* and *unjustified* the fact stipulated by criminal law.

In Civil law *worst intention* is called artfulness and fault is named error, imprudence, in general, covering the intention form stipulated by criminal law.

- There is no cause that removes judicial liability – the existence of causes which removes guilty, implicit means removing of judicial liability. The criminal law in force, there are causes that removes the criminal nature of offence (such as, self-defense, necessity state, physical or moral constraint, fortuitously case, irresponsibility, drunkenness, minority or error) and causes that removes criminal liability or conviction consequences (amnesty, prescription, lack of preliminary complaint, parts reconciliation and rehabilitation).

The New Criminal code introduces the term of "*justificatory causes*", namely self-defense, necessity state, exertion of a right or fulfilling an obligation, victims consent and "*non attributable causes",* which are mentioned physical or moral constraint, non attributable excess, minority, irresponsibility, intoxication, error and fortuitously case).

Conclusions

Criminal liability, as a form of judicial liability has to combine certain conditions to may be applicable, whether are stipulated by the criminal law in force, either are subject to modifications. But them analysis should refers to consequences produced as follows criminal liability, such as, possible controversies arising from non attributable excess. Moreover, can be discussed the intoxication consequences when the offender is not able to be subject of liability, committed under involuntary intoxication with psychoactive substances. However, the criminal liability is based on term of "*penalty*", reduced almost major offences stipulated by the New Criminal Code.

Bibliography:

Carmen Domocos, "*Fapta omisivă şi incriminarea ei în legea penală română*", Universul Juridic Publishing House, Bucharest, 2010;

Ilie Pascu, "*Drept penal. Partea generală*", Hamangiu Publishing House, Bucharest, 2009;

Maria Kmen, Ruxandra Rata, "*Răspunderea penală a minorului*", Hamangiu Publishing House, Bucharest, 2007;

Mihai Albici, "*Despre drept şi ştiinţa dreptului*", All Beck Publishing House, Bucharest, 2005.

THE LEGAL INSTITUTION OF THE WAIVER OF PENALTI

Laura-Roxana Popoviciu[*]

Abstract

This article approaches an entirely new institution in the Romanian criminal law that is the institution of the waiver of penalty.

As provided in the New Criminal Code between the means of personalisation of penalties, we tried to do a brief analysis of the conditions stipulated by law to rule this institution by the court, and the conditions under which this measure of clemency is prohibited.

The court is the only one able to achieve in fact the work of personalisation of penalty, depending on the actual circumstances in which the offence was committed and the offender, it is required that the law gives them a full freedom of action to achieve these operations.

Key words: *penalty, criminal, personalisation of sentences.*

Introduction

Article 15, align. 1 of the New Romanian Criminal Code defines the infraction as the offence under the criminal law, committed in guilt, causeless and imputable to the person who committed it.

To establish the facts that are going to be prohibited, the legislator starts from observation that these acts were committed in reality, and there is a concern that they could be repeated.

By interdicting these facts members of society are shown, in a specific form of expression, what conduct they must have towards certain social values, what actions are prohibited or, conversely, are ordered to defend the respective social values.

As noted in theory[1], any human behavior is manifested in a highly complex environment consisting of a multitude of stipulations that cause a person to act in different ways, in which the person must refrain from committing crimes by controlling those tendencies that push the person to violating the law.

In the most general sense of the term, the offence is an act of man, an act of his exterior conduct, prohibited by law under a specific sanction, repressive, which is the penalty[2].

The criminal rule covers not only the description of the conduct, that is prohibited, but also it specifies the coercive consequences, that the offender, who violated the criminal rule, has to suffer, certain privations, which makes the perpetrator not to repeat the offence.

If a person offends against the law, which is a reflection of community's opinion, the social demands and socio-legal rules, a penalty must applied to that person, penalty occurring as a consequence of the person's wrong choice, relative to which the person bears full responsibility.

[*] Ph.D. Lecturer, AGORA University of Oradea, Law and Economics Faculty, e-mail: lpopoviciu@yahoo.com

[1] G. Antoniu, *Unele reflecţii asupra vinovăţiei penale,* Studii de drept românesc Magazine, no. 1/1993, pp. 57-59.

[2] A. Boroi, *Drept penal, Partea generală*, C.H. Beck Publishing House, Bucharest, 2006, p. 99.

But, according to other opinions[1], the penalty can fulfill its fair purpose only when it is suited and adopted to each offender individually.

A penalty, to be effective, must reflect the seriousness of the offence, not to be too soft, or too harsh, but as it has to be. In the situation in which the applied penalty reflects the exact seriousness of the crime, it becomes a just penalty.

But offenders are very different among themselves, and these differences result from the family environment, living conditions, mental capacity, education, etc.

Given these issues, in the criminal law appeared the necessity of applying penalties as close as possible, as feature and duration, to the offenders' character, to the type and seriousness of the committed offences, and this is possible only by individualizing the penalty, an extremely complex operation.

Personalisation of the penalty is carried out in three stages:

- legal personalisation of penalty made by the legislator during the phase of drafting of the law, in which the legislator sets the minimum and maximum limits of penalty;
- judicial personalisation made by the court, which, within the overall limits of the penalty, depending on the seriousness of the offence and of the offender, sets in the penalty.
- administrative personalisation occurs during the phase of execution of penalties.

Personalisation of penalties is a fundamental institution of the law.

Among the forms of personalisation of ppenalties, judicial personalisation has as its main concern setting how the convict will bear the coercion applied as result of the committed crime, operation also sensitive because it can directly influence and in a significant proportion the process of offender's social recovery[2].

It is governed in both Criminal Codes, both in the active one, and in the New Criminal Code, in which the legislator has provided some substantial changes.

Intervention of the legislator in the work of penalty's personalisation is manifested by governing two new institutions: the waiver of penalty and the penalty delayed.

Thus, in the Criminal Code in force, the personalisation of penalties is provided in Title III of the General Part of the Criminal Code, Penalties, and Chapter V. In this chapter means of judicial personalisation of penalty are provided as:

- mitigating and aggravating circumstances;
- conditional suspension of the execution of the penalty;
- supervised suspension of penalty execution;
- execution of the penalty at workplace.

In the New Romanian Criminal Code, the personalisation of penalties is the fundamental institution reviewed.

In this, Personalisation of penalties is provided in Chapter V, Title III of the General Part.

According to this, the means of judicial personalisation of penalties are:

- mitigating and aggravating circumstances;
- waiver of penalty;
- penalty delayed;
- supervised suspension of penalty execution;
- supervised freedom.

---

[1] I. Oancea, *Drept penal. Partea generală,* Didactic and Pedagogic Publishing House, Bucharest, 1971, p. 267.

[2] A. Boroi, *Drept penal. Partea generală, conform Noului Cod* penal, C. H. Beck Publishing House, Bucharest, 2010, p. 476.

We see the introduction of two new institutions, the waiver of penalty and penalty delayed. Similarly, the supervised freedom is governed in this chapter, and the institution of the supervised suspension of penalty execution was reconsidered.

All these means have been designed in a progressive sequence determined by the seriousness of the offence, the injuriousness of the offender, the degree of intervention for correction of the convict and its consequences on him[1].

Among these important institutions of the criminal law, we chose to stop and clarify some aspects related to the waiver of penalty, an unique institution in the criminal law in Romania.

In terms of criminal procedure, the waiver of penalty finds correspondence in the art. 396 align. 1 and 3 of the New Code of Criminal Procedure[2], according to which the court decides on the defendant's accusation, pronouncing, as appropriate, conviction, waiver of penalty, penalty delayed, acquittal or termination of criminal proceedings.

Waiver of penalty consists in the recognized right of the court to waiver definitive to the establishment and imposition of a penalty for a person found guilty of committing a crime, for the person's correction, taking into account the offense committed, the offender and the person's conduct before and after committing the crime, is sufficient to apply a warning because the establishment, implementation or execution of a sentence is likely to cause more harm than help to the recovery of the defendant[3].

The New Criminal Code art. 80 entitled Conditions of waiver of penalty provide in align. 1 and 2 that the court may decide to waive the penalty if the following conditions are met:

a) the offence has a low seriousness, taking into account the nature and the extent of follow-ups, the used means, the manner and circumstances in which it was committed, the reason and the purpose;

b) in terms of the offender, the conduct previous the committed crime, the efforts to remove or mitigate the consequences of the offence, and his chances of referral, the court considers that the imposition of a penalty would be inappropriate because of the consequences that would have on the person.

The waiver of penalty cannot be ruled if:

a) the offender has previously suffered a conviction, except the cases provided in art. 42 letters a and b or for which rehabilitation has been intervened or fulfilled;
b) to the same offender the waiver of penalty was ruled in the last 2 years preceding the date of committing of the offense for which the offender is on trial;
c) the offender has evaded prosecution or trial, or he tried thwarting in finding the truth or to identify and prosecute the author or participants;
d) the penalty prescribed by the law for the committed offence is imprisonment exceeding three years.

In case of concurrence of offences, the waiver of penalty may be ruled if for each concurrent offence, conditions referred to in align. 1 and 2 are met.

Regarding the conditions referred to in align. 1, called in the doctrine positive conditions, they must be fulfilled cumulatively for the offender to be eligible for waiver of penalty.

---

[1] A. Boroi, op.cit. p. 476.
[2] F. Radu, *Renunțarea la aplicarea pedepsei*, in Dreptul, no. 6/2011, p. 86.
[3] A. Boroi, op.cit. p. 477.

The court is the only one able to achieve in fact the work of personalization of penalty, depending on the actual circumstances in which the person committed the offence and the offender, it is necessary that the law to give the court full freedom of action to achieve this operation[1].

The court, specifically knowing the offence, the offender's personality, his contribution to the committing of the offence and the circumstances in which it was committed, can assess actual and its real risk, observing that there is a certain responsibility, and establishing and applying an appropriate[2] penalty of one species and duration (amount) or applying new criminal institution, the waiver of penalty.

Unlike other means of personalization, the waiver of penalty has a special feature because here the offender is no longer subject to an execution of penalty, but without influencing the execution of safety measures and civil obligations provided in the decision.

- The first condition shows the committed offence, that presents a reduced seriousness, meaning that through its specific features it causes a less serious social peril.

This also applies to the used means, the manner and circumstances in which it was committed, the reason and purpose.

Every offence must be thoroughly analyzed.

The introduction of this provision is likely to alert the court about the reduced seriousness of these petty actions eliminating the possibilities of increasing the number of offenders in prisons, also taking into account the negative influence of this environment on prisoners.

- The second positive condition inserts the coordinates in which it is appreciated that the waiver of penalty is a warning to the offender, which, even without the imposition of a penalty, will no longer commit crimes, coordinated concerning the person of the offender, the conduct had before committing of the crime, the efforts made for removing or mitigating the consequences of the offence, and his chances to correct his conduct.

It is undeniable that the same penalty as gender and duration does not produce the same educative effect on all offenders whom it is applied; sometimes it causes some real and profound transformations of the individual consciousness, and, consequently, constant and lasting changes of the behavior; in others it only has a temporary inhibitory effect, that lasts only while the fear of its threat persists[3].

In studying and assessing a person, offender or not, there can be no analysis of isolated processes, but their interaction and how they integrate into the dynamic unit of a behavior[4].

Therefore, court's assessment is formed on considerations concerning the person of the offender, especially on his behavior before and after committing the crime, behavior showing his concern for mitigating the consequences of the offence, etc.

Criminal records are significant, if he was convicted of criminal offences, sanctioned for other offenses, and other aspects of his behavior in society in general, and collectivity in which he lives or works in particular[5].

---

[1] V. Dongoroz, S. Kahane, I. Oncea, I. Fodor. N. Iliescu, C. Bulai, R. Stănoiu, Explicaţii teoretice ale Codului penal român, Vol. I, Ediţia a II-a, Romanian Academy Publishing House, Bucharest, 2003, p. 119.

[2] M. Basarab, *Drept penal. Partea generală*, vol. I şi II, Lumina Lex Publishing House, Bucharest, 1997, p. 171.

[3] Ş. Daneş, V. Papadopol, *Individualizarea judiciară a pedepselor*, Scientific and Enciclopedic Publishing House, Bucharest, p. 102.

[4] T. Şuteu, V. Fărcaş, *Aprecierea persoanei*, Albatros Publishing House, Bucharest, 1982, p. 44.

[5] I. Pitulescu, T. Medeanu, *Drept penal. Partea generală,* Lumnina Lex Publishing House, Bucharest, 2006, p. 378.

Equally important are data on the attitude of the offender after committing the crime.

Because waiver of penalty is left to the appreciation of the court, by fulfilling the conditions provided by the law, a right for the convict is not created, but only a vocation for this measure of judicial personalization of penalty.

Align. 2 of art. 80 provide the negative conditions, being sufficient to fulfill one of them not to rule the waiver of penalty:

- The first condition, which prohibits the court's disposal for the waiver of penalty, relates to the situation in which the offender has previously suffered a conviction, except the cases provided in art. 42 letters a and b, or for which rehabilitation has intervened or was fulfilled. We conclude that the court may rule the waiver of penalty if, although the offender was previously convicted, the conviction is ruled for offences that are not under criminal law is amnesty or for which rehabilitation has intervened or was fulfilled.

Decriminalization of an action by the criminal law stops all criminal consequences of the court order made under other criminal law relating to that action. As a result of these consequences, a conviction for an offence decriminalized cannot form a state of relapse.

The term "actions that are not under criminal law" means only those actions taken out from the field of criminal illicitness due to the decriminalization of those actions.

Criminal law of decriminalization ends the criminal liability for actions taken out from the field of criminal illicitness, and all criminal consequences of convictions related to these actions[1].

- The second negative condition prohibiting the rule of the waiver of penalty refers to the situation where for the same offender another waiver of penalty was ruled in the last 2 years preceding the date of committing the offense for which he is on trial.

It is the case of the offender that has already benefited by this act of clemency from the judicial organs of the state and yet he showed persistence in the criminal field.

- If the offender has evaded the prosecution or the trial, or he tried thwarting to find the truth or to identify or to call the author or the participants to account, the waiver of penalty can no longer be ruled.

Offender's conduct after committing the offence is of interest as compared to the process started by its committing, being important to consider, inter alia, whether the offender:

- tried or not to evade prosecution or trial;
- tried or not to thwart finding the truth;
- tried or not to thwart finding the truth or to identify and to prosecute or to call the author or the participants to account.

This is because there are situations when the defendant rejects the accusation, claiming an alibi[2].

Statements may differ depending on the raised alibi, for example, if he was at the cinema or in a nightclub, at someone's home, in an institution[3].

- The fourth negative condition concerns the situation when the penalty provided by the law for the committed offence is imprisonment exceeding 3 years.

---

[1] A. Cocainã, *Recidiva în dreptul penal român*, Lumina Lex Publishing House, Bucharest, 1992, p. 176.

[2] I. Mircea, *Cu privire la verificarea criminalistică a alibiurilor învinuitului sau inculpatului*, in Studia Universitatis Babeş-Bolyai, Iurisprudentia, Cluj-Napoca, p. 64, E. A. Nechita, *Criminalistica. Tehnica şi tactica criminalistică*, Pro Universitaria Publishing House, Bucharest, 2009, p. 150.

[3] E. A. Nechita, op.cit. p. 150.

It should be noted that according to art. 81 align. 1, when it rules the waiver of penalty, the court applies the offender with a warning.

The warning consists of presenting the reasons de facto which led to the waiver of penalty and the offender's noticing on its future conduct and the consequences to which he exposes himself if he commits crimes.

The court, by virtue of its active role and, especially, to fulfill the aim of criminal law, will have to make the offender to understand and, in addition, to notice him that, in the event he will persevere in a criminal behavior, he exposes himself to more severe consequences.

Effects of the waiver of penalty are provided in art. 82 of the New Criminal Code.

The person against the waiver of penalty was ruled is not subject to any lapse, prohibition or incapacity that might result from the committed offence.

The waiver of penalty has no effect on execution safety measures and civil obligations provided in the decision.

Conclusions

The institution of the waiver of penalty is a completely new in the Romanian criminal law, which provides the court an alternative to the application of penalty for some offenders and some offences considered to be a reduced social peril, so that their rehabilitation can be made in liberty.

Bibliography:

Radu F., *Renunţarea la aplicarea pedepsei*, in Dreptul, no. 6/2011;

Boroi A., *Drept penal. Partea generală, conform Noului Cod penal*, C. H. Beck Publishing House, Bucharest, 2010;

Nechita E. A., *Criminalistica. Tehnica şi tactica criminalistică*, Pro Universitaria Publishing House, Bucharest, 2009;

Boroi A., *Drept penal, Partea generală*, C.H. Beck Publishing House, Bucharest, 2006;

Pitulescu I., Medeanu T., *Drept penal. Partea generală,* Lumnina Lex Publishing House, Bucharest, 2006;

Dongoroz V., Kahane S., Oancea I., Fodor I., Iliescu N., Bulai C., Stănoiu R., *Explicaţii teoretice ale Codului penal român, Vol. I, Ediţia a II-a*, The Romanian Academy Publishing House , All Beck Publishing House, Bucharest, 2003;

Basarab M., *Drept penal. Partea generală*, vol. I and II, Lumina Lex Publishing House, Bucharest, 1997;

Antoniu G., *Unele reflecţii asupra vinovăţiei penale,* Studii de drept românesc Magazine, no. 1/1993;

Cocaină A., *Recidiva în dreptul penal român*, Lumina Lex Publishing House, Bucharest, 1992;

Şuteu T., Fărcaş V., *Aprecierea persoanei*, Albatros Publishing House, Bucharest, 1982;

Oancea I., *Drept penal. Partea generală,* Didactic and Pedagogic Publishing House, Bucharest, 1971;

Daneş Ş., Papadopol V., *Individualizarea judiciară a pedepselor*, Scientific and Enciclopedic Publishing House, Bucharest;

Mircea I., *Cu privire la verificarea criminalistică a alibiurilor învinuitului sau inculpatului*, in Studia Universitatis Babeş-Bolyai, Iurisprudentia, Cluj-Napoca.

CRIMINAL LAW AND THE LEGALITY OF INCRIMINATION AND OF CRIMINAL LAW SANCTIONS IN THE CRIMINAL CODE IN FORCE AND THE NEW CRIMINAL CODE

Laura-Roxana Popoviciu[*]

Abstract

This article is intended to examine the concept of criminal law and the legality of indictment and criminal sanctions in the Criminal Code in force and from the perspective of the New Criminal Code. We speak thus of one of the most important principles of law, occurring at the same time some aspects and other large institutions of criminal law, such as crime, recalling in this respect similarities between its definitions given by the two codes. Criminal legal rules incriminates, in abstract, a large variety of facts, to protect social values against those who endanger their normal development, because we must keep in mind that there may be occasions when certain human actions, though prohibited by criminal rules are not offenses because they do not meet all the essential features that a crime must met cumulatively.

Key words: *legal, criminal law, incrimination, penalty.*

Introduction

According to the Criminal Code in force, criminal law, as a form of expression of the right, is c a set of rules stipulating which actions constitute offenses, which sanctions can be applied to offenders and what measures can be taken in case of committing these actions.

Because legal rules establish a well-defined conduct, whose non-compliance attracts penalties imposed by courts, the need for their elaboration, adoption and promulgation by a special procedure to the legislative bodies was required[1].

Criminal Law sets out, in its way, the actions for which the state can claim to hold a person for criminal accountability and the penalties applied to those who commit crimes.

Incrimination and penalty can only be legislator's work.

This defines the principle of legality unanimously upheld in the criminal doctrine in Romania expressing the rule that the entire activity in the criminal law is carried on and in accordance with the law[2].

This principle is not only the research subject of criminal law[3].

Besides being a basic principle of law in general, it is consecrated in complementary disciplines of the criminal law, such as criminalistics which provides that, under this principle, all activities carried out by professionals involved in criminal investigations, tactical methods and sciential-technical means used in forensic activity cannot be arranged, performed or used only in compliance with the Code of Criminal Procedure and the active law[4].

---

[*] Ph.D. Lecturer, AGORA University of Oradea, Law and Economics Faculty, e-mail:lpopoviciu@yahoo.com

[1] F. Ivan, *Drept penal*. *Partea generală*, Presa universitară română Publishing House, Timişoara, 2001, p. 21.

[2] C. Mitrache, Cr. Mitrache, *Drept penal român, partea generală*, Universul Juridic Publishing House, Bucharest, 2006, p. 44.

[3] A. Boroi, *Drept penal. Partea generală, conform Noului Cod penal*, C. H. Beck Publishing House, Bucharest, 2010, p. 11.

[4] E. A. Nechita, *Criminalistica. Tehnica şi tactica criminalistică*, Pro Universitaria Publishing House, Bucharest, 2009, p. 10.

The purpose of the criminal law being protection against crime, the rule of law in our country, ensuring that order involves an adherence to the principle of legality.

The principle of legality of incrimination, enunciated, among the first ones, by Beccaria in "Dei delitti e delle pene", it was proclaimed in art. VIII of the "Declaration of the Rights of Man and of the Citizen" (1789) as: "No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law", afterwards being signed up to the level of principle in modern criminal law.

The rule, that no offense exist outside the law (nullum crimen sine lege), is a fundamental rule, closely related to the legality of penalties, the penal code in force providing not only "the law provides which actions are offenses" (legality of incrimination), but also that the law provides for „penalties that are applied to offenders" (legality of sanctions).

If the Criminal Code in force, according to the three major institutions of criminal law (crime, criminal sanctions and criminal accountability), establishes the principle of legality in a single art., art. 2 as "*Legality of incrimination*", materializing as mentioned above in two rules, the New Criminal Code establishes the principle of legality in two separate articles:

"Article 1. The legality of incrimination

Criminal law specifies what actions constitute offenses.

No one can be sanctioned criminally for an act not provided in the criminal law at the perpetration date.

Article 2. The legality of criminal law sanctions

Criminal law provides what penalties and educational measures are applicable that may be taken against individuals who have committed crimes, and what safety measures may be taken against individuals who have committed offenses under the criminal law.

No penalty can be applied, or no educational measure or safety measure can be taken if it was not provided by the criminal law at the time the act was committed.

No penalty can be established and applied beyond its general limits".

Thus, both criminal codes, the active one and the New Criminal Code, establish expressly the principle of legality.

This is imperative because all legal regulatory activity of the actions constituting offenses, sanctions and measures that can be taken in case of committing these actions by the offenders must be reported, produced and embodied on the fundamental principle of law: the principle of legality.

The general concept of legality ("nihil sine lege" - nothing without law) requires the supremacy of law in social life in the sense that the activity of the state (adoption, modification, addition, promulgation and enforcement of legal acts) and of citizens is to comply with rules and laws[1].

Criminal Code in force, unlike the New Criminal Code, defines expressly the aim of criminal law in art. 1: "the criminal law defends, against criminal offenses, Romania, the sovereignty, the independence, the unity and indivisibility of the state, the person, its rights and liberties, the property, and the rule of law".

The defense, for each of these social values, is reflected in the Special Part of the Criminal Code which defines each crime separately.

Thus, art. 1 of the current Criminal Code refers to:

[1] I. Tănăsescu, C. Tănăsescu, G. Tănăsescu, *Drept penal general,* All Beck Publishing House, Bucharest, 2002, p. 90.

Romania, taken as a general concept, as state law. Then make reference to the *sovereignty*, *independence*, *unity* and *indivisibility*, attributed in writing in the Constitution.

Regarding the *person*, meaning the person of a man, taken as an individual, he is protected regardless of nationality, race, ethnic origin, language, religion, sex, opinion, etc.[1]

Article 1 refers to the *human rights and freedoms*, in general, which have their counterparts in Title II of the Special Part of the Criminal Code, Chapter II "Crimes against the freedom of persons", and Chapter III "Offenses relating to sexual life".

The purpose of criminal law is also the defense against crimes of public *and private property*, Title III of the Special Part of the Criminal Code is dedicated to crimes against property, and not least the criminal law protects against crimes, the entire *rule of law.*

The New Criminal Code no longer defines the purpose of the criminal law.

It is understood, because criminal law is one that provides the actions constituting criminal offense, and also provides for applicable penalties, educational measures that can be taken against individuals who have committed crimes, and also safety measures that can be taken against individuals who have committed actions under the criminal law, without being applied if they were not under criminal law at the time the act was committed.

Offenses are actions presenting social peril, so it is natural that the criminal law protects in Romania not against any actions presenting a social peril, but only against those whose actions have a degree of social peril of such gravity that they cannot be tackled only by applying of penalties, meaning that they are offenses[2], for the others, which has a lower gravity is sufficient to take other disciplinary measures, administrative, etc. those that do not have a criminal feature.

Comparing the two criminal codes, the active one and the New Criminal Code, we found that both codes provide that criminal law is the one that provides what actions constitute offenses.

In the most general sense of the term, the offense is an act of man, an act of outside conduct, prohibited by law under a specific sanction, repressive, which is the penalty[3].

This prohibition is exactly the specific way of achieving judicial-criminal regulation of relations of social defense. To establish the facts to be prohibited, the legislator starts from observing that such acts were once committed in reality and there is a concern that they could be repeated.

By prohibiting these actions, members of society are shown, in a specific form of expression, what conduct they should have towards certain social values, what actions are prohibited or, conversely, are ordered to defend the respective social values.

In any way we would define the offense, we cannot omit that, in the end, the action should be reported to a rule of incrimination, to a legal model to be able to establish its character of offense.

The doctrine supported[4], that in a certain way, the rule of incrimination creates, in legal terms, the offense; it gives the action this quality, only by referring to a rule and the measure in which the features of these actions are coinciding, overlapping those of the legal model[5], an action clothes the legal coat of offense, and may be subject to criminal sanction.

---

[1] L. R. Popoviciu, *Drept penal. Partea* generală, Pro Universitaria Publishing House, Bucharest, 2011, p. 31.
[2] V. Dongoroz, S. Kahane, I. Oncea, I. Fodor. N. Iliescu, C. Bulai, R. Stănoiu, Explicaţii teoretice ale Codului penal român, Vol. I, Second Edition, All Beck Publishing House, Bucharest, 2003, p. 35.
[3] A. Boroi, *Drept penal, Partea generală*, C.H. Beck Publishing House, Bucharest, 2006, p. 99.
[4] G. Antoniu, *Reflecţii asupra structurii normei ele incriminare,* in R.D.P. no. 3/1998, p. 9.
[5] V. Dongoroz, *Drept penal*, Tempus Society & Romanian Association of Penal Sciences Publishing House, Bucharest, 2000, p. 211.

It is said[1] that no matter how inconvenient an action is, it is not an offense if the rule does not incriminate or sanction it; the rule is an act of judicial creation.

Among human actions, offenses are prohibited and provided by the law, because they are harmful to human relations and values.

If we talk about the definition of the offense, we find that there is a difference between the definition of the active Criminal Code and the one of the New Criminal Code.

According to art. 17 of the Criminal Code in force, "an offense is an act provided in the criminal law, manifesting a social peril and committed in guilt".

According to art. 15 of the New Criminal Code, "offense is a crime under the criminal law, unreasonable and attributable to the person who committed it".

In both definitions, our legislator highlights aspects as: material, human, social, moral, political and legal, it confers, in other words, the general concept of offense, a realistic, scientific character[2].

The legality of incrimination is a strong guarantee of observance of citizen's rights and freedoms, which cannot be held accountable for a conduct not provided by the law to be illegal.

Although the legality of incrimination and of criminal law sanctions is structured differently in the two codes, they express in essence the same thing.

The New Criminal Code provides the legality of sanctions in art. 2.

Thus, the person who committed a crime can be sanctioned only with the penalty provided by law for that offense.

A modern criminal code cannot only provide penalties; sometimes it may be necessary (or even more effective) to take an educational measure or a safety measure[3].

Criminal Code in force provides that the law stipulates what actions constitute offenses, the penalties applied to offenders and the measures that can be taken if committing these actions.

Criminal Law sets out in its way the actions facts on which the state can claim to hold a person criminally accountable, and also the penalties, that are applied to those who commit crimes.

Incrimination and penalty can only be the legislator's work, so, in that respect, the state limits its discretionary authority.

What impresses the action a criminal character is its provision in the rule of incrimination, or, in other words, the criminal nature of the action depends on the will of the legislator and not on the objective reality[4].

An important provision of the New Romanian Criminal Code is provided in align. 3 of art. 2, in the sense that no penalty can be established and applied outside its general limits.

Thus, determination of penalties for offenses in the criminal law is made both in General Part of the Criminal Code, by establishing their nature and general limits (life imprisonment, imprisonment for 15 days to 30 years, fine), and also in the Special Part, by specifying the minimum and maximum limit of the penalty for each offense separately[5].

We must keep in mind that the rule of law is often violated by certain persons who commit actions condemned by society. Its values can be restored only through criminal law sanctions designed to compel the offender, but also to re-educate him, to fit him in socially.

---

[1] G. Antoniu, op.cit. p. 9.
[2] I. Oancea, *Drept penal. Partea generală*, Didactic and Pedagogic Publishing House, Bucharest, 1965, p. 118.
[3] V. Dongoroz și colectiv, op.cit. p. 36.
[4] F. Ivan, op.cit. p. 21.
[5] I. Pitulescu, T. Medeanu, *Drept penal, partea generală*, Lumina Lex Publishing House, Bucharest, 2006, p. 26.

Penalty is adapted to the needs of defending society, and it related to the seriousness of the offense and the danger posed by the offender, his danger is being considered greater if he repeats committing offenses. This practice is taken from ancient times, in which, together with methods to identify criminals, were also used procedures to record those convicted so that, if they had committed for the second time offenses, they were applied a more severe punishment[1], for example, "branding with red iron" [2].

It requires penalties to be personalized to be effective. It is known that each person, so also the offender is different, the same penalty having different degrees of correlation in the personality of those who commit crimes.

Applied under provisions of the law, the penalty's purpose is to prevent the perpetration of new offenses by the convicted person, but it also have a preventive anti-crime role, following the provision of the penalty by the criminal rule, members of society know it and adhere to it.

The criminal rule covers not only the description of the conduct that is prohibited, the incrimination, but also the coercive consequences, that must be bared by the offender, who broke the criminal rule, certain privations which cause the perpetrator not to repeat the offense.

The sanctions are designed to modify the behavior structure of the offender, by reevaluation of his attitude towards fundamental social values protected by the criminal law, and towards social relations, that are generated and maintained around these values, thus fulfilling an educational role[3].

Criminal sanctions have a third role, the one of prevention, of averting the possibility of committing new crimes. They express the seriousness of the committed offense and warn, at the same time, both actual perpetrators and prospective ones.

Conclusions

By comparing the two legal acts, the Criminal Code in force and the New Criminal Code, about the legality of incrimination and of criminal law sanctions, although this principle is structured differently, the principle expresses the same rules:

- (*nullum crimen sine lege)* "there is no crime without law";
- (*nulla poena sine lege)* "there is no penalty without law";
- the legality of criminal accountability, "offenses are the only grounds for criminal liability".

Bibliography:

Popoviciu L. R., *Drept penal. Partea generală*, Pro Universitaria Publishing House, Bucharest, 2011;

Boroi A., *Drept penal. Partea generală, conform Noului Cod penal*, C. H. Beck Publishing House, Bucharest, 2010;

Nechita E. A., *Criminalistica. Tehnica şi tactica criminalistică*, Pro Universitaria Publishing House, Bucharest, 2009;

Boroi A., *Drept penal, Partea generală*, C.H. Beck Publishing House, Bucharest, 2006;

[1] E. A. Mihuţ, *Identificarea persoanelor după urmele reliefului papilar*, Lumina Lex Publishing House, Bucharest, 2004, p. 56.
[2] Idem.
[3] A. Boroi, op.cit. 2006, p. 281.

Mitrache C., Mitrache Cr., *Drept penal român, partea generală*, Universul Juridic Publishing House, Bucharest, 2006;

Pitulescu I., Medeanu T., *Drept penal, partea generală*, Lumina Lex Publishing House, Bucharest, 2006;

Mihuţ E. A., *Identificarea persoanelor după urmele reliefului papilar*, Lumina Lex Publishing House, Bucharest, 2004;

Dongoroz V., Kahane S., Oncea I., Fodor I., Iliescu N., Bulai C., Stănoiu R., Explicaţii teoretice ale Codului penal român, Vol. I, Second Edition, All Beck Publishing House, Bucharest, 2003;

Tănăsescu I., Tănăsescu C., Tănăsescu G., *Drept penal general*, All Beck Publishing House, Bucharest, 2002;

Ivan F., *Drept penal. Partea generală*, Presa universitară română Publishing House, Timişoara, 2001;

Dongoroz V., *Drept penal*, Tempus Society & Romanian Association of Penal Sciences Publishing House, Bucharest, 2000;

Antoniu G., *Reflecţii asupra structurii normei ele incriminare,* in R.D.P. no. 3/1998;

Oancea I., *Drept penal. Partea generală*, Didactic and Pedagogic Publishing House, Bucharest, 1965.

CREDIT FACILITY ACCORDING TO THE NEW CIVIL CODE

Rada Postolache[*]

Abstract

Credit facility is described by the provisions of the new Romanian Civil Code as the main form of a bank credit, particularized by the fact that funds are kept at the customer's will and by the way such funds are reimbursed. Credit facility is not the same thing with the classic money loan, which is distinctively regulated by the new Civil Code.

Key words: *credit facility, loan, credit line, interest, unilateral termination.*

Introduction

Adopting the view on the unity of private law, the new Romanian Civil Code has brought special private contracts in the field of its contractual regulation, including bank contracts. The new Romanian regulations provide in a synthetic manner for the contractual forms mentioned above, as much as to offer them a legal identity and content, thus leaving to the protagonists involved a great freedom when it comes to their legal establishment, as long as banking prudence requirements instituted by the authorities concerned are observed. The present work shall analyze credit facility by starting from its natural connection with specific banking normative acts, so as to prove in the end its feature of a named, consensual and unilateral contract, with its own specific acknowledged identity, reserved to some special entities.

1. Definition, legal classification and modalities of credit facility

Credit facility is regulated by the new Civil Code[1], Book V, Title IX "Various special contracts", Chapter XV "Current bank account and other bank contracts", Section 3 "Credit facility", art. 2193-2195. The aspects which concern banking prudence and customers protection – banking services consumers – remain, undoubtedly, under the incidence of special legal norms, particularly the Government Ordinance No. 99/2006 on credit institutions and capital adequacy[2], aligned to the European Union law.

Credit notion. The new law, just like the special law in force, does not define credit. Under these circumstances, we will offer the definition provided by a special normative act, currently abrogated, namely Law No. 58/1998 on banking activity[3], art. 3 point 7, according to which credit means "any commitment to give an amount of money, in the exchange of the right to have reimbursed the paid amount of money and to receive an interest or other expenses concerning the amount of money in question, or any extension of a due date and any commitment to purchase a title incorporating a debt or another right to the payment of an amount of money". The definition contains common elements, on the basis of which the

[*] Lecturer doctor, "Valahia" University of Târgoviște, Faculty of Law and Social-Political Sciences, Social-Political Sciences Department, e-mail: radapostolache@yahoo.com.

[1] Law no. 287/2009 on the Civil Code, Romanian Official Gazette, part I, no. 511 from July 24th 2009, modified by Law No. 71/2011, Romanian Official Gazette, part I, no. 409 from June 10th 2011, republished, Romanian Official Gazette, part I, no. 505 from July 15th 2011, in force from October 1st 2011, denominated in this work New Civil Code or New law, in order to set it apart from the former Civil Code.

[2] Off. Gaz. No. 1027 from December 27th 2006.

[3] Republished, Off. Gaz. No. 78 from January 24th 2005, currently abrogated.

species or forms[1] of the category involved can be established, among which there is also credit facility.

Notion of credit facility. According to art. 2193 of the new Civil Code, "credit facility is the contract by means of which a credit institution, a financial non-banking institution or any other entity authorized by a special law, called *financer*, takes upon the commitment to keep an amount of money at the customer's will, for a determined or non determined period of time". The definition mentioned above contains the characteristic element of the contract under scrutiny – the obligation to keep an amount of money at the customer's will, for a determined or non determined period of time, by setting at the same time apart such contract from its classical form – loan, which involves giving the funds to the person borrowing the money. Establishing the content of the contract requires, nonetheless, taking into account all the provisions which are assigned to it by the new Civil Code (art. 2193-2195).

Legal qualification. Credit facility is a *named* contract, thus regulated by the new Civil Code. The name "credit facility" constitutes a novelty element of the new regulations, but within banking practice and doctrine[2] is used, with the same meaning, the expression "credit opening", with all its varieties.

The contract analyzed by us has an *unilateral* character[3], there being absent mutuality and interdependence of the duties taken upon themselves by parties. While the financer is committed, the customer is free to use or not the credit which was opened for him, authors considering[4] that, on this ground, the contract can be rather considered *a credit by signature* than an advance of funds, just as it is possible for the credit opening to be a just a *framework contract*, its use requiring, for each operation, a new will agreement expressed by parties, as it happens, for instance, in the case of discount[5].

Credit facility is different from *interest loan*, which is distinctively regulated by the new Civil Code, at art. 2167-2170, as a species of consumption loan, together with use loan. The interest loan is the classical, simple form, usually left as a rule in the activity field of *particular entities*, without excluding the possibility of its being used with a profession title, which is, in this case, subject to special law (art. 2157, ¶ 2). In fact, specialized literature has considered that the type of credit contract varies in accordance with the quality of the borrower; the credit granted by a professional is a consensual contract, even if the amounts of money were not put at the customer's will[6], the loan granted by a particular entity being a real contract[7].

The *distinct* element is nonetheless represented by the *duty* assumed by the financer/lender – that of keeping a certain ammount of money at the customer's will (it can thus be explained the word "facility"), but also by the fact that the amount of money is given to the borrower, a fact which generates two distinct contracts. According to this criterion, the

---

[1] On credit classification, see: I. Turcu, *Operaţiuni şi contracte bancare. Tratat de drept bancar*, volume 1 and 2, V[th] edition, updated and completed, Lumina Lex Publising House, Bucharest, 2004, p. 260-280; Rada Postolache, *Creditul bancar*. *Forme de manifestare potrivit tehnicilor juridice utilizate*, in *Annals* of the Faculty of Legal Sciences, "Valahia" University of Targoviste, No. 2/2008, p. 202-209.

[2] For example, see Fr. Grua, *Contrats bancaires. Contrats de services*, tome 1, Economica, Paris, 1990, p. 219-279. The author analyzes the contract under the name of "credit opening contract".

[3] For legal character of the contract, see Marinela Daniela Manea, Rada Postolache, *Creditul bancar, de la teorie la practică*, C.H. Beck Publising House, Bucharest, 2009, p. 114-122.

[4] Ch. Gavalda, J. Stoufflet, *Droit Bancaire-Institutions-Comptes, Opérations-Services*, 4e édition, Litec, 2000, p. 177.

[5] *Ibidem.*

[6] For that purpose, see Ph. Neau-Leduc, *Droit bancaire*, 4e édition, Dalloz, Paris, 2010, p. 227.

[7] G. Decocq, Y. Gérard, Juliette Morel-Maroger, *Droit bancaire*, RB Edition, Paris, 2010, p. 126.

loan is a *real* contract, its valid conclusion requiring to hand over the amounts of money to the borrower, the latter having the duty to pay an interest and to reimburse the amount of money received at the due date. When it comes to credit facility, the way funds are given is different, since it is all about a loan affected by the condition of funds being used by the customer, this condition being just a way of imposing a duty on the customer and not being capable to affect the object itself. As a result of this reason, authors consider that the credit opening is, more surely, *a convention serving as a framework contract* to those operations for which they will use the opened credit – discount, accept of some commerce effects, ckecks payment, and money transfer[1]. In the opinion of the same writers, credit is not necessarily accomplished in the form of loan, being perceived as a promise sui generis, which has a special object – credit acceptance [2].

Concluding, credit facilty is concluded at the moment when the agreement of will is accomplished, the contract being *consensual*[3].

In practice, credit facility appears as the *basic or common form of a banking credit*, together with credit by signature and credit through debt transfer, having as legal ground the provisions of art. 18 letter b) of the GEO No. 99/2006 on credit institutions and capital adequacy. The content of the contract is established by the contracting parties and may provide for any of the banking credit operations mentioned by the special law, at art. 18 letter b), without them being nonetheless limitative, such as consumption credit, mortgage credit, factoring with or without regress, financing of commercial transactions, including forfeiting.

Modalities of credit facility – simple crediting and credit line.

According to the provisions of art. 2193 and 2194 of the new Civil Code, credit facility may be simple or may be a "credit line", in both cases its performance taking place by means of the current account rendered available by the financer, which is accessory to the credit contract.

In the case of simple facilty, also called *simple credit opening*, the financer "keeps" funds with a determined value at the customer's will. The financer's duty is *immediate*, being complied with at the moment when the financial funds are put the customer's use; the customer may withdraw the whole amount of money either at a time, either gradually, without for the reimbursement, albeit integral, to give him also the right to obtain other withdrawals.

In the case of credit line, also called "credit opening in a current account", the financer *promises* to keep funds with a determined value at the customer's will, the customer being entitled to perform withdrawals of money, but also succesive reimbursements of money, within the limits of the maximum amount of money established, reimbursements recompleting the fund – from which other withdrawals of money may be done. At this point, parties usually stipulate the automate renewal of a credit opening, without the financer's express agreement, working on the "revolving" system. On such ground, credit appears here as putting *future* funds at someone's will.

Other times, credit facilty may be only *eventual*, such as in the case, for instance, of leasing, the credited tenant becoming an owner only at the due term, if he wishes so.

In both variants, the relations between parties are accomplished also in relation to the credit destination[1], such as stocks financing, goods purchasing, a.s.o.

---

[1] G. Decocq, Y. Gérard, Juliette Morel-Maroger, *quoted works*, p. 126.
[2] *Ibidem.*
[3] Marinela Daniela Manea, Rada Postolache, *quoted works*, p. 114 and the following.

2. Contracting parties

The new law defines the parties participating at the credit facility as financer and customer. In practice, in connection with the two parties mentioned above, appear intermediary persons[2] – the provider of the goods purchased on credit, the credit insurer and the guarantor of the duty to give back the borrowed amounts of money.

Financer. Credit facility is reserved to some particular subjects, including: "the credit institution", "the non-banking financial institution", "other entity authorized by the special law".

Credit institutions, under the form of Romanian legal persons, may be constituted and function within one of the following categories: banks; credit cooperative organizations; saving and crediting banks in the locative field; mortgage credit banks; institutions issuing electronic currency (art. 3 of GEO No. 99/2006). Among these, the entity issuing electronic currency is excluded from the quality of financer, its activity being limited at issuing electronic currency.

Non-banking financial institutions are called by specialized literature also *parabanking* entities, instituted according to some special legal provisions. Their existence increases the sphere of financers, particularly in the field of the credit reserved to consumption, supporting the extra-banking channel of credit and limiting thus the monopoly of credit institutions upon such activity.

Other entities may offer credit only if they are authorized by the special law.

Although the new Civil Code has expanded the financers field, through its modification, from an operational and concrete point of view, given the exclusivity owned by credit institutions in administering current bank accounts, credit facility remains only in their field, the new legal provisions turning out to have shortcomings; the activity of other entities, authorized according to law, represent rather a loan, and, according to new regulations, a real contract. Moreover, the law also contains an inadvertence – after instituting the generic name "financer" at art. 2193, at art. 2195, ¶ (2) uses, unjustifiably, the term "bank", thus triggering an adverse effect – diminishment of financers field.

Customer. The new Civil Code has instituted a generic term for the credited person, which has a very large scope and is used by all credit institutions – *customer*, at times also called *beneficiary*. In banking practice, a customer may be any entity – physical or legal person – a population, enterprise or state, special law frequently conditioning the customer quality on the compliance with certain requirements.

3. Content of credit facility

In essence, the content of credit facility is pointed out by the provisions of art. 2193 and 2194 of the new Civil Code: the financer's duty to keep at the customer's will an amount of money for a determined or non-determined period; the customer's right to use the credit, in one or several installments, according to banking practices and the duty of credit reimbursement, in the forms agreed. In reality, credit contract is much more *complex*, the above mentioned duties being completed by: the duty to pay the interest, the contract being presumed as onerous; the customer's duty to respect the destination of the amounts of money rendered available to him, if such duty was stipulated by the credit contract; the duty to

---

[1] Destination represents one of the few situations which give to the financer the right to control the use of funds, and even the customer's affairs, for instance when the customer guarantees to reimburse the money with the benefits which will be obtained from the amounts of money invested.

[2] For more details, see Marinela-Daniela Manea, Rada Postolache, *quoted works*, p. 108.

inform the customer about the legal regime of interest and due fees, in the forms agreed upon.

Still, parties may *subordinate* the duties assumed to *any condition* which they deem appropriate, for instance to that of informing the financer about the affected destination of the amounts of money withdrew, about the profit account and expenses, about financial statements. Moreover, the contract is subject to a great diversity of technical and banking norms, due to the specificity of the field.

Special law – GEO No. 99/2006 – contains provisions which provide for the duty to *explicitly delimit* the operations performed in the sphere of a credit contract, on participants' behalf, by avoiding *too large or too general formulas* – "Contractual documents must be drafted so as to allow customers to understand all contractual terms and conditions, but particularly the operations to which they commit themselves, according to the contract concluded. Credit institutions cannot pretend interests, penalties, fees, or other costs and expenses from the customer, if their payment is not stipulated in the contract" (art. 117, ¶ 2).

4. Contract termination

Contract on a determined period. The new law makes no reference to the cancellation or unilateral resolution of the contract, a fact which confirms the unilateral contract attribute of credit facility.

A financer may unilaterally give up at a credit facility, for strong reasons, which regard the beneficiary of the credit, it there are no contrary clauses in the contract (art. 2195, ¶ 1). In the silence of law, such strong reasons are deemed to refer to the transgression of contractual clauses by the customer, for instance offering unreal data at the contract conclusion (discovered during the contract execution) or not observing the destination of the amounts of money withdrew, the reasons being different from a contract to another, from a credit type to another.

The contract termination by the financer indicates a situation in which the customer, who infringed the duties assumed, is *sanctioned*, his conduct justifying the cease of the payments by the financer and, implicitly, the cease of the right to use the credit, the customer not being entitled to withdraw other amounts of money and having to give back the amounts of money used and their accessories. Law leaves nonetheless on customer's behalf a 15 days guarantee term in which he has to restitute the amounts of money withdrew, thus eliminating the possibility for the financers to commit abuses and protecting the customer.

Contract on a non-determined period. According to art. 2195, ¶ (3) of the new Civil Code, the contract on a non-determined period may be terminated by any of the parties, by observing a 15-working days term, if the contract or other banking practices provide for no contrary manners. By defining such term, law avoids the situation in which the contract could be unexpectedly terminated, thus equally protecting the two parties.

Conclusions

Although animated by the private law unity, the new Civil Code offers only a common framework to credit facility, just like in the case of other banking contacts. The contract analyzed by us rests subject, under the particularity of its legal elements, to the provisions of special law, which are quite technical and diverse, but also to the structure provided by the contracting parties.

Although is aimed to be an unitary regulation of banking contracts, the new Civil Code does not cover bank credit in the integrality of its forms, such regulation turning out to be, consequently, partial. The new Civil Code has the unquestionable merit of regulating, for the first time, a contract left until now, almost completely, to the field of banking practices, by setting it at the same time apart from the interest loan.

At the same time, the new regulation explicitly protects the customer, by avoiding for the credit facility to be unexpectedly terminated by the financer.

Bibliography:

Georges Decocq, Yves Gérard, Juliette Morel-Maroger, *Droit bancaire*, RB Edition, Paris, 2010;

Philippe Neau-Leduc, *Droit bancaire*, 4e édition, Dalloz, Paris, 2010;

Marinela Daniela Manea, Rada Postolache, *Creditul bancar, de la teorie la practică*, Beck Publishing House, Bucharest, 2009;

Rada Postolache, *Creditul bancar. Forme de manifestare potrivit tehnicilor juridice utilizate*, in Annals of the Faculty of Legal Sciences, "Valahia" University of Târgovişte, no. 2/2008;

Rada Postolache, *Drept bancar*, Cartea Universitară Publishing House, Bucharest, 2006;

I. Turcu, *Operaţiuni şi contracte bancare. Tratat de drept bancar*, vol. 1 and 2, Vth edition, revised and updated, Lumina Lex Publ. House, Bucharest, 2004;

Ch. Gavalda, J. Stoufflet, *Droit Bancaire-Institutions-Comptes, Opérations-Services*, 4e édition, Litec, 2000;

Fr. Grua, *Contrats bancaires. Contrats de services*, tome 1, Economica, Paris, 1990.

CONVENTIONAL JUDICIAL REPRESENTATION BY LAWYER. LEGAL IDENTITY AND CHARACTERISTICS

Dana Lucia Tulai*

Abstract

Legal doctrine reveals the difficulties one meets in establishing the juridical identity of the contract that is being concluded between a lawyer and their client, precisely because of the complexity of the lawyer's mission, as well as because of the peculiarities of this bond.

Keywords*: judicial representation, lawyer, mandate.*

Introduction

Legal representation is a well-known institution both in private and procedural law. Judicial representation causes great interest from the part of the litigants, as well as for the purpose of justice implementation. Most of the times, litigants do not possess the legal knowledge that is necessary in order o successfully confront the judicial battle. Therefore, they often resort to more qualified individuals, who have proper legal training, in order to advise them in their actions and to represent them in front of judicial institutions. Efficient legal defence during a lawsuit also has major contribution to ensuring a lawful, solid court decision.

There are some cases in which the right to judicial representation is limited, litigants being compelled to personally stand in trial: when requests for divorce are being judged by the court of first instance, with some exceptions stipulated by art. 614 of the Civil Procedure Code; also when answering interrogation, with the exception provided by art. 223 of the same bill.[1]

Conventional judicial representation finds its legal regulation within a group of bills. First of all, the Civil Code, which regulates the mandate contract (art. 2009 to 2038). The Civil Procedure Code stipulates some special rules concerning the litigants`representation during a lawsuit (art. 67-73). Law n. 51/1995 Concerning the Organization and Practising of the Lawyer Profession completes these legal stipulations by regulating conventional judicial representation in those cases when it is performed by a lawyer. art. 3, ¶ 1(b) stipulates that the lawyer's activity materializes as legal assistance and representation in the court of law, in connection with criminal pursuance bodies, with authorities that have jurisdictional attributions, with public notary offices and judicial executors, with public administration bodies and institutions, as well as with other legal persons, within the limits statued by the law. We can find a similar text of law in art. 91 of the Lawyer Profession Statute.

As art. 3 of Law n. 51/1995 regulates, a lawyer's activity is being accomplished by legal consultation and claims, assistance and representation in connection with jurisdiction bodies, criminal pursuance bodies and public notary offices. They use particular legal means to defend the rights and legitimate interests of clients in relation with public authorities, institutions and any domestic or foreign person. They also draw up legal documents and use any other legally permitted means in exerting the right to defense.

*Ph.D. in Progress, Assistant Professor, "Babes-Bolyai" University of Cluj-Napoca, Political Economy Department, e-mail:dana.tulai@econ.ubbcluj.ro

[1] G. Boroi, O. Spineanu Matei, *Codul de procedura civila adnotat,* All Beck Publishing House, Bucharest, 2005, pp. 347, 785.

Thus, the lawyer carries out some material, technical operations, drafts procedural documents, but they also offer legal advice and representation to their clients.

Legal doctrine reveals the difficulties one meets in establishing the juridical identity of the contract that is being concluded between a lawyer and their client, precisely because of the complexity of the lawyer's mission, as well as because of the peculiarities of this bond.[1]

An opinion expressed in doctrine is that the contract between a lawyer and their client is a complex contract, which combines heterogeneous elements; some of them are typical of services performance contract or of work contracted out, others characterize the mandate agreement.[2]

Before the release of Law n. 51/1995, authors expressed the opinion that in any of its forms, legal assistance consists of a "*to do*" obligation, that is to perform lawyer services, which means we are talking about a services performance contract.[3] However, an author emphasises that when the object of the contract is judicial representation, the identity of the agreement will be that of a judicial mandate; in such a case, the rights and bounds of the contracting parties will be ruled not only by Law n. 51/1995, but also by the Civil Code provisions concerning the mandate, as well a by those of the Civil Procedure Code, related to judicial mandate.[4] In any case, considering the legal assistance contract to be a services performance contract contradicts the characteristics of the lawyer profession: the lawyer performs their duties without being subordinated to their client, they enjoy an independence that allows them to terminate the contract whenever they feel that the client's demands are unjust, under the condition that they give notice and that the agreement termination should not be abusive.

Other authors, inspired by French doctrine[5], consider that the lawyer who only offers legal advice, without having the power of representation, has, in civil relations, the identity of an undertaker, not that of a trustee.[6]

Some doctrinaires of law have expressed the opinion that the lawyer and their client conclude an *unnamed contract* that is a *sui generis* agreement. The unnamed contracts are those that have not been given a legal regulation. The contract that bounds a lawyer to their client has both a name – *legal assistance contract* – and a legal consecration in art. 3, ¶ 1(b) of Law n. 51/1995 and art. 121-149 of the Lawyer Profession Statute. This Statute stipulates the following aspects of the contract: the form and the manner in which it should be concluded, the validity requirements, its content and amendment, its investment with executor formula, payment of the lawyer's expenses, the extent of the lawyer's duties, the lawyer's fee and the effects of the contract. We can also find particular procedural provisions concerning judicial assistance and representation in both the Civil and Penal Procedure Codes.[7]

---

[1] I. Deleanu, *Tratat de procedura civila*, vol. I, All Beck Publishing House, Bucharest, 2005, p. 570.
[2] Ibidem, p.572.
[3] Fl. Teodosiu, V. D. Zlatescu, *Contractul de asistență juridică,* in *Revista română de drept*, 1986, n. 8, p. 22.
[4] M. Banciu, *Reprezentarea în actele juridice civile*, Dacia Publishing House, Cluj-Napoca, 1995, p. 192.
[5] Ph. Malaurie, L. Aynes, *Les contrats speciaux*, Cujas Publishing House, 1988, no. 3 p.11-13: these authors assert that the contractor of work usually performs sevices concerning either an object (which makes them resemble to a seller) or a person (in which case they are more of an agent); therefore, those performing intelectual services, such as phisicians, private teachers or lawyers, are in some way contractors of work.
[6] Fr. Deak, St. Carpenaru, *Contracte civile și comerciale*, Lumina Lex Publishing House, Bucharest, 1993, pp. 120, 122.
[7] art. 67-81 of the *Civil Procedure Code*, as modified by O.U.G. no. 138/2000 and O.U.G. no. 51/2008, concerning litigants' representation and assistance in the court of law; articles 171-174 of the *Penal Procedure Code*, concerning the same matters in the case of a trial.

If we consider this contract to be a mandate, which is a theory that has been favoured in recent legal doctrine, after Law n. 51/1995 and the Lawyer Profession Statute came into operation, then this agreement should also be submitted to the provisions of the Civil Code concerning the mandate contract (art. 2009-2038), as well as to its more general provisions on contracts and conventions (art. 1166-1323).

It has been said that mandate stands at the origins of all contracts.[1] This assertion might be overstated, but there are authors[2] who consider that the legal bound between a lawyer and their client is best described as a mandate contract. Present legal provisions concerning the legal assistance contract explicitly refer to the lawyer's *mandate*.[3] More so, in criminal trials, the Supreme Court of Justice has decided that the lawyer has the identity of an agent, regardless of the fact that they have been given the power to represent their client or just the mission to assist them.[4]

Another author[5] asserts that the juridical identity of this agreement is that of a *named contract*, one that creates unique, particular rights and bounds for the lawyer profession. It resembles most to the classical mandate contract. It bears the name of *legal assistance contract* and not that of *legal representation contract* because the notion of *legal assistance* has a more comprehensive meaning, which includes judicial representation as well.

We know that the mandate contract implies a power of representation for the representative, as well as concluding legal documents in the name and on behalf of the principal. It is also true that the lawyer who only offers legal advice obviously does not represent their client in connection with third parties, therefore they are not in the position of an agent.

Thus, being given the fact that a lawyer's activity is more complex and vast than that of an agent, we consider the legal assistance contract as a whole to be a species of its own, a *named contract* which implies various duties for the lawyer, some of which are resemblant to those of a performer of services, most of them being similar to the misson of a representative.[6]

Legal assistance offered by the lawyer to their client implies giving legal advice, consulting, writing down legal documents and petitions etc. It does not necessarely implies the existence of a mandate of representation, even though when such a mandate is being given, in absence of opposite provisions, it implies a mission of legal assistance as well.[7]

Another way of performing a lawyer's profession is legal representation of the litigants that is the lawyer accomplishes, on behalf and on account of their client, the acts, the means and the operations allowed by law and necessary for defending their client's best interest. The lawyer represents their client under the provisions of the legal assistance contract that they have concluded, which empowers the lawyer to stand for their client in

---

[1] Ph. Malaurie, L. Aynes, op.cit. p.235.

[2] C. Rosu, *Contractul de mandat în dreptul privat intern*, C. H. Beck Publishing House, Bucharest, 2008, p. 193-199; A. S. Banu, *Contractul de mandat. Analiza teoretică și practică*, Universul juridic Publishing House, Bucharest, 2009, p. 232-233.

[3] art. 126, ¶ 2-3 of the *Lawyer Profession Statute* stipulates that in absence of opposite provisions, the lawyer is empowered to perform any act profession-specific that they feel is necessary to satisfy the client's interests. As for the activities that have been expressly mentioned in the legal assistance contract, they will be performed as a special *mandate,* which empowers the lawyer to conclude acts of preservation, administration and disposal in the name and on behalf of their client.

[4] C.S.J. s. pen. dec. n. 569/1990, in *Dreptul* no. 1/1991, pp. 74-75.

[5] L. Danilă, *Organizarea și exercitarea profesiei de avocat,* C. H. Beck Publishing House, Bucharest, 2007, p. 182.

[6] A similar opinion has been expressed by I. Deleanu, op.cit. p. 570 et seq.

[7] J. Vincent, S. Guinchard, *Procedure civile*, Ed. Dalloz, 1987, p. 371.

court, performing in their name and on their behalf all the acts necessary for starting and carrying out a law suit.

As far as the lawyer's mission of *judicial representation* is concerned, we consider that it has all the legal characteristics of a *mandate of representation.*

Except for the emergency mandate,[1] as well as for the tacit one[2], a lawyer's mandate has an *intuitu personae* nature. Therefore, the representative must personally comply with their duties and they cannot designate a substitute without the principal's agreement. Therefore, should the representative's death occur, the mandate is terminated. But if the client's death occured during litigation, the mandate does not come to termination, according to art. 71 of the Civil Procedure Code. In such case, it is imperative for the principal's successors to become parties to litigation, as the representative is obliged to inform the court of the principal's death.

In one case[3], the court's settlements were made void due to the fact that after the petition was filed and while litigation was pending, the plaintiff died and the court was not informed of this situation by the representative, although they were compelled to do so and to ask for the successors to become parties to litigation. In another case[4], as the defendant dies, their successor takes their place as party to litigation. Since they can exercise their rights either personally or through a representative[5], they ought to express their will concerning the continuation or the termination of the lawyer's mandate.

The proxy to exercise the right to file a complaint or to represent a pary in litigation must take the form of a notarized signiture document and if the proxy is given to a lawyer, the signiture should be certified according to the regulations of Law n 51/1995. The power of representation might also be given through verbal statement, made in court and written down in the minutes of the court session.[6]

The mandate is presumed to have been given for all the acts of litigation, even if it does not contain any definition on this matter, but it may also be restrained to precise acts or to a certain court of law.[7] The mandate, which, as a principle, has got a general nature, does not extend upon acts of disposal, such as abandonment of litigant rights or conclusion of a transaction, which require a special proxy. However, the lawyer who gave legal assistance to a party during litigation, even without having a proxy, can perform any acts necessary in order to preserve those rights that are submitted to a time limit and they may also appeal against the given settlements of the court.[8]

The lawyer's mandate is also revocable. The withdrawal of the mandate can not be made opposable to the opponent party until they were notified with it, except for the case in which the retraction of the mandate was made in court session, in their presence.[9]

The lawyer may abdicate from their mandate as well, but not in a gusty or ill-founded manner. The representative who renounces to their mandate must inform both their principal and the court at least 15 days before court time or before appeal reaches its time limit.[10]

---

[1] Stipulated by article 44 of the *Civil Procedure Code.*
[2] Stipulated by article 69, ¶ 2 of the *Civil Procedure Code.*
[3] Trib. Suprem, dec. civ. no. 270/1985, CD 1985, p. 213.
[4] ICCJ, s. civ. si de propr. int. Decision no. 5761/21 oct. 2004, www.scj.ro.
[5] According to article 67, ¶ 1 of the *Civil Procedure Code.*
[6] According to article 68 of the *Civil Procedure Code.*
[7] According to article 68, ¶ 3 of the *Civil Procedure Code.*
[8] According to article 69, ¶ 1-2 of the *Civil Procedure Code.*
[9] According to article 72, ¶ 1 of the *Civil Procedure Code.*
[10] According to article 72, ¶ 2 of the *Civil Procedure Code.*

Except for those cases in which the lawyer dissociates from their client, as long as the representative acts within the bounds of their mandate, all their actions, even if they were prejudicial for the principal, fall to their client and profit their opponent. However, the principal has the possibility to claim compensation from their representative, if they were proven guilty of misconduct or indiscretion.

The lawyer acting as a representative takes on a duty of care. According to art. 110 of the Lawyer Profession Statute, the lawyer must make all efforts to defend the rights and legitimate interests of their client. The fact that the lawyer's bound to their client is that of a duty of care and not that of an obligation of result also derives from art. 129, ¶ 4 of the Statute, which stipulates that the fee by hour as well as the fixed charge is due to the lawyer regardless of the result that derives from performing their professional services.

Law no. 51/1995, as well as the Lawyer Profession Statute does not contain provisions concerning the lawyer's civil responsibility towards their client for inadequate performance of their obligations.[1] However, this doesn't mean that the lawyer does not have such resposibility; it only means that their civil responsibility falls under the provisios of common law.[2]

Some foreign court decisions have settled that the lawyer assumed an obligation of result. We find these rulings to be unfounded because, as far as the court decision is concerned, the lawyer can only be bound by an obligation of means. However, they have an obligation of result concerning the completion of certain material operations.[3]

A lawyer's mandate is usually performed by onerous title. This does not mean that the legal assistance contract isn't a mandate, since, on one hand, the Civil Code provides that the mandate given for performing professional activities is presumed to be onerous[4] and, on the other hand, a lawyer may also provide legal assistance and representation that is free of charge. The fact that a lawyer's mandate is usually onerous makes it resemble to an employment contract or to work contracted out. The difference is that the lawyer is obliged to perform legal operations and they are the client's representative, whereas the employee and the subcontractor carry out material acts and they are not representatives, even though they can receive such powers as well.

A lawyer's mandate is concluded as a result of the contracting parties' consensus. art. 121, ¶ 1 of the Lawyer Profession Statute provides that the legal assistance contract must be concluded in writing *ad probationem.* More, according to art. 121, ¶ 5 of the Statute, in exceptional situations, the legal assistance contract may be concluded verbally.

Conclusions

Following the analysis that we have performed, we appreciate that an agreement that empowers the lawyer to represent their client in justice has all the characteristics of a mandate contract. However, the content of a legal assistance contract is usually more complex and heterogenous, as it often implies offering legal advice and consulting, drafting legal documents or performing material acts and operations that do not require the power to represent. Therefore, we consider this contract to be a complex one, which has a regulation of its own, in Law no. 51/1995 and the Lawyer Profession Statute and to which the provisions of the Civil Code and those of the Civil Procedure Code serve as common law.

---

[1] Both bills contain provisions concerning the lawyer's disciplinary responsibility.

[2] I. Les, *Organizarea sistemului judiciar, a avocaturii si a activitatii notariale*, Lumina Lex Publishing House, Bucharest, 1997, p.197.

[3] A similar opinion has been expressed by I. Deleanu, op.cit. p. 570 and the followings.

[4] art. 2010, ¶ 1 of the *Civil Code.*

Bibliography:

S. Banu, *Contractul de mandat. Analiza teoretică și practică*, Universul juridic Publishing House, Bucharest, 2009;

C. Roșu, *Contractul de mandat în dreptul privat intern*, C. H. Beck Publishing House, Bucharest, 2008;

L. Danilă, *Organizarea și exercitarea profesiei de avocat*, C. H. Beck Publishing House, Bucharest, 2007;

G. Boroi, O. Spineanu Matei, *Codul de procedură civilă adnotat*, All Beck Publishing House, Bucharest, 2005;

I. Deleanu, *Tratat de procedură civilă*, vol. I, All Beck Publishing House, Bucharest, 2005;

I. Leș, *Organizarea sistemului judiciar, a avocaturii și a activității notariale*, Lumina Lex Publishing House, Bucharest, 1997;

M. Banciu, *Reprezentarea în actele juridice civile*, Dacia Publishing House, Cluj-Napoca, 1995;

Fr. Deak, St. Carpenaru, *Contracte civile și comerciale*, Lumina Lex Publishing House, Bucharest, 1993;

Ph. Malaurie, L. Aynes, *Les contrats speciaux*, Cujas Publishing House, 1988;

J. Vincent, S. Guinchard, *Procedure civile*, Ed. Dalloz, 1987;

Civil Code;

Civil Procedure Code;

Law no. 51/1995 concerning the Organization and Practising of the Lawyer Profession Statute.

EVOLUTION OF SPECIAL CONTRACTS LAW

Dumitru Vaduva*

Abstract

Civil Code does not define the notion of "special contracts", even though it is an important part of it. To define it is necessary to analyze the special rules of contracts in order to establish their place and role in relation to the common law of contracts.

Key words: *contracts, specialization, vertical development of contracts, imperative rules.*

Introduction

The old Civil Code has not used the notion of "special contract", and the new Civil Code is using it only once in Title IX of Book 5 "Different special contracts", otherwise is alluding to it by using the notions: "other contracts", "different contracts", etc. In the lack of a legal definition, it is necessary to clear the notion of "special contracts", step including several analyses.

1. Special contracts. The law of special contracts.

1.1 Terminology.

The notion of "special contracts" used by the new Civil Code in Title IX of Book 5 "Different special contracts" is misleading and it suggest that there would be a category of general contracts. Nobody entered a "general" contract or a "contract", but just concrete contracts, the only ones legally capable to generate obligations, for instance: buying-selling contract, location contract etc.

Also, the shown notion can suggest that "special contracts" would be particular contracts, derogatory from common law or placed at its border. To avoid this inconvenience was proposed the notion of "civil contracts" to replace the one of "special contracts" suggesting that these contracts have nothing in special, but form just a category of contracts[1]. We do not analyze civil contracts, but the category of contracts settled by law, identified by the adjective "special". Thus, it is necessary to reveal the sense of the adjective "special" attached by the legislator to the notion of "contract".

1.2 The law of special contracts

Noticing from Title IX of Book 5 of the new Civil Code and from art. 1167 of the same Code, we can intuitively define "special contracts" as being the special rules particular for each contract, subordinated to the theory of contract, establishing the regime of a juridical operation, namely the formation and content of a particular contract.

These special rules are gathered in the "*law of special contracts*". One can propose that the area of "special contracts" be named "the law of special contracts". The title proposed can also suggest that this area would be a subject matter together with the law of common contracts, obviously a bad idea[2], until nowadays, as it will be shown.

Thus, we keep the classical name of "special contracts", but we will delimitate its understanding by analyzing the relation between the general theory of contracts and the

* Lecturer Ph.D. University of Pitesti, Faculty of Law and Administrative Sciences, email: dumitru_vaduva@yahoo.com

[1] T. Prescure, A. Ciurea *Contracte civile*, Hamangiu Publishing House, Bucharest, 2007, "Introduction".

[2] P.-H. Antonmattei, J. Raynard, *Droit civil Contrats spéciaux*, Litec Publishing, 3rd Edition, Paris, 2002, p. 2.

"special ones" to check if the adjective "special" is just the name of the group of contracts settled by law, or is a "specialization" of these contracts, as the legislator expressly and for the first time distinguishes between "general rules" of the contracts and "*particular rules regarding certain contracts*" (art. 1167, ¶ 1-2 of the new Civil Code), thus suggesting the existence of different regimes for these categories.

2. The relation between common and special law of contracts. The evolution of the law of special contracts

2.1 Common law of contracts

The general theory of contracts (Title III, Chapter I of Book 5 of the new Civil Code) defines the *contract* and organizes its rules of drafting and general effects, completing itself with the rules of general theory of obligations regarding the application of its provisions and liability for non-compliance of the obligations, transmission and exemption, all forming the *common law* of contract.

2.2 The role of the general theory of contracts

General and abstract concept, the "general contract" is an elastic mechanism designed to be used in achieving an unlimited number of juridical operations: conveyance, transfer of usage, transfer to obtain a favor etc, onerous or free, *intuitu personam* or not, random or commutative, etc, but each of these, have a necessary juridical translation in a bunch of characteristic rules which, in order to be distinguished from the "general contract" was called "special contract".

General theory of contracts cannot be uniformly applied for all juridical operations[1]. There is not a general and single rule regarding the superposition of the common law of contract over the rules connected to special contracts to define the formation and effects of each type. Different manners in which the concept of contract is translated into "*different special contracts*" (Title IX, Book 5 of the new Civil Code) justify the study of the area of "*special contracts*".

2.3 The complexity of the relation between special and general contracts: proximity and specialization

The study of special contracts would be easier if these would be just simple applications of the theory of contracts, as we can conclude from art. 1167, ¶ 1 of the new Code, which states that "all contracts are subjected to general rules (…)". The difference between special contracts and common law of contracts is stated by ¶ 2 of the same article, which states that "*the particular rules regarding certain contracts are stated by the present Code or by special laws*".

The relation between general and "special" is complex, especially in the actual positive law. Some contracts are closer to the general theory, so are less specialized, and "*some contracts*" (art. 1167, ¶ 2 of the Code) are distant, even more as some are *species* of special contracts, such as agency agreements confronted by mandatory contracts, lease contract confronted by bailment agreement, etc.

2.4 The relation between general and particular has not always been the same

In a first stage, "special contracts" represent the diversity in which the common law of contracts is transposed (A). In the second stage, "special contracts" become more specialized (B).

[1] V. Barbu, I. Genoiu, C. Cernat, *Drept civil, Contracte speciale*, C.H. Beck Publishing, Bucharest, 2009, pp. 2-3.

A. First stage: 1865-last years of the 20th century

2.4.1 Specification of contracts

Naturally, the common law of contracts is never uniformly transposed in "*different*" special contracts; otherwise they will all be identical. In the period between the moment of entrance into force of the 1864 Civil Code and until last years of the 20th century this diversity did not involved a *specialization*, but just a *specification*. Special contracts were just simple examples of the common law of contracts. Civil Code defined usual contracts by naming them: buying-selling contract, bailment agreement, society, commission, borrowing, deposit, personal guarantees, and the real contracts, transaction, namely all contracts identified by the Roman law, but these were just models; the parts projecting an economic operation were free to follow or to derogate by their individual convention, an essential condition being that all conventions must be subordinated to the common rules of contract. These had authority over the special contract's norms, which formed an example law.

Within this relation which merely represented a specification, we can distinguish degrees of this specification, certain contracts being closer to or far from common law. This relation can be illustrated like a tree with several branches. The branches, i.e. special contracts settled by the 1864 Civil Code are extensions of the trunk, i.e. common law of contracts, and some of the branches are marginal, far from the trunk.

2.4.2 Specification degrees

Without being stated by a special title, the 1864 Civil Code settled a list of contracts, called by the doctrine "main contracts", each of them being distinguished by operations (b) and features (a), delimitations valid nowadays for the shown contracts, taken by the new Civil Code, close to or far from the common law.

a. Pattern of the common law of contracts. The proximity of some and estrangement of other special contracts from the common law of contracts is explained by the formation (key elements) and by the "general contract" effects (binding force; relativity), settled on the pattern of the most used juridical operations: the *onerous* and *synalagmatic* ones.

a_1. Consequences on the regime of special contracts: synalagmatic and onerous. Considering the model of common law, special contracts were *onerous* and *synalagmatic*, a rule kept until today. Being the most used, they were also *consensual* (art. 971 Civil Code found in art. 1178 of the new Code). These are: real estate contracts, contracts for use of assets.

a_2. Contracts distant from the common law. In opposition, civil free contracts do not fit in this model, so are distant from the common law, some of their rules even being derogative. Following the model of Roman law, taken by the 1864 Civil Code, and nowadays by the new Civil Code, are presumed to be free, by their nature (or even essence, as the borrowing contract), some contracts for services, especially the real ones, and the commission contract, being considered contracts between friends. This feature, derogative from the "general contract" lending the unilateral characteristic and is stated for each of the above-mentioned types of contracts (art. 1534 Civil Code transposed in art. 2010, ¶ 1 of the new Code; art. 1593 Civil Code transposed in art 2106 of the new Code; art. 1561 C. Code transposed in art. 2146 of the new Code and *a contrario* art. 1567 C. Code expressly transposed in art. 2159, ¶ 1 of the new Code). In addition, these contracts have particular rules regarding their *form*, real contracts not being consensual. It deviates from the rule of the free feature the regime of commercial contracts, these being, in fact, onerous, without being distinguished by the object of the juridical operation (translative of property or for services).

The other features which are not specific for the common law must be expressly mentioned or deducted from the nature of the special contract. For instance, the *intuitu personam* feature is not specific to onerous contracts, being attached to free contracts, because free services are made between friends, and even more, specific to liberalities stated

by the donation contract. If this feature is to be attached to an individual onerous contract, this fact must be expressly stated.

b. Closeness and estrangement between the regimes of special contracts within the category of synalagmatic and onerous contracts. The regime of onerous and synalagmatic contracts is not the same for all contracts. Within this category the specification of contracts is deepened, being influenced by the *type of juridical operations*, imprinting the degree of estrangement of contracts from common law. We must establish which of these operations represents the model of common law. Closeness to or estrangement of "certain contracts" from the common law of contract is verified by comparing the two large opposite categories of special contracts, *synalagmatic* and *onerous*: contracts transferring property, and contracts of services. The first ones, the most usual, at least at the moment of drafting the old Civil Code, are closer to common law, configuration kept in the present. This is the explanation of the fact that, for instance, for the buying-selling contract it is necessary as *ad validitatem*, according to the general theory of contract (art. 964 Civil Code turned into art. 1226, ¶ 2 of the new regulation), that the price, essential element, should be determined or determinable in the moment of concluding a contract, rule resumed, almost useless, by the special rules of this contract (art. 1303 Civil Code turned into art. 1660, new Code), such determination being possible in the shown moment; in opposition, by derogation from the general theory, the exigency of determining the price in the moment of concluding the contract can lack in the synalagmatic and onerous of services contracts, for instance, in corporate contracts when the price for services cannot be determined in that moment (art. 1484 Civil Code, with the exception of the inclusive price, transposed into art. 1854, ¶ 3, Thesis II of the new Code). Derogation is rational because in its absence the pricing requirement in the moment of concluding the contract, according to common law, could influence the imbalance of the value of mutual services, a natural element for these operations.

These contracts are close to the common law by the exigency of existence *ad validitatem* of the price as an essential element in concluding synalagmatic and onerous contracts, as well as in contracts transferring the use of assets: contract for location and its subcategories.

B. Stage two: last years of the 20th century – first decade of the 21st century

2.4.3 Emphasizing the diversification and trend of contracts to specialize

In the last decade of the 20th century and especially in the first one of the 21st century, with the movement to free market system arose a new philosophy and politics of the contractual freedom, conducted by the European legislation and by an important expansion of economic trades. Juridical, these novelties were translated in: special rules on competition and consumers' protection, which have influenced the formation and effects of the two pillars of the special contracts law, buying-selling contracts and contracts for services; the diversification of special contacts, by sanctioning some unnamed contracts, some "imported" from the Anglo-Saxon law (generally, those finished in "ing"), the sponsoring contract, leasing contract, franchising contract, renting contract, agency contract, tenanting contract, crediting contract between banks and their clients etc.

Specialization of contracts brought also the complication of contracts' rules. For instance, to buying-selling contract were attached new binding obligations: guarantee for concordance owed by seller for consumable or secondary assets; obligation of professional seller to advise the buyer, guarantee of security owed by seller for dangerous assets, etc.

2.5 The new Civil Code consolidates the evolution of special contracts law

The top moment of evolution of contracts law was the drafting of the new Civil Code in 2009. Innovative in many areas of civil law, such as the civil law of personas, of

matrimonial regime, of administration of assets etc, it represents a pillar of the actual juridical reform, but in the area of contracts has not brought substantial modifications, having the merit of synthesizing the evolution of contracts' legislation by codifying contracts settled in the previous period and to modify certain rules of the "main contracts" or of subsequent ones. It comprises contracts of high importance such as the insurance contract, transportation contract, agency contract etc, types settled by special laws, which in 1864, at the adoption of the Civil Code, could not have been imagined. Also, for the unification of the private law, the new Civil Code subjected the main contacts, taken from the old Civil Code, Commercial Code and from special laws, to some necessary operations of compilation and systematization[1].

The actual law of special contracts is completed by contracts settled by special rules, which were not included in the new Code; as well as by a voluminous legislation on the protection of consumers influencing by imperative norms the law of contracts, regarding formation and effects of contracts between professionals and consumers.

2.6 Enlargement of the area of imperative rules of contracts

All these novelties brought today a change in structure of special contracts law: the enlargement of the imperative rules of special contracts, being a method and a *brand* for specialization of contracts. Many of the rules of the contract for renting houses in the urban areas, of leasing contracts, of contracting in constructions, of insurance contracts, of different types of the contracts for mandate, all becoming almost true statutes; or of the types of transportation contract (water, land, road, rail, air, etc) turned into a different branch, but preserving its origin as a civil contract, especially of locating the workplace, by common rules that are stated by the new Code. In the same situation are placed the rules for consumers' protection, altering the formation and effects of buying-selling or services contracts between professionals and consumers.

2.7 . Vertical development of special contacts

New contracts, more and more specialized, can be imagined as vertical development of boughs growing from the branches (main contracts) of a trunk (common law of contracts). The first own their existence to the branches that develop, while the latter are deep anchored to the trunk, some having a central position, other just a marginal one.

3. Conclusions on the relation between common and special law of contracts

We can notice that this relation has altered under the influence of the already shown contracts. The first one is just a law called to interfere in the areas unregulated by the more comprehensive and diversified legislation of contracts. For instance, the insurance contract is specialized, because almost all of its aspects are covered by exact texts, for it the general theory of contracts having a limited role. Same, the contract for credit between banker and consumer, a type of borrowing contract regulated by the new Civil Code, is specialized, settling regimes of consumption loans, distinguishing between movable and immovable ones[2].

In the already shown measure, common law of contracts is also applicable for these contracts. For instance, the formation of these contracts by the mechanism of offer and

---

[1] D. Chirică, *Tratat de drept civil. Contracte speciale*, Vol. I. Vânzarea și schimbul, C. H. Beck Publishing House, Bucharest, 2008, pp. 2-3.

[2] See also Fr. Coll Dutilleul, Ph. Delebecque, *Contracte civile și comerciale*, 7th Edition, Dalloz Publishing-house, Paris, 2004, p. 6.

acceptance are just applications of common law or, when talking about a special contract, the promise for selling and/or buying is also subjected to the same law, the rules of promise and acceptance being applicable to all contracts, even if the legislator chose to settle it in special rules of buying-selling contract (art. 1669-1670).

Conclusion on the significance of "special contracts"

Noticing the relation between common and special law of contracts, we can conclude that the adjective "special" joined with the notion of contract initially signified *specification* towards the general theory, not derogation from it[1] of the main contracts, known from the Roman law and assumed by the 1864 Civil Code, distinguishing one from another. Due to the multiplication of special contracts and specialization of the main contracts, including here most of the new contracts more and more specialized towards the law of contracts. Any special contract has escaped this vertical development. They have become common law for each subspecies. For instance, the contract for location for its two types: renting houses and tenancy; or the contract for mandate for its varieties: commission, agency etc. In this stacking of judicial norms, the special contract is subjected to the common law of contracts and superior for its types.

Bibliography:

Vlad Barbu, Ilioara Genoiu, Cosmin Cernat, *Drept civil, Contracte speciale*, C.H. Beck Publishing House, Bucharest, 2009;

Dan Chirică, *Tratat de drept civil. Contracte special*, Vol. I. *Vânzarea și schimbul*, C. H. Beck Piblishing House, Bucharest, 2008;

Titus Prescure, Andreea Ciurea, *Contracte civile*, Hamangiu Publishing House, Bucharest, 2007;

François Collart Dutilleul, Philippe Delebecque, *Contracte civile și comerciale,* 7th Edition, Dalloz Publishing-house, Paris, 2004;

Paul-Henri Antonmattei, Jacques Raynard, *Droit civil Contrats spéciaux,* Litec Publishing House, 3rd Edition, Paris, 2002;

Alain Bénabent, *Droit civil Les contrats spéciaux civils et commerciax,* 5th Edition, Montchrestien, Paris, 2001.

[1] A. Benabent, *Droit civil Les contrats spéciaux civils et commerciax*, 5th Edition, Montchrestien, Paris, 2001, p. 1

THEORETICAL APPROACHES ON THE NECESSITY OF ELABORATING PROTECTION POLICIES ON GENDER-BASED VIOLENCE BOTH IN EUROPEAN UNION AND IN ROMANIA IN 2011

Elise-Nicoleta Valcu[*]

Abstract

Gender-based violence is a violation of human rights and fundamental freedoms of, as well as a violation of the right to security and human dignity involving especially actions of men against women, also being a phenomenon with victims and abusers of all ages, education levels, income categories or social positions, being connected to the unequal distribution of force between men and women in our society.

Key words: *gender-based violence, domestic violence, victim, legal framework, gender-based equality.*

Introduction

Starting from the opinion that gender-based violence will never be eliminated by a single intervention, as for instance, its incrimination and sanction both at an international, communitarian, and at a national level, we consider that it could be reduced, and its consequences mitigated by a combination of actions in the areas of infrastructure, legal, judiciary, education, health etc. We also recognize the importance of religious confessions of any kind by their involvement in combating and preventing this phenomenon. The specific issue of gender-based violence is not only connected to the violence in its criminal sense, but also refers to different types of actions against women for the simple reason that they are women[1]*, actions connected to labor law, political environment, social status, etc.*

I. Definition and relevant provisions on "gender-based" violence concept

We can state that violence against women comprises a wide range of violations of human rights, namely: domestic violence, sexual abuse and harassment, prostitution, human trafficking, violence against women at their workplace, violence against women in conflictive situations, violence against women in prison or in health care institutions, as well as a series of traditional harming practices, political discriminations, workplace violence, etc.

We consider that the most serious forms of violence against women are the ones involving simultaneously physical and psychical abuse committed in family and known as "family or domestic violence". It is well known the fact that in most cases, domestic violence is pointed against women, especially in marriages or informal intimate relations, being committed by men and that in most cases the abuser invokes cultural, traditional or religious practices as mitigating circumstances, including the cases of so-called honor killings.

Regarding the legal framework we note that the Council of Europe, UN and European Union make considerable efforts to improve the status of women both in family, as well as in society.

Thus, under the UN patronage were issued a series of juridical instruments regarding the women's rights, namely the Convention on the Elimination of all Forms of

[*] Lecturer Ph.D. University of Pitesti, Faculty of Law and Administrative Sciences, e-mail: elisevalcu@yahoo.com

[1] Studies dedicated to gender-based violence estimate that a fifth up to a quarter of all European women have suffered from physical violence at least once in their adult life, and over one-tenth have suffered from sexual violence, involving the use of force.

Discrimination against Women (CEDAW), UN General Assembly Resolution of 19 December 2006, "The intensification of the efforts for elimination of all forms of violence against women", Declaration on the Elimination of Violence against Women of 20 December 1993[1]. According to UN, "the term *violence against women* means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life"[2].

On 18 March 2011, the Committee on Women's Rights and Gender Equality of the European Parliament forwarded to its communitarian co-legislator a "Report on priorities and outline of a new EU policy framework to fight violence against women" having as landmark[3] the Commission's Strategy for equality between women and men[4] presented in 2010.

Even more we note the European Commission's preoccupation in 2011 for drafting a directive with the same theme to be proposed for debate in the Council and European Parliament[5], but also its Action Plan for applying the Stockholm Program[6] to present in 2011-2012 a "Communication on a strategy of combating violence against women, domestic violence and female genital mutilation, followed by an action plan of the European Union"[7].

Not least, the European Commission has the obligation that based on its available resources and on the Member States' databases, to draft and present to the European Parliament annual statistics regarding gender-based violence, including the number of women killed by their partner or former partner each year.

Regarding the Romanian framework, in 2011 it is not settled the concept of "gender-based violence", for which reason we find actions pointed against women incriminated as appropriated in the Criminal Code or in special criminal laws, labor laws (for instance, gender-based discrimination at the workplace, in the moment of employment, promotion, etc).

Thus, we mention that Law No 217/2003, in its art. 2 defines family violence as being: "any physical or verbal action committed intentionally by a family member against another member of the same family, causing a physical, psychical or sexual sufferance or a material prejudice. It also represents family violence the coercion of a woman to exert her rights or fundamental freedoms".

The fact that the end of the above mentioned text expressly refers to the "coercion of a woman to exert her rights and freedoms" considering it as being a form of family violence we appreciate it as just and appropriate with the European values, furthermore we consider that the text is an exemplification of the gender-based violence.

---

[1] A/RES/48/104.

[2] UN, Beijing 1995, Action Program, Point 114.

[3] Were considered also the Resolution of the European Parliament of 26 November 2009 on the elimination of violence against women, OJ C 282E, 21 October 2010, p. 53; and Resolution of the European Parliament of 24 March 2009 on combating female genital mutilation in the EU, OJ C157E, 6 May 2010, p. 52.

[4] 2010-2015.

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

[6] Stockholm Program 17024/09, adopted at the reunion of the Council of Europe on 10-11 December 2009.

[7] Also see the 2010 Commission study entitled "Feasibility study to assess the possibilities, opportunities and needs to standardize national legislation on violence against women, violence against children and sexual orientation violence'".

Even since 2010 was forwarded to the Romanian Parliament the project[1] for modification of the Law No 217/2003, which has the merit to amend the shortcomings of the actual regulation, namely, the actual text though it incriminates and settles a series of actions as being acts of violence does not expressly settles any liability for such actions. The new text settles in its art. 28 that "repeated actions of family violence, committed with intention, harming a family member or causing a physical, psychical or sexual sufferance or a moral or material prejudice, represents an offence punished by imprisonment for 1-3 years or by fine."

Regarding the definition of the concept of "gender-based violence" we consider that the regulation inserted in art. 2 Point b) of the legislative project, namely "any physical or verbal action committed by a family member[2] against another family member, having as result a physical, psychical or sexual sufferance or a material prejudice". Family violence includes also the coercion of the victim to exert her fundamental rights, also the civil and economic ones, as well as to exert actions related to family life, causing or may cause a moral or material prejudice for the victim.

The new regulation brings a series of improvements for the actual one expressly stating a series of measures aiming the protection of the victims of family abuse. Specifically, art. 7 states that the victim of a family abuse has the right to address to the court, for it to prohibit, by presidential ordinance, the remaining or returning of the abuser in the common home ordering, if necessary, his evacuation.

By the same decision the court may also impose the following measures: *a)* to compel the abuser to cover certain costs which are supported or will certainly be supported by the victim, as for instance, medical expenses, legal charges or enforcement costs; *b)* to take measures regarding the custody of minor children, maintenance obligation and social services.

The same legislative project[3] shows that if the penal action was taken for an offence of family violence, the court, at the request of the prosecutor, the victim or ex officio, whenever there are evidences or clues on the existence of a danger for the victim, can order against the accused one or more of the following special safety measures: *a)* the compel to join special rehabilitation programs; *b)* the interdiction to remain or return to the family home, workplace, school or other places indicated by the victim where she unfolds social activities, in the conditions established by the court; *c)* the interdiction to come near the house, workplace, school or other places indicated by the victim where she unfolds social activities, in the conditions established by the court; *d)* the interdiction to contact the victim by any direct or indirect means.

The new Criminal Code[4], in art. 199, though it does not expressly define family violence, states that: "If the offences stated by art. 188-189 and art. 193-195 are committed against a family member; the special maximum of the penalty will be increased by a quarter". The offences referred to are: murder, first degree murder, hitting or other violence, body injury, hitting or injuries causing death. So, we must note that the mentioned regulation

[1] In the beginning of 2011 in France was debated a legislative project on the prohibition of abuses against women incriminating repeated offences. The project was drafted under the warning of the experts that in most cases verbal threats and intimidation lead to violence. In France, statistics on domestic violence are alarming: figures show that every 2 days, a woman is beaten to death by her husband.

[2] art. 2 ¶ a) of the legislative project defines the concept of "family member" as being a member of the biological, legal or in fact family or who lives together with the abuser and with whom he/she has established a relationship based on trust, care or dependence, for instance: husband or ex-husband, partner in a consensual union (concubinage); including relatives to grade IV.

[3] See for more details art. 15 et seq.

[4] Law No. 286/2009.

though it diminishes the area of family violence offences, states an aggravation of the criminal offence for actions referred to, reason for why we note an increased interest of the legislator.

I. The new framework of the EU's policy for combating gender-based violence

Regarding the effort of the EU on the combat of violence against women we remember that since 2010 different debates were launched.

Thus, it is noted that in February 2010 was adopted by the European Parliament the annual report on equality between men and women in the EU. The issues on the agenda refer to:

1. Combating violence against women. The Parliament requested the establishment in the following five years of a European year dedicated to combat violence against women, considering that one of four women is physically abused in her adult life, and over 10% of the women are victims of sexual violence. The Parliament supports the ideas to create a European Observer of Gender Violence, to launch the "European mandate to protect the victims" and to establish a hotline of assistance dedicated to victims, common for all European Union.

2. Combating trafficking in human beings. Trafficking in human beings is a form of border criminality defined by the EU as a priority issue. The echoes in this area of the debated problem has received results in less than a year from the meetings, the European co-legislator drafted Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. In Romania, the Ministry of Administration and Interior ensures, on request, the physical protection of the victims of trafficking in human beings throughout the trial, also ensuring at every border crossing special trained personnel for identifying and taking victims to specialized institutions. Romanian citizens who, on the territory of other state, are victims of trafficking in human beings are receive, upon request, diplomatic assistance from Romanian diplomatic missions and consulates, which are compelled to issue, in case of emergent repatriation, identity documents in a reasonable time, without unjustified delays[1].

Also, it is ensured the distribution of information materials on the rights of victims of trafficking in human beings, according to the Romanian legislation and statute of residence, the knowledge of personal rights being vital for the victims[2].

Every day the crimes become more and more complex, involving effective organizations which coordinates and plans criminal actions on a higher scale[3], developing the transnational crime phenomenon, inclusive that of trafficking in human beings.

For identification of trafficking networks, namely of offenders in the activity of investigating transnational crimes various automatic systems of identification are functional, among which we mention: AFIS Printrak Bis[4] (system of identification of persons by prints), IMAGETRAK (system of facial recognition and construction)[5], SIS (Schengen Information System) and EURODAC (system for implementation of asylum policy).

---

[1] Elena-Ana Mihuţ, *Metodologia investigării infracţiunilor*, AGORA University Press, Oradea, 2007, p. 35.
[2] Ibid.
[3] Elena-Ana Nechita, *Criminalistică. Tehnică şi tactică criminalistică*, PRO Universitaria Publishing House, 2nd Edition, Bucharest, 2010, p. 223.
[4] See Elena-Ana Nechita, *op.cit.* pp. 223-224.
[5] See Elena-Ana Nechita, *op.cit.* p. 243.

3. Gender equality in leadership positions and in policy[1].

4. The woman's position in the labor market – the place for inequalities and discriminations.

5. Settling the statute of migrant women and ethnic minority women, especially Roma women.

In the beginning of 2011 the Committee for women's rights and equality of the European Parliament forwarded to the plenum a report with a set of recommendations in order to be debated and to issue a resolution in this area, recommendations which can be structured as following:

a) Harassments, with over 87% of the victims being women, cause psychological traumas and serious emotional stress, and should be considered a serious form of violence against women and inserted in the judicial framework of all Member States.

b) Harming traditional practices, such as genital mutilation of women (GMW) and the so-called "honor killings" are forms of violence against women.

c) Both women and children are subjected to the same forms of exploitation and can be treated as "merchandises" on the international reproductive market, these new arrangements, such as maternity replacement increment the size of trafficking in women and children and also the number of international illegal adoptions.

d) Domestic violence was identified as the main cause of miscarriages and premature births, requesting the Commission to pay more attention to violence against pregnant women, because the abuser endangers more than a single person.

e) Member States by special programs are compelled to support NGOs, women's associations and other public or private organizations offering assistance for victims of violence and services, but especially to organizations which assist women victims who wishes to talk about their sufferance.

f) The need for action not only regarding the victims, but also the abusers, to increment the degree of conscience about violence and to contribute in changing stereotypes and social predefined ideas which determine the perpetuation of proper conditions of this type of violence and its acceptance.

The European Parliament resolution (adopted in its plenary session) of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women proposes a new global political vision on gender-based violence which will include:

a) A criminal law instrument designed as a directive against gender-based violence;
b) Measures proposed to help the victims to rebuild their lives, by approaching the needs specific for different categories of victims, such as minority women, granting in the same time their safety and contributing to their physical and psychical restoration, as

[1] Almost everywhere in Europe women gain more ground in politics. In Germany, Angela Merkel became the first woman Chancellor in the history. Vaira Vike-Freiberga was elected the President of Latvia in 1999. Tarja Halonen was the first woman elected as President of Finland in 2000. Ireland successively elected 2 female Presidents: Mary Robinson (1990-1997) and Mary McAleese in 1997. Also, Switzerland has 2 female Presidents: Ruth Dreifuss (1999) and Micheline Calmy-Rey (2007). In Spain, Jose Luis Rodriguez Zapatero named a "revolutionary" Government formed, for the first time, by a majority of women (9 women and 8 men). Also, Madrid wishes to draft a project for a "law of equality" which will impose the presence of 40-60% of eligible women in all the elections, but also in the councils of administration of different companies. France also is among the countries which promote feminine values in politics. Eleven women are part of the Government of François Fillon, among them is Rachida Dati (Minister of Justice, with an Algerian mother and a Moroccan father), Rama Yade (State Secretary, Senegalese) and Fadela Amara (State Secretary, Algerian), reflecting the French "diversity", the colours of the new France. It must be mentioned that women were named in front of some ministries, normally led by men. Thus, Michèle Alliot-Marie was named Minister of Home Affairs and Christine Lagarde, Minister of Economy and Industry, Valerie Pecresse, Minister of Education and Research) and Roselyne Bachelot, Minister of Health.

well as measures to encourage information exchange and best practices regarding the survivors of violence against women;

c) Mechanisms to ease the access to legal assistance, offering to the victims the possibility to state their rights in the Union;

d) Requesting the Member States to ensure the instruction of the officials who come in contact with cases of violence against women, including of the personnel operating in the legal area, social protection, medical care services and emergency help centers in order to properly detect, identify and react to such cases, paying special attention to victims' needs and rights. Member States must take initiatives to expand the network of shelters, so that it will satisfy the basic needs. An objective could be the creation of a shelter for every 10.000 inhabitants. In the creation of these shelters for victims, it is extremely important that the personnel have knowledge and experience with abused women[1]. The assistance must also include accommodation and legal[2] and psychological assistance. The personnel of the centers could also assist policemen during integrations and judicial proceedings[3];

e) Plans for drafting specific rules of investigations for policemen and medical personnel, to insure evidences in cases of gender-based violence;

f) A partnership with universities, aiming at providing training on gender-based violence for persons working in relevant areas, especially judges, officers of the judicial police, health care and education personnel, as well as for those who assist the victims;

g) Creation of a European charter stating a minimum level for assistance services offered to the abused women, including: right to legal assistance, creation of shelters for protection and temporary accommodation.

Conclusions

We consider that the elaboration of a coordinated legislation – communitarian – national – together will the other segments of the fight against this phenomenon – a functional system of penalties, prompt institutions oriented towards the needs of these women, financial resources, will certainly support them leading, in time, to a decrease of this phenomenon.

We also consider that all the legislative approaches both at national and communitarian level are necessary knowing the extreme vulnerability of women and children facing family violence often manifested by control and isolation.

Bibliography:

European Parliament resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women;

The "*Report on priorities and outline of a new EU policy framework to fight violence against women*" on 18 March 2011drafted by the Committee on Women's Rights and Gender Equality of the European Parliament;

Resolution of the European Parliament of 26 November 2009 on the elimination of violence against women, OJ C 282E, 21st October 2010;

Elena-Ana Nechita, *Criminalistică. Tehnică şi tactică criminalistică,* PRO Universitaria Publishing House, 2nd Edition, Bucharest, 2010;

[1] Council Framework Decision on the standing of victims in criminal proceedings, 2001/220/JHA, art. 13.

[2] According to the Framework Decision of the Council 2001/220/JHA, Member States shall ensure that victims have access to advice – art. 6 and art. 4, ¶ f), iii).

[3] Council Framework Decision on the standing of victims in criminal proceedings, 2001/220/JHA, art. 13, ¶ 2c).

Law no. 286/2009;
Elena-Ana Mihuț, *Metodologia investigării infracțiunilor*, AGORA University Press, Oradea, 2007;
Law no. 217/2003;
The Project for amending Law no. 217/2003.

BRIEF CONSIDERATIONS ON IMMIGRATION AND IMMIGRANT'S EDUCATION INTEGRATED POLICY IN THE EUROPEAN UNION FOR 2011

Elise-Nicoleta Valcu[*]
Alina Gabriela Marinescu [**]

Abstract

Communitarian education and immigration are among the basic elements for the socio-economic development and competitiveness of the European Union. If in the European Union immigration and immigrants' integration have represented an interest, constant in the political debates of the supranational governance, for the Member States the political reactions towards immigrants reflects the ideas of nation, tolerance.

Key words: *migration, immigrant, third-country national, European Union, policy on education.*

Introduction

The immigration phenomenon raises significant economic, social and demographic issues for the EU's Member States. In these conditions, it is necessary a coherent approach of the phenomenon at an European level, designed as a common policy, having the objective of a better management of the migratory fluxes by a coordinated approach which will have in consideration the European economic and demographic situation. Two types of immigrants are found in the EU, namely the first category formed by citizens of a Member State[1] who live in other state[2] on the EU's territory for which it is used the terminology "third-country national", and the second category[3] representing citizens of the extra-communitarian[4] states for who the legislative texts and the literature use the name "third-country national".

I. Theoretical aspects on immigration in the European Union

Migration represents the phenomenon which involves the movement of a population from an area to another one with the purpose of settling. *To emigrate* represents the abandon of the own state, while *to immigrate* represents the entrance of a person in a state, other than the origin one, to settle there. The *immigration phenomenon* is international and has as starting point the origin state of the immigrant and as arriving point the state in which that immigrant is settling.

Regarding the third-country national, he can be *legally* on the territory of the European Union, case in which he is the beneficiary of the communitarian provisions

[*] Lecturer Ph.D. University of Pitesti, Faculty of Law and Administrative Sciences, email: elisevalcu@yahoo.com
[**] Lecturer Ph.D. University of Pitesti, Faculty of International Relations, History and Journalism, email: alina.marinescu74@yahoo.com

[1] Named Member State of origin.
[2] Named host state.
[3] Turks and Kurds in Germany and Belgium; Algerians, Moroccans, Tunisians in France; Albanians, Moroccans, Slovenians, Tunisians in Italy; Vietnamese, Chinese, Indians, Pakistanis in Great Britain (especially immigrants coming from the Commonwealth); Turks, Indonesians, Moroccans in Holland; Moroccans in Spain, etc.
[4] In most cases these groups, especially Islamic non-Europeans, face the prejudices of the majority and discriminations. Discrimination is manifested by intolerance, abuse, use of force and a series of restrictive policies. The French National Front constantly unfolds an anti-Arab and anti-Semite policy, militating for the forced repatriation and anti-islamisation of France.

mentioned in this article, of the right of staying, labor, the right to family reunification or other rights recognized for the members of his family, or *illegally*, case in which the communitarian provisions state the return of the immigrant and sanctions for the employers of third-country nationals living illegally.

Migrant population represented in 2010 almost 2,9% of the world population – or almost 190 millions, than almost 2,2% in 1970[1]. Starting from these numbers we can state that international migration is an ascendant phenomenon.

Most states have three formal entrances for admission of high qualified persons, and a fourth, "the back door", for asylum seekers and clandestine migrant workers, some of them being qualified persons[2], namely:

- The admission of professionals and persons with exceptional skills which exist in all states, due to the common will to ease the transfer or knowledge and know-how;
- The transfers between companies, to facilitate international business and, especially, to encourage capital investments;
- The admission of international students (graduates)[3].

In the Union the elimination of internal borders control brought to discussion two important phenomena: internal migration and asylum request. Thus, it became necessary the establishment of identity of asylum seekers or of persons held for illegal trespassing of the external border of EU. As a result, each Member State shall have a system which will allow the verification of a foreigner found on its territory and who has requested asylum in another Member State[4].

In this regard was created the EURODAC system, with the purpose to store data and to contribute to the establishment of the Member State responsible with the examination of an asylum request submitted on the territory of another Member State by a third-country national[5].

Another category of immigrants is represented by the *refugees*. The refugees are involuntary immigrants. They are persecuted in their countries by an oppressive regime because of their ethnic, religious, linguistic or political membership. The vast majority of the refugees is found in Southern Europe and especially came from Africa, Asia and Middle East. We distinguish several categories of refugees based on their social and legal status: *a)* Refugees protected by the 1951 Geneva Convention; *b) De facto* refugees, having the permission to live in the refuge country based on humanitarian reasons and having a different status than the one offered by the Convention; their rights are more limited than the ones of the refugees protected by the Convention, for instance in Great Britain it is forbidden for the refugees of this category to bring their families for 4 years, while the refugees protected by the Convention have the right to an immediate family reunification; *c)* Refugees *in orbit* - asylum seekers who travel from one to another country, because there is no state willing to assume responsibility to examine their asylum request; d) Refugees enjoying a temporary

[1] Keeley, Brian, (2009) *International Migration - The human face of globalization,* OECD Insights, 2009.
[2] Abella, M. I. (International Labor 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.
[3] Nicolaie Iancu, *The consequences of the migration of higly-skilled, Law skilled and unskilled workers, in AGORA International Journal of Juridical Sciences*, No. 2/2010, AGORA University Press, p. 219.
[4] Elena-Ana Mihuț, *Metodologia investigării infracțiunilor*, AGORA Press, Oradea, 2007, p. 15.
[5] According to Regulation (EC) 2725/2000 of 11 December 2000 concerning the establishment of EURODAC for the comparison of fingerprints for the effective application of the Dublin Convention (Regulation (EC) 343/2003 of 18 February 2003).

protection, with the condition to return to their origin country as soon as the situation allows it.

II. The communitarian legal framework adopted until nowadays on the status of immigrants in the European Union

In 1992, the Treaty of Maastricht has created the formula of the three pillars, the third pillar being represented by Justice and Home Affairs (JHA) having as main preoccupations the asylum policy, rules regarding the cross of the common external borders and the policy of immigration.

The Treaty of Amsterdam (1997) placed the policy of immigration and asylum in the common responsibility of the Member States, making it one of the political priorities of the Union. The Treaty of Amsterdam represents the stage in which the initiatives for cooperation in justice, liberty and security are subjects of the communitarian legislation, which includes the policies on visas, conditions for issuing the permits for residence for immigrants, asylum, etc.

The Program adopted by the Tampere European Council[1] inserted four axes in the policy on immigration: a common European asylum system, a policy on legal immigration and integration of the nationals of states which are not members of the Union, the fight against illegal immigration, cooperation with countries of origin and transit.

The Stockholm Program (2010-2014), adopted by the Council of Europe in December 2009 marks the priorities for the development of a European area of freedom, security and justice for the next five years.

Regarding immigration, the Stockholm Program brings as novelty the establishment of a global approach of this phenomenon. In this regard, we consider that any global approach of immigration must first of all take into consideration the determining factors that push people to leave their countries and the necessity of drafting specific action plans of development and investments in the countries of origin or transit, especially by easing financial transfers between immigrants and the country of origin or by creating commercial and agricultural policies to favor the economic activities, as well as by developing democracy, state law, human rights and fundamental freedoms.

Thus, the "Stockholm" measures aims aspects as integration of third-country nationals and the grant of rights recognized also for EU nationals, partnerships with countries of origin without reference to the development of a common strategy on immigration for labor purposes. Also, the Stockholm Program proposed the creation of a Code of Immigration, which will ensure for legal immigrants a uniform legal system comparable to that of the communitarian citizens, considering that besides the efforts laid by the country of residence or by local authorities also the immigrants must lay their own efforts. In this context, the European Parliament requests an evaluation of the capacity of Member States to receive asylum seekers, to create a "mandatory and irrevocable solidarity system" between them, as well as the consolidation of the cooperation with third-countries, especially EU's neighbors.

Council Directive 2003/86/EC settles aspects regarding the conditions for admission and staying of third-country nationals in the communitarian area, as well as the issue on the right to family reunification[2]. The communitarian provisions are applicable to the requesting

[1] The Tampere European Council (1999) has decided the establishment of an area of freedom, security and justice in the EU, with an action program that has previously been adopted by the Vienna Council (1998).

[2] Measures initiated by the Council Directive 2003/86/EC on the right to family reunification are in accordance with the obligation to protect the family and to respect family life, stated in many international law instruments,

persons legally residing on the EU's territory, being a "third-country national"[1] or a "refugee"[2] and having the status of "sponsor of reunification"[3].

Council Directive 2009/50/EC settles the conditions for entrance and residence of third-country nationals for the purposes of highly qualified employment. It aims the establishment of conditions for entrance and residence of third-country nationals[4] for the purposes of highly qualified employment for a period longer than three months on the territory of EU's Member States, as owners of an EU Blue Card, as well as for their family members.

Council Directive 2008/115/EC[5] *on common standards and procedures in Member States for returning*[6] illegally *staying third-country nationals*[7] establishes a set of horizontal

---

especially the Directive respects the fundamental rights and principles stated by art. 8 of the European Convention for Human Rights and Fundamental Freedoms and by the Charter of Fundamental Rights of the European Union.

[1] "Third-country national" represent every person who is not a citizen of the Union as stated by art. 17 ¶ 1 of the TEC.

[2] "Refugee" means any third-country national or stateless person enjoying refugee status within the meaning of the Geneva Convention relating to the status of refugees of 28 July 1951, as amended by the Protocol signed in New York on 31 January 1967.

[3] "Sponsor of reunification" represents a third-country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her. This Directive shall not apply where the sponsor is: a) applying for recognition of refugee status whose application has not yet given rise to a final decision; b) authorized to reside in a Member State on the basis of temporary protection or applying for authorization to reside on that basis and awaiting a decision on his status; c) authorized to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States or applying for authorization to reside on that basis and awaiting a decision on his status; d) this Directive shall not apply to members of the family of a Union citizen.

[4] This Directive shall not apply where the third-country nationals are: a) applying for recognition of refugee status whose application has not yet given rise to a final decision; b) the beneficiaries of international protection in accordance with the Council Directive 2004/83/EC of 29 April 2004 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 and has not yet given rise to a final decision; c) are beneficiaries of protection in accordance with national law, with international obligations or with the practice of the Member State or who have requested international protection in accordance with national law, international obligations or with the practice of the Member State and have not yet given rise to a final decision; d) requesting the permit for residence in a Member State as researchers, according to Council Directive 2005/71/EC, with the purpose of unfolding a research program; e) are family members of EU citizens and have exercised or exercise the right to free movement within the Community, in accordance to Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States; f) are beneficiaries of the status of long time resident within a Member State, in accordance with Council Directive 2003/109/EC and exercise their right to free residence in another Member State for the purposes of unfolding an economic activity as employee or as independent worker; g) entering within the territory of a Member State based on the arrangements stated by an international agreement to ease the temporary entrance and residence of certain categories of natural persons unfolding a commercial activity or an activity in the area of investments; h) or were admitted within the territory of a Member States as seasonal workers.

[5] The application of the present Directive does not harm the obligations resulted from the Geneva Convention of 28 July 1951 on the status of refugees, as it was amended by the New York Protocol of 31 January 1967. The present Directive respects the fundamental rights, as well as the principles recognized by the Charter of Fundamental Rights of the European Union.

[6] Victims of trafficking in human beings to whom was granted a residence permit based on Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities are not prohibited from entering the territory with the condition of not representing a threat to public order, public safety or national security.

[7] Member States may decide not to apply this Directive to third-country nationals who: a) are subject to a refusal of entry in accordance with art 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorization or a right to stay in that Member State; b) are subject

norms, applicable for all third-country nationals who do not fulfill, or who no longer fulfill the conditions for entrance, staying or residence in a Member State being applicable measures as returning, removal or the use of coercive measures, taking in public custody and the interdictions for entrance applicable to third-country nationals.

Council Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals is oriented on the general interdiction to employ third-country nationals without the right of residence in the EU[1], accompanied by sanctions against the employers who break this regulation.

Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities settles the status of third-country nationals who are or have been victim of human trafficking, even if they have illegally entered on the territory of a Member State.

Council Decision of 25 June 2007 establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the General Program "Solidarity and Management of Migration Flows" settles as main objective the support of efforts laid by Member States in allowing third-country nationals with economic, social, cultural, religious, linguistic and ethnic origins to met the conditions for residence and in easing their integration in European societies.

III. The educational program unfolded by the European Union applicable to third-country immigrants

In 2011 the "European representative voices" mention that most Member States and their institutions are not ready to apply the communitarian educational integrated policies and, even more, a part of the states do not even have an institutional system created for this purpose. Great Britain[2] leads the top of the best educational policies for integration in Europe, Czech Republic from Central Europe and Estonia from the Baltic Countries. In Italy, which is ranked on 19 from 31, at the integration of immigrants, the needs of students coming from other countries are seen as "a group issue".

Statistics on EU show that there are some difficulties that can generate disadvantages for immigrant children in EU in their attempt to success in social life: they tend to prematurely leave school, have inferior levels of qualification and, in comparison with their colleagues, and even fewer are enrolled in higher education. In addition, there are other problems, such as the precarious socio-economic status, linguistic barriers, insufficient family and communitarian support and discrimination, leading to marginalization and exclusion. The realities of the Member States' schools show that a migrant child is treated by teachers as a problem. On the other hand, some of the children fail to correctly learn both the language, because the lack of time and weak preoccupation of family members, and because of the new society, resources being poor or even lacking.

European Parliament Resolution of 2 April 2009 on educating the children of migrants[3] has as main objective the identification of the consequences of immigration in EU,

---

to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

[1] According to art. 3 a Member State may decide not to apply the prohibition to illegally staying third-country nationals whose removal has been postponed and who are allowed to work in accordance with national law.

[2] Romania ranks 26 of 31regarding the adaptation of migrant children. Children of other nationalities best integrate in schools from Sweden, Canada, Belgium, Finland, Norway and Portugal.

[3] (INI)2008/2328; see in this regard the *European Parliament resolution of 12 March 2009 on migrant children left behind in the country of origin*; the Green Paper of the Commission of 3 July 2008 "Migration & mobility:

as well as on the educational systems of Member States. It is considered that are necessary efforts undertaken at EU level, considering that all Member States face similar problems in this area, and even more, it is expected that the percentage of pupils and students coming from immigrant families to grow given the conflicts in the Arab world. The communitarian act recommends to Member States the creation of integrated assistance centers for legal immigrants, because these centers allow them to efficiently approach all obstacles met in the integration process (issues related to workplace, education, health etc), assisted by qualified personnel.

Regarding the educational phenomenon, Member States' Governments must elaborate their own educational programs aimed to ensure free education of legally immigrant children, teaching of national language and the promotion of their own national language and culture[1], but also educational programs about human rights, emphasizing equality, inclusion and freedom of person to prevent xenophobia and segregation, phenomena with a quick propagation, imminent in the case of immigrants and their children.

Even more, starting from the realities of Member States, the Resolution recommends that in schools frequented by immigrant children the curriculum must focus on their needs, and teachers must be trained in intercultural competences allowing them to efficiently face the diversity existing in school. We consider that such a measure would be welcomed leading to a decrement of early dropout of school.

Resolution recommends that the social policy of Member States to take account of the important part played by the involvement of young immigrants in extra-curricular activities, which represent a strong mean of social integration. In this regard, a sociological study ordered by the European Commission emphasizes that to the extent to which immigrant children and young men the sooner they integrate in the educational system, the sooner they will have better results in primary, secondary and higher education, as well as on the labor market.

Conclusions

Legal or economic mechanisms do not automatically produce social or political progress or ensure the implicit integration of immigrants, or their access on the labor market, education, insurances and assistance, but are necessary specific and solid measures on the management of immigration and of its implicit risks. As the subject of immigration, asylum and citizenship has developed in the area of political preoccupation of EU, it has tried to find the necessary instruments to shape a common policy on this phenomenon.

Regarding Member States, we consider that they have the obligation to respect the needs that result from cultural and religious practices, from communities' social norms by offering the necessary support to preserve culture, language, to create educational policies that will offer equal chances for all children of third-country nationals.

Bibliography:

Nicolaie Iancu, T*he consequences of the migration of higly-skilled, Law skilled and unskilled workers*, in AGORA International Journal of Juridical Sciences, No. 2/2010, AGORA University Press;

---

challenges and opportunities for EU education systems" (COM(2008)0423); European Parliament resolution on integrating immigrants in Europe through schools and multilingual education – OJ C 233E, 28.09.2006.

[1] Including parents, and especially the mothers, of migrant children should be involved in the programs for teaching the official languages of the host country, to ensure that the children are not separated from society and to help them integrate at school.

Stockholm Program (2010-2014);

Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment;

Council Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals;

European Parliament Resolution of 2 April 2009 on educating the children of migrants;

Keeley, Brian, (2009) *International Migration-The human face of globalization,* OECD Insights, 2009;

Council Directive 2008/115/EC on common standards and procedures in Member States for returning;

Elena- Ana Mihuţ, *Metodologia investigării infracţiunilor,* AGORA University Press, Oradea, 2007;

Council Decision of 25 June 2007 establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the General Program "Solidarity and Management of Migration Flows";

Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities;

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification;

According to Regulation (EC) 2725/2000 of 11 December 2000 concerning the establishment of EURODAC for the comparison of fingerprints for the effective application of the Dublin Convention (Regulation (EC) 343/2003 of 18 February 2003).

THEORETICAL ASPECTS ON ISSUES FACED BY DISADVANTAGED CATEGORIES OF MINORS IN EUROPEAN UNION AND IN ROMANIA

Maria-Gabriela Zoană[*]
Andra Dascălu (Puran)[**]

Abstract

The Charter of Fundamental Rights of the European Union, annexed to the Lisbon Treaty, states the rights of children, offering the Union a powerful credit for guaranteeing survival, protection and development of children. These vulnerable children should be described by indicators and objectives from the European Platform against Poverty.

Key words: *minor, juvenile crimes, education, abandonment, social protection, poverty risk.*

Introduction

The legal framework of settling the issues aiming the rights of children in contemporary societies is circumscribed nationally by constitutions, special laws dedicated to the protection of children, in the Union by the Charter of Fundamental Rights of the European Union annexed to the Lisbon Treaty[1]*, and by communitarian directives and regulations, and internationally by universal declarations or conventions. In this regard we mention the right of children to identity, name and citizenship, the right to family protection, the right to know their parents, the right to education, freedom of expression, information, social protection and the right to benefit of education and health, etc.*

I. Overview on the limit situations of categories of minors and issues generated by it

Both nationally, as well as communitarian, issues or limit situation of minors can be identified:

- In the families[2] of third-country nationals found legally or illegally on the territory of the Union.
- In the case of disadvantaged children, with small incomes and the case of children belonging to ethnic minorities.
- In the families of nationals of EU Member States with poor financial resources.
- In the educational or social protection system, at the level of access to health care services for multiple causes, most times impossible or difficult to quantify because of the lack of data, studies or official reports.

In the same vein[3], the UN network of independent experts on social inclusion has identified specific groups of children with a high risk of extreme poverty[1], namely:

---

[*] Lecturer Ph.D. "Titu Maiorescu" University of Bucharest, Faculty of Law, e-mail: ijjs@univagora.ro
[**] Teaching assistant, Ph.D. candidate, University of Pitesti, Faculty of Law and Administrative Sciences, email: andradascalu@yahoo.com

[1] E. Valcu, *Drept comunitar instituțional. Curs universitar*, 2nd Edition, reviewed and amended, Sitech Publishing House, Craiova, pp. 110-111.

[2] During January-September 2009, almost one third of the cases of domestic violence were against children, see in this regard the Statistic Bulletin no. 5/2009 Family Protection, issued by the Ministry of Labour, Family and Social Protection.

[3] Opinion of the European Economic and Social Committee on "Child poverty and children's well-being" (exploratory opinion) (2011/C44/06).

a) Institutionalized children or children who have been institutionalized, street children, victims of abuse, maltreatments or negligence, children whose parents have mental health problems, children in placement, homeless children and victims of domestic violence or trafficking in human beings.

b) Children with disabilities, children belonging to ethnic minorities, Roma children, asylum seekers or young immigrants.

c) Children coming from poor rural areas, isolated and without basic facilities, as well as children living on the outskirts of large urban agglomerations.

Children of teenage mothers. This category of children is very exposed to abandonment risks in the case of newborns in maternities, most times doubled by the membership of the mother to the same social category of minors. "Children with teenage mothers", as well as "children-parents", are different social categories requiring special protection programs.

Children with divorced parents. According to the law, these children are placed in the custody of one of the parents (usually the mother's, receiving alimony established according with the father's incomes).

Children abandoned in hospitals. Many of these children are abandoned in maternities, right after birth, and it has been proven that reliable statistics cannot be made starting from the socio-demographic features of the mothers, because many of them do not give full or true information about them in the moment of hospitalization (name, residence, civil status, address), thus the searches fail in most cases.

Children from disadvantaged families with low incomes and children belonging to ethnic minorities with a high risk of poverty

In 2011 EU aims the elaboration of a coherent framework of approaching child poverty and children well-being, based on their rights[2]. Also, it is pursued the establishment of a coherent and specific European objective for eradication of infantile poverty and improvement of children's situation.

Specifically, are aimed:

a) For families with children shall be established a minimum family income, by financial transfers calculated based on the situation of parents on the labor market. Is also considered the insurance of a financial support for all children through fiscal credits and/or universal financial allowances.

b) Commission Communication on health inequalities for 2012 shall mainly aim the health of children.

c) Comparative Education Society in Europe recommends that EU working group draft indicators regarding children, for monitoring and evaluation of public health care policies and their impact, including of indicators regarding mental health and disorder of children.

d) For children exposed to extreme poverty, it is necessary the insurance of equal chances for all of them, through very good social policies and to increment the efforts regarding the achievement with success of educational results for each child, so that poverty and exclusion no longer be inherited by future generations. Policies on integration and

---

[1] A child "exposed to poverty risk" is living in a household "exposed to poverty risk", in other words, a household where the total incomes represent less than 60% of the equivalent medium national income.

[2] For more details see the Opinion of the European Economic and Social Committee on "Child poverty and children's well-being" (exploratory opinion) (2011/C44/06).

combating discrimination must be enforced, especially regarding immigrants and their successors, as well as regarding ethnic minorities.

e) Member States labor markets shall support, with active policies, the employment of parents and insure quality services, as for instance local childcare, in an accessible and financially approachable mean.

f) Regarding protection against violence, abuses and exploitation, European Commission aims on long term 2011-2010 to analyze, together will all interested parties, the feasibility of defining a new series of indicators on violence, maltreatment and exploitation of children, which will contribute to solving issues as identification, protection, criminal investigation and prevention, in accordance with recommendations[1] stated in the study on indicators.

Juvenile delinquency Preventing and combating juvenile delinquency has been and it is a permanent preoccupation of criminal politics of the Member States.

Criminality among juveniles raises specific problems related to prevention and combating, due to a series of factors which lead to a criminal behavior of the juveniles – social category extremely vulnerable, found in the process of evolution of personality, easy to influence and receptive to external stimuli (positive or negative)[2]. Main factors contributing to the emergence and development of juvenile delinquency are:

- Lack of models for juveniles;
- Lack of communication;
- Lack of respect for ethical and moral principles and of family models of behavior. The family education proved to be the main cause of failure of the integration process and of the behavioral deviance of minors.

Family educational deficiencies are manifested by: total lack of interest in child's education, excess of care, spoiling, lack of unity of opinion regarding child's education between family members, lack of moral authority of the parents due to behavioral deficiencies, of vices etc, lack of positive human models in his own family, lack of understanding and affection because of selfishness and indifference to the child, excessive severity, unconsciousness or will which creates an anxious family environment, use of violence as education means.

The most used form of children's maladjustment, considering as cause the family educational deficiencies is vagrancy, 20% of the minors leaving their homes or dropping out of school before committing offences; of them 18% come from behavioral poor families.

- From the frequent absence of parents
- Psychopathological disorders associated with physical and sexual abuse from persons in the entourage
- Failure of the educational systems to promote ethical and social values
- Poverty, unemployment, social exclusion and racism

Criminality among minors punished by definitive conviction in courts is both a national, as well as a European issue.

This category aims minors from separated families, with a low level of education etc. The typology of penalties applied for minors convicted by courts, according to the actual

[1] Created in 2009 at the request of EU Agency for Fundamental Rights.

[2] Camelia Şerban Morăreanu, *Prevenirea şi combaterea violenţei intrafamiliale,* Hamangiu Publishing House, Bucharest, 2009, pp. 60-63.

legislation, comprises surveillance, control and education measures for the protection of the child[1].

Because the problems of minors aim both familial and institutional systems, the issue of juvenile deviance and delinquency could be seen as a deficiency of all education and social inclusion systems. Juvenile delinquency is becoming more and more obvious in all European states. Thus, according to the European Parliament, almost 15% of all offences can be qualified as juvenile delinquency; in some European states the percentage reaches 22%.

Children left behind in the country of origin, parents abroad[2]. The unprecedented ampleness of the migration of labor force has lead to a new category of children "temporarily abandoned" by both parents or by one of them with the purpose of working abroad.

This phenomenon aims both children of nationals of EU Member States, as well as children of third-country nationals, being wide spread also in Romania.

Usually left in the care of grandparents, older brothers or close relatives, these children are deprived of at least of one of their rights – the right to family care and education[3].

On the other hand, for all these categories, the European and national legislation have stated the institution of family reunion, by offering the possibility for the third-country national to support and accommodate his family located in the origin country[4].

Education The right to education of children is guaranteed by the Charter of Fundamental Rights of the European Union, by the Universal Declaration of Human Rights, and also by the European Convention of Human Rights and Fundamental Freedoms[5]. By its political institutions and actors, the educational system aims granting access to education for all children, thus contributing to the purpose of the Lisbon Strategy – development of knowledge based society.

School drop-out is a negative factor of the educational process usually met among:

- Children of third-country nationals
- Children of EU Member States' nationals
- Roma children

For this issue, it is premature to state those social inclusion policies, which regulate school and professional counseling services, specialized support for children with learning and integration difficulties and social scholarships, work on optimal parameters in all EU Member States[6].

---

[1] Camelia Şerban Morăreanu, *Elemente de drept penal şi procedură penală – curs universitar*, Hamangiu Publishing House, Bucharest, 2010, pp. 138-141.

[2] According to a study of UNICEF and the "Social Alternatives" Association, in 2008 in Romania, in the case of almost 350.000 children, one of the parents was working abroad, and in the case of almost 126.000 children, both parents.

[3] In Romania, on 30 September 2009, over 30% of these children had both parents abroad, and 57% just one parent.

[4] For more details see E. Vâlcu, *Brief considerations on the legal status of nationals of the third states in the European space- Theoretical aspects on the innovations in the area, in 2010*, Revista Europeană de Drept social, no 7/ 2010, pp. 43-61; E. Vâlcu, *Introducere in dreptul comunitar, Curs pentru studenţi*, Sitech Publishing House, Craiova, 2010, pp. 53-59.

[5] For a review of the main in international legal instruments regarding child protection, see Camelia Şerban Morăreanu, Raluca Şerban, *„Condiţia copilului oglindită în instrumente juridice internaţionale"* – article published in the Volume of International Scientific Communication Session *"Integration and Globalization"*, organized by the University of Pitesti, between 15-16 April 2005, University of Pitesti Publishing House, 2005, pp. 389-393.

[6] In this regard we mention the issue of Roma inclusion remained unsolved for 2011 both in Romania, as well as in other European states, given our opinion that the Roma issue is European, not just Romanian.

European Parliament resolution of 12 March 2009 on migrant children left behind in the country of origin[1] draws attention on the fact that for these children there are possible negative aspects including the risk of general lack of care as regards physical and mental health, and mental-health related effects of depression, the loss of free time to play and develop, lack of school participation and general participation in education and training, malnutrition etc.

Also, it is pursued the reduction of criminality rate, which is also determined by the fast reaction of civil community and authorities with competences regarding the discovery, research and combat criminality. In this regard, Member States have proposed different strategies, among which we mention: each Member State has the obligation to create and maintain an information system called SIS (the Schengen Information System), with its two versions SIS I and SIS II[2].

The European Parliament request Member States to offer better information for migrants regarding their and their family's rights on free movement, living abroad, and also regarding the terms and conditions for working in another Member State[3].

In this vein, are important the programs of Member States to inform EU citizen, possible future migrants or of third-country nationals about their right to residence[4] and the conditions for receiving a work or residence permit. The right to residence seen in the context of free movement of persons determines security measures, Member States commonly assuming the issue of guaranteeing security[5].

Conclusions

The achievement of the European Strategy 2020 depends on the foreshadowing of a young, educated, healthy and confident generation.

Discrimination, poverty[6] and material deprivation, lack of access to basic medical care services, lack of a decent housing and education prevent millions of children to have a good start in life and to develop their personality. Often, measures taken in the first years of the child's life can have a positive impact for the rest of his existence. It is fundamental the creation of adequate policies, which will insure for all children, especially for those belonging to marginalized groups, the opportunity to fulfill their potential and, as such, to positively contribute to their future.

---

[1] P6_TA (2009) 0132; B6-0112/2009.

[2] Elena-Ana Mihuţ, *Câteva consideraţii cu privire la cele patru libertăţii de circulaţie fundamentale şi evoluţia infracţionalităţii transnaţionale,* in *Criminalitatea transfrontalieră la graniţa dintre prezent şi viitor* (scientific coord. Ovidiu Predescu, Elena-Ana Mihuţ, Nicolaie Iancu), T.K.K Publishing House, Debrecen, Hungary, 2009, p. 175.

[3] E. Vâlcu, *Introducere in dreptul comunitar*, *Curs pentru studenţi*, Sitech Publishing House, Craiova, 2010, pp. 49-53.

[4] Elena-Ana Nechita, *Libera circulaţie a persoanelor în spaţiul Uniunii Europene*, Agora University Press, Oradea, 2010, pp. 75-76

[5] Nicolaie Iancu, Mircea-Adelin Chiorean, *Globalizarea şi infracţionalitatea transfrontalieră* in *Criminalitatea transfrontalieră la graniţa dintre prezent şi viitor* (scientific coord. Ovidiu Predescu, Elena-Ana Mihuţ, Nicolaie Iancu), T.K.K Publishing House, Debrecen, Hungary, 2009, p. 134.

[6] Child poverty and children's well-being are major challenges for the European Union. However, the ampleness and gravity of the issue considerably varies from a state to another and, in most Member States, even from a region to another. Thus, the European statistics of 2007 on income and living conditions (EU-SILC) reveals the following: 20% of the European children are exposed to poverty (4), towards 16% of the total population. This risk is higher for children of all Member States, except Cyprus, Denmark, Estonia, Finland, Germany and Slovenia (the risk is equal with the general average in Latvia). The percentage of children who at risk of poverty is between 23-25% in five states (Greece, Italy, Poland, Spain and United Kingdom), and it varies between 10-12% in other five states (Cyprus, Denmark, Finland, Slovenia and Sweden).

Bibliography:

Opinion of the European Economic and Social Committee on "Child poverty and children's well-being" (exploratory opinion) (2011/C44/06);

Camelia Şerban Morăreanu, Elemente de drept penal şi procedură penală – university course, Hamangiu Publishing House, Bucharest, 2010;

Elise-Nicoleta Vâlcu, *Brief considerations on the legal status of nationals of the third states in the European space- Theoretical aspects on the innovations in the area, in 2010*, Revista Europeană de Drept social, no. 7/ 2010;

Elise-Nicoleta Vâlcu**,** *Introducere in dreptul comunitar***,** *Curs pentru studenţi*, Sitech Publishing House, Craiova, 2010;

Elena-Ana Mihuţ, *Câteva consideraţii cu privire la cele patru libertăţii de circulaţie fundamentale şi evoluţia infracţionalităţii transnaţionale,* in *Criminalitatea transfrontalieră la graniţa dintre prezent şi viitor* (scientific coord. Ovidiu Predescu, Elena-Ana Mihuţ, Nicolaie Iancu), T.K.K Publishing House, Debrecen, Hungary, 2009;

Nicolaie Iancu, Mircea-Adelin Chiorean, *Globalizarea şi infracţionalitatea transfrontalieră* in *Criminalitatea transfrontalieră la graniţa dintre prezent şi viitor* (scientific coord. Ovidiu Predescu, Elena-Ana Mihuţ, Nicolaie Iancu), T.K.K Publishing House, Debrecen, Hungary, 2009;

Camelia Şerban Morăreanu, *Prevenirea şi combaterea violenţei intrafamiliale,* Hamangiu Publishing House, Bucharest, 2009;

Elena-Ana Nechita, *Libera circulaţie a persoanelor în spaţiul Uniunii Europene*, Agora University Publishing House, Oradea;

European Parliament resolution of 12 March 2009 on migrant children left behind in the country of origin;

Camelia Şerban Morăreanu, Raluca Şerban*, "Condiţia copilului oglindită în instrumente juridice internaţionale"* – article published in the Volume of International Scientific Communication Session *"Integration and Globalization"*, organized by the University of Pitesti, between 15-16 April 2005, University of Pitesti Publishing House, 2005.

Section II
Law and religion

THE RELIGIOUS ELEMENT IN THE EVOLUTION OF FAMILY LAW

Roxana Albăstroiu [*]
Lavinia Olah [**]

Abstract

Religiousness, as a respectful attitude aspiring towards the esoteric, but with a prosaic quality, proves to be a main characteristic of humanity. The relation between law and religion is an extremely complex and changing one; it varies throughout history, given that it adapts to the conscience of its public, in order that make its mark on the current realities.

Key words: *the Church, the State, family law, marriage, secularization*.

Introduction

The law is not detached from the complexity of the social life which is of a relational quality. "In its classic sense, the law is closely tied to the context."[1] *Similar to other legal institutions, the family has changed so much throughout time both in regard to its functions as well as its structure. Actual facts which correspond to the real conditions of humanity have altered the view on the family, giving rise to legislative reforms aimed at this exact topic.*

1. The evolution of relations between juridical norms in family law and religious norms

Depending on its frequency, one type of relationship or another will lead to the creation of a new regulating legal measure, or the periodic nature of a certain natural event will undoubtedly necessitate its being considered from a legal point of view. Scientists from the previous century were wondering where the family had come from, those in present times, question where it is heading.[2]

In these circumstances the bond between the law and religion appears inevitable in history. "The law has never been given the secular appearance that it has at present".[3] Obviously, there was a period in the history of every state, when the law and religion "were overlapping" in the sense that law was considered as having divine origin.

The secularization of all institutions take place step by step, thus accomplishing the separation, more or less violent, of the religious functions and attributes from the secular ones, and the result of this was the separation of Church and State. Although we must

[*] Ph.D. Candidate, Faculty of Law and Administrative Sciences, University of Craiova, POSDRU/88/1.5/S/49516 "Creşterea calităţii şi a competitivităţii cercetării doctorale prin acordarea de burse"; roxana_albastroiu@yahoo.com
[**] Lecturer, Ph.D. Faculty of Law and Administrative Sciences, University of Pitesti; lavinia_olah@yahoo.com
[1] Gheorghe Dănişor, *Filosofia drepturilor omului*, Universul Juridic Publishing House, Craiova, 2011, p. 221.
[2] Cristiana Mihaela Crăciunescu, *Regimuri matrimoniale*, All Beck Publishing House, Bucharest, 2000, p. 3.
[3] Ion Craiovan, *Filosofia dreptului sau dreptul ca filosofie*, Universul Juridic Publishing House, Bucharest, 2010, p. 48.
[3] *Ibidem*, p. 49.

remember, even in this case, a certain quiescent bond remains between the law and religion at a psycho-social level.

It was the French Revolution of 1789 that marked the scored triumph by secularizing marriage, an act which brought with itself a new rational, lay spirit of mind, hostile to religious ideas. This new way of thinking is part of the vast secularization that took over the whole of Europe. During the Renaissance, the secularization of public law was the first step in this process of emancipating the law from the tight grip of religion, followed subsequently by private law.

After a period wherein certain fields – family law, for example – were regulated exclusively by religious norms, and others supported the co-existence of two types of norms, religion formally separate itself from the law. Sovereignty will no longer be a heavenly right but a populist one. After all, we are in the presence now of a new mysticism, given that even the father of modern democracy, Jean Jacques Rousseau, entitles his own system "the civilian religion". "Precisely how the absolute monarch had the right to the lives and wealth of his subjects in the name of God, so shall the general will, as Rousseau conceived it, have the right over the lives and the wealth of its citizens."[1]

With regards to private law, specifically marriage which is one of the traditional institutions of the Church, it was strongly desired that it be released from all the rules and Christian religious implications, and the result was – according to some[2] - "the distortion of the divine essence of marriage, its indissolubility, by promoting divorce and restricting the impediments that marriage once posed."

In the Middle Ages, under the impulse of Christianity and Islam, the central aspect of marriage was given by the fact that "man and woman are intimately united in that they honour the same gods which are the only they honour".[3] The foundation of a family in Christianity is represented by the following biblical precept: "be fruitful and multiply and replenish the earth" (Genesis, 9-1). The concept of family in the Church meant the evolution and cohesion of relationships between its members, developing the feeling of love and respect between the spouses and tempering the absolute power of *pater familias* both over his wife as well as his descendants. Despite all of these, the inequality between sexes continues to exist, however, this time, the inferiority of women is proffered by divine law and perpetuated by the behaviour the Christian religion imposes on society.

In modern times, the regulation of the Phanariotes bring back to a certain extent the principles of Roman law, with special attention being given to establishing patrimonial relations between spouses, thus in the Pravilniceasca condica and the Legiuirea Caragea (chapter 16, S.1) it is stipulated that "the woman's fortune is called a dowry, which she bestows upon her husband of her own agreement, so that she may be the mistress of the dowry forever, and he may take the income of it forever"[4]This conception which presents marriage as a "conjugal arrangement" based on a marriage contract or a matrimonial conventional is further developed by the Civil Code of 1864 (art. 1223 C. civ.).

The advent of the French-inspired Civil Code of 1864, is the moment when civil marriage is introduced in our country[5]. As he was a supporter of the secular state, Cuza decided to place the Church under the State's supervision, with the exception of certain

---

[1] *Ibidem,* p. 49.
[2] Iulian Mihai L. Constantinescu, *Biserica şi instituţia căsătoriei, Condiţiile administrării căsătoriei*, Aius Publishing House, Craiova, 2008, p. 43.
[3] Adrian Pricopi, *Căsătoria în dreptul român*, Lumina Lex Publishing House, Bucharest, 1998, p. 24.
[4] Adrian Pricopi, *op.cit.* p. 29.
[5] Ion Dogaru, Sevastian Cercel, *Elemente de dreptul familiei*, Themis Publishing House, Craiova, 2001, pp. 20-30.

matters of a strictly religious nature. Following the passing of such legislation the role of the Church had diminished in certain civil aspects. The State strengthened its hold on the administrative structure of the Church. Thus, pursuant to the Civil Code of 1864, civil marriage became the norm and degrees of relative consanguinity beginning with IV no longer constituted an impediment.[1]

Article 26, ¶ 4 from the Constitution of 1948 attests not only to the validity of civil marriage moreover it imposes it as a condition for any religious marriage.

At present, art. 48, ¶ 2 from the Romanian Constitution stipulates that one can celebrate their religious union only after concluding the civil one.

In the same way, it is stipulated in art. 3 from the Family Code that "only a marriage agreement concluded before a justice of the peace can confer upon the couple the rights and duties stated in the present code".[2]

Actually, all these reforms can appear only by adapting the law to concrete facts – perceived from the level of social conscience, which it seeks to regulate.

2. Norms of family law and religious norms – factors of social cohesion

No other private law institution may be considered as stable and at the same time as flexible.[3] Sociological, ethnological, religious and structural aspects present a great interest in this case, these aspects represent factors which have defined continuity but also the evolution of the matter at hand.

In a period when the Church is mistaken for the State, and holy rules are promoted to the rank of law, the institution of marriage depends exclusively on the religious precepts and many of the familial practices and customs of our times which in the past were seen as immoral. After the secularization of the law however, the rules imposed by the Church more than influence the life of the family, by remaining quite often within the general conscience under the form of tradition of moral rule.

The tradition of family law founded on the Christian-orthodox religion in our country has created certain constant elements throughout time, some of which have become principles of family law.[4]

As we have seen in the previous section, with the advent of Christianity, the purpose of marriage itself changed. The simple unions that were once meant to perpetuate the species, were abandoned and the purpose of marriage became an attempt to fulfill the human individual by rejoining him with his other half which had been lost at the "Fall of Man" and by giving more sentiment to relationships within the family; the reason why the husband and the father with a right over the life and death of any family member disappear, because this right belongs only to the heavenly Father, as the Christian faith teaches us.

Marriage is deemed a "mystery", by this idea underlying that within it man has the possibility to accomplish a great part of the purpose for which he was created, specifically to redeem himself for the original sin and to gain the kingdom of life everlasting. If in the Orthodox Church the union between a man and a woman is a mystery acknowledged as a bilateral legal act and not as a marriage-contract, in the Roman-Catholic Church such a union or "matrimonial alliance" is not just a sacrament but also a contract (can. 1055).[5]

---

[1] Iulian Mihai L. Constantinescu, *op.cit.* p. 47.
[2] art. 3 Family Code of 1954, modified by the Decision of Constitutional Court no. 1345/2008.
[3] Jean-Philippe Lévy, André Castaldo, *Histoire du droit civil*, 1er édition, Édition Dalloz, Paris, 2002, p. 46.
[4] Ioan Ceterchi, *Istoria dreptului românesc*, vol. I, Socialist Republic of Romania Academy Publishing House, Bucharest, 1980, p. 57.
[5] Iulian Mihai L. Constantinescu, *op.cit.* p. 33.

As influenced by the economic evolution as well as by the recent accession of Romania to the European Union, family law tends to clearly dissociate the patrimonial side from the non-patrimonial. The so-called contractualisation of family law and the attempt to introduce this legal system into our country come from this. We must also underline the fact that "the matrimonial system" may be seen as a field or branch of the legal science[1]. According to this aspect, it tends to separate itself from family law in our legal system also, just as it was conceived half a century earlier by the French state. Obviously, these differences that have appeared in the systems of various countries are the result of the distinct evolution of societies, mentalities, cultures, etc. The law may attain certain degrees of independence, as a product of the social activities of people and through its technical elements, but it may also shift from one society to another, thus producing the diffusion and traditions. A process of lending and, over time, propagating or "juridical contamination" is unfurling on a historical scale[2].

The religious element in family law may be given, among other things, by the existence of the family created through marriage. Thus, we may observe that although things have evolved on a practical level and the family is now based on friendship and on a certain openness of relationships, marriage still remains from a legal point of view the sole form of constituting a family (as stipulated in the Romanian legal system), since neither the Family Code nor the New Civil Code sanction other forms of cohabitation such as common-law marriage or domestic partnerships.

Another religious constant in the evolution of family law is surely represented by monogamy. In this sense, a monogamous family is upheld in several countries, at least once with the adoption of Christianity as the official faith.

Both in the Old and the New Testament, family and marriage have a basic underlying principle, namely monogamy, which is upheld by the existence of symbols of the spiritual union between God with the chosen people, or between Christ and the Church. The rules[3] imposed by the Christian Church until the time of secularization, maintain these customs until the present time.

In our legal system, the principle of monogamy is a general and fundamental one as stipulated by art. 5[4] from the Family Code and by art. 290 from the New Civil Code which states that "it is forbidden to conclude a new marriage with a person who is already married". This principle is upheld by public order and morals, and on a juridical level, violating it draws with it both civil (the annulment of a marriage concluded despite this impediment), as well as criminal sanctions (art. 303 from the Criminal Code punishes it with one to five years in prison).

The religious element can be found also in the New Civil Code by introducing betrothals as an optional form of pre-marriage. Since it appeared in history, either through clerical regulations, or within the framework of the civil law, the betrothal only represents a period wherein information concerning their respective economic and social situations is mutually imparted between families. The importance granted by the Church to the betrothal was determined by the interests of the dominant classes to keep their wealth within the

[1] Annie Lamboley, Marie-Helene Laurens-Lamboley, *Droit des régimes matrimoniaux*, 3e édition, Ed. Litec Juris Classeur, Paris, 2004, p. 1.
[2] Jean-Pierre Chauchard, *Droit de la Sécurite Sociale*, 2eme édition, LGDJ, Paris, 1998, p. 27.
[3] "Legea leviratului", vezi Constantin Mihoc, *Taina căsătoriei şi familia creştină în învăţăturile marilor Părinţi ai Bisericii din secolul IV*, Teofania Publishing House, Sibiu, 2002, p. 20.
[4] It is forbidden for a man that is already married to wed a woman that is also already married.

respective families and to stress the line separating the social classes.[1] The betrothal, although abandoned for a time by the civil law, is regulated now by art. 283-287 from the New Civil Code, wherefrom the obvious wish of the legislator emerges, the wish of clearly stating the consequences of unjustifiably breaking off a betrothal.

The indispensable bond between law and religion may be expounded through countless other examples. These are only a few subtleties that can be observed in the institution of marriage as an institution of family law, but also as a "mystery" of religious canon, preceded by a betrothal or not.

At present, the scientific and technological development has opened the way to certain new procedures, and the legalized reality, more than often limited by the social reality, must regulate all newly appeared situations, even if they may seem contrary to morality and good manners, which are deeply instilled, till a certain point in time, in the collective conscience. We must recall however that "the juridical norm does not represent anything else than the social norm noted by objective law."[2]

The multiplication of legal norms is the product of a growing complication of the social life, associated with the necessity to coordinate million of individual decisions, with the purpose of protecting the natural and social environment[3]. The legislator will have to keep the law in balance, thus ensuring the natural stability of the social relations legally regulated, through its legislative policy.

Conclusions

The relation between law and religion, too often so slightly distinguished, is maintained as a latent bond at the psycho-social level of human consciousness.

Scientific progress, the economic situation, inter-relational freedom, the dynamism of social and, why not, religious factors, all push the "broom of history" on perhaps an unending path, and the law, which though constrained must adapt its norms to the daily realities, takes large steps, more or less secure steps, towards the sudden development, without having the necessary time to become aware of its existence.

Bibliography:

Dănişor Gheorghe, *Filosofia drepturilor omului*, Universul Juridic Publishing House, Bucharest, 2011;

Craiovan Ion, *Filosofia dreptului sau dreptul ca filosofie*, Universul Juridic Publishing House, Bucharest, 2010;

Constantinescu Iulian Mihail L., *Biserica şi instituţia căsătoriei*, *Condiţiile administrării căsătoriei*, Aius Publishing House, Craiova, 2008;

Ghiţa Oana, *Dreptul familiei*, Universitaria Publishing House, Craiova, 2007;

Dogaru Ion, Dănişor Gheorghe, Dănişor Dan Claudiu, *Teoria generală a dreptului*, C. H. Beck Publishing House, Bucharest, 2006;

Lamboley Annie, Laurens-Lamboley M. H., *Droit des régimes matrimoniaux*, 4e édition, Éd. Litec Juris Classeur, Paris, 2006;

Bouineau Jacques, *Roux Jérôme, 200 ans de Code civil*, Éd. L'imprimerie de la République, Paris, 2004;

[1] Oana Ghiţa, *Dreptul familiei*, Universitaria Publishing House, Craiova, 2007, p. 268.
[2] Jacques Bouineau, Jérôme Roux, *200 ans de Code civil*, Éd. L'Imprimerie de la République, Paris, 2005, p. 161.
[3] Ion Dogaru, Dan Claudiu Dănişor, Gheorghe Dănişor, *Teoria generală a dreptului*, C. H. Beck Publishing House, Bucharest, 2006, p. 213.

Lévy Jean-Philippe, Castaldo André, *Histoire du droit civil*, 1er édition, Éd. Dalloz, Paris, 2002;

Mihoc Constantin, *Taina căsătoriei şi familia creştină în învăţăturile marilor Părinţi ai Bisericii din secolul IV*, Teofania Publishing House, Sibiu, 2002;

Dogaru Ion, Cercel Sevastian, *Elemente de dreptul familiei*, Themis Publishing House, Craiova, 2001;

Crăciunescu Cristiana Mihaela, *Regimuri matrimoniale*, All Beck Publishing House, Bucharest, 2000;

Chauchard Jean-Pierre, *Droit de la Sécurite Sociale*, 2eme ed, LGDJ, Paris, 1998;

Pricopi Adrian, *Căsătoria în dreptul român*, Lumina Lex Publishing House, Bucharest, 1998;

Ceterchi Ioan, *Istoria dreptului românesc*, vol. I, Socialist Republic of Romania Academy Publishing House, Bucharest, 1980;

Constituţia României; Codul familiei; Codul penal.

THE INFLUENCE OF RELIGIOUS LEADERS ON A NATION: A CASE STUDY

Banciu Viorica *

Abstract

The focus of this paper is on the ways in which language develops and evolves in times of national crisis. After the events of September 11, through public rhetoric, an act of terror became a war. New York became America's first city, while Rudolph Giuliani was named the 'mayor of the world'. Undoubtedly, the public language (re)created a national identity. President Bush used the political discourse in order to influence and convince the nation to accept a war against terrorism. His attempt was supported by the religious leaders of USA.

Key words: *terrorism, religion, political discourse.*

Introduction

On the morning of September 11, 2001 at 8:45 an American Airlines jet flew into the north tower of the World Trade Center. Another plane collided into the south tower and the media did not cover the accident. This was confirmed an hour later as another American Airlines plane flew into the Pentagon and another hijacked flight crashed south of Pittsburgh. CNN broadcast 'Breaking News' and for several days thereafter they announced the 'Attack on America'. This 'attack' quickly became an act of war like 'Pearl Harbor'.

Nonetheless, the goal in this paper is to detail how the particular road taken - the construction of a nation at war – is aided through the strategic deployment of language. Through the use of language, we create and recreate particular worlds of understanding. How did an act of response to terror become a war against terrorism? Walter Laqneur, a famous terrorism specialist, said that 'the success of a terrorist operation depends almost entirely on the amount of publicity it receives. This is one of the main reasons for in the cities the terrorist could always count on the presence of journalists and TV cameras and consequently a large audience[1].

Power and Persuasion in the Public Perception

Power and persuasion rest in the access to the media and the ability to shape reporting. After the attack, George W. Bush addressed the nation. Bush's first statement came forty-five minutes after the first hit, from Emma Booker Elementary School in Sarasota, Florida. He characterized the situation as '*difficult for America'* and '*a national tragedy'*. He described the events briefly: *'Two airplanes crashed into the World Trade Center'*[2]. The language he used and his remarks show us that he was in control– grammatically marked as an active agent. We must note the use of the personal pronoun 'I' and the use of the active voice as Bush marshals the resources of the state: '*I have spoken to the Vice President, to the Governor of New York, to the Director of the FBI, and have ordered that the full resources of the federal government go to help the victims and their*

* University lecturer, Ph.D. University of Oradea, The Faculty of Social Humanistic Science, banciu_vio@hotmail.com

[1] Silberstein, S. *War of Words*, New York, Routledge, 2002, p. 2.

[2] Silberstein, S. *War of Words*, New York, Routledge, 2002.

families and to conduct a full-scale investigation to hunt down and to find those folks who committed this act'[1].

Attorney General John Ashcroft's statements are in a sharp contrast to President Bush's statements. We can note that his statements are grammatically 'passive': *Crime scenes have been established by the federal authorities*. Other statements have no agent: *'the full resources of the Department of Justice are living deployed to investigate these crimes and to assist survivors and victim families.*

President Bush said: *'Terrorism against our nation will not stand* and he pledged to find 'those folks who committed this act' being both presidential and folksy; he also notes: *'The presidency is still a dammed informal monarchy'*. Reporting that: *We created a national tragedy* grammatically the President creates a united nation, under God. Bush uses the pronouns here, what Wilson calls a *pronominal window into the thinking and attitudes* of a political leader. The referent for the pronouns 'we' and 'you' is ambiguous (as we'll recall from the exhortations of our high school teachers to avoid their use). Bush's 'we' is the nation re(created) and united through his remarks in contrast with the ambiguity in the phrasing by Health and Human Services Secretary Thompson: *It is now our mission to begin the heading from this tragedy.*

President Bush spoke again at 1:04 from Barksdale Air Force Base in Louisiana: *I want to reassure the American people that the full resources of the federal government are working to assist local authorities to save lives and to help the victims of these attacks.* Without being present in the capital he was able to confirm that he had marshaled the full resources of the state and that his people – the Vice President, the Secretary of Defense, the national security team and his Cabinet had taken the necessary security precautions to continue the functions of 'your government' who are in service of the people's safety. *We have taken all appropriate security precautions to protect the American people.*

In Bush's speech there are several key phrases: *Make no mistake. The United States will hunt down and punish those responsible for these cowardly acts*. There are some interpretations to these words: 'hunting down' and 'punishing' could indicate covert actions (assassination or bringing the terrorists to justice under USA or international law) or military action. Bush continued: '*We have been in touch with the leaders of Congress and with the world leaders to assure them that we will do whatever is necessary to protect America and the Americans.* It is well known that when the President speaks he governs and also warns USA allies of further attacks. The President repeated twice 'make no mistake'. The second time he used the words, one can understand them in a military context as he addresses the rhetorically unified notion: 'The resolve of our great nation is being tested. But 'make no mistake'. We will show the world that we will pass this test'. But it expands on a single statement made earlier at Barksdale: *Terrorism against our nation will not stand' and now the assurance or resolve are accompanied by assurances of action: 'we will do whatever is necessary*. The President ended thanking 'the folks' who had been mounting the rescue efforts and offered a prayer for victims and families. He ended with 'God bless'. By that evening the President began characterizing the attacks:

Good evening. Today, our fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts. The victims were in airplanes, or in their offices; secretaries, businessmen and women, military and federal workers; moms and dads, friends and neighbors. Thousands of lives were suddenly ended by evil, despicable acts of terror.

[1] Ibidem.

The President invoked *fellow citizenry*, united with its symbolic territory of a *way of life* and its *freedoms*. To invoke those symbolic is to invoke precepts for which most Americans would give their lives. In order to understand how these concepts worked it is necessary to say a few words about both nation and symbols.

Nation is defined as *an imagined political community* by anthropologist Benedict Anderson. It is 'imagined' because the members of even the smallest nation will never know most of their fellow members and meet them or even hears of them, yet in the minds of each lives the image of their communion. Yet, it is well-known that national boundaries tend to be recent, elastic and accidental. However, it is known that nowadays, all individuals on the planet are born into nations. Lauren Berlaut, in her 'The Anatomy of National Fantasy' (1991), studied the nation building and noted ... *we inhabit the political space of a nation* and the space was not merely legal, geographical, genetic, linguistic or experimental but *some cluster of all of these.*

Berlaut calls this political space the 'national symbolic', a place that brings together all the symbols that evoke America. After Berlaut, the rhetorical terrain of September 11 can be taken as a national symbolic site. Berlaut argues that through our linguistic practices we continually (re)create the nation. One of the goals of the national symbolic is to produce a fantasy of national integration. Through national identity the individual is promised almost limitless collective identity. This is America's symbolic terrain, the site from which Bush's speeches are delivered.

Americans were brought together through their contrasts with a shared enemy. In emergency situations the evil and the worst in human nature are met daring and caring. After Bush's last speech America was at war and 'despicable acts' or 'mass murder' were contrasted in his speech with 'the brightest beacon for freedom, justice, and peace'. There are contrasts that would be maintained during the rhetorical war. These key words would be used by other heads of state–allied with the USA and need to convince and rally their people.

President Bush has two styles in his rhetoric: the motivational one, which is high on optimism and low on specific programs; the second style is pedagogical, which is high on realism and symbolism framed in human terms. Hart noted: *The President…is the nation's first chauvinist as well as its most dependable teacher*. President Bush tends to both styles but long the butt of jokes for his listeners and displays a highly pedagogical style–which became increasingly pedagogical in the following days. Bush emphasizes that the nation would prevail even if the context is tragic: *These acts of mass murder were intended to frighten our nation into chaos and retreat. But they have failed; our country is strong. Our military is powerful, and it's prepared. The functions of our government continue without interruption. America has stood down enemies before and we will do so this time*. The President spoke with confident realism and announced steps he had taken as nation's chief executive:

Immediately following the first attack, I implemented our government's emergency response plans. I've directed the full resources of our intelligence and law enforcement communities to find those responsible and to bring them to justice'. In the next two statements Bush signals presidential prerogatives: 'I appreciate so very much the members of Congress who have joined me in strongly condemning these attacks. And on behalf of the American people, I thank the many world leaders who have called to offer their condolences and assistance.

The first statement was a declaration that mentioned the members of the Congress that joined the President; in the second statement Bush spoke *on behalf of the American people*. In both statements the language foregrounds the presidential prerogatives, i.e. the ability to set the agenda and to speak for the nation. The confirmation of building support was announced as already given information.

The first reference to war was made when Bush announced the building coalition: *America and our friends and allies join with all those who want peace and security in the world, and we stand together to win the war against terrorism* And in support of that war the President asked once again: 'God bless America'.

The President is very much in steps with the public and this public was quick to label September 11 as an act of terrorism. People on the street referred to the hijackers as 'zealot terrorist pigs'. They went further installing Bush as the commander in chief: *Whatever we have to do to eradicate the country or the world of this vermin, I just hope Bush will do whatever is necessary to get rid of them*. These remarks reflect the realities of the US military action. And this is explained by the rhetoricians Campbell and Jamieson who noted that the constitutional rhetoric cooperation between the President and Congress has been replaced by one of justification.

The Support of Religious Leaders

At the National Day of Prayer and Remembrance, at the National Cathedral in Washington D.C., the speakers included a Muslim imam, a Jewish rabbi and a catholic cardinal. From the pit, Dean Baxter addressed the audience:

'*Today we gather to be reassured that God hears the lamenting and bitter weeping of Mother America because so many of her children are no more'. Then he prayed for divine wisdom and for the leaders because the service was the service of leaders, most particularly of the President, but the clergy were cautious not to target only the President. He called for wisdom and for a generic management team: 1) he ratified the institution of presidency ('our leaders'), its military action ('necessary actions for national security') and the naming/constructing of evil; 2) a veiled admonition against revenge: 'Let us also pray for divine wisdom as our leaders consider the necessary actions for national security. Wisdom of the grace of God that as we act, we not become the evil we deplore'*.

We notice that Dean Baxter could have chosen several modifiers for 'necessary action'; he could have used nothing, simply 'necessary action' (as our leaders consider necessary action) or 'any necessary action' as well as his choice 'the necessary action'. We distinguish the use of the definite article 'the', i.e. the assumption that the item already exists. By choosing the definite article Dean Baxter signals his acceptance that (presumably military) action will be necessary for national security. And military action will be taken against those already defined as evil. Bush will take 'the necessary (given and approved) actions'.

In the President's speeches from September 2001 we saw the building of the dichotomy between an 'evil' them and a 'national' us. The ratification of Bush's designation of 'evil' would resonate throughout the religious service.

Reverend Caldwell echoed those said by Dean Baxter and Baxter's *lamenting and bitter weeping* was paralleled by our *heavy and distraught hearts, the evil we deplore* became *the evil hand of hate and cowardly aggression*. He also seemed to ratify military action in the service of national security when he asked that leaders be guided *in the momentous decisions they must make for our national security*. This explicit call for caution was not only with respect to revenge, but against racial profiling: *save us from blind vengeance, from random prejudice and from crippling fear.*

Reverend Billy Graham began by thanking the President for this installation of religion into the national life. Graham affirmed the theistic, but inclusive nature of gathering: *We come together today to affirm our conviction that God cares for us, whatever our ethnic, religious or political background may be*. Then he said: *I'm speaking as a Christian now,* so Graham implicitly reaffirmed support for Bush's war on terrorism: *We are facing a new kind of enemy. We are involved in a new kind of warfare* and ended calling for wisdom: *We also*

know that God is going to give wisdom and courage and strength to the President and those around him.

Conclusions

The past September 11 brought about the new McCarthyism, when increased patriotism saw attacks on those who questioned US policy. The result was ACTA (American Council of Trustees and Alumni) who wrote a report against all those American campuses 'which were supposed to have offended 'the American policy with their attitude; and they had a blacklist and its report was in fact naming the names. The ACTA report had taken the *culture wars* to a new level. What had been a *war of words* became *a war on words*.

Bibliography:

Silberstein, S. (2002) War of Words, New York: Routledge;

Ashcroft, J. Press Briefing by Attorney General John Ashcroft, 11 Sept. 2001, 7"15 p.m. ED www.whitehouse.gov/news/releases/2001/09/20010911-10.html;

Blair, T. Statement in Response to Terrorist Attacks in the United States. 11 Sept. 2001, www.number-10.gov.uk/news.asp?NewId=2545;

Bush, G. W., Address to a Joint Session of Congress and the American People, 20 Sept. 2001, www.whitehouse.gov/news/releases/2001/09/20010920/8.html;

Bush, G. W., President Bush Addresses the American Nation, 19 Mar. 2003, EST <www.whitehouse.gov/releases/2003/03/20030319/17.html>

Bush, G. W., President Bush Salutes Heroes in New York, New York. 14 Sept. 2001, <www.witehouse.gov/news/releases/2001/09/20010914/9.html;

Bush, G. W., President Pledges Assistance for New York in Phone Call with Pataki, Giuliani, 13 Sept. 2001 www.whitehouse.gov/news/releases/2001/09/20010913-4.html;

Bush, G. W., President's Remarks at National Day of Prayer and Remembrance, The National Cathedral,Washington, DC, 14 Sept. 2001, www.whitewhouse.gov/news/releases/2001/09/20010914-2.html;

Bush, G. W., Presidential Address to the Nation, 7 Oct. 2001, <www.whitewhouse.gov/news/releases/2001/10/20011007-8.html;

Bush, G. W., Remarks by the President After Two Planes Crash Into World Trade Center, Emma Booker Elementary School. Sarasota, FL. 11 Sept. 2001, 9:30 a.m. EDT www.whitwhouse.gov/news/releases/2001/09/200101.html;

Bush, G. W., Remarks of the President Upon Arrival at Barksdale Air Force Base, Barksdale Air Force Base, LA. 11 Sept. 2001, <www.whitewhouse.gov/news/releases/2001/09/20010911-1.html;

Bush, G. W., State of the Union, 28 Jan. 2003, 9:01 p.m. EST, <www. whitewhouse.gov/news/releases/2003/01/20030128-19.html;

Bush, G. W., Statement by the President in His Address to the Nation, 11 Sept. 2001, 8:30 p.m. EDT, <www. whitewhouse.gov/news/releases/2001/09/20010911-16.html;

Rodriguez, R. (2001) Essayist Richard Rodriguez of the Pacific News Service Revisits New York City, NewHour with Jim Lehrer/Online NewHour. 14 Dec. 2001 <www.pbs.org/newshour/essays/july-dec01/verticalcity_12-14.thml;

Siddiqi, M. H. (2001) Muslim Prayer of Imam of Islamic Society of North America. National Day of Prayer and Remembrance. The National Cathedral, Washington, DC. 14 Sept. 2001 <http:// usinfo.state.gov / topical / pol / terror / 01091816.htm.

CONSUMPTION OF NARCOTICS IN THE CHRISTIAN CONCEPTION

Nicoleta-Elena Buzatu*

Abstract

The traffic and the consumption of narcotics has become a world-wide problem. This phenomenon has disastrous consequences not only from the point of view of public health but also because it undermines the very social evolution, nourishing corruption the organized crime.

Key words: *narcotics, consumption, flagellum, fight, prevention.*

Introduction

The consumption of narcotics appeared since man has been created to be a rational being. The complexity of changes that took place in the surrounding world - climate, fauna, flora, natural catastrophes, etc - have determined man to find out answers able to explain his curiosity.[1] *His living within a hostile environment made man look for a way of surviving in an unknown world; thus this aspect of his life became one of his most important preoccupations.*

While administrated correctly and rationally, narcotics have had been and still are benefic for medicine. Yet, unfortunately, they started to be abusively used and, in the course of time, they have turned out to be a serious danger for humanity, a real social disaster.[2]

Fighting against the illicit traffic and narcotics consumption was and still is a complex and serious problem at both national and international level. The ways this phenomenon acts, the consequences it produces as well as the means of eradicating it are top topics of interest for the states' authorities and for the public opinion, as it is a really dangerous and serious phenomenon encroaching the health of the population, the economic and social stability and the good evolution of the states' democratic institutions.

The analysis regarding the consumption of narcotics shows certain raising tendencies of this phenomenon (increase in the number of users, drug-addicts, criminality, etc) which, if not be applied efficient measures of fight and prevention, will lead to tragic social consequences, especially among the youth. It is hard to establish the real size and proportion of the narcotics consumption phenomenon; it is not only about Romania, but also about other countries where this noxious phenomenon has taken alarming proportions with respect of society.

To be a narcotics user [1] means to take or to consume drugs; the term has attached a new nuance to the standard one, as been used to define the consumption in excess of toxic substances or of stupefacients.

---

* Lecturer, Ph.D Candidate Law School, University of Bucharest, "Dimitrie Cantemir" Christian University, Bucharest, Faculty of Juridical and Administrative Sciences, Departament of Public Administration, nicoleta_buzatu@yahoo.com.

[1] Filipaş, A. – *Drept Penal român. Partea specială,* Universul Juridic Publishing House, Bucharest, 2003, p. 180.

[2] Răşcanu, R. – *Dependenţă şi drog. Aspecte teoretice şi clinic ameliorative,* Bucharest University Publishing House, Bucharest, 2008, pp. 15. See also Răşcanu, R.; Zivari, M. – Psychology and Psychopathology in Drugs Addiction, Ars Docendi, Printing House Bucharest, 2002, pp. 15.

A user in conformity with art 1 letter h) of Law no 143/2000[2] is the person who administers himself or allows the others to illicitly administrate him narcotics either administrated by mouth, by smoking, by injection, by snuffing or by other ways through the drug can reach within the body.

As stipulated in art 1 letter h1) of the same law,[3] an addict is the one who after having been repeatedly administrated narcotics - out of need or compulsorily - has physical or psychic consequences according to medical and social criteria.

Various sources of information - mass-media included - constantly inform the public about the fact that, at a planetary level, billions of people have been the victims of the "*white death*" and that their number increases yearly. This narcotics-consumption flagellum has unfortunately included the population of our country, as well.

Drugs-consumption extended at the level of the whole country, spreading among various walks of society, who are using a large range of narcotics - from opium, cannabis, cocaine, heroine, LSD and amphetamine. The way of administration differs from a drug to another and from the effect the user expects to have on him.

The capital of the country is the main zone for the traffic and drug consumption. That is why programs meant to address to heroine or synthetic drugs users have been extended and improved. Police and the government authorities have improved their methods of collecting data and have recorded an increase in the captures of narcotics.

In university centers the students consume especially opiates, cocaine and synthetic drugs while in high schools they are mainly using cannabis.

At the same time drugs are also consumed in the form of pills of amphetamine, LSD or ecstasy, as psychotropic medicine.

The consumption of various categories of narcotics - vegetal or synthetic - has disastrous consequences on the human body and on the social relations the addicts participate in.[4] The seriousness of this narcotics consumption flagellum - as is correctly named - entered the preoccupation of the states and of the whole international community and lots of measures have been adopted: from a social and medical, to police and military who simply waged a war against the producers of cocaine or opium.[5]

In order to significantly diminish the number of those who become victims of drugs, school and family play an important role being called to maintain the health of the younger generation. Contrary to the older population, the youth are more attracted by the new and more tempted by new experiments and risks. The narcotics flagellum is one of the most complex, deepest and tragic phenomena of the modern contemporary world.

Treatments and rehabilitations for and of the chronic users have three distinct stages: *disintoxication*, which is generally applied after a fit, and is meant to make the addict weaken its drugs-using habits; *social reinsertion*, meant to offer the addict serious reasons as to make

---

[1] Sandu, F.; Ioniţă, G. I. – *Criminologie teoretică şi practică,* II-nd edition, Universul Juridic Printing House, Bucharest, 2008, p. 240.

[2] Chapter I art. 1, letter h) was modified by art. I ¶ 2 of Law no. 522 of November 2004 for modifying and completion of Law no. 143/ 2000 on the fight against illicit traffic and consumption of narcotics.Before this modification, the context was the following: *addict* - is the person who being physically and/ or psychically dependent of narcotics, is registered by one of the sanitary units appointed to this reason by the Ministry of Health."

[3] Chapter I art. 1 letter h) of Law no. 143/ 2000 on fighting against the illicit traffic and consumption of narcotics was completed by art. I ¶ 3 of Law 522 of November 24, 2004 for the modification and completion of Law no. 143/2000 on the fight against the illicit traffic and drugs consumption.

[4] The term *addict* defined by Law no. 143/2000 on the illicit traffic and narcotics consumption was replaced with *consumer* by art. I ¶ (e) of Law no. 522/2004.

[5] *Stancu, E. – Introducere în criminologia generală,* II-nd edition, "Dimitrie Cantemir" Christian University, Bucharest, 1996, p. 112.

him be interested in a previous or a new social activity; this aspect has two levels: placing the individual in an institutionalized frame or acting over his social group; *post-cure*, meant to help the individual increase his necessary adaptability as not to be again trapped by narcotics.

Addiction acts against the preservation of the sacred traditions and against the recognized universal values. Here appears the necessity of the Church to involve itself in the fight against addiction, both generally and particularly. All alcoholics and addicts are considered to be delinquents or ill. The Church will not judge them as delinquents, but will save them through its specific methods, and rescue them form their dangerous sickness as the Saviour said,'*Those who are well have no need of a physician, but those who are sick.*" (Mt 9:12). So the Church has the Samaritan mission to include off unrighteous in the grace of the Body of Christ by being received and treated as sons and brothers of the same ecclesiastical communion. Afterwards, a real activity of Christian education should be given to the victims of addiction making them recover the trust and goodness of the Heavenly Father. Narcotics are a means by which a confused soul is looking for, who blindly seeks for an ungrounded and strange fulfillment of his much dreamt-of wishes. After a long and judicious analysis of sin, it was demonstrated that sin is an attempt to fill an inner gap.[1]

In the youth's mentality the consumption of narcotics means either a hope or a challenge. This phenomenon is a really serious problem for both parents and teachers and, at the same time, an alarm signal for the whole society.

Conclusions

It is necessary that firm measures should be taken at the level of the whole society, for bringing into the attention and conscience of the population the risks attached to the narcotics consumption, and for the state authorities to get involved in backing all actions of preventing the drug consumption and to more seriously and professionally try to integrate in society those who became drugs consumers after having been the victims of this flagellum: Ministry of Administration and Interior Ministry of Health, Ministry of Finance, Ministry of Education, Research, Youth and Sports, Ministry of Culture and of National Patrimony, Ministry of Agriculture and Rural Development, Sanitary and Veterinary Authority, National Authority for the Protection of the Consumer as well as all non-government organizations, family, school, the Church. All these institutions shall cooperate and act in common to fight against this phenomenon, which could not be eradicated from the very beginning, but, at least, could be controlled. Remarkable results can be obtained in the fight against addiction and narcotics and in controlling criminality if all the above enumerated institutions shall work together in future.

Bibliography:

Sorin Cosma, *Toxicomania - păcat al deznădejdii sufletești*, June 17, 2009, www.paginamedicala.ro – Comunitatea medicală online;

Sandu, Florin; Ioniţă, Gheorghe Iulian – *Criminologie teoretică şi practică*, II-nd edition, Universul Juridic Publishing House, Bucharest, 2008;

Răşcanu, Ruxandra – *Dependenţă şi drog. Aspecte teoretice şi clinic ameliorative,* Bucharest University Publishing House, Bucharest, 2008;

Filipaş, Avram – *Drept Penal român. Partea specială,* Universul Juridic Publishing House, Bucharest, 2003;

[1] Preot Sorin Cosma, *Toxicomania - păcat al deznădejdii sufletești,* June 17, 2009, www.paginamedicala.ro/fiducius/blog/articol/Toxicomania-pacat-al-deznadejdii-sufletesti_749.

Răşcanu, Ruzandra; Zivari, Mirela – *Psihologie şi psihopatologie în dependenţa de drog,* Ars Docendi, Printing House Bucharest, 2002;

Stancu, Emilian – *Introducere în criminologia generală*, II[nd] edition, "Dimitrie Cantemir" Christian University, Bucharest, 1996.

"MAN'S RIGHTS" OR THE "HARMONIOUS COMMUNION BETWEEN LAY AND RELIGION IN THE UNIVERSAL ORDER"

Nicoleta-Elena Buzatu[*]
Anca Păiușescu[**]

Abstract

The abundance of laws concerning man's rights and the activities meant to preach about the religious tolerance - visible in the last 60 years - raise the question whether the level of the public morality has been improved. This seems to be a cosmic question, which consequently, is not given a definite answer.

Key words: *lay, religion, Christian, rights, liberties.*

Introduction

The Christian conception about man is similar to the doctrine based on the teachings about man's fundamental rights and liberties. Man's rights have a universal character just because the universal values of all types of religions have things in common, especially with regard to tolerance and non-discrimination. Breaking man's rights brought about lots of tragedies and serious political and social conflict, as well as a wave of violence among nations or even within nations themselves.

I. Are Man's Rights of a Divine Origin or are they granted by men or by state?

The adepts of religious denominations are on the point to gain the right to gather freely in assemblies and express their common religious convictions. The climax of the natural evolution of the religious groups is that of organizing themselves, by associating natural persons, sharing similar religious creeds, with legal personalities. Affiliating legal persons, whose mission is to promote religious convictions, is practically aimed at translating into practice the direct achievement of the right concerning the liberty of conscience, thinking and religion.

In Caritas in Veritate,[1] Pope Benedictus the XVI-th warns:

"Nowadays we are the witnesses of an extremely serious inconsistency. On the one side, the so-called arbitrary and non-essential rights are claimed and accompanied by the request of being recognized and promoted by authorities while, on the other side, the basic and elementary rights are not taken into consideration and are violated almost everywhere in the world. If the only basis of man's rights can lay in the conclusions drawn by an assembly of citizens, these rights can any moment be changed, and thus the obligation of observing and accomplishing them simply disappears from the conscience of the community. In other words, both governments and international bodies can overlook the objectivity and sacredness of these rights."

[*] Lecturer, Ph.D. Candidate, Law School, University of Bucharest, "Dimitrie Cantemir" Christian University, Bucharest, Faculty of Juridical and Administrative Sciences, Department of Public Administration, nicoleta_buzatu@yahoo.com.

[**] Lawyer, Lecturer, Ph.D, "Dimitrie Cantemir" Christian University, Bucharest, Faculty of Political Sciences, Department of Communication and PR, ancamili@yahoo.com.

[1] In Marian Covlea, *Apărarea drepturilor omului - Documentar,* under print at the Prouniversitaria Printing House, Bucharest, 2011.

Fact is that certain rights granted by the state can be annulled and withdrawn by the very state itself, and so the door toward abuses is large open. Consequently, frauds and deceits can even be legally consecrated!

Important norms based on the divine origin of man's rights:

1. **The Bible: Man is the creation of God, appointed to master over all beasts.** From this point of view, the extremist environmentalism proves to be satanic, as it makes no distinction between man and beast, but even considers them superior to man!

2. **Magna Charta** (1215).

3. **The Petition of Rights** (1628).

4. **Habeas Corpus Act** (1679).

5. **Bill of Rights** (1689).

6. **The Universal Declaration of Man's Rights:** UNO, 1948.

7. **The Constitution of the United States** (17 September 1787).

8. **Déclaration des droits de la femme et de la citoyenne** (1791).

9. ***Déclaration des Droits de l'Homme et du Citoyen*** (26 août 1789).

10. **John F. KENNEDY** (January 20, 1961): "*... the belief that the rights of man come not from the generosity of the state, but from the hand of God".*

The general notion of man's rights is inspired from the divine revelation and from the recognition of the fact the all human creatures are created in the image and likeness of God.[1] The validity of these rights is to be found in the principles of the innate rights written in the hearts of all people.[2] Despite all these, once separated from their source of inspiration and from the innate right,[3] man's rights become anti-human. The rights which are incompatible with the innate law are not only incorrect, but oblige to subjugate certain human beings with the aim to promote others' interests. Almost weekly we are the witnesses of the way these so-called rights are referred to in order to explain for the public policies that threaten the most vulnerable representatives of society or that are used to put to silence those who defend the Christian values and the innate law. This is obviously evident in the attempts to separate the right to life from the principles of the innate law.

Although man's rights have been accepted and recognized long before WWII, their present aspect is due to the Nürenberg International Military Court and to the Universal Declaration of Man's Rights (1948). Among those accused and sentenced in Nürenberg were the authors of the "T4" euthanatizing program and of those who promoted the abortion program in a conquered Poland. In July 27, 1946 the Court heard the Nazi and found out how they used "various biological devices to produce the genocide. They considerably diminished the birth rate in the seized countries, by sterilization, castration and abortion, by separating men from women and by interdicting marriage."[4]

One of the central world powers, in its attempt to create a larger religion with a personal and public morality is, for sure, the Charta of the United Nations (1945), an act in which religion includes race, sex and language non-discrimination and which requires all the

---

[1] Genesis, 1:26-27. See also the Universal Declaration of Human Dignity www.dignitatishumanae.com (translator's note).

[2] Romans, 2:14-15.

[3] The innate right is a doctrine based on an ethic natural and universal system resulting from the divine order of the cosmos or from the rational and social nature of humanity. The innate right is an ideal right, immutable and universal, without any state character. It is pre-existed the modern state. As it was not created by any authority, it cannot be retracted. (Example: the right to life). One of the founders of this doctrine was Hugo Grotius (1853-1911), a Dutch historian and specialist in international law (translator's note).

[4] *International* Military Court (July 27, 1946), Vol XIX, pp. 498-9 (*www.mazal.org*).

signatory states to involve themselves in promoting man's rights with no partiality.[1] The removal of intolerance and discrimination based on religion or on certain mentalities was, probably, one of the most difficult and hard-to-be-solved target of the United Nations. It was only in November 25, 1981 that the UNO General Assembly could reach an agreement regarding the "Declaration on the Removal of All Forms of Intolerance and Discrimination Referring to Religion and Faith".[2]

II. The Innate Right and the Divine Origin of Man's Rights

The Innate Right can be understood as the entirety of in-born rights, inherent to human nature. All the people have equal innate rights (ex. the right to life and to bodily integrity or to personal freedom), irrespective of sex, age, social position, time, place or state order they live in. [3] The innate rights are super-state rights and that is why they cannot be modified or altered, as they are "eternal"; they are different from the state provisions and legal acts which - in the course of the historical evolution - could be changed, as for instance the positive right, under the pretext that they have an advanced juridical quality as compared to the latter.[4]

The innate rights have deep historical roots in the Greek antiquity. They also appear in the philosophic conceptions of some of the Sophists (V^{th} - IV^{th} centuries BC), in Plato's (427-347 BC) and Aristotle's (384-322 BC) philosophy. Yet, they were the basic preoccupation of the Stoics (beginning with the III^{rd} century), being improved by the Greek and Roman disciples of this current, that is by Cicero (106-43 BC), Seneca (about 4^{th} BC- 65 AD) and Epictet (about 50-138 AD). In the philosophy and theology of the Middle Ages, and especially in that of Thomas d'Aquino (1225-74) and of other scholastics, the innate rights were considered to be a reminiscence of the divine right. The innate rights have acquired a political relevance only in the Enlightenment period ($XVII^{th}$ -$XVIII^{th}$ centuries). The theory of the innate rights based on reason (*rational rights*) - theory advanced by J. Althusius (1557-1638) and H. Grotius (1583-1645), later by S. Pufendorf (1632-94), Chr. Thomasius (1655-1728), Chr. Wolff (1679-1754), J. J. Rousseau (1712-78), I. Kant (1724-1804) and so on - was aimed to sustain the philosophic justification of the French Revolution (1789) as well as of other "bourgeois" revolutions of $XVIII^{th}$ -XIX^{th} centuries, becoming, thus, a strong instrument in the hands of the bourgeoisie in its fight against the feudal system and against the absolutist state, for a state of law.[5] The innate rights have been materialized in the man's and citizen's rights, the modern law the state is grounded on.

In the dawns of Christianity, as well as in the dawns of other religions, this tradition of the innate right has witnessed a special evolution: all people were created by God according to His image and likeness. These convictions lay at the basis of man's rights, even if then, when there were uttered, they had not much connection with the political reality. Practically, they were so-called universal philosophic considerations that could not succeed to penetrate the political world and the law but at the beginning of the modern age.[6]

---

[1] Dumitru Mazilu, *Drepturile omului*, Lumina Lex Publishing House, Bucharest, 2004, p. 43.
[2] *Idem.*
[3] Reinhard Beck, *Sachwörterbuch der Politik,* Kröner Verlag, Stuttgart 2006, p. 637.
[4] *Idem.*
[5] Dumitru Mazilu, *Teoria generală a statului şi dreptului,* All Beck Publishing House, Bucharest, 2002, p. 109.
[6] *Idem.*

III. Religious Entities - the main pillar in achieving the right to the liberty of conscience, thinking and religion

The liberty of conscience and religion has two aspects: an internal one - meant to assure the liberty of the person to have his/her own convictions with regard to the nature of the surrounding things, or of the faith or lack of faith in the values of various denominations - and an external aspect - which practically is the exteriorization of the internal aspect. Freedom in religion cannot exist without one of the two above mentioned aspects, which are co-related and interdependent. Still, the inner aspect is, nevertheless, closer connected with each individual as his/ her religious freedom consists in their free exteriorization of convictions, beliefs of values. Any exteriorization of religious convictions would be meaningless whether not manifested in front of other individuals, or together with them. The human being continually tends to demonstrate the rightfulness of his/ her own convictions, and the most efficient method, and the easiest, is to promote or even preach these convictions in front of others as to attract a larger number of disciples.

Both the international community as well as each state admits the right of the individual, as well as of groups of individuals, to religious self-determination, to the right to believe, to think freely and to express their religious convictions to individuals or groups of individuals. In the recommendation stipulated by the Parliamentary Assembly of the Council of Europe no 1201 of February 1993 regarding the religious tolerance granted by any democratic society, the Assembly reiterates, in art no 3, the fact that religion means an improved relationship between the individual with God and with himself, as well as with the outer world and with the society he lives in.

The viability of any denomination, religion or philosophic direction will always be admitted according to a time-resisting test and to the number of disciples; the most efficient instruments in spreading around convictions and religious values will undoubtedly be the group religious entities.

In the view of art 5 of the Recommendation of the Parliamentary Assembly of the Council of Europe, no 1396 of January 27, 1993, "Democracy and religion are not incompatible, but on the contrary, democracy offers the best framework to liberty of conscience, expression of faith and religious pluralism. As for religion, due to its moral and ethic commitments, to the values it defends, to its critical spirit and its cultural treasure, can be a real partner of a democratic society". The creation of a norm framework - equitable, simple and univocal - as well as the implementation and the observance of these norms by the state agents are positive state obligations.[1]

The creation of religious juridical entities is imposed by the modernization and by the continuous evolution of society; consequently, religion - as part of society - cannot avoid progress. Yet, this domain appears to be quite "sensitive and delicate". The juridical regulations concerning this aspect are not limited to the state will only, but, more often than not, the state norms are interfering with the canon laws, institutionalized many centuries ago. The norms connected with the creation, function, disappearance of religious entities having a legal personality - especially in the case of century old traditions of certain denominations - have been founded long before the concept of legal personality, recording, wiping out, etc were introduced. Therefore, when speaking about its regulations, the state finds itself in the position of creating universal norms for different realities.

[1] Mădalina Tomescu, Protecţia juridică internaţională a drepturilor omului, Prouniversitaria Publishing House, Bucharest, 2009, p. 67.

At the same time, one of the principles of the legislative techniques is the evenness of its regulations.[1] In such a case, all legal persons have equal rights and obligations, and the state cannot offer a legal entity more favourable positions than to another entity.[2]

Under these conditions, the norms regarding the setting up, registration, organization of any activity and the liquidation of any of the religious legal personalities become not only a "very delicate" problem, but a really complex one.

The tendency of reconciling as many as possible denominations there appears the risk of discrimination. To meet all rights is not possible if not treating all denominations equally, without entering each one's particularities. There are no more important or less important denominations; there are only viable denominations, proving their viability by a permanent and efficient activity and there are denominations which have not yet passed the time-resting period. Yet, neither the first nor the second category can be given a differentiated treatment by the state. In conformity with art 6 of the Recommendation no 1396, "a democratic state - be it lay or connected with any religion - shall offer all the religions which observe the CEDO stipulations equal conditions for their existence and evolution, enabling them to find their own place in society".[3]

In the age of technological information, when all activities are based on financial and bank transactions, when purchasing worshipping places or religious objects are made through bank transfers between legal persons, when each group's actions are to be solved through a legally authorized person, the absence of a legal person representing one group or another of worshippers is an obstacle in exercising the right regarding the liberty of faith.

The same problem was repeatedly debated by the European Court for Man's Rights, which decided that the liberty of religion,[4] when groups are involved, shall be seriously treated and interpreted in the same context with the right to the free association (art. 11). In such a case the state cannot involve in the free activity of the religious entities, applying unnecessary limitations for the public security, the public order, the protection of public health and morality or for the protection of the citizen's rights and liberties, inclusively the limitations concerning the right to have legal personality because they all shall represent a violation of art. 9 and 11 of the Convention.

IV. The Parliament of All Religions

The discussions on the question whether the so-called universality of man's rights is correct or not - discussions that have appeared in a Christian Europe - conducted to a movement where out of the dialogue between all the religions and traditions of mankind, there resulted values common to all the whole world, a so-to-say new order of mankind. The reference point was the creation of the World Parliament of Religions that met in its first session in 1993 in Chicago, after long and difficult preparations, when the "Declaration on the New World Order" was adopted.

The World Parliament of Religions declared that without a permanent dialogue between religions there will be no peace in the world. The religions of the world are in themselves universal values and God is universal, so that no church or cultural tradition has the right to consider Him as being solely theirs.[5]

---

[1] Momcilo Luburici, *Teoria generală a dreptului,* Oscar Print Publishing House, Bucharest, 2006, p. 109.
[2] *Idem.*
[3] Recommendation of the Council of Europe, no. 1396, art. 6.
[4] art. 9 of the European Convention of Man' Rights.
[5] "Declaration for the New World Order" The World Parliament of Religions, September 4, 1993, Chicago.

Conclusions

The juridical norms draw their consistency from social norms, especially from the religious norms; it is the religious norms that imposed respect of man toward man and respect for the rights and liberties of each and every individual. The state of law - as a political institution - is forced to assure the observance of each individual's rights and to contribute to their entering into practice; more precisely, the state has to create simple and efficient mechanisms directed toward a concrete achievement of the fundamental rights. That is why the institutionalization of religious entities that have legal personality and the free right granted to groups with a non-formal activity is absolutely necessary in a democratic state.

Bibliography:

Marian Covlea, *Apărarea drepturilor omului - Documentar*, under print at the Prouniversitaria Publishing House, Bucharest, 2011;

Mădalina Tomescu, *Protecţia juridică internaţională a drepturilor omului*, Prouniversitaria Publishing House, Bucharest, 2009;

Momcilo Luburici, *Teoria generală a dreptului,* Oscar Print Publishing House, Bucharest, 2006;

Reinhard Beck, *Sachwörterbuch der Politik*, Kröner Verlag, Stuttgart 2006;

Dumitru Mazilu, *Drepturile omului*, Lumina Lex Publishing House, Bucharest, 2004;

Dumitru Mazilu, *Teoria generală a statului şi dreptului,* All Beck Publishing House, Bucharest, 2002.

CUSTOM OF SOURCE IN ROMAN-BYZANTINE LAW

Corina Buzdugan *

Abstract

In the Romanian people's past, customary rules (customary law) were applied until the written law. For Roman law consultants, the custom was initially the unwritten law, which was based on morals and enforced by extended use. It is the law established by the people, without turning to their sovereign for help. Later on, when the social life became more developed, this unwritten law was replaced by some measures of a general nature, promulgated by kings whose authority gradually took the place of the people in inducing habits and customs, but the old law still remained in force in the fields in which the written law was missing.

Keywords: *custom, rules, law, Roman.*

Introduction

"Mind the authority, the rational basis, mainly the authority of custom; for the custom must be kept only if it is theinterpreter of reason"

- Quintus Septimius Florens Tertullianus -

Hegel[1]says that we can identify as law sources any historical process, and positive determination, which are nothing but social relations transformed by the action of legal norms in legal relations. The source of law is the real source of positive law. This definition of the source of law is, in Mircea Djuvara's interpretation, a complex of extremely heterogeneous factors that shape the content of social relationships. Legal realities, however, are already the product of these social relationships and therefore, on numerous occasions, the legal source is stronger if one studies the subject of legal realities. The custom (tradition or habit) is one of the most important formal sources of law. For any historian, it is very hard to settle not only the historical character of the real, truthful source of customary law, but also to fix its features and, especially, the conditions which helped it become such an inspiration.

Theodor Mommsen said: "The tradition which we have received, with its multitude of peoples' names and tangled, obscure legends, resembles the dried leaves, hard to imagine that were once green." This statement, highlights the problems, some almost insurmountable, facing the real history when trying to identify habits that, over time, turned into rules of law.

Thus, the great historian quoted above, says, rightly, that instead of going through this maze and trying to clarify some fragments of humanity, it would be more appropriate to research people's real life and the way it was expressed in law and culture in general. This way, one can justify the institutions which emerged in the early Roman law, and are valid even today.

In primitive, archaic societies, and later, in Antiquity and Feudalism, the custom had a very broad field of action: it regulated family life, kinship, fashion and even food production and exchange of goods. The custom is generally established by word-of-mouth. It

* Lecturer, Ph.D, "Dimitrie Cantemir" Christian University, Bucharest, Faculty of Law, Cluj-Napoca, e-mail: ijjs@univagora.ro

[1]Hegel G. W. F, *"The principles of phylosophy of law*", T.R.I Publishing House, Bucharest 1996.

is formed and strengthened by observing the uniformity in a "perpetual, considered to be right" causality, as Mircea Djuvara appreciates. In the economic evolution of the society, the custom is expressed in the law, because it "follows the common sense in society, the need for security, equal treatment and therefore, for justice".

The habits (morals, duties) are an important class of social rules that have appeared from the primary forms of social organization. Thus, one can define custom as a rule of conduct, established and reinforced in time. It occurs spontaneously, as a result of a repeated conduct that becomes mandatory at some point, people gradually becoming accustomed to keeping the tradition.The habit arose as a result of social stability and repeatability, of consequent situations that enabled it to carry on the cycle of relationships thus created. The relationship between law and non-legal custom was born from the fact that members of the communities were used to obeying the same rules, whenever the situation required. The source of customs seems to be the imitation - community memory, the fundamental authority – the tradition that decided and imposed the latter as good and useful.

Being part of the social rules, customs are ways to share technical standards and social behavior, settled through life experience which was useful for the harmony of the community.

The moment that the state, the public power recognized the custom, it became law or legal norm. Professor E. Speranția said - at that point, it became legally binding with other rules and violations that lead to state sanctions. The custom is recognized as a source of legal norm and consequently, of law.

The first appearance of the law was the customary one, but not any custom became a customary rule of law, unless it was constantly practiced as a habit and considered mandatory.

What distinguishes custom (custom or tradition) of morality and law is its less rational, less conscious nature, stemming from its creation process while the law and moral involve a conscious project, aimed to be made rational.

The roman-canonical theory issued two conditions for a custom to become law: a subjective condition, according to which that practice is binding, and can claim under legal sanction. Later, a third requirement was added: the precise nature of the rule of conduct imposed by repetition.

The history of Romanian law acknowledges the custom as Geto-Dacian source of law, practice that remained within certain limits even after the Roman conquest (custom, *suos maiorum*).

Geto-Dacian customary rules came into being during the military democracy were sanctioned by the Geto-Dacian polity and became legal norm.

Later, after the Romans conquered Dacia, the Dacian local law remained in force to set things right in the system, but only for what the Romans allowed to be governed by local law. These rules were included in the customs and habits.

The old customs and morals are kept as law, and the law enforces for it is strengthened by the people. Julian, the law consultant, says that the requisitions approved by the people without recourse to any written text, should be guarded by all, because the people expresses its will by consent and deeds.

Justinian, in the sixth century, justifies keeping a maritime law in his encoding, on the ground that it has been used for a long time. Why shouldn't important people, who used to charge higher taxes for a very long time, without any changes, as old testimonies prove – do the same since this is the way it has always been?

Such a custom, whose use is old, is not only well-kept, but it is recommended not to be contradicted by any subsequent fact. As an example of this practice, Ulpian cites a monarch addressing the governor of a province, in which he instructs not to allow anything against an old custom. Therefore, such a custom that is founded on the people's will, and

whose expression was made by an old and permanent use, has the function to imitate the law, to create real obligations as written law. After Julian's reign, in cases where written laws are non-existent, one has to keep the manners (mores) and if these are non-existent too, one must take into consideration what is consistent; and if such a regulation is also non-existent, the current law of Rome must be enforced.

This case-law proves that when it comes to giving a law, firstly, people appealed to manners and customs, secondly, to the established case law, and thirdly, to the analogy with the rules in force in Rome, when the latter possibilities were not-existent.

Thus, in the absence of a written procedure, this was the course to follow. In the presence of the latter, the practice can only be used to interpret the meaning of the law, and there is a conflict among the authors in this regard. The law consultant, Paulus, informs us that when it comes to interpreting a law, one must examine the law used by the city in such cases: for custom is the best interpreter of laws.

Consequently, the need of the city residents is normative if there is a conflict of interpretation of laws, since their constant practice is considered as measure in understanding and enforcing a law. If custom is the interpreter par excellence of a law, it can repeal the law when the will of the people is expressed and everyone consents to its disappearance. Julian informs us that it was commonly accepted that the laws can be repealed not only by the decision he has passed, but also by disuse, with the tacit consent of all.

Therefore, to terminate the use of a law by the people, it is enough to revoke the termination of use or disuse. This situation did not last long, because the evolution of clans and tribes was made in favor of more complex social groups. In that case, the rural groups and the government opted for a more pronounced centralization, so that the unit of the power, the safest and most effective way to organize an empire, became large after successive conquests. Kings began to issue royal constitutions, which limited the influence of the people in creating the laws. Emperor Constantine the Great said - attracting Produs's attention, one of his governors, that the authority and the use of the old custom is not without honor, but one should not allow it to overcome the reason or law. With this royal decision, that brought the conformity with reason for the first time in a legal text, the local custom was never allowed to repeal a written law, as frequently as before. General customs of the empire still continued to repeal written laws.

With this constitution, two conditions were officially added to form a custom: its compliance with the reason and harmony with the law. The Roman tradition, which did not have a clear definition of the word "ratio", had difficulty in assessing the value of a custom against reason. But when the case is presented, the practice was either rejected or tolerated, according to the situation. One thing is certain, namely that the custom should not be based on an error, placed outside reason or unnecessary, because according to a rule of the Roman law, aberrant assumptions do not hold in legal cases.

As far as the condition to adapt the custom with the law is concerned, one can find such an example in Emperor Justinian's constitution. In the 106th article, this emperor established a private law in favor of sailors, which he based on customs in force, making the observation that he confirmed this customary law, because it was not against a previous law. This shows how impatient kings were when it came to customs against the law. When Emperor Justinian ordered the revision of previous legislation, he published instructions regarding this coding. Here are the cues he gave Tribonian, in the year 530 AD, for drafting the Digeste: "laws that are contained in old collections, which are now in disuse, should not be introduced in the new coding, because we want our authority enforced, frequent sentences carried out, and the custom of Rome approved".

In the post Justinian period and until Leo VI, the Philosopher, The Byzantine Roman doctrine on custom held another position in the law science. The custom was implemented within a system of written laws which enforced the rule of law over custom.

This customary system was applied following a reference made by the law, not as a stand-alone customary law and opposed to the written one.

Under Leo VI, the position of customary law changed one more time, so that the custom was once again a legal system with its base outside the scope of law. This is due to social changes made in the past two centuries of the first millennium, changes that have shifted the balance towards a new power of the people against the monarchy. However, Emperor Leo VI reacted against this tendency to form the custom in an unwritten code by introducing some customs in the written law, giving them legal power. This way, he abolished the custom from becoming law. In his articles of law, Emperor Leon, the philosopher, allows eight customs and rejects four, proving how difficult it was to face social realities.

Conclusions

From what has been discussed above, the following conclusions regarding the Roman-Byzantine general conception of custom can be drawn. For Roman law consultants, the custom was in the first stage unwritten law, which was based on morals and enforced by extended use. It established the right of people, without turning for their sovereign for advice. Later, on a more developed stage of social life, this unwritten law was replaced with some general measures, promulgated by emperors whose authority gradually took the place of the people in issuing customs, but it was still in force in the fields in which the written law was non-existent.

Bibliography:

Cretu Vasile - Public International Law, Fundația România de Mâine Publishing House, Bucharest, 1999;

Ph. D. Coman Florian - Public International Law vol. I., Sylvi Publishing House, Bucharest, 1999;

G. Mihai, R. I. Motaca, Fundamentals of Law - Theory and Philosophy of Law, ALL Publishing House, 1994;

Professor Ph.D. Ghimpu Sanda, Ph.D. Breboi Gh., Ph.D. Mohanu Gh., Ph.D. Popescu Andrei, Ph.D. Urs Iosif - Legal Dictionary – a selection, Albatros Publishing House, 1989;

Moca Gheorghe - Public International Law, vol. I, University of Bucharest, 1989;

Ph.D. Cloșca Ionel - Public International Law Dictionary, Scientific and Enciclopedic Publishing House, Bucharest, 1982;

Geamănu Grigore - Public International Law –vol. I, Didactic and Pedagogic Publishing House, Bucharest, 1981;

Sperantia E., Introduction to Philosophy of Law, Romanian Book Publishing House, Cluj-Napoca, 1964.

LEGAL MARRIAGE VERSUS RELIGIOUS MARRIAGE ACT IN LIGHT OF THE NEW REGULATIONS OF THE CIVIL CODE

Laura Cetean-Voiculescu[*]
Ada Hurbean[**]

Abstract

In Romania, in accordance with the current legislation, in order for a marriage to be legally valid it must be completed by a state authority, as an official act. Therefore, the marriage has a civil character. But the religious marriage, given that we are a Christian people, is permitted, with the only condition of subsidiary in relation to civil marriage.

Keywords: ***r****egistry marriage, legal marriage, religious marriage, engagement.*

Introduction

This paper does not propose a presentation and a thorough analysis of legislative changes, numerous and controversial, regarding marriage, changes recently introduced by the appearance of the new Civil Code entered into force on 1 October 2011, but only legal reference to the main characters of the legal act of civil marriage and the celebration of religious marriage, not only permitted by law but also approved by civil society, due to the fact that the Romanian people is Christian. The very first provision of the new Civil Code refers to the religious marriage, which complement the provisions stipulated in the Constitution from 2003.

Short term considerations relating to marriage

The term "marriage" has several meanings. On one hand, marriage is the legal act that is concluded by those who want to get married, a core institution of the human society or a legal situation, in principle considered permanent by the married ones. Even though the Romanian legal doctrine formulated many definitions, most of the authors retained the essence as follows: the specific element of the marriage is community life.

The marriage is basically designed to endure, for the spouses, all of their lives. By celebrating a marriage, a man and a woman are founding a living communion which is based on feelings of affection, friendship, trust and understanding, which implies the fact that future spouses have to think deeply about marriage about to be concluded so that it will correspond to its mission.

In the Family Code regulations now repealed by the new Civil Code provisions, there is no legal definition of marriage, but the legal characters of the institution can be easily detached from its regulations. Now the legal situation is similar, the new Civil Code does not provide such a definition, but there are articles on its legal character, substantive and formal conditions for the marriage ceremony, some dispositions related to engagement, divorce, termination or dissolution etc.

[*] Lecturer Ph.D. University "1 Decembrie 1918" Alba Iulia, Law Department, e-mail:lauravoiculescu@yahoo.com.
[**] Lecturer Ph.D. University "1 Decembrie 1918" Alba Iulia, Law Department, e-mail:adahro@yahoo.com.

Aspects of marriage characters with special regard to the civil one

First, marriage is between a man and a woman. Even if the character of marriage existed in the old regulations contained in the Family Code, the current regulator insists on several pieces of legislation on this issue, emphasizing that marriage can only be concluded between persons of the opposite sex, excluding same-sex marriages. Given the mentality and traditions of the Romanian people we believe that the legislation is appropriate in this context, even if we consider the increasing liberalization of the same-sex marriages throughout Europe and internationally.

Thus, according to the art. 258, ¶ 4 of the Civil Code, "according to this code, spouses mean a male and a female joined in marriage," according to the art. 259, "the marriage is the freely consented union between a man and a woman, done according to law" and according to art. 271, "marriage is concluded between a man and woman by free and personal consent." Furthermore, the civil institution of engagement can only be completed between a man and a woman, according to the art. 266, ¶ 5.

Second, marriage is freely accepted. According to the first paragraph of art. 258, the family is based on marriage freely consented by spouses, and according to the art. 272 the marriage is officiated by the free consent of the future spouses. Therefore, marriage is officiated by non-imposed consent of the future spouses, their free expression, based on love, is not restricted in any way by any other consideration, and above all material considerations[1].

Thirdly, marriage has a solemn character, since it can only be officiated personally by future spouses (art. 271), with due observance of the forms required by law (is celebrated by the civil officer at the town hall in a previously determined day, etc.).

Fourth, marriage is a legal act, even though the doctrine also formulated the opinion that it is a contract.

Fifth, marriage is monogamous, this character being reiterated by the Family Code and the current Civil Code, which enshrines the rule of the institution of marriage for preventing the already married to conclude a new marriage (art. 273), and sanctioning with the absolute nullity of the marriage made without respecting the law (art. 293).

Sixth, the marriage is officiated for the entire life. According to the old rules, this character was undoubtedly because no marriage could be annulled by mutual consent and there is only one exceptional way of breaking this institution, namely the divorce. But now, the Civil Code provides three ways for dissolution of marriage: divorce pronounced by the court, divorce by administrative agreement between the spouses and divorce through notary procedures. Although these two new ways of dissolution of marriage appeared, we believe that this character of marriage continues to subsist.

Seventh, the marriage's goal is to start a family. The current regulations sanction, like the previous one, fictitious marriage, the art. 295, first paragraph providing that marriage enclosed for reasons other than to start a family is null and void. Instead, on cases where the cause of nullity of marriage may be covered, the new Civil Code introduced an amendment adding a condition for 2 years of marriage, apart from the other three situations that were regulated previously (cohabitation of spouses, the birth of a child, pregnancy wife).

Eighth, the marriage is based on full equality of spouses, male and female. The full equality of rights, under both the Constitution and the current Civil Code refers to the conditions for officiating marriage and engagement and also to the relationships between

[1] Laura Cetean-Voiculescu, Adam Drăgoi, *Curs teoretic şi aplicativ de Dreptul familiei*, Agora University Press, Oradea, 2007, p. 40.

spouses or between them and their children throughout the marriage and even in case of termination or dissolution of marriage.

Finally, the last character, the most prominent theme in terms of concern, is the civil character of marriage. Celebration and registration of marriage is the exclusive competence of state authority. But the Constitution and the old and current regulation refers to religious marriage.

Thus, the Constitution (2003) provides in 48th article that the family is based on the freely consented marriage of the spouses, their equal right and duty of parents to ensure the upbringing, education and training of children (first paragraph) and in the second part of the second paragraph, religious marriage can be celebrated only after civil marriage.

In the current rules of marriage, the new Civil Code provides that the religious celebration of marriage may be made only after civil marriage (third paragraph of the art. 259). Therefore, legally, the law insists on the possibility of religious marriage ceremony, but only after the civil marriage ceremony, in order to ensure compliance with the substantive and valid form for the celebration of marriage.

In formal terms, in order to fulfil this subsidiary requirement, those who want a religious celebration of the marriage have the obligation to provide the marriage certificate to the priest before the celebration.

Considering that the Romanian people are a Christian people, our customs and traditions lead to compulsory religious marriage morally and socially. In legal terms, religious marriage is not compulsory, but is accepted and referred by the law, as noted above. As regards compulsory civil marriage ceremony before the religious marriage, the purpose is obvious, namely to ensure a marriage validly performed, both in terms of the capacity of entering into marriage, and in terms of consent and satisfying other conditions of substance and form necessary for a valid marriage.

Given the freedom of conscience, constitutional principle, which includes religious beliefs, including the lack of such beliefs, the legislation rarely refers to religion. But in matters of marriage, there are, as we showed, in addition to the general principle ("freedom of thought, opinion and religious beliefs cannot be restricted in any way; nobody can be forced to adopt an opinion or to join a religion contrary to his beliefs"[2]), two such references. Also, regardless of religion adopted by a person, the rule of subsidiary it's applicable, the law is not referring only to the Orthodox or another religion distinctly and *ubi lex non distinguit, nec nos distinguere debemus*.

According to the art. 29, ¶ 3 of the Constitution, religious denominations are free and organized according to their own statutes, under the law. In the misunderstandings that might arise, the ¶ 4 provides that in relations between religions are banned any forms, means, acts or actions of religious enmity. Finally, according to the ¶ 5 of the same article, religious denominations are autonomous from the state and are supported by it, including the facilitation of religious assistance in the army, hospitals, prisons, homes and orphanages.

Civil and religious engagement

From the religious point of view, engagement is an event as important as the religious ceremony. It expresses the same covenant, feelings, and emotions and is officiated in the same place, in a holy shrine. Engagement is a ceremony that can be performed with the marriage or a few months or one year before. Therefore, the engagement ceremony is not dependent on the marriage date.

[2] Paragraph 2 of the 29th article, Romanian Constitution.

Basically, most couples are engaged informally, not by going to a Church, and the engagement ceremony is performed in the same day as the religious wedding. To realize the importance of religious engagement is good to know that if the two have broken engagement and will marry someone else, the priest will celebrate as the two would be a at the second marriage (even if they were only engaged in religious terms). The first religious marriage is made with all the honours, but the second is more like a blessing, it lacks many elements from the first marriage religious ceremony. If it has not been a religious engagement, the religious mass for marriage will not miss the engagement with what it symbolizes.

From October the first, with the entry into force of the new Civil Code, the law regulates the legal engagement. In the first text of this institution, the law even defines the engagement, adding that mutual engagement is the promise to enclosure the marriage.

In the conditions required to celebrate the engagement, the law refers to the same background conditions necessary for marriage, except for authorized medical opinion and the guardianship court. But unlike marriage, the formal requirements are not mandatory; engagement can be proven with any evidence.

From the religious point of view, if the engagement was not celebrated before, the marriage ceremony will include the mass for engagement, but from the civil point of view, engagement ceremony is not mandatory previous to the marriage ceremony and the officer marital status does not have any obligation to do so.

Even if the second paragraph of the art. 266 states the same requirements for engagement as there are for marriage, the ¶ 5 repeats the condition regarding sex difference, a provision which, in our opinion, was no longer necessary.

The following four articles of the Civil Code refer to breaking the engagement. The sanction for breaking an engagement is not to forced end the marriage, even in the presence of penal clauses in this respect. There are no requirements of form for breaking an engagement; it can be proven by any evidence.

But breaking the engagement abusively is sanctioned by law with payment of damages (tort liability) for expenses incurred or contracted for marriage, if these expenditures were appropriate to the circumstances and for any damage caused. The person who will be required to pay damages is either the one who abusively, broke the engagement or the one who led the author to break the engagement. The law stipulates a special prescription term for this action, one year after breaking the engagement.

The legislator has also considered the event that the two fiancée, whose engagement was broken, received gifts. Law does not stipulate that these gifts come from third parties, and therefore if fiancés have made gifts to each other the same rules will apply. Thus, gifts are subject to refund their fiancés engagement consideration received or the period between the end of the engagement and marriage ceremony, except the usual gifts. How to return the gifts received is mainly in kind, and in the event that restitution is not possible, be returned to their value, up enrichment.

The legislator has regulated the event that the two fiancée, whose engagement was broken, they received gifts. Law does not stipulate that these gifts come from third parties, and therefore if fiancés have made gifts to each other will apply the same rules. Thus, the gifts are subject to refund are those received in consideration of the engagement, or received in the period between the engagement and the marriage ceremony, except for the usual gifts. The way to refund the gifts is mainly in nature, and in the event that restitution is not possible, their value will be returned.

If the engagement was not broken but ceased by the death of one of the fiancée, gifts will not be subject to restitution.

One of the omissions of the legislature is the lack of a more rigorous specification of the engagement's purpose and of the moment it should be performed. In fact, from by reading the texts which govern it, it seems that the only goal of the legislature was to punish

the broken engagement, because, besides the first article of Chapter I on the engagement, the rest only covers this aspect. As, in order to perform civil engagement there are the same conditions as for the civil marriage, we ask the question whether the same requirements apply for the religious engagement, can children perform it, for example? Even though most Orthodox priests, for example, require the marriage certificate for engagement as for the religious marriage, the lack of an express provision in the law will surely lead to contradictory solutions.

Conclusions

In conclusion, a series of legislative changes occurred in October of this year, both on marriage and on civil engagement, changes which will also have repercussions on the religious aspects, a new institution being born – the Engagement and on the substance or form of marriage, character and principles of marriage, termination arrangements and so on.

Marriage and religious engagement is of particular importance for the Romanian people, the new regulations and constitutional provisions referring specifically to the religious marriage. With the subsidiary condition fulfilled, from the legal point of view, the religious marriage is permitted bay law explicitly, while the engagement is admitted implicitly. There are still some issues not covered by law such as the religious engagement, which is not provided to be subsidiary to the civil engagement.

Bibliography:

The new Civil Code of 2011.

Laura Cetean-Voiculescu, Adam Drăgoi, *Curs teoretic şi aplicativ de Dreptul familiei,* Agora University Press, Oradea, 2007;

Romanian Constitution of 2003.

SHORT CONSIDERATIONS REGARDING TO THE RELATION BETWEEN LAW AND RELIGION

Cîrmaciu Diana[*], Teacă Mihaela[**]

Abstract

„*Jurisprudentia est divinarum atque humanarum rerum notitia atque injusti scientia" – Ulpianus.*

The relation between law and religion got different connotations along the years, taking into consideration the fact that a lot of people who are preoccupied with the sphere of law and politics are having connections with religion too.

Key-words: *law, religion, judicial education.*

Introduction

The presence of religion in the Romanian system of law is an act of rights, based on our culture and a permanent necessity in the complex process of the development of society based on moral principles. The notions „law" and „religion" are revealing two complex aspects of life, which have often intersected in history, but even in our contemporary period. Both of them have contributed to the formation of the identity of a nation, to the legitimacy of power and to the regulation of our society. Law without religion would degenerate into a mechanic legal system. Religion without law would lose its social essence[1].

It is necessary for us to accentuate the role of the Church in creating, keeping and transmitting national values of spiritual, moral and cultural character. We must not forget that until the moment of the adoption of the Law of Public Instructions (25 November / 7 December 1864), the Romanian educational system had developed its activity exclusively in the frame of the Church[2].

Even the definition given by Ulpianus, which considered law to represent three precepts "to live honestly, not to cause for others harm and to give everyone what he owns"[3], indicates a relation with religion and morality, because not only by the legal norms but also through religion we are proposed (or in most of the cases assessed) viable models of goodness and holiness, valuable marks in life and society. Religion and law represent factors of stability and communion in the Romanian society, a holy and steady inspiration source to protect and promote values like: life, propriety, freedom, dignity, and honor.

"Everywhere where law appears for the first time in history, we can find it with an other power, which offers the stamp a more majestic consecration, it extorts from the vicissitudes, from the interests and opportunities, the critics of rationality and the arbitrator of pure power and it places it to a distance, which cannot be reached and which causes the birth of respect".[4] There was no place where law was born with this lay physiognomy which it

[*] Lecturer, Oradea University, Law Faculty, e-mail:diana.cirmaciu@rdslink.ro

[**] Teaching assistant, Oradea University, Law Faculty, e-mail: mihaela.teaca@yahoo.com

[1] T. L. Fort, *Law and religion*, Mc Farland and Co Inc. Pub. Jefferson, North Carolina, 1987, p. 11.

[2] We are considering statistics mostly regarding to primary, gymnasium and lyceum education.

[3] „*Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*". Practically, according to some oppinions, in the definition given by Ulpianus for a moral principle are being attached two judicial principles, because not to cause harm to others and to give everyone what he owns are principles of law and to live honestly is a moral principle.

[4] Ihering, *Esprit du droit romain*, translation from French, Bucharest, 1982, p. 266.

presents today in every society; the authority which is represented by he judicial order has its basis in the divine origin which is given by the governors to the rules of law and in the sacred character offered by the obedient people towards law, which delimits their freedom. The explication is that the primitive nations, but even those civilized are obeying to the rules of law when they believe in their beyond human origins.

Eugeniu Sperantia, former University Professor by the Law Academy *"Carol the 2nd"* from Oradea and by the Faculty of Law from *Dacia Superioară* University from Cluj-Napoca, published in 1936 a work entitled *Lessons of Judicial Encyclopedia with a Historical Introduction in the Philosophy of Law.* It is a referential work in the domain of law philosophy which treats from a historical point of view the evolution of low in the prism of religion, especially concentrating on the research of the Christian period and on the beginning of the Renaissance. Sperantia, analyzing the work of Saint Augustin, pointed out the work *„De civitate Dei".* It is a complex work, structured im twentu two books, from which the last twelve are debating the relation between *the earthly fortress and the fortress of God*, showing that even the state is stricken by the original sin, having born form crime (Cain and Romulus), needing this way the protection of the Church. As a consequence it is considered that law and justice can exist on earth only in the measure when the earthly state subordinated itself to the Church.[1] The ideas of Saint Augustin were adopted by the oriental nations and even by the barbarian lately Christianized nations. The accumulation of heritage in the hands of the Church and of the priests has lead to a change of perception of the Church and its role by the state. The followers of Saint Augustin, Thomas Becket, archbishop of Canterbury and Jean de Salisbury, bishop of Chartres, are becoming even more powerful in their works, showing the abuses which are done, in the situation when there are no norms. Only after this the Church tries to organize itself according to some principles and norms which were considered to be the basis of the Roman law, an important, but not visible role having the glossiest and especially the canonists. The canonic law is born in the 12th century overlapping the wave of the study of law, having the same roots, with all the complexity which is born from here. The canonic law has its origins in the canonic books of the councils and in the collection of the Papal ordinances[2], due to the theologian *Dionysius* Exiguus. In addition to these "The Falsele Ordinances", "Decretum", "Magnum volumen canonum", "Decretum gratiani" are considered to be a real collection of canonic law. The general result of the rebirth of Roman law and the attempts for its systematization, represent a very important level for the crystallization of "ratio naturalis", which viewed trough the whole structure of Roman law, have given birth to and cultivated a rational law. We are talking about a law which would come from the human nature and the nature of things and of the world and which implies in itself the marks of a divine creational Rationality.

The studies of canonic law and of lay law are beginning to captivate the attention in equal measure of the medieval jurists, with the remark that the two types of judicial science have guided the specialists towards different preferences: the jurists or legists analyze the lay law and interpret the norms generally in the benefit of the emperor, and the canonists or decree followers interpret them in the benefit of the Pope. Having the same roots the two sciences are interpenetrating, that's why the interpretation of the norms, originating practically from the same basis, one could make according to the objective which must have been analyzed. In the common, general sense the expression of the source of law designates

[1] Eugeniu Speranția, *Lecțiuni de Enciclopedie Juridică cu o Introducere Istorică în Filosofia Dreptului,* Cluj-Napoca, Tipografia Cartea Românească, 1936, p. 121.
[2] *Ibidem,* p. 126.

the determination factors of law, the objective-material, social-economical and ideological conditions, specific for the society in frame of which the activity of the human community, organized based on judicial norms, is developed; and the this way organized society, from which the notion "material source" originates, given for these determination factors of law. In a strict judicial language, the expression of source of law is used in a specific meaning, of "expression from of the law", from which the notion formal source comes, given – in an abstract sense- for the expression modalities of law.

The relation between law and religion can be outlined as we have presented also by the influences exercised along the times by canonic law. *Jus canonicum* had represented the ensemble of rules used by the church to organize its internal functions and even to assure discipline in the community of the believers. Because this connection between what is right and what is good, between law and religion is sanctioned on one hand by the realities of human life, and on the other hand by some theorists of law, the natural conclusion arises: law acnnot exist without morality, without affirmation of moral principles, which are always pursuing the accomplishment of good, right and equity.

A prove to the importance of the presence of canonic law in the study plans of the law faculties is even the structure of the educational plan of the State Faculty of Law and Sciences from Cluj for the universitary year 1893/1894[1]. This way we are informed that in the 1st semester 71 students were attending 5 hours long on a week the course of canonic lawm titularu professor being university professor Dr. Csiky Viktor[2]. In the 2nd semester, a number of 44 student attended the same course of canonic law and a course of Penal Law of Church, both of the courses having the same titulary professor, professor Csiky. In teh same time from the archive documents originating from the Law Academy from Oradea we are informed, for example, that in universitary year 1919/1920 one had the opportunity to study canonic law, courses of 5 hours on a week.

Conclusions

Law and religion (treated as a system of norms), like morality have their common origins in the necessity of some norms to regulate the relations between people in the society. Each of them is the work of people, both of them being based on beliefs, on a mystical sentiment of a superior power, being identical at the beginning and differentiated in time. The difference is made in the nature of the sanction, which is becoming spiritual or moral, spiritual in religion and material in law. If the evolution has general lines, unlike law and religion, between the lay and religious authority we can often find recurrences to confusion or political-judicial alignment between the two disciples.[3] This alignment can be explained by the common mystical basis as characteristic and which proves to manifest itself not only in the genesis of the great doctrines but even in their authority and prestige. The progress of the human spirit, of the science and of philosophy will accentuate the difference from a political point of view; the psychical and moral relation remains instead, corresponding with the permanent mystical element which they have as common basis.

---

[1] Arhivele Naţionale – Serviciul Judeţean Bihor, *fond 47 Facultatea de Drept şi Ştiinţe de Stat – Cluj*, dos. 1 (1871-1927), f. 49.

[2] Lawyer and University Professor Dr. Csiky Viktor had begun his didactic activity by the Univesrity of Cluj on 29 September 1872, having different functions along the time: Dean of the Faculty of Law in the university year 1874/1875, Deputy Dean in the university year 1875/1876, rector in university year 1884/1885 and pro-rector in university year 1885/1886. He was retired on 20 October 1899.

[3] A. Iacub, *Dreptul şi religia*, Editura Tipografia Moldova, Chişinău, 2009, p. 8.

Bibliography:

A. Iacub, *Dreptul şi religia*, Tipografia Moldova Publishing House, Chişinău, 2009.

T. L. Fort, *Law and religion*, Mc Farland and Co Inc. Pub., Jefferson, North Carolina, 1987;

R. Jhering, *Esprit du droit romain*, Bucharest, 1982;

E. Speranția, *Lecţiuni de Enciclopedie Juridică cu o Introducere Istorică în Filosofia Dreptului*, Tipografia Cartea Românească, Cluj-Napoca, 1936.

RELIGIOUS ORIENTATION OF INSTITUTIONALIZED YOUTH

Dejeu Gheorghe[*]
Stanciu Simona[**]

Abstract

The study aims to identify factors involved in religious orientation of institutionalized children in Bihor County, based on statistical data from Bihor DJPCAS activity report for 2010.

To capture a possible dynamics of this process we are aware of the need for a sociological analysis panel for a long period of time. The issues captured in this study will be of value if used for comparison in future years.

Religious orientation of institutionalized children creates the premises of social integrations through religious groups and predispose to social behavior that can facilitate the social integration of youth leaving the care institutions.

Key words: *conversion, conscience, abuse, religion and power, manipulation, care institution, frustration, exploitation.*

Introduction

An important aspect of social life is the religious behavior as an area of social behavior and also the influence it has on other areas of the individuals' social life. This is most evident in the life of children and young people in care institutions, where the group behavior, the imitative behavior takes on specific characteristics, according to the social climate the individual is exposed to.

In the social life of children and young people institutionalized substantial changes took place after December 1989, as a result of the multiple reforms to the national care system for the children in difficulty. Elements of the reform that changed the social life of children and young people refer to different living accommodations (there are no more children's houses, where u would find a large number of children in inadequate spaces, but a transition to spaces that imitate a normal family environment took place with children of different ages and genders), as well as a different philosophy regarding the education and social assistance of institutionalized children.

As a result the social life of institutionalized children is heavily influenced by the quality of the adults that are responsible for their care. It is obvious that the religious life of the adults will influence, along with other factors, the religious orientation of the institutionalized young people.

In our opinion it is more about imitation of the adult in order to receive their approval rather than a conversion, as that implies the idea of turning from something to something else. As explained in "Enciclopedia religiilor – PRO Publishing House, 2005, page XIV", conversion or metanoia means a change in thinking or repentance and implies a mutation or rebirth. We consider that conversion is an evidence of an inner preoccupation on a philosophical level. That is rarely demonstrated at the age of the subjects in topic or in a social environment of this type.

[*]Ph.D..Lecturer, University of Oradea, fchipea@yahoo.com
[**]Lecturer, University of Oradea, fchipea@yahoo.com

On the other hand we cannot rule out the possibility of conversion as all the religious cults in Romania are interested in disseminating their specific doctrine in environments such as care institutions for children.

We are not looking to analyze the ethical aspects of a conversion, but we cannot ignore the possibility of situations in which people who are looking to convert young people in these institutions don't have the child's best interest in mind, but rather exploit the child's situation and peoples empathy for their own purposes. We insist on the fact that these type of actions are very effective as Bogdan Teodorescu remarks in " Cinci milenii de manipulare" Tritonic Publishing House, 2007, p. 353 quoting Oliver Thomson: One of the most remarkable and less studied aspects of human history is the one about de ease with which people can be lead. We were convinced by religious fanatism to worship cruel gods, be afraid of weird hells, blessing human sacrifices and torture.

We are left with the hope that those who are animated by contributing to the conversion of children and young people who are institutionalized, do so with the child's best interest in mind as this is noted in Law no. 272.

In the motives for conversion, after a focus group of 16 young people institutionalized in a NGO (Non Governmental Organization), most of them noted that their final decision was based on information, knowledge, conscience and acceptance into a desirable group.

On the other hand a focus group made up of 5 young people who left a NGO child institution and also abandoned their conversion considered that their original conversion was based on an interest at that time, a material gain or even as a result of a psychological pressure they were faced with.

As a result of these focus groups several factors were identified which influence conversion:

- the level of information that is dependent on the child's age, his state of mind and the pedagogical and human qualification of the one who is presenting the information.
- the psychological-emotional state of the child/young people in the moments he is presented with religious information, connected with personal aspirations, frustrations, present conflicts etc.
- attachment towards important people in the child's life is also important as he will try to imitate the person who he feels is emotionally attached to.
- the psychological-emotional state that is specific to puberty and adolescence combined with the specifics of institutionalized living.
- the psychological-emotional pressures, even abuses that are present in these environments.
- health status of the subject also influence decisions such as conversion, it is known that an illness leads to intensified religious beliefs.
- economical status influences conversion as the subject is inclined to more easily accept a faith when he is dependent economically to a certain person.
- conversion is also influenced by the social and cultural context, at some moments in life it is fashionable to adhere to a certain faith.

Mentioning that the religious orientation of young people in institutions is not necessarily a conversion we present statistical information from the DGASPC Bihor official report: [1]

[1] (www.dgaspcbihor.ro)

The type of services DGASPC Bihor offers		No. of beneficiaries
Total no. of beneficiaries of care services of residential type, 497 of whom in:	placement centers of residential type	139
	placement centers of familial type	314
	welcome centers of emergency	31
	maternal centers	6 mothers and 7 children
Total no. of beneficiaries of family type services 1227, of whom:	children in pro maternal assistants	677
	children in substitute family/tutelage	550
Total no. of beneficiaries of recovery and rehabilitation services 188, of whom:	children from natural family	60
	children from placement centers	99
	children from maternal care	29
Type of services offered by accredited private organizations		**No. beneficiaries**
Total no. of residential type care services 372, of whom:	residential type placement centers	72
	family type placement centers	300
Total no. of beneficiaries of family type services 121, of whom:	children in pro maternal assistance	24
	children in substitute families/tutelage	95

Specific indicators in the child's care domain

Indicators regarding special needs

Social services	Handicap grade	No. children/youths
residential type center	Severe	157
	Accentuated	22
	Medium	32
	Light	32
	with only scholar orientation certificate	14
Total		**257**
maternal care	Severe	31
	Accentuate	20
	Medium	80
	Light	19
	with only scholar orientation certificate	10
Total		**160**
substitute family/tutelage	Severe	17
	Accentuate	14
	Medium	22
	Light	6
	with only scholar orientation certificate	5
Total		**64**

Children with handicap group from their biological family

Handicap grade	No. children
severe	891
accentuate	272
medium	1238
light	411
with only scholar orientation certificate	7
Total	**2819**

- out of the 491 children/youths in the residential type care system, 243 are registered in an handicap grade.

Indicators regarding social needs - cases

Social services	Social needs	No. children/youths
residential type centers	educational problems	18
	social problems	491
maternal care	educational problems	149
	social problems	677
substitute family/tutelage	educational problems	26
	social problems	550
Total		**1911**

Graduation of some form of education

Social services	No. Children/youths
residential type center	347
maternal care	282
substitute family/tutelage	451
Total	**1080**

Youths over 18 still in the system – education stage

Education stage	No. youths
Preuniversity level	101
University level	10
Vocational school	4 graduates
Special classes	13 graduates*
Without education	28*
Total	**156**

* youths with handicap grade

Conclusions

From the roughly 2500 institutionalized children in Bihor, about 1500 are in state run institutions, out of which 1227 in family type care. These, together with 493 that are in NPO's care are exposed to influences regarding religious orientation through all the factors we exposed above, the most important being the religious beliefs of the person they form an emotional bond with.

In Bihor County the vast majority of NPO employees are of evangelical orientation. This aspect could unbalance the religious orientation of institutionalized children according to the 2002 census.

Total	Orthodox	Reformed	Roman-catholic	Pentecostal	Baptist	Greek-catholic	Adventist	Atheism	Jews	Muslim	*Total protestants*
600223	357996	107817	55555	34460	22366	14086	1858	1155	210	175	*16650 1*
100%	59.6 %	18.0 %	9.3%	5.7%	3.7%	2.3%	0.3 %	0.2 %			*27.7 %*

The religious life of young people is an important field of the social life with serious repercussions on social behavior. Some aspects remain to be clarified, such as:

- who decides and who is responsible for the religious education of children in care institutions
- how should the religious education be done, to what/whos gain
- who evaluates the consequences of religious education in the period of time following institutionalization
- what is the role of religion in social integration of institutionalized young people

We noticed that within the focus group a significant number of young people come to reject the religion to which they converted in the institution, as a reaction of denial to everything that is associated with the institution. In this situation, where is the fault? What can be done to avoid these types of situations?

Religion should impose a social life ethics that favors social integration. The question remains if such an objective is taken into consideration.

Bibliography:

Max Weber, *Etica protestantă și spiritul capitalismului*, Humanitas Publishing House, 2007;

Bogdan Teodorescu, *Cinci milenii de manipulare*, Tritonic Publishing House, 2007;

Giuseppe Annoscia, *Enciclopedia Religiilor*, PRO Editură și Tipografie Publishing House, 2005;

Gianpaolo Romanato, Ioan Petru Culianu, *Religie și putere*, Polirom Publishing House, 2005;

www.djaspcbihor.ro;

www.wikipedia.org .

BIBLICAL PERSPECTIVES ON THE OFFENCE OF DECEIT. THE LEGAL ARCHETYPE OF DECEIT IN THE BIBLE

Dobrilă Mirela Carmen*

Abstract

An analysis of the offence of deceit through the perspective of the Bible has as primary purpose to emphasize that the spirit in which the Old and New Testament were written is also found within the content of the art. 215 in the Romamian Criminal Code. This hermeneutical process is meant to identify a legal archetype in the Biblical texts, and showing that, despite the secularization of legal science, it is impossible to completely detach it from the spirit and teachings of the Bible.

Keywords: *offence of deceit, Bible, sin of deceit, Decalogue.*

Introduction

As an age-long source of moral and theological wisdom, the Bible represents the originating muse for many sciences, including legal science. Therefore, even in the field of criminal law, these influences can be demonstrated in a case such as that of the offence of deceit. The legal system is the manner in which the state implements its rightful norms, which are derived at least in part out of the Biblical texts, out of the laws and norms offered by God through the Holy Scriptures.

1. The Biblical text, origin of the offence of deceit

Christianity establishes the principle that every man is responsible for his actions, being a subject to the liability governed by human laws, but especially to the inevitable divine judgments[1].

For acts of deception, everyone is subjected to human laws that establish a legal liability for such acts affecting one person's patrimony, such as criminal liability or civil liability, each with its own sanctions, but beyond this point there is responsibility before the divine judgment[2].

In theology, offences of deceit as described in the art. 215 of the Criminal Code correspond to what is designated in religious terms as the concept of sin, taking the shape of the sin of lying, of deception, of trickery, of avarice, of abuse, etc., which justifies a hermeneutical approach to the Biblical texts.

Both the Old Testament and the New Testament record the origin and evolution of lies, but each time the Divine Law forbids it: "You shall not steal; you shall not deal falsely; you shall not lie to one another"[3], "Do not lie to one another"[4], because "a lying mouth brings death to the souls".[5]

Beginning with God's incompatibility with lying and falseness, with causing damages whenever the law is broken, continuing with the fact that the lawmaker himself

* Ph.D. Candidate, Assitant, Faculty of Law, "Alexandru Ioan Cuza" University of Iasi, Department of Private Law, email: mirela.dobrila@uaic.ro;

[1] E. Safta-Romano, *Arhetipuri juridice în Biblie*, Polirom Publishing House, Iaşi, 1997, p. 197;

[2] St. Paul sais: "It is too little for me to be judged by you or any human court (…). It is the Lord who judges me" (I Corinthians 4:4);

[3] Leviticus 19:11; Isus Sirah VII, 13:14.

[4] Colossians 3:9.

[5] Solomon 1:11.

must hold true to the Biblical teachings, ensuring the transposition of some of the divine laws to the area of legal norms applying to human beings, it cannot be pure coincidence that criminal law condemns offences of deceit that in some way touch someone's patrimony, offences which imply malfoy and cause damages. This link is not without significance, as the Biblical texts do not simply enunciate the principle of forbidden acts of deceit, but makes many references to the offence of deceit, some verses having an explicit legal nature.

2. The offence of deceit and the sin of deceit

Based on the teachings of the Holy Scriptures, in the Old Testament it is shown that: "God made the man upright, but they have sought out many schemes of deceit".[1]

The penal liability for the offence of deceit has its correspondent in the divine law in terms of sin[2]; sentencing and imposing criminal penalties for the offence of deceit has its starting point in the Old and New Testament, where the sin of deception was condemned.

The relationship between liability and penalty implicitly raises the issue of the role of the penalty, which re-establishes the moral order which has been broken, as in theology there is always the possibility of rehabilitating oneself through repentance[3]. "Sin is unlawfulness" [4], and the term of "sin" has several meanings, beginning with the moral-religious one and going as far as the general one of criminal offence, which includes unlawfulness.

In terms of theology, there are two types of sin: the original sin (the sin of Adam and Eve) and personal sin (the sin of each person individually). For Christians, the sin is not understood in a legal sense and keeping the commandments given by God is dictated by conscience and not by fear of punishment. Through the idea of sin, theology takes into account the infringement of law, including the legal sense, when an attempt to infringe the law materializes into an action or inaction.

In the case of offences of deceit, we can conceptually discuss sins as having legal aspects, and if we relate to the taxonomy given by theology of committing sins (committing that which is forbidden) and omitting sins (ignoring that which is mandatory)[5], deceit can be performed under both categories, and spiritual sin becomes criminal itself.

If we look at the classification into deliberate sins (directly or indirectly), and involuntary sins[6], deceit fits into the first category, that of intended sins, and the Holy Scriptures consider that committing a crime with intent makes it all the more serious[7].

2.1. The Eden deceit and the original sin

According to Biblical texts, the long history of deceit begins in the Garden of Eden as the primordial deception, which had the lie as an intrigue and was the first successful result of deception. Beginning with the verse 3:1 of the Book of Genesis, Eve is convinced by the serpent, the incarnation of evil and deceit, to eat the apple, the forbidden fruit, and therefore Adam and Eve become mortals because they can eat from the Tree of Life and are

[1] Ecclesiastes 7:29.
[2] Lat. *Peccatum.*
[3] E. Safta-Romano, *op.cit.* p. 170.
[4] I John 3:4.
[5] E. Safta-Romano, *op.cit.* p. 64.
[6] *Idem*, p. 66.
[7] In the New Testament, St. Pavel sais: "For if we go on sinning deliberately after receiving the knowledge of the truth, there no longer remains a sacrifice for sins, but a fearful expectation of judgment, and a fury of fire that will consume the adversaries" (Hebrews 10:26, 27).

led out of the garden, the traditional Christian interpretation of this violation of the commandments of God is considered as an primary sin or adamic sin[1].

Eve had her own part in the deception process, as she fulfilled both the role of the deceived individual (by the snake), but also the role of deceiver in dealing with God[2], and thus the essential forms of deceit that exist in human society are also found in the archetypal Biblical story[3].

To make the connection to the offence of deceit, according to the art. 215 of the Criminal Code, the existence of this offence requires the use of techniques of misleading, and in the Biblical scenario the snake, embodiment of the wisest of animals, uses trickery when he attempts to deceive the victim in order to dominate her. A parallel can also be drawn to the condition of the existence of the intention to derive unjust material gains and causing damages, elements required by the Criminal Code in order to establish the existence of the offence of deceit, and the damages in the Biblical tale, where the snake causes damages against the other protagonists, as well as the consequences of the snake's plot on the destiny of man.

St. Paul said about Eve's deception: "but I fear, as the serpent deceived Eve through his subtlety, so your minds should be corrupted"[4]; "Adam was not deceived, but the woman was deceived"[5]. Eve's fascination towards the fruit of the Tree is answered with the worst kind of deceit, trickery embodied in the snake that makes it so that falseness appears to be truth[6]. Even though it seems impossible to imagine that man doubted the words of his Creator, believing instead in a lie, the first lie uttered in Eden was effective, in the sense that man was deceived.

Deceit, which works its effects on someone's thinking, is the appropriation of lies by people which believe them to be truth[7]; the mind was misled when man tasted from the fruit forbidden by God, a fruit which seemed immensely fascinating to the unknowing, and the insidious advice was the catalyst for tasting the forbidden fruit[8].

The memory of the original sin, of the primordial deceit, is refreshed when the descendents of the primordial pair started to amplify the mistake of their parents[9], through lies and deceit, i. e. when the Bible narrates the wrongful conduct of Cain[10].

---

[1] The serpent was more subtil than any beast of the field which the Lord God had made. He said to the woman, 'Did God actually say that you shall not eat of any tree in the garden?' And the woman said to the serpent: 'We may eat of the fruit of the trees in the garden, but God said, you shall not eat of the fruit of the tree that is in the midst of the garden, neither shall you touch it, lest you die.' But the serpent said to the woman, 'You will surely not die. For God knows that when you eat of it your eyes will be opened, and you will be like God, knowing good and evil (Genesis 3:1-5).

[2] T. Stănciulescu, *Studiu introductiv: Despre semnele minciunii*, în J. A. Barnes, *Sociologia minciunii*, Institutul European Publishing House, Iași, 1998, p. 29.

[3] *Idem*, p. 43.

[4] II Corinthians 11:3.

[5] I Timothy 2:14.

[6] The deception of Eve by the serpent, in order to partake of the forbidden tree, began by the distortion of the truth with intent to deceive Eve, questioning God's words.

[7] I. Briancianinov, *Despre înșelare*, Schitul Românesc Lacu Publishing House, Saint Mountain of Athos, 1999, Apologeticium Digital Edition, 2005, p. 4.

[8] *Idem.* p. 2.

[9] T. Stănciulescu, *op.cit.* p. 54.

[10] Having killed his brother, Cain lied: "And the Lord said to Cain: Where is Abel, your brother? And he said, I know not! Am I my brother's keeper?" (Genesis 4:9).

2.2. Deceit and Judas

Elements of deception can be identified for deceitful disciple Judas, one of the Twelve Apostles, by selling Jesus who was crucified and sentenced to death on the Cross through those fraudulent maneuvers[1].

3. Deceit and the Decalogue

The Decalogue, as the Ten Commandments received by Moses from God on Mount Sinai, has never lost its validity and represents the foundation of religious life for people. Acts of deception are prohibited by Biblical texts, subsequent laws incriminating them as the offence of deceit. Criminal law reiterates the legal commandments of the Decalogue.

3.1. Deceit and the commandment "You shall not steal!"

The eighth commandment of the Decalogue is: "You shall not steal"[2], prohibiting stealing goods belonging to another person. The commandment in the Decalogue is found in the form of legal sanctions regarding the offences of unentitled appropriation of goods owned by other individuals in all criminal legal systems. In our legal system, the eighth commandment, "you shall not steal", regards appropriation offences in a broad sense, referring to any unjust appropriation of goods owned by other people, regardless of the form in which these acts are committed, whether it is actual stealing, or whether it is a case of deceit.

The eighth commandment does not prohibit acquiring material goods *per se*, but it does exclude ownership based on deceit, as the people who acquired these goods are not entitled to them in any way[3].

3.2. Deceit and the commandment "You shall not lie!"

The Biblical texts have referred to our tendency to distort the truth; thus, the ninth commandment of the Decalogue condemns any lie, any false expressed or committed in order to deceive: "You shall not bear false witness against your neighbor"[4]. The New Testament reinforces God's command against lying: "Do not lie one to another, seeing that you have put off the old self with his deeds"[5].

The Bible emphasizes the seriousness of the sin of lying[6]: "therefore, having put away falsehood, let each one of you speak the truth with his neighbor"; "Let the lying lips be put to silence" because "God hates (...) a lying tongue".

The ninth commandment of the Decalogue, by prohibiting any kind of lies, requires for every Christian to speak the truth, with the hope of endeavor in this regard, as King David cried out: "Lord, protect my soul from lying lips and from a deceitful tongue"[7].

The offence of deceit is accomplished through lying, and lying is a form of deceit through which someone is misled, deceived, deluded, and the words of God refer to all these unjust deeds[8].

---

[1] In the Garden of Gethsimani, Judas gave a sign to those who wanted to catch the Lord, saying: "The one I will kiss is the man; hold him fast" and he came to Jesus and kissed him (Matthew 26:48, 49).
[2] Exodus 20:15, Deuteronomy 5:19.
[3] E. Safta-Romano, *op.cit.* p. 182.
[4] Exodus 20:16; Deuteronomy l 5:20.
[5] Colossians 3:9.
[6] Ephesians 4:25, 15; Zechariah 8:16, 17; Psalm 31:18; Proverbs 6: 16-17.
[7] Psalm 120:2; „ Whoever desires to love life and see good days, let him keep his tongue from evil and his lips from speaking deceit" (I Peter 3:10).
[8] "You shall not steal; you shall not deal falsely; you shall not deceive one another" (Leviticus 19:11).

4. Deceit in the Biblical texts

Born with the ability to make a choice, to choose between right and wrong or truth and untruth, man is inclined to behave contrary to the precepts of biblical texts: "Everyone deceives his neighbor and no one speaks the truth; they have taught their tongue to speak lies and they weary themselves by committing iniquity"[1].

One of the most important virtues and responsibilities specific to Christianity is being just to others, as no-one is allowed to harm or intrude on others[2]. Acts of injustice include deceit, as a criminal offence through which material damage is caused[3].

Regarding the offence of deceit, the Biblical texts establish that there must be justice in patrimonial relations between people "and that no man overreach nor circumvent his brother in business".[4]

The Bible speaks of acquiring illicit fortune through trickery, an aspect which is echoed by the criminal lawmaker when deceit is incriminated in art. 215 of the Criminal Code: "He that gathers treasures by a lying tongue, is vain and foolish, and shall stumble upon the snares of death" and "Wealth gained hastily will dwindle, but whoever gathers little by little will increase it"[5].

For the criminal sanction provided for the offence of deceit by art. 215 of the Criminal Code, there is a corresponding biblical text: "(...) the unjust shall be caught in their own snares" and "(...) he that speaks lies, shall not escape"; "therefore he that speaks unjust things, cannot hide, neither shall the judgment pass him by", "but the wicked shall be punished according to their own deceitful spirit"[6].

St. Augustine, at the end of his treatise entitled *Against Lying*, writes that "lying is a great evil that ceaselessly troubles our lives (…). The liar's thinking is twofold. (…) The heart of the matter is therefore knowing which of these two people is the true liar: the one who says something false in order not to deceive, or the one saying something true in order to deceive, knowing that the first knows and thinks that what he says is false, while the second knows and thinks that what he says is truth? Is it the one who by misinforming (the traveller) has made him take on the proper path, or the one who by giving advice that is true has made him walk an evil way?"[7] In what regards this perspective on lying, an overlay can be noticed for the content of the offence of deceit, which can be performed both through the representation of a false act as true, and also through calling false an act which is true.

Beyond any theological subtlety, what is extremely inspiring for meditation and legal hermeneutics is the way in which Jesus Christ used the phrase: "Blessed are the weak-minded", as a presumption of truth to his words, the beneficial role of trusting a stranger in human relationships being empowered and reasserted[8].

With regard to lying as a discourse contrary to the truth, meant to deceive, St. Augustine says that "through intent, and not through the truth of falseness of the thing itself, we must judge whether lies are told or not. One can lie by telling the truth. To lie is to speak

---

[1] Jeremiah 9:5.
[2] E. Safta-Romano, *op.cit.* p. 62.
[3] It is recommended for the Cristhians to run away from deceit (I Peter 2:1) and to beware of the deceitful persons who come to them in sheep's clothing but inwardly are ravenous wolves (Matthew 7:15,16).
[4] I Thessalonians 4:6.
[5] Proverbs 21:6; Proverbs 13:11.
[6] Proverbs 11:6; Proverbs 19:5, 9; Wisdom of Solomon 1:8, 3:10, 1:3.
[7] S. Chilea, *Paradoxul mincinosului şi ambiguitatea minciunii*, Studii Teologice Journal, no. 3-4/1974, Bucharest, pp. 198-199.
[8] V. M. Ciucă, *Bona fides într-o nouă hermeneutică*, Journal Hermeneia– Journal of Hermeneutics, Art Theory and Criticism no. 2/2009, Academic Foundation AXIS Publishing House, Iași p. 21.

against one's own thoughts with the intention of deceiving". Thus, lying does not necessarily equate to falseness, as one can also lie through communicating truth, the difference being that this truth is communicated so that it misleads the interlocutor.

Legal science has its deepest roots in God's teachings, known to man through the natural moral laws. Human justice, apparently secularized, is based on the norms of divine law[1], the concepts and ideals of justice being built on the grounds of moral theology, and the concepts used in the case of offences of deceit (truth, justice) appear as worldy, human-made, but their deepest structure is supported by the norms of the natural Christian ethics.

Conclusions

The offences of deceit in art. 215 of the Criminal Code have their correspondent in theology as the sin of lying and deceiving, and the origin and evolution of lie and deceit can be traced both through the Old and New Testament, beginning with the primordial deception, when Eve is convinced by the snake, embodiment of deceit, to eat the forbidden fruit; it continues with the trickery of Judas the apprentice, with two of the ten commandments, which forbid lying and deceiving, as well as with some principles that form the basis for the condemnation of deceit in the Criminal Code. Moreover, the Biblical texts not only enunciate the interdiction to commit acts of deceit, but actually refer to some of the elements of the offence of deceit, certain verses having explicit legal character.

Bibliography:

V. M. Ciucă, *Bona fides într-o nouă hermeneutică*, Journal Hermeneia– Journal of Hermeneutics, Art Theory and Criticism no. 2/2009, Academic Foundation AXIS Publishing House, Iași;

I. Briancianinov, *Despre înșelare*, Schitul Românesc Lacu Publishing House, Saint Mountain of Athos, 1999, Apologeticium Digital Edition, 2005;

T. Stănciulescu, *Studiu introductiv: Despre semnele minciunii,* în J. A. Barnes, *Sociologia minciunii*, Institutul European Publishing House, Iași, 1998;

E. Safta-Romano, *Arhetipuri juridice în Biblie*, Polirom Publishing House, Iași, 1997;

The Bible or *The Holy Scriptures*, Institutul Biblic și de Misiune al Bisericii Ortodoxe Române Publishing House, Bucharest, 1991;

S. Chilea, *Paradoxul mincinosului şi ambiguitatea minciunii*, Journal Studii Teologice, no. 3-4/1974, Bucharest.

[1] E. Safta-Romano, *op.cit.* p. 77.

CONVERGENCES AND DISTINCTIONS BETWEEN MORAL AND JURIDICAL ORDER

Drăghici Andreea[*]
Duminică Ramona[**]

Abstract:
In the present article we attempt to plead for the reassertion of the unbreakable connection between the two types of order by starting with the finding that modernity has opted to break the link between moral and juridical order. The moral code appears to constitute an expression of a universal order which must form the basis of any legal order.

Key words: *order, law, moral code, similarities and differences*.

Introduction

Society nowadays is characterized by a rapid progression, an unprecedented technical and scientific development, which stresses the tendency to deny the collective moral conscience, by promoting a more self-aware conscience, which in fact harms the moral quality of the law. In order to resolve this difficult situation, we will demonstrate in the following pages that by returning the law to its moral foundations, we consider, we may achieve the goal of ensuring coexistence of society.

1. Juridical and moral order. Outlining the concepts

It is unanimously accepted that the lives of people in society are not chaotic but ordered and organised.

One way or another, every human activity generally undergoes a process of regulation, in the sense that they cannot take place in a disorganized manner, outside of a certain social order. These activities may not be performed without a set of rules and principles, enforced either within a group or society. No social process may exist without organisation, and therefore without regulation[1]. "The creation of norms – notes E. Speranţia – is as natural a phenomenon as possible, in society. This enactment originates from the laws of life in general, and afterwards from the laws of human thinking in general and, finally from the nature of society and the circumstances found therein".[2]

The activities of members of society are regulated by developing a set of rules, prescriptions, constraints, obligations, rights and duties of a moral, religious, juridical, economic, political, aesthetic nature etc., which set in good order the conduct or behaviours of individuals or groups within society. Thus we explain the fact that within the same society there is an economic order, a moral one, a juridical one and so forth, which work

[*]Lecturer Ph.D. Faculty of Law and Administrative Sciences, University of Pitesti (e-mail: andidraghici@yahoo.com).
[**]Assistant Ph.D. Candidate, Faculty of Law and Administrative Sciences, University of Pitesti (e-mail: duminica.ramona@yahoo.com).

[1] Ion Vlăduţ, *Introducere în sociologia juridică*, 2nd edition, Lumina Lex Publishing House, Bucharest, 2000, pp. 117-118.
[2] Eugeniu Speranţia, *Lecţiuni de enciclopedie juridică*, in *Antologie de filosofie românească*, vol. IV, Ed. Minerva, Bucureşti, 1998, p.214.

simultaneously without excluding each other, and their result is nothing short of what is generically referred to as the social order.[1]

The Romans first defined order through a famous turn of phrase: *Dispositio unius rei, post aliam, suo quemque loco colocatur* – order is the positioning of every thing one after the other so that each is in the right place.

Throughout time, the concept of order has been explained from numerous perspectives: in sociology, it was seen as the ensemble of interdependent and harmonious relationships within society or in metaphysics as the result of an organic connection between man, society and nature. In the theory and sociology of the law, order is synonymous with an imperative disposition – a commandment, a prescription or it is considered an ensemble of fundamental standards and values within any society, from which there can be no detraction under pain of nullification, or it constitutes a framework for the creation, enactment and resolution of rules and principles that may be accepted as law, within a society.[2]

Each dimension of the regulation of society includes specific values and receives direct or indirect influences from the other dimensions. Given that they are connected and interdependent, they tend to render each other adequate in order to form an organised and dynamic unit, whose integrity and efficiency are guaranteed by law.[3]

The legal order of society, seen as a dimension of the social order - presents the two aspects of positive law – the constraining aspect and the harmonizing aspect. It establishes itself through norms that sanction and guarantee the exercise of rights and imposes the fulfilling of duties. Thus, the juridical order is maintained and controlled through law.

In the recent literature[4], social order is defined as "an ensemble, a well-organised and coherent multitude of laws and legal institutions whereby a society establishes itself legally and politically, as well as the way of regulating, through such laws and institutions, the relations between the various subsystems of society taken globally, the relation between parts of the respective ensemble of rules and institutions itself."

Another dimension of the social order is considered to be the moral order. The concept of moral order is not different from that of order in general, rather it involves and gives it a profoundly human side, since moral order is defined as "the balance between the interior states, between actions and relations between people, between the moral rights and duties of the individual"[5]. From a theological and philosophical perspective, the moral order refers to the order and harmony of the universe, without which man cannot exist. "The universe contains nothing by chance, states J. Guitton, rather different degrees of organisation whose hierarchy we have to decipher"[6].

Moral order exists and is maintained only if good prevails. It is closest to perfection when the ration between goodness and evil is the largest. If evil prevails, then the order crumbles, the balance is broken and disorder takes its place[7].

---

[1] Ion Vlăduţ, *op.cit.* p. 118.
[2] A. J. Arnaud (Ed.) *Dictionnaire encyclopedique de theorie et de sociologie du droit*, deuxieme edition, L.G.D.J. Paris, 1993, pp. 415-417.
[3] Gheorghe C. Mihai, *Fundamentele dreptului. Ştiinţa dreptului şi ordinea juridică*, vol. I, 2nd edition, C. H. Beck Publishing House, Bucharest, 2009, p. 318.
[4] E. Moroianu, *Conceptul de ordine juridică*, Studii de drept românesc, no. 1-2/2008, Bucharest, 2008, p. 34.
[5] Irineu Ion Popa, *Substanţa morală a dreptului*, Universul Juridic Publishing House, Bucharest, 2009, pp. 288-289.
[6] J. Guitton, G. Bogdanov, I. Bogdanov, *Dumnezeu şi ştiinţa*, Harisma Publishing House, Bucharest, 1992, p. 53.
[7] Irineu Ion Popa, *op.cit.* p. 290.

2. A short musing on the similarities and differences between the law and the moral code

Throughout history, the connection between the moral code and the law constituted the focus point of discussions of legal theory and philosophy, being, according to A. Rava, "a centre of storms".

If no well-specified distinction between moral laws and juridical laws existed in ancient Greece, Romanian legal doctrine distinguishes for the first time between law and moral rule.

In the analysis of the relation between law and moral rule, generally, the legal and philosophical doctrines have evolved in two main directions found at totally opposite ends, more precisely the one which cannot conceive the existence of law without the slightest moral quality, a representative of this is Georges Ripert and the one that supports the existence of a rule of law without moral quality, the state being the only foundation of the law, among the representatives of this we find M. Walline, Carre de Malberg, Kelsen.

Thus, according to Georges Ripert "if there is no limit between the law and the moral code, the law would not be anything but 'moral code'". The moral rule inserts itself in law by way of the ethical concepts of the legislator or of the judge, or in the best case it persists near the limits of the law in order to penetrate therein when the opportunity arises[1]. Civil responsibility, to prohibit the acquiring of wealth without just cause, to exercise the rights conferred by law in good-faith and without abuse, all these are a few examples given by the French doctrinaire in support of his statements.

At the opposite end, H. Kelsen shows us that the law must make allowances for the influence of the moral quality, of politics and of other extra-juridical factors. By saying that the law is moral at most means to affirm the fact that it is a social norm with a relative moral value and contrary to any other system, thus the justification of the law through moral order is deprived of significance.[2]

Obviously, both orientations have been contested throughout time, as they were considered extreme since we may not completely deny the link between law and the moral quality, although they are simultaneously defended and promoted by norms of law.

Both the law and the moral code consist in an ensemble of norms of conduct, although the moral precepts preserve an unchangeable truth, while the legal norms refer to the relative phenomena, resulted from the will and intelligence of people. Also, while moral norms guide people to fulfill the moral good, the law does not pursue the human person towards its perfection, rather the regular individual in relation to his neighbours.

The moral laws in a society do not necessarily have to have a unitary quality and therefore during different historical periods or even during the same time, different moral values may exist within social groups, while the law must be unitary in order to ensure a certain legal order within the given society.

Moral norms know a spontaneous quality in their creation, while the legal norms are created as a result of conscious and organised legislative activities, except of course for the custom.

Another difference between the two types of norms has to do with the aspect of sanctioning. While laws are made to be respected under the constraint imposed by the state[1],

---

[1] G. Ripert, *La règle morale dans les obligations civiles*, ed. III, LGDJ, 1935, p. 35.
[2] H. Kelsen, *Théorie pure du Droit*, Dalloz, 1962, pp. 86-89.
[1] Camelia Şerban Morăreanu, Orestia Olteanu, *Paralelă între norma socială şi norma juridică* –Volume of the International Conference *"Integrare şi globalizare"*, organized by University of Piteşti on 15 -16 of April 2005, University of Piteşti Publishing House, 2005, p. 281.

the violation of moral norms is sanctioned by public scorn, marginalization, contempt, regret, pangs of guilt. At the same time, there are certain legal norms that do not sanction but repay, for example hiring a college graduate brings with it a reduction in taxes. "The effectiveness of every law, originating from anywhere, is not based exclusively on sanctions through force" – this fact becomes apparent in the doctrine[1] - thus from this point of view the law is very similar to the moral code.

We may not ignore the influence that the moral code exercises on the law. Thus, numerous norms with the same content have both a moral nature as well as a legal one, for example, civil laws that uphold good-faith, criminal laws that require that persons behave respectfully towards the life, dignity and property of other people, they have a moral content as well. The intermixing of moral values in the field of the law is obvious. "Honesty is a moral value, but it becomes a legal one in the Code of Commerce, in the law of competition, in criminal and civil procedures. By criminalizing the act of false testimony, the criminal code demands that honesty be upheld, which it indirectly champions".[2] In the same line of thought, M. Djuvara states that "on whichever branch of the law we look, we come to realize that progress consists on bringing harmony between the law and the moral code and influencing them ever strongly, in the sense that every action must be seen in a moral light in order for it to have a legal effect. As proof of this, we have a fundamental concept in the law according to which any action contrary to the moral code has no legal effects and is not protected by the law".[3]

Often the law makes express reference to moral, for example art. 1, ¶ 4 of The New Civil Code provides that "only law practices according to public order and morals are recognized as sources of law". The legislator does not define the concepts of "public order" and "morals", but they are applied and interpreted in relation to the diversity of conditions that shows the evolution of life, complexity of values to be established by law.[4]

Therefore, the law incorporates moral precepts, promotes, defends and guarantees fundamental moral values and represents an important tool of moral education.[5] If moral elements did not exist, there would be no order in the social life of people, for this reason it is said that "any legal norm must contain a minimum of morality".

3. An appeal to bring back the moral quality of the law

Modernity has led to a separation between the law and the moral code, which encourages the widening of the individual dimension, the law has become individualized and for this reason people preponderantly have rights but duties only in exceptional cases such as the care for others. In this way, the moral quality of the law has been damaged both on an individual and a social level. Human rights, which have appeared out of necessity in the struggle against oppression, are individual rights that neglect not only the right to individual duty towards another person, but also the right to juridical-political duty towards another, thereby promoting the pure selfishness that has thus become law.[1]

---

[1] N. Titulescu, *Reflecţii*, Albatros Publishing House, Bucharest, 1986, p. 5.
[2] Gh. C. Mihai, *op.cit.* p. 263.
[3] M. Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv*, All Beck Publishing House, Bucharest, 1999, p. 376.
[4] Elisé Marinescu, Camelia Şerban Morăreanu, *Consideraţii generale privind necesitatea interpretării normelor juridice*, published in the Volume of the International Conference *"Economia contemporană. Prezent şi perspective"*, organized by the University of Piteşti on 24 - 25 of April 2004, Agir Publishing House, 2004, p. 559.
[5] N. Popa, *Teoria generală a dreptului*, All Beck Publishing House, Bucharest, 2002, p. 132.
[1] Gh. Dănişor, *Filosofia drepturilor omului*, Universul Juridic Publishing House, Bucharest, 2011, p. 144.

The absence of a moral conscience in recent times did not come about just in consequence to promoting individualism but also because of the fact that people today could be more immoral or have less of an inclination for morality than his forebears, with causes being found in the conflict between science and conscience, between the practical material form of life and modern culture.

Moral imperatives are evoked everywhere in contemporary society: we have to defend human rights, democratic institutions, we must ensure real protection to children, we must fight against corruption, unemployment, poverty, human and drug trafficking, and it is precisely this excess that brings into question their values, making them insignificant. Therefore, in our modern culture, this apparent zeal to promote moral principles acts as "a front" for the expression of individual wishes and preferences[1]. This tendency is reflected in the law as well.

As such, we feel an increasing need to find the point of reference of humanitarian wisdom again, in a world marked by moral uncertainty come about because of our technological advances. The separation of the law from the moral code can lead only to the dehumanization of the law. The law deprived of a moral quality could only crated a certain order of cohabitation, but never attain perfection in life. However, without the self-accomplishment or perfection of the individual, this order is artificial and limiting. If the law is not meant for humans, then it is a simple indifferent order. In order to reach its goal, the law must return to its previous natural version and it must reintegrate moral precepts into its structure[2].

In this same way, recent doctrines[3] have shown that the way whereby the law may accomplish its goals is to try again to perfect its relations, in order to reach the people and not the other way round. This can be accomplished by rediscovering the ontological good as a fundament of law and morality.

Conclusions

Although they may seem fallen out of fashion the existing doctrinal conflicts regarding the relation between the law and the moral code are brought back into the mainstream by the specificity of contemporary society. In the context of our lives nowadays, certain forces, especially pertaining to the field of politics, are trying to impose certain norms that are severely harming the moral principles, and this aspect often poses the problem of a moral crisis within the law and of trying to overcome this problem more and more. It is true that the law cannot take the place of the moral code just as the moral code cannot substitute itself for the law. However it is just as true that between these things there is an unbreakable connection. In the process of creating a law, the legislator cannot ignore the fact that society has its own moral code from where he should start developing every rule, because any law which does not suit the society it addresses will fail in fulfilling its purpose.

Bibliography:

Dănişor, Gh., *Filosofia drepturilor omului*, Universul Juridic Publishing House, Bucharest, 2011;

Mihai, Gheorghe C., *Fundamentele dreptului. Ştiinţa dreptului şi ordinea juridică*, vol. I, 2nd edition, C.H. Beck Publishing House, Bucharest, 2009;

[1] Alasdair Macintyre, *Tratat de morală după virtute*, Humanitas Publishing House, Bucharest, 1998, p. 12.
[2] Irineu Ion Popa, *op.cit.* pp. 406-407.
[3] Gh. Dănişor, *op.cit*. p. 239.

Popa, Irineu, Ion, *Substanţa morală a dreptului*, Universul Juridic Publishing House, Bucharest, 2009;

Moroianu, E., *Conceptul de ordine juridică*, Studii de drept românesc, no. 1-2/2008, Bucharest, 2008;

Şerban Morăreanu, Camelia şi Olteanu, Orestia, *Paralelă între norma socială şi norma juridică* –Volume of the International Conference *"Integrare şi globalizare"*, organized by the University of Piteşti on 15 -16 of April 2005, University of Piteşti Publishing House, 2005;

Marinescu, Elise şi Şerban Morăreanu, Camelia, *Consideraţii generale privind necesitatea interpretării normelor juridice*, Volume of the International Conference "*Economia contemporană. Prezent şi perspective"*, organized by the University of Piteşti on 24 - 25 of April 2004, Agir Publishing House, 2004*;*

Popa, N., *Teoria generală a dreptului*, All Beck Publishing House, Bucharest, 2002;

Vlăduţ, I., *Introducere în sociologia juridică*, 2nd edition, Lumina Lex Publishing House, Bucharest, 2000;

Djuvara, M., *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv*, All Beck Publishing House, Bucharest, 1999;

Macintyre, Alasdair, *Tratat de morală după virtute*, Humanitas Publishing House, Bucharest, 1998;

Arnaud, A. J., (Ed.) *Dictionnaire encyclopedique de theorie et de sociologie du droit,* deuxieme edition, L.G.D.J., Paris, 1993;

Guitton, J., Bogdanov, G., Bogdanov, I., *Dumnezeu şi ştiinţa*, Harisma Publishing House, Bucharest, 1992;

Speranţia, Eugeniu, *Lecţiuni de enciclopedie juridică*, in *Antologie de filosofie românească*, vol. IV, Minerva Publishing House, Bucharest, 1988;

Titulescu, N., *Reflecţii*, Albatros Publishing House, Bucharest, 1986;

Kelsen, H., *Théorie pure du Droit*, Dalloz, 1962;

Ripert, G., *La règle morale dans les obligations civiles*, ed. III, LGDJ, 1935.

THE DIVINE FOUNDATION OF THE LAW

Duminică Ramona*

Abstract

Throughout history, the bond between law and religion seems inevitable, as it significantly marked the juridical culture. The religious precepts form the foundation of the legal system in all times and all cultures. Moreover, there are legal systems even today whose main source lies in religion, such as Muslim law.

Key words: *foundation, religious precepts, the law*.

Introduction

In an age where doctrinal discussions are led by a positivism at times exaggerated, by overlooking the fundaments, we consider as suitable that juridical thinking return to its origins, the historical-philosophical and religious bases of the juridical phenomenon.

Thus, the present article attempts to rediscover one of the sources of the authority of the law, one of the aspects that have helped it survive the passing of time: the divine origin attributed to rules of law.

1. Everlasting law – the foundation of all law

The authority of the law finds its justification in the omnipotence of its creator. Yet, what is this "exterior authority" which "must be obeyed"? First there were the gods in ancient cities, then for the most past God Himself in the Bible and in the Judeo-Christian faith.

According to the Bible, God is the creator of the world absolutely and independently and at the same time He gives it purpose. The existence and the accomplishable purpose can therefore be found in the hand of God, both of them being the work of His divine all-powerfulness and wisdom. Apart from the creation plan of the world, God also has a plan for the running of the world, a plan according to which God orders and runs the whole of creation. This plan seen as a law for the whole of creation is dubbed the eternal law is the eternal will of God whereby he leads the world and it was chosen by God freely. The eternal law, as a norm and source of all there exists, is subordinate eternally to his divine will and sovereign wisdom. Through it God has decided since the beginning of time that it is necessary for all creatures to preserve the order assigned to them.[1]

In the Holly Scripture it is said of the eternal law "I was set up from everlasting, from the beginning, or ever the earth was".[2]

This law is necessary because God cannot create beings and not give them a purpose also, without arranging everything do that the purpose be fulfilled. At the same time, it is unchanging since God is unchanging in His universal will and decisions, given that it applies to the whole universe.

All these qualities transform the eternal law into the foundation and the source of all laws, the Law par excellence, which ensure the natural and moral order of all beings and things. "Its existence is uncontestable, it can be found in the conscience of all people and in

* Assistant Ph.D. Candidate, Faculty of Law and Administrative Sciences, University of Pitesti (e-mail: duminica.ramona@yahoo.com).

[1] Irineu Ion Popa, *Substanţa morală a dreptului*, Universul Juridic Publishing House, Bucharest, 2009, pp. 21-22.

[2] Book of Proverbs 8, 23 (King James Version).

all times". The moral precepts are available forever and concern man and the society he inhabits, who creates human laws based on the moral ones.[1]

The divine characteristic of the law is expressed most vigorously in the Bible. The voice of God is clearly heard in the Torah, which in the Greek version of the Bible is translated as "nomos", and in the Latin one "lex". The Legislator is himself like God: the commandments are written on the stone slabs "by the finger of God". However God needs a mediator, a Prophet. He who carries the word of God holds power. Thus, he who holds the Decalogue has the power. Christian iconography illustrates this biblical event, consecrated and popularized the substantial link between law and power.[2]

2. Religion – the vector for creating the law throughout history

Despite being basically different, the law and religion have been tightly connected, however, since the earliest times. It is true that a majority of juridical norms are linked to religious precepts, but the fact that there is a large part of them that reflect certain religious commandments, as we will show in this study.

In fact, even when religious norms become law, there are substantial differences between them, for example in the level of punishment, the religious precepts concern the relation between man and divinity, while the juridical ones involve the sanctioning from the social group. Sometimes there is an obvious rip between legal and religious norm, for example the principle of self-defense and the one of turning the other cheek, however it is clear that in a certain stage of the evolution of society, religion has played the role of a vector in the creation of the juridical system, and in other systems it still maintains this role, given that the law is inseparable from religious dogma, as is the case of Muslim law, whose formal source principle is the Qur'an.[3]

It is incontestable that religion is based on mysticism. The law also in part is based as religion on the mystical feeling since to some extent its authority consists of three distinct forces: constraint, reason and the mystical feeling, faith in divinity.

Since the beginning, in the history of nations, the law was mistaken for religion, with juridical norms considered to hail from God. However, it is considered through doctrine[4] as being the first stage in the evolution of the relation between religion and the law. This concept of the law is predominant in archaic ages and characterised especially the initial laws of the ancient cities which were completely saturated by religion.

Within this stage, confusing the law and religion manifested took on two forms: theocracy – the direct governing of society by the gods and the monarchy endowed with divine right - government through representatives of divinity. The direct governing by the gods is found in the Egyptian culture, where the pharaoh was considered a god and in the Jewish culture, in its primitive times, where society is governed by Jehovah. Sovereignty by divine right can be found in the culture of most of the ancient peoples – Persians, Greeks, Romans and it consists in the governing not by the gods, but by the people that represent divinity: the Chinese emperor was seen as the "son of heaven"; the Greeks considered that

[1] Irineu Ion Popa, *op.cit.* pp. 23-24.
[2] J. C. Bécane, M. Couderc, *La loi,* Dalloz, 1994, p. 7.
[3] D. C. Dănișor, I. Dogaru, Gh. Dănișor, *Teoria generală a dreptului*, 2nd edition, C. H. Beck Publishing House, Bucharest, 2008, p. 7.
[4] Al. Vălimărescu, *Tratat de enciclopedia dreptului*, Lumina Lex Publishing House, 1999, p. 88 et seq.

their laws are the work of the gods; public Roman law almost completely identifies with the religion.[1]

In Greek culture, in the first words in the dialogue about the Laws written by Plato were uttered by the Foreigner from Athens and acknowledged by Clinias of Crete and Meghilles of Sparta, he make this divine inspiration known: "To whom do you attribute the institution of your laws, to a god or a man? To a foreign god, a god? We attribute it to Zeus; in Lacedemon to Apollo…" The dialogue reflects a point of view spread out throughout the Greek world, which remained alive at least until the fifth century. In Rome, the divine inspiration of the legendary founders of the Eternal City, Romulus, the creator and Numa, the keeper of sovereignty, confirms that the sacred marks the content of the law.[2]

J.B. Bossuet stresses the divine quality of the law: "The law has no interest or passion. It is sacred and inviolable. It punishes or reward." If the king's law exemplifies the characteristics of the biblical law, it is because the monarch represents the divine law.[3]

The second stage in the relation between law and religion is contoured as a consequence of the evolution of society on an economic and political level. Thus, in Roman society, the increase of population, the birth of a new social class which did not subscribe to the Roman religion, as it is restricted to Roman citizens, the ever-growing immigration brought about the need to develop new documents and procedures, which were available to those who were not citizens. Despite this, there is no complete separation between religion and law, rather a coexistence of the two. At the same time, there are fields that ultimately remained regulated by religious norms, for example, family law would be under the control of the Church until the French Revolution.[4]

The French Revolution brings the law into its third stage, that if secularization.

The triumph of the law at the end of the eighteenth century, its culmination in the first half of the nineteenth is due to its secularization. As it lost its divine quality, the law finds a new transcendence and attains in continental Europe an unequal power and a distribution. The discovery of a new source of political sovereignty and of a new origin for the rules of law welcomes in the modern age of the law. In truth, the religion separates itself from the law under the aspect of form; however, we are actually witnessing the advent of a new kind of mysticism, as it has been stated. From this moment the foundations of a new concept of society and the law are grounded on the contract. Because the civil society is founded only on the pact between free and equal people, the law is no longer the word of God.

J.J. Rousseau identifies a new source of the law, specifically the general will: "The political body is a moral being endowed with it own will; and this general will, which always tends towards the preservation and wellbeing of the whole and of every one of its parts, and which is the source of laws, is the rule of justice for all the members of the state, in relation with themselves and the state".[5]

The legal meaning of the term "secularization" appeared in France, in the Constitution of 1946, in art. 1 and it was afterwards repeated in the Constitution of 1958, in which the following were stated: "France is a secular Republic. It ensures the equality before

---

[1] I. Craiovan, *Filosofia dreptului sau dreptul ca filosofie*, Universul Juridic Publishing House, Bucharest, 2010, p. 49.
[2] J. C. Bécane, M. Couderc, *op.cit.* p. 6.
[3] J. B. Bossuet, *La politique tirée des propes paroles de l´Ecriture sainte* (1677/1704), ceuvres complètes, Ed. Lachat, Paris, Vives (1862-1866), t. XXIII *apud* J. C. Bécane, M. Couderc, *op.cit.* p. 9.
[4] I. Craiovan, *op.cit.* p. 49.
[5] J.J. Rousseau, "Economie politique" de l´Encyclopedié, éd. Pléiade, p. 245 *apud* J. C. Bécane, M. Couderc, *op.cit.* p. 19.

the law of all citizens irrespective of religion. It respects all faiths". The Universal Declaration of Human Rights and of the Citizen from 1789 contoured a new perception of the secularization, one in which the state sanctions the freedom of religion: "No one shall be harassed not even for their religious views, except when these vies disturbs the ordered established by law".

These aspects have endured throughout time, so that today they can be found in the Constitution of our state. The constitutional stipulations reflect the relation between law and religion in general terms. Thus, art. 29 from the Constitution states: "Freedom of thought, opinion and religious beliefs shall not be restricted in any form whatsoever. No one shall be compelled to embrace an opinion or religion contrary to his own convictions. (3) All religions shall be free and organised in accordance with their own statutes, under the terms laid down by law. (4) Any forms, means, acts or actions of religious enmity shall be prohibited in the relationship among the cults. (5) Religious cults shall be autonomous from the State and shall enjoy support from it, including the facilitation of religious assistance in the army, in hospitals, prisons, homes and orphanages.", and art. 32, ¶ 7 consecrates the freedom of religious education and in the last line of, art. 48, ¶ 2 – the relation between religious and civil marriage, in the sense that the former may only take place after the latter.

The influence of religion on contemporary juridical norms is also found not only on a constitutional level, but also in family and criminal law.

For example, although in the contemporary the life partnership or cohabitation is established as undeniable social reality, a part of legal doctrine[1] advocating for its regulation, however, at legal rule level, marriage remains the only form of family formation since neither the Family Code, nor the New Civil Code acknowledges other forms of cohabitation such as commonlaw marriage or domestic partnership, which are condemned by religion. Moreover, another principle of family law, that of monogamy upholds this union between law and religion, because both in the Old Testament as well as the New Testament, family and marriage have a common founding principle, monogamy. Article 5 from the Family Code and art. 29 from the New Civil Code stipulate that "it is forbidden to conclude a new marriage with a person who is already married". The introduction of betrothals in our legal system through the New Civil Code keeps the bond between law and religion alive, as it is well known that religion places a great deal of importance on long-term engagements.

In the same vein, we may not ignore the fact that the Decalogue has been the source of many law systems in the world, including ours. Some of the commandments formed the foundation of several recent laws, e.g. those in family law or of certain rules in criminal law, as we shall see in the following paragraph.

3. The biblical commandments reflected in the current Romanian legislation

In the analysis of the current laws we may choose to ignore the influence of religion, however, if we try to find the foundation of a regulation, then it is difficult not to discuss this influence.

The Decalogue (the Ten Commandments) can be found in chapter V of the Bible. Initially, the Ten Commandments were etched out on two stone slabs (known as the Book of the Covenant) and they contain four rules pertaining to the direct relation of the believer with God (I-IV), one rule of strict morals (V) and five moral-juridical rules (VI-X) which have lain at the base of many laws.

---

[1] Camelia Şerban Morăreanu, *Concubinajul, realitate ce impune soluţii legislative*, in Curierul Judiciar Magazine no. 11-12/ 2004, All Beck Publishing House, p. 17; Georgeta Ştefania Ungureanu, Camelia Şerban Morăreanu, Ştefan Cocoş, *Statutul familiei în contemporaneitate*, Prouniversalis Publishing House, Bucharest, 2005, pp. 35-36.

For example, the fifth commandment speaks of the relation between parents and children: "Honour you father and your mother, so that you may live long in the land the Lord your God is giving you" a relation reflected on a juridical level in norms that regulate the legal duty to support, art. 86-96 from the Family Code. This obligation is founded on the solidarity within the family, the moral duty of each one or us to give moral and financial support to our relatives my marriage or blood that are in need or incapable of working. The family code establishes the order wherein this duty is owed "the descendant is obliged to support his ascendant" (art. 89 letter b from the Family Code), which means that every time the parents "are in need" and lack the possibility to earn a living through their own effort "due to an incapacity to work", the children are obliged to support them. It is obvious that the meaning of the biblical commandment surpasses the legal sphere before mentioned, since to "honour you father and mother" is a moral duty which begins during their lives, but which continues even after their passing-on, by respecting their memory and the honouring of the dearly departed. This duty of respecting a person even after they have passed on forms at present the core of the stipulations of art. 78-79 from the New Civil Code, pursuant to which "the deceased person is owed respect both for his memory and his body. The memory of the deceased person is protected under these conditions as their image and reputation during their lives". Here is how the biblical precepts outlast the ages and are reflected in current laws.

The following four commandments (VI-IX) can be found in the articles of the Criminal Code, but also in the Constitution and recently in the Civil Law also.

Thus, the influences of the sixth commandment, "Thou shall not kill", is identified in the regulations pertaining to crimes of murder (art. 174), felony murder (175) felony murder one (art. 176), infanticide (art. 177), manslaughter (art. 185). We find this commandment reflected not only in the Criminal Code but also in the constitutional and civil law, as we have said before. Article 22 from the Constitution states that the right to life, as well as the right to physical and mental integrity of the person is guaranteed by law, and ¶ 3 outlaws the death penalty. The dispositions of art. 61 from the New Civil Code stipulate in the same sense as the Constitution that: "The life, health, physical and mental integrity of every person are equally guaranteed and protected by law."

The seventh commandment – "Thou shall not commit adultery." – can also be found in the law. It constitutes an encouragement to choose the middle way, the balance in every aspect of life, by avoiding excesses.

Secondly, the commandment hints at those excesses that appear in the intimate life of the individual that life much-blamed in the Bible and by Christian morality, a life full of "pleasures and debauchery". Even if sexual freedom forms the objective of a strong movement in the last few years, scoring certain successes regarding its acknowledgement and sanctioning from a legislative point of view, e.g. as in the Netherlands, where same-sex relations have been regulated. However in most states they must respect certain well-determined limits.[1] In this matter, Romanian Penal Code strictly regulates these aspects, being drawn clear limits by criminalizing offenses regarding sexual life[2]: rape (art. 197), sexual relations with a minor (art. 198), seduction (art. 199), sexual perversion (art. 201), sexual corruption (art. 202), incest (art. 203) and sexual harassment (art. 203). Prostitution (art. 328) and proxenetism are added to these felonies.

---

[1] M. Ticu, *Decalogul ca fundament al dreptului. O analiză juridică a poruncilor biblice*, Juridical Sciences Magazine no. 3-4/2005, Themis Publishing House, Craiova, pp. 166-167.

[2] See: Camelia Şerban Morăreanu, *Prevenirea şi combaterea violenţei familiale,* Hamangiu Publishing House, Bucharest, 2009, pp. 123-130.

In family law, this biblical commandment can be found in the duty of fidelity the spouses owe each other, as regulated by the dispositions of art. 309 from the New Civil Code: "The spouses owe themselves mutual respect, fidelity and moral support."

The eighth commandment, "Thou shall not steal", is reflected in the Criminal Code in art. 208, 209 which incriminate the act of theft and in art. 211 which condemns burglary.

Moving on to the ninth commandment "Thou shall not bear false witness against thy neighbour" may be considered one of the foundations of art. 260 from the criminal Code which stipulates the felony of perjury which consists in "the act of a witness which in a criminal, civil, disciplinary or any or any other matter is being deposed and makes false statements or does not tell all he knows concerning the essential circumstances on which the witness was questioned". The punishment is "one to five years imprisonment".

By these few examples, we have tried to demonstrate that these religious precepts lie at the base of juridical norms even today and a tight relation between law and religion has endured in time.

Conclusions

Contemporary laws are in truth created by man, and yet we cannot deny the fact that certain regulations still find their foundation in religious precepts, as we have tried to demonstrate in our study. Conversely, society is in a constant state of change and evolution, given that human needs are also changing, and thus the law must keep up with the new social realities, although quite often laws contravening morality are elaborated. Nowadays, the role of the legislator has become more and more difficult. However, he must find solutions to regulate social realities as well as possible. One solution which has proved its worth throughout time is to follow the moral and religious precepts. Creating the law may not be an act of will alone, but also one of consciousness, referring to a very good knowledge of the existing realities. The actual life of humans has its own moral rules deeply rooted in the collective conscience, which must not be neglected by the legal process.

Bibliography:

Dănişor, Gh., *Filosofia drepturilor omului*, Universul Juridic Publishing House, Bucharest, 2011;

Craiovan, I., *Filosofia dreptului sau dreptul ca filosofie*, Universul Juridic Publishing House, Bucharest, 2010;

Popa, Irineu, Ion, *Substanţa morală a dreptului*, Universul Juridic Publishing House, Bucharest, 2009;

Şerban Morăreanu, Camelia, *Prevenirea şi combaterea violenţei familiale,* Hamangiu Publishing House, Bucharest, 2009;

Dănişor, D. C., Dogaru, I., Dănişor, Gh., *Teoria generală a dreptului*, 2nd edition, C. H. Beck Publishing House, Bucharest, 2008;

Ungureanu, Georgeta Ştefania, Şerban Morăreanu, Camelia, Cocoş, Ştefan, *Statutul familiei în contemporaneitate*, Prouniversalis Publishing House, Bucharest, 2005;

Ticu, M., *Decalogul ca fundament al dreptului. O analiză juridică a poruncilor biblice*, Revista de Ştiinţe Juridice no. 3-4, Themis Publishing House, Craiova, 2005;

Şerban Morăreanu, Camelia, *Concubinajul, realitate ce impune soluţii legislative*, în Revista Curierul Judiciar no. 11-12, All Beck Publishing House, Bucharest, 2004;

Vălimărescu, Al., *Tratat de enciclopedia dreptului*, Lumina Lex Publishing House, Bucharest, 1999;

Bécane, J. C., Couderc, M., *La loi*, Dalloz, 1994.

PREVENTING THE EXERCISE OF RELIGIOUS FREEDOM ACCORDING TO THE NEW CRIMINAL CODE

Duvac Constantin *

Abstract

The author makes an in-depth analysis as to the legal content of the offence of preventing religious freedom, set out in art. 381 of the new Criminal Code. For this purpose, the author examines the object of the criminal safeguards, the subjects of the offence, actus reus and mens rea, the forms, modalities, penalties and certain aspects related to proceedings, in connection to the offence laid down under art. 381 of the new Criminal Code. Furthermore, the author has no reluctance in expressing his stance as to the constitutive content of this criminal offence and to propose certain solutions and own ideas.

Key-words*: religious freedom, cult, ritual, offence.*

Introduction

*The **new Criminal Code in relation with the criminal law in force.** The offence of preventing religious freedom[1] was included by the legislator of 2009 under Title VIII of the Special Part of the new Criminal Code, adopted by Law no. 286/2009[2], entitled "Offences infringing upon relations that concern social community life", Chapter III – "Offences against religious freedom and respect owed to the dead".*

In comparison with the wording of art. 318 of the Criminal Code in force, the current criminalisation is complemented with new hypotheses, and new offences whose perpetration has been recently reported are criminalised. In this way, a distinct hypothesis is introduced, namely the act of forcing a person, by threat or force, to fulfil an act that is forbidden by the cult she/he is a member of (for instance, the act of forcing a person to eat food that is forbidden by her/his religion).

At the same time, the penalties provided for this offence, in all its criminalisation variants, have been reconsidered and rendered more severe.

The object of the criminal safeguards. *The special legal object* of the offence of preventing religious freedom is represented by the relations that concern social community life, whose natural origin, conduct and development are conditioned by the defence of *religious freedom* – component of the freedom of conscience – which comprises the right of any person to have or partake in a religion, to manifest it either alone or in community, with others and in public or private, by means of the practices and rituals that are specific to the respective cult, including by means of religious education, as well as the freedom to maintain

* Associate Professor Ph.D. the Faculty of Law and Economics within Agora University of Oradea; email: ctinduvac@yahoo.com.

[1] Art. 381. – "(1) The act of preventing or disturbing the freedom to exercise the ritual of any religious cult that is organised and is functioning according to the law, shall be punished by imprisonment from 3 months to 2 years or by fine.
(2) The act of forcing a person, by coercion, to partake in the religious service of any cult or to fulfil a religious act connected to the exercise of a cult shall be punished by imprisonment from one to 3 years or by fine.
(3) The same penalty shall sanction the act of forcing a person, by force or threat; to fulfil an act prohibited by the religious cult she/he is a member of, cult that is organised according to the law.
(4) Criminal action shall be initiated upon prior complaint from the injured person.

[2] Published in the Official Journal no. 510 of 24 July 2009.

or change the religious belief. Consequently, the special legal object of the offence is directly represented by the social values of the freedom of conscience, in terms of the freedom of exercising the chosen religious cult or the freedom of non-exercising such a cult, as well as the relations that concern social community life articulated around and due to such social values.

Penal safeguards concern the respective social relations, and not the cults themselves, whose content and ritual may vary from a cult to another and that may be maintained or removed from reasons that differ from the penal safeguards[1].

In Romania, the freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of human rights and freedoms.

The freedom of thought, of conscience and religion is set forth under art. 9 of the European Convention of Human Rights[2] and art. 2 of the First Additional Protocol to this Convention[3], the case-law of the European Court of Human Rights being rich and having a clarifying nature in this regard[4].

The freedom of conscience is one of the fundamental freedoms of the citizens, ensured by the Constitution of Romania (art. 29)[5]. Representing an essential value, social relations that move around the freedom of conscience are subjected to the provisions of Law no. 489/2006 on religious freedom and general arrangements of the cults[6], ensuring the full freedom of conscience, and exercising religious cults or the activities of religious associations being a key in this regulation.

According to art. 1 of this law, "the Romanian State observes and ensures the fundamental right of thought, opinion and religious belief of any person on the territory of Romania, in accordance with the Constitution and international treaties to which Romania is a party. No one shall be prevented or forced to embrace an opinion or a religion contrary to her/his own convictions and no one shall be subjected to any discrimination, pursued or put in a situation of inferiority for grounds of her/his belief, of partaking or non-partaking to a religious group, association or cult, or for exercising, under the arrangements set out by the regulatory framework, religious freedom".

---

[1] C. Bulai, in V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, Nicoleta Iliescu, C. Bulai, Rodica Stănoiu, V. Roşca, *Explicaţii teoretice ale Codului penal român. Partea specială*, vol. IV, Romanian Academy Press, Bucharest, 1972, p. 651.

[2] Art. 9. – "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change her/his religion or belief, and freedom, either alone or in community, with others and in public or private, to manifest her/his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others".

[3] Art. 2. – "In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions".

[4] For details, please see: C. Bârsan, *Convenţia europeană a drepturilor omului. Comentariu pe articole*, vol. I, *Drepturi şi libertăţi*, All Beck Publishing House, Bucharest, 2005, pp. 697-725, 1070-1075; M. Udroiu, Ov. Predescu, *Protecţia europeană a drepturilor omului şi procesul penal român* (Manual), C. H. Beck Publishing House, Bucharest, 2008, pp. 224-233.

[5] For comments on this article, see: I. Muraru, in M. Constantinescu, I. Muraru, I. Deleanu, Fl. Vasilescu, A. Iorgovan, I. Vida, *Constituţia României*, comentată şi adnotată, Regia Autonomă "Monitorul Oficial", Bucharest, 1992, pp. 72-76; Elena Simina Tănăsescu, in M. Constantinescu, A. Iorgovan, I. Muraru, Elena Simina Tănăsescu, *Constituţia României revizuită, comentarii şi explicaţii*, All Beck Publishing House, Bucharest, 2004, pp. 56-59.

[6] Published in the Official Journal no. 11 of 8 January 2007.

Pursuant to art. 13, ¶ 3 of Law no. 489/2006, "the act of preventing or disturbing the freedom to exercise any religious activity that is organised according to the law *shall be punished according to the provisions of the criminal legislation*". Since this is a referral norm, this is not deemed a criminal law provision in a special law, yet it represents a mere caveat, as the provisions of the Criminal Code are applicable even if such a mention lacks[1]. At the same time, probably due to this interpretation of Professor Dongoroz too, by the Draft-Law on the application of the Criminal Code and for amending and supplementing certain regulatory acts that cover criminal provisions, one puts forward the repealing of ¶ 3 of art. 13 thereof.

The same regulatory act provides that the relations amongst the cults, as well as amongst religious associations and groups must be manifested in a spirit of tolerance and mutual respect. In Romania any forms, means, acts or actions of religious defamation and enmity, as well as the public outrage against religious symbols shall be prohibited [art. 13, ¶ (1) and (2)].

An organised cult entails the existence of the persons who serve the cult (priests), of the worship houses (churches, temples), of the premises where the remainders of the dead are deployed (cemeteries, cremation places), of the community of persons partaking to the respective cult. The exercise of the cult is made by means of religious services, by attending worship houses, by baptizing ceremonies, wedding ceremonies, funerals, etc. Criminal law protection embraces the whole religious collectivity, whose freedom of exercising the religious cult is guaranteed.

In the second paragraph of the text, the legal safeguards don't cover the religious collectivity, yet they are provided for each individual, whose freedom not to attend religious services, not to fulfil religious acts against her/his will is guaranteed[2].

Finally, the criminalisation set out in art. 381, ¶ 3 of the Criminal Code protects the person whom, as a member of a religious cult, which is organised and is functioning according to the law, is guaranteed the freedom not to fulfil an act prohibited by that cult (e.g.: Adventists may not be forced to work on Saturdays or to eat pork).

The material object. The offence of preventing the freedom of cults may have as a material object the body of the person or persons against whom violent or coercion acts would be perpetrated with a view to preventing the free exercise of a religious cult. Where the offence has been perpetrated in the modality set out in ¶ 2 or ¶ 3, first sentence of the art. 381 of the Criminal Code, by physical coercion, the body of the person or persons against whom this coercion was exercised always represents the material object of the offence. At the same time, a material object of this offence may be represented by the things that serve or are destined to serve to the expression of the religious cult, in cases where upon them the action resulting in the prevention or disturbance of the freedom of exercise is committed (the respective goods are destroyed, stolen or concealed for this purpose). When the offence of prevention is produced by way of destruction, theft or concealment of the respective goods, the crime of preventing religious freedom exists under a real concurrence with the theft or aggravated theft, or with the offence of destroying[3].

---

[1] V. Dongoroz, in V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, Nicoleta Iliescu, C. Bulai, Rodica Stănoiu, V. Roşca, *Explicaţii teoretice ale Codului penal român. Partea specială*, vol. IV, Romanian Academy Press, Bucharest, 1972, p. 963.

[2] Şt. Daneş, in T. Vasiliu, D. Pavel, G. Antoniu, Şt. Daneş, Gh. Dărângă, D. Lucinescu, V. Papadopol, D. C. Popescu, V. Răműreanu, Codul penal român, comentat şi adnotat. Partea specială, vol. II, Scientific and Enciclopedic Publishing House, Bucharest, 1977, p. 428.

[3] Şt. Daneş, *op.cit.* vol. II, p. 652. For the same purpose: V. Lazăr, in Gh. Nistoreanu, V. Dobrinoiu, Al. Boroi, I. Pascu, I. Molnar, V. Lazăr, *Drept penal. Partea specială*, Europa Nova Publishing House, Bucharest, 1997, p. 587;

In the same fashion of thinking, some authors note[1] that offences covered by art. 381, ¶ 1 and 2 of the Criminal Code are not complex offences (they don't absorb potential means-offences which, as a rule, are result-offences) and, consequently, may not have a material object.

When the prevention action has as a material object a worship house, an object of cult or a corpse, a grave or a monument, or a funerary urn, there will also be an offence of profanation of worship houses or objects of cult (art. 382 of the Criminal Code) or, as case may be, profanation of corpses or graves in concurrence with the offence of preventing religious freedom.

The subjects of the offence. Any natural person may be a *direct active subject* (author) of the offence of preventing the freedom of cults. The standing of civil servant having duties that involve defending legality, or the standing of a cult servant, may be taken into account when establishing a criminal penalty. If the perpetrator is a civil servant, the offence may also constitute abuse of power (art. 297 of the Criminal Code), in concurrence with the offence of preventing religious freedom[2].

Cults shall elect, appoint, hire or dismiss their staff according to their own statutes, canonical codes or regulations.

Disciplinary penalties may be applied against the staff of the cults for breaching doctrinary or moral principles of the cult, according to their own statutes, canonical codes or regulations.

Clerical staff and persons treated as such within acknowledged cults may not be forced to disclose the entrusted actions or the actions of which knowledge was acquired in the exercise of her/his statute.

Carrying out the tasks of a priest or any duty that involves carrying out the tasks of a priest without the express authorization or consent of the religious bodies, with or without legal personality, shall be punished according to criminal legislation.

The legal person may be an active subject of this offence under the conditions set out in art. 135 of the Criminal Code.

The offence of preventing religious freedom may be perpetrated in any form of criminal participation (co-perpetration, instigation, aiding and abetting).

Other authors argue[3] that, in any of the variants, this is likely to be perpetrated in participation under the form of instigation and complicity only.

The main *passive subject* of this offence is the State, as the representative of the society that is directly threatened by the prejudice of the relations on social life and social values corresponding to them. Apart from the main passive subject, a secondary or adjacent passive subject may be the person against whom the action of preventing the exercise of the religious cult was conducted or the person who was forced, by means of coercion, to it. The adjacent passive subject may be either singular or plural. In cases of the offences set out under ¶ 1 and 3 of art. 381 of the Criminal Code, the scope of the persons who may be secondary passive subjects is limited to those who belong to the religious cult whose free exercise was breached. In case of the variant provided for in ¶ 2 of the same article, the scope

---

N. Conea, *Drept penal. Partea specială*, vol. II, Lumina Lex Publishing House, Bucharest, 2000, p. 524; Al. Pintea, *Drept penal. Partea specială*, lecture notes, Sitech Publishing House, Craiova, 2010, p. 116.

[1] Mioara Ketty-Guiu, in Gh. Diaconescu, Mioara Ketty-Guiu, C. Duvac, *Drept penal. Partea specială*, România de Mâine Foundation Publishing House, Bucharest, 2007, p. 498.

[2] C. Bulai, *op.cit.* vol. IV, p. 652. For the same purpose: I. Gheorghiu-Brădet, *Drept penal român. Partea specială*, vol. II, Europa Nova Publishing House, Bucharest, 1996, p. 240. The author considers that the two criminal offences are in an ideal concurrence of offences.

[3] C. Bulai, *op.cit.* vol. IV, p. 652.

of the persons who may be passive subjects of the offence doesn't have any limitation, and therefore, any person, no matter if she/he shares or not the religious cult in which she/he is forced to partake or attend, may be a secondary passive subject of the offence[1].

Mention must be made that parents or legal tutors have the exclusive right to ensure, in accordance with their own convictions, the education of the minor children. The religion of a child who is 14 years may not be changed in absence of her/his consent, and the child who is 16 years has the right to choose her/his religion on her/his own.

On the other hand, any person has the right to express the religious belief in a collective way, according to her/his own convictions and to the legal provisions, both within religious bodies having legal personality (cults and religious associations[2]), and within bodies without legal personality (religious groups).

In the aggravated variant as well as in the one that is assimilated to it, the plurality of passive subjects shall engender a real plurality of offences of preventing religious freedom[3]. The existence of a real concurrence of offences is also maintained whether the specific act is perpetrated under the conditions of art. 35, ¶ (1) of the Criminal Code or even if plural acts are committed on the same occasion, under the same circumstance (context), yet towards different passive subjects.

Actus reus. *The material element* differs as to the three variants of the offence of preventing religious freedom.

1. The material element of the typical offence lay down under ¶ 1 of art. 381 of the Criminal Code, lies in the action of preventing or disturbing the freedom of exercising the ritual of a religious cult, which is organised and is functioning according to the law.

The prevention may be achieved by any act that renders impossible the commencement or development of a religious cult ritual. The prevention may be either direct, when the acts of the cult, their commencement or development are hindered in a direct and material way, or indirect: close down of the premises, concealment or destruction of the objects needed for the exercise of the cult, unlawful deprivation of liberty of the cult servants, firing tear gas etc.[4].

As far as the prevention action is achieved by means of an action which meets by itself the constitutive elements of an offence, the offence of preventing religious freedom shall be taken into account in an ideal concurrence with that specific offence (unlawful deprivation of liberty – art. 205 of the Criminal Code, assault or other acts of violence – art. 193 of the Criminal Code, grievous bodily injury – art. 194 of the Criminal Code, assault or violence causing death – art. 195 of the Criminal Code, destroying – art. 253 of the Criminal Code etc.).

The disturbance may be engendered by acts that prevent a religious cult from being conducted normally, according to its ritual. What hinders in this case is not the exercise of the cult ritual itself, but its undistorted, free exercise. The disturbance may take place by producing noises, disorders or perturbations in or around the premises where the religious cult ritual is conducted etc.[5]

---

[1] *Ibidem.*

[2] *Religious associations* are legal persons consisting of at least 300 persons, either Romanian nationals or individuals residing in Romania, who associate with a view to expressing a religious belief. The religious association acquires legal personality following the entry on the Religious Association Register, which is set up at the Registry of the court in the territorial remit of which it has its seat.

[3] C. Duvac, in Gh. Diaconescu, C. Duvac, *Tratat de drept penal. Partea specială*, C. H. Beck Publishing House, Bucharest, 2009, p. 989.

[4] C. Bulai, *op.cit.* vol. IV, p. 653.

[5] *Ibidem.*

In this case, too, if the disturbance represents another offence (for instance, public order disorder – art. 371 of the Criminal Code, outrage against public morality – art. 375 of the Criminal Code etc.) the rules of the concurrence of offences shall apply.

Both criminalised actions may be either definitive or may have a limited duration. Both of them may be produced by any means, which are likely to engender the respective effects, which means the prevention or disturbance of the freedom to exercise a religious cult ritual. Exercising the cult means the conduct of the religious service, ceremonies or practices of the cult, the congregations of the religious members if they pertain to the exercise of the cult etc. It may also be an individual cult act, perpetrated either inside the cult premises or outside them. In general, the offence of preventing the freedom of cults may be perpetrated outside the premises where a religious cult is conducted either on a regular basis, or on certain occasions only[1].

Mention must be made that, from a particular viewpoint, the introduction by the legislator of 2009 of the term "ritual" in the typical content of the criminalisation under review, together with the phrase "religious cult" that exists in the criminal legislation in force, seems superfluous, if cult means the totality of rituals of a religion[2]. Consequently, *de lege ferenda* we propose the removal of the term "ritual" from the legal content of the offence set out in art. 381 of the Criminal Code.

2. As to the variant set out in ¶ 2 of art. 381 of the Criminal Code, the material element lies in the action of forcing a person to attend religious services of a certain cult or to fulfil a religious act against her/his will, no matter if it is an acknowledged or unacknowledged religious cult.

To force means to compel somebody to do the said acts against her/his will and conscience. The nature of the act the person is forced to fulfil has no relevance whatsoever, nonetheless it is sufficient that this act is connected to the exercise of a religious cult. In cases where the act which the person is forced to attend or which the person is forced to fulfil is not a religious act connected to the exercise of a cult, it may not represent the offence of preventing religious freedom, yet, potentially, the act of unlawful deprivation of liberty (art. 205 of the Criminal Code)[3].

3. The material element of the variant that is assimilated to the aggravated one, as provided for in ¶ 3 of art. 381 of the Criminal Code, a newly-introduced hypothesis (*ex novo* criminalisation), consists of the action to force a person, by means of force or threat, to fulfil an act that is prohibited by the cult she/he is a member of.

Key pre-requisites. In the case of the typical variant and of the assimilated one, the criminalised action should concern a religious cult, which is organised and is functioning according to the law. In order to be organised and to function according to the law, a cult has to be acknowledged by the authorities from Romania with competence in this field.

The regulatory act to which the new Criminal Code refers is Law no. 489/2006 on the religious freedom and general arrangements of the cults. On the date of the entry into force of this law, in Romania there operated *18 acknowledged cults*, legal persons of public utility: Romanian Orthodox Church; Serbian Orthodox Episcopate of Timişoara; Roman-Catholic Church; Romanian Church United with Rome, Greek-Catholic Church; Archbishopric of Armenian Church; Russian Christian Church of Old Ritualists of Romania; Reformed Church of Romania; Evangelical Church of Augustan Confession of Romania;

[1] *Ibidem*, p. 654.
[2] Please see Romanian Academy, "Iorgu Iordan" Institute of Linguistics, *Dicţionarul explicativ al limbii române*, 2nd edition, Univers Enciclopedic Publishing House, Bucharest, 1998, pp. 248, 929.
[3] C. Bulai, *op.cit.* vol. IV, p. 654.

Evangelical Lutheran Church of Romania; Unitarian Church of Transylvania; Union of Christian Baptist Churches of Romania; Evangelical Christian Church of Romania – the Union of Evangelical Christian Churches of Romania; Romanian Evangelical Church; Pentecostal Union – Apostolic Church of God of Romania; Seventh Day-Adventist Christian Church of Romania; the Federation of Jewish Communities of Romania; Muslim Faith; Jehova's Witnesses Association.

Religious associations which, by their activity and number of members provide safeguards of sustainability, stability and public interest, have an acknowledged cult standing before the State by means of Government decision, upon proposal of the Ministry of Culture and Cults. The decision shall be published in the Official Journal of Romanian, first Part.

The acknowledgement of canonical statutes and codes is granted insofar as they do not prejudice, by their content, the public order and security, public health or morals or fundamental human rights or freedoms.

In case of a religious cult that is organised by breaching the law or that operates by breaching the afore-mentioned regulatory act, the act doesn't represent this offence. In their activity, cults, religious associations and religious groups are mandated to observe the Constitution and the legislation of the country and to be without prejudice to the public order and security, public health or morals or to the fundamental human rights or freedoms.

As to the variant set out in ¶ (2) of art. 381 of the Criminal Code, forcing a person to attend the exercise of the cult or to fulfil an act connected to its exercise should have occurred by means of coercion. The act of forcing has to be the result of a coercion (either physical or moral), of a forceful act, against the real will and conscience of the person. This act shall not be an offence if the person attends the religious service or participates in the fulfilment of a cult act by virtue of a moral obligation stemming from certain relations with the person to whom she/he feels indebted[1].

The coercion that determined the act of forcing the person to acts of exercising a cult may therefore be either physical or moral. Physical coercion may engender the attendance *against her/his will*, whilst moral coercion may result in the *forced* attendance to the exercise of the religious service of a cult or to the perpetration of an act connected to the exercise of the cult[2].

In cases where physical coercion also engenders one of the consequences referred to in art. 193 *et seq.* of the Criminal Code, those texts shall apply jointly with the text of art. 381 ¶ (2) of the Criminal Code.

In order to trigger criminal liability, the action criminalised by ¶ (3) of art. 381 of the Criminal Code may only be perpetrated by means of force or threat. In cases where the means used by the perpetrator represent by themselves offences, other than those provided for in art. 193 ¶ (1) of the Criminal Code or in art. 206 of the Criminal Code, provisions of art. 193 ¶ (2) *et seq.* of the Criminal Code shall also apply, subject to the severity of the injuries of the passive subject, as the case may be.

The immediate consequence represents the creation of a state of danger as to the relations of social community life connected to the freedom of conscience, in terms of the freedom of exercising a religious cult, state in which such a cult may not be exercised or may not normally be exercised.

There must be a *causal relation* between the action that represents the material element of the offence of preventing religious freedom and the result or the immediate

[1] *Ibidem.*
[2] *Ibidem.*

consequence, and it implicitly results from the materiality of the act perpetrated by the direct active subject.

Mens rea. *Modes of culpability*. In the explanations provided in connection with this criminalisation text, in the phrasing that currently exists under the criminal law in force, one has argued that, in its typical variant, the offence may be perpetrated both with *direct* intention, and with *oblique* intention, the latter existing when the perpetrator, although by means of her/his act she/he didn't mean to prevent or disturb the free exercise of a religious cult, nonetheless she/he accepted that the result of her/his action is a virtually certain consequence and, therefore, the occurrence of a state of danger (for instance, by producing noise in the proximity of a worship place, the perpetrator knows that by this action she/he may disturb the performance of the cult). In the case of the sub-typical variant, *the intention* may only be a *direct* one, considering that the person who forces another person, by means of coercion, to participate in the exercise of a religious cult has a clear foresight of the consequences of her/his actions of coercion, and moreover she/he desires those consequences to occur[1].

Based on the unitary concept that bolstered the criminalisation of the acts under review, certain authors[2] argue that in the case of the typical act, the *mens rea* is represented also by *direct intention*.

Other authors[3] consider that in both criminalisation variants, the offence may be perpetrated both with *direct intention*, as well as with *oblique intention*. For this purpose, one has mentioned as an example, the hypothesis in which the perpetrator, by subjecting her/his victim to an intentional action of moral or physical coercion to adopt a certain philosophical attitude, foresees that as a consequence of this coercion, the victim will fail to attend the acts of a religious cult or partake in such a cult, and even if she/he does not desire that consequence to occur, she/he accepts the possibility of its occurrence.

In our opinion, in absence of a key pre-requisite pertaining to the purpose and, by referring to the provision of art. 16 ¶ (6) first sentence, the offence under review, in all its

---

[1] C. Bulai, *op.cit.* vol. IV, p. 655. For the same purpose: Lucia Moldovan, in M. Basarab, Lucia Moldovan, V. Suian, *Drept penal. Partea specială*, vol. II, Cluj-Napoca, 1987, p. 104; Ioana Vasiu, *Drept penal român. Partea specială*, vol. II, Albastră Publishing House, Cluj-Napoca, 1997, pp. 501-502; R. Bodea, Împiedicarea libertăţii cultelor, in "Criminal Law Review" issue no. 2/2003, pp. 74-75; H. Diaconescu, *Drept penal. Partea specială*, vol. I, 2nd edition, All Beck Publishing House, Bucharest, 2005, p. 355-356; R. Bodea, *Drept penal. Partea specială*, Hamangiu Publishing House, Bucharest, 2008, p. 618, T. Toader, *Drept penal. Partea specială*, revised, 2nd edition, Hamangiu Publishing House, Bucharest, 2007, p. 371.

[2] Şt. Daneş, *op.cit.* vol. II, p. 429. For the same purpose: O. A. Stoica, *Drept penal. Partea specială*, Didactic and Pedagogic Publishing House, Bucharest, 1976, p. 427; O. Loghin, Av. Filipaş, *Drept penal. Partea specială*, Casa de Editură şi Presă "Şansa" SRL, Bucharest, 1992, p. 317; T. Toader, in O. Loghin. T. Toader, *Drept penal român. Partea specială*, Casa de Editură şi Presă "Şansa" SRL, Bucharest, 1994, pp. 544-545; Court of Appeal from Oradea, criminal sentence 789/R/2002 *cited* by R. Bodea, *op.cit.* p. 73; O. Predescu, Angela Hărăştăşanu, *Drept penal. Partea specială*, revised, 2nd edition, Omnia Uni S.A.S.T. Publishing House, Braşov, 2007, p. 400.

[3] I. Gheorghiu-Brădet, *op.cit.* p. 241. For the same purpose: Al. Boroi, in Gh. Nistoreanu, V. Dobrinoiu, Al. Boroi, I. Pascu, I. Molnar, V. Lazăr, *Drept penal. Partea specială*, Europa Nova Publishing House, Bucharest, 1997, p. 588; Al. Boroi, *Infracţiuni contra unor relaţii de convieţuire socială*, All Publishing House, Bucharest, 1998, p. 127; V. Dobrinoiu, *Drept penal. Partea specială*, vol. I, Lumina Lex Publishing House, Bucharest, 2004, pp. 274-275; Al. Boroi, Gh. Nistoreanu, *Drept penal. Partea specială*, 3rd edition, All Beck Publishing House, Bucharest, 2005, p. 200; Al. Boroi, *Drept penal. Partea specială*, C. H. Beck Publishing House, Bucharest, 2006, p. 607; Mioara Ketty-Guiu, *op.cit.* p. 499; I. Măgureanu, *Drept penal. Partea specială*, 2nd edition, Pro Universitaria Publishing House, Bucharest, 2007, p. 487; P. Dungan, in M. Basarab, V. Paşca, Gh. Mateuţ, T. Medeanu, C. Butiuc, M. Bădilă, R. Bodea, P. Dungan, V. Mirişan, R. Mancaş, Cr. Miheş, *Codul penal comentat. Partea specială*, vol. II, Hamangiu Publishing House, Bucharest, 2008, p. 974; Al. Pintea, *op.cit.* p. 117; Al. Boroi, *Drept penal. Partea specială*, C. H. Beck Publishing House, Bucharest, 2011, p. 628.

three criminalisation hypotheses, may only be committed with *direct* or *oblique intention*. Reckless perpetration of the offence is not criminalised.

The motives and the *purpose* of the offence have no relevance as to the existence of the offence[1]; nevertheless they are interesting as to the elements for determining the penalty to be applied to the defendant.

Forms. As it is a commissive intentional offence, preventing religious freedom is susceptible of stages such as *preparatory acts* and *attempt*, yet they are not criminalised and consequently not punished.

The crime is momentary and it is considered to have been *committed* at the moment of perpetrating the unlawful action and of producing the state of danger for the social relations safeguarded by the text of art. 381 of the Criminal Code.

Modalities. For each of its three variants, the offence of preventing religious freedom has two *regulatory modalities*.

As to the typical offence, the two modalities reside either in the prevention, or in the disturbance of the freedom of the exercise of a religious cult ritual. In the case of the aggravated variant, the two modalities lie either in coercing a person, or in attending the religious services of a cult, or in fulfilling a religious act connected to the exercise of a cult. In any of these alternative regulatory modalities, the act represents an offence, nonetheless it doesn't preclude certain differentiations in terms of the degree of the social danger of the offence (e.g. the disturbance must present a lower concrete social danger as compared to the prevention of the free exercise of the cult or the coercion to fulfil a cult act must be more serious than the obligation to attend the cult service)[2].

With regard to the last criminalisation hypothesis, the two regulatory modalities refer either to the obligation, by means of force, or to the obligation, by means of threat, of the victim to fulfil an act that is prohibited by the cult she/he is a member of.

These regulatory modalities may have as correspondent different *factual modalities* that stem from the circumstances under which the criminal activity is committed and which will be taken account of when determining the criminal punishment.

Penalties. A natural person shall be punished for the perpetration of the offence of preventing religious freedom in its typical variant with imprisonment from 3 months to 2 years or with a fine.

In its aggravated variant and in its assimilated variant, the penalty provided for by the legislation for the natural person is imprisonment from 1 to 3 years or with a fine.

The legal person shall be punished, under all criminalisation hypotheses, with a fine amounting to 120 and 240 day-fines, according to art. 137 ¶ (4) indent (b) of the Criminal Code.

Aspects related to proceedings. Criminal prosecution of this offence shall be conducted by criminal prosecution bodies under the supervision of the prosecutor within the prosecutor's office attached to the court.

Criminal proceedings shall be initiated upon prior complaint of the victim.

Once criminal proceedings have been initiated, reconciliation of the defendant with the victim shall not remove criminal liability which lies with the perpetrator.

Preventing religious freedom is tried at first instance by the court, whilst on appeal it is heard by the appeal court to which the court of first instance is attached.

---

[1] In a contrary meaning: I. Gheorghiu-Brădet, *op.cit.* p. 241.
[2] C. Bulai, *op.cit.* vol. IV, p. 656.

Cults may have their own religious judgement bodies for dealing with internal disciplinary matters, in accordance with their statutes and regulations, and in this case, statutory and canonical provisions apply exclusively.

Nevertheless, the existence of their own judgement bodies shall not remove the criminal and criminal proceedings legislation to be enforced by relevant judiciary bodies.

Conclusions

Preventing religious freedom is complemented with new hypotheses, and new offences whose perpetration has been reported recently are criminalised. At the same time, penalties provided for by law have been rendered more severe for this particular offence.

The legal content of this offence corresponds to the needs to apply penal sanctions of these anti-social behaviours, and it ensures a real safeguard of religious freedom in Romania and it is fully in line with relevant constitutional provisions, as well as with those contained in the international acts, ratified by the Romanian State in this field. However, one should consider whether the term "ritual" should be retained in the constitutive content of the typical offence, in conjunction with the phrase "religious cult".

The regulatory act under review is completed with modern provisions by Law no. 489/2006 on religious freedom and general arrangements of the cults, and this legal instrument frames and imbues with a legal significance all the modalities under which the religious freedom Romania may be expressed.

Bibliography:

Al. Boroi, *Drept penal. Partea specială*, C. H. Beck Publishing House, Bucharest, 2011;

Al. Pintea, *Drept penal. Partea specială*, lecture notes, Sitech Publishing House, Craiova, 2010;

Gh. Diaconescu, C. Duvac, *Tratat de drept penal. Partea specială*, C. H. Beck Publishing House, Bucharest, 2009;

M. Basarab, V. Paşca, Gh. Mateuţ, T. Medeanu, C. Butiuc, M. Bădilă, R. Bodea, P. Dungan, V. Mirişan, R. Mancaş, Cr. Miheş, *Codul penal comentat. Partea specială*, vol. II, Hamangiu Publishing House, Bucharest, 2008;

R. Bodea, *Drept penal. Partea specială*, Hamangiu Publishing House, Bucharest, 2008;

M. Udroiu, O. Predescu, *Protecţia europeană a drepturilor omului şi procesul penal român* (Manual), C. H. Beck Publishing House, Bucharest, 2008;

T. Toader, *Drept penal. Partea specială*, revised, 2nd edition, Hamangiu Publishing House, Bucharest, 2007;

Gh. Diaconescu, Mioara Ketty-Guiu, C. Duvac, *Drept penal. Partea specială*, România de Mâine Foundation Publishing House, Bucharest, 2007;

O. Predescu, Angela Hărăstăşanu, *Drept penal. Partea specială*, revised, 2nd edition, Omnia Uni S.A.S.T. Publishing House, Braşov, 2007;

I. Măgureanu, *Drept penal. Partea specială*, 2nd edition, Pro Universitaria Publishing House, Bucharest, 2007;

Al. Boroi, *Drept penal. Partea specială*, C. H. Beck Publishing House, Bucharest, 2006;

C. Bârsan, *Convenţia europeană a drepturilor omului. Comentariu pe articole*, vol. I, *Drepturi şi libertăţi*¸ All Beck Publishing House, Bucharest, 2005;

Al. Boroi, Gh. Nistoreanu, *Drept penal. Partea specială*, 3rd edn, All Beck Publishing House, Bucharest, 2005;

H. Diaconescu, *Drept penal. Partea specială*, vol. I, 2nd edition, All Beck Publishing House, Bucharest, 2005;

M. Constantinescu, A. Iorgovan, I. Muraru, Elena Simina Tănăsescu, *Constitution of Romania revised, comments and explanations*, All Beck Publishing House, Bucharest, 2004;

V. Dobrinoiu, *Drept penal. Partea specială*, vol. I, Lumina Lex Publishing House, Bucharest, 2004;

R. Bodea, Împiedicarea libertăţii cultelor, in "Criminal Law Review" issue no. 2/2003;

N. Conea, *Drept penal. Partea specială*, vol. II, Lumina Lex Publishing House, Bucharest, 2000;

Romanian Academy, "Iorgu Iordan" Institute of Linguistics, *Dicţionarul explicativ al limbii române*, 2nd edition, Univers Enciclopedic Publishing House, Bucharest, 1998;

Al. Boroi, *Infracţiuni contra unor relaţii de convieţuire socială*, All Publishing House, Bucharest, 1998;

Gh. Nistoreanu, V. Dobrinoiu, Al. Boroi, I. Pascu, I. Molnar, V. Lazăr, *Drept penal. Partea specială*, Europa Nova Publishing House, Bucharest, 1997;

I. Gheorghiu-Brădet, *Drept penal român. Partea specială*, vol. II, Europa Nova Publishing House, Bucharest, 1996;

I. Vasiu, *Drept penal român. Partea specială*, vol. II, Albastră Publishing House, Cluj-Napoca, 1997;

O. Loghin. T. Toader, *Drept penal român. Partea specială*, Casa de Editură şi Presă "Şansa" SRL, Bucharest, 1994;

M. Constantinescu, I. Muraru, I. Deleanu, Fl. Vasilescu, A. Iorgovan, I. Vida, *Constituţia României*, commented and annotated, Regia Autonomă "Monitorul Oficial", Bucharest, 1992;

O. Loghin, Av. Filipaş, *Drept penal. Partea specială*, Casa de Editură şi Presă "Şansa" SRL, Bucharest, 1992;

M. Basarab, Lucia Moldovan, V. Suian, *Drept penal. Partea specială*, vol. II, Cluj-Napoca, 1987;

T. Vasiliu, D. Pavel, G. Antoniu, Şt. Daneş, Gh. Dărângă, D. Lucinescu, V. Papadopol, D. C. Popescu, V. Răműreanu, Codul Penal Român, comentat şi adnotat. Partea Specială, vol. II, Scientific and Enciclopedic Publishing House, Bucharest, 1977;

O. A. Stoica, *Drept penal. Partea specială*, Didactic and Pedagogic Publishing House, Bucharest, 1976;

V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, Rodica Stănoiu, V. Roşca, *Explicaţii teoretice ale Codului penal român. Partea specială*, vol. IV, Romanian Academy Publishing House, Bucharest, 1972.

STATE, LAW, MORAL AND RELIGION

Fodor Elena-Mihaela*

Abstract

Among social norms, there is a strong connection between religious, moral and legal norms. Religious norms enter the sphere of legal norms through moral. Legal norms influence church law. The connection and separation between these norms in the course of history is commented.

Key words: *law, religious norms, moral.*

Introduction

The legal norm may be defined as "a way of coordinating human actions and of imposing the general interests of the collectivity upon each participant"[1] *with the purpose of achieving the objective of wide social scope. Society is unconceivable without these rules which regulate the complexity of social relations.*

Social norms are in a continuous process of transformation and change not only from one social system to another, but also within the same system, depending on the changes in life, spiritual and material conditions. The norm's field of reference includes those situations which are significant to the social group where it was issued, trait captured in the statement: "to formulate norms means to use in a selective manner in future experience the results of past experience"[2].

The legal norm is a rule of conduct instituted and sanctioned by the state, whose application is ensured through juridical conscience and, when needed, through the state's coercive force. Its role in society is to set certain coordinates for guiding the conduct of individuals in the direction of strengthening and developing social order and relations. The application of coercion ensures legal order n society, conferring the needed stability to social relations.

Moral norms are sentences or prescriptive enunciations, through which is indicated what must or must not be done, respectively how should or should not be the subject conscious in repeatable situations, so that his manifestation or way of being to be appreciated as good and not bad. As a body of general norms of practical personal conduct "moral norms impose themselves upon the conscience as absolutely valid and imply the exclusion of any contradiction"[3]. Morals are based on the intimate conviction and personal conscience of the necessity of respecting its precepts, the reason of the moral norm being firstly duty towards one self and then towards the other members of the human community. The utilitarian concept considered that good enhanced happiness and abated suffering. "Utility - sais Bentham[4] - is a abstract term, he expresses the quality or tendency of something to shield us from harm or to obtain a benefit; benefit means pleasure or source of pleasure…Pain and

* Associate professor dr. Faculty of Law Cluj-Napoca of the Christian University "Dimitrie Cantemir" Bucharest, Public Law Department, mihaelafodor@yahoo.co.uk

[1] Cornel Popa, *Praxiologia şi teoria generală a normelor* în *Filozofie. Materialism dialectic şi istoric,* Didactic and Pedagogic Publishing House, Bucharest, 1975, p. 421.

[2] Cornel Popa, *Preliminarii la o teorie generală a normelor,* Philosophy Magazine, no. 12/1969, p.1437.

[3] Eugeniu Speranţia, *Introducere în filosofia dreptului,* Cartea Românească Publishing House, Cluj, 1964, p. 254.

[4] Jeremy Bentham, *Deontologie ou Science Morale,* trad. B. Laroche, 1834, quoted by Emilia Stere in *Din istoria doctrinelor morale,* Vol.3, Scientific and Enciclopedic Publishing House, Bucharest, 1979, p.159.

pleasure consisted in what each feels as such, the peasant as well as the prince, the ignorant as well as the philosopher". This point of view is criticized by Kant. In "Critique of Practical Reason", he refutes, first of all, the moral systems based on utility[1]. He denies that the supreme norm of conduct is the tendency of happiness, this being a variable element. Moral is to be radically distinguished, on the other hand, from what is useful and what is pleasurable. If one works to achieve utility, the action loses its moral character. Moral is independent, it is superior to utility. She commands absolutely; it is like a sublime voice that imposes respect that inexorably reprimands us, even when we try to silence it and we try not to listen to it. It wants that our actions should posses a universal nature. The moral norm is regarded by Kant as a "categorical imperative" and is formulated as follows: "Work in such a way that the maxim of you action may serve as a principle to a universal legislation". The same philosopher considered that "the moral law cannot influence our activity without the aid of virtue", which in his opinion is the power to resist any temptation that would prevent us from respecting this law. He who struggles against all that might distract the will from the moral norm is a virtuous man. G.G. Antonescu considers that this notion, which Kant creates of virtue, leads him to an excessive moral purism[2]. The same conception of morals is to be encountered at John Rawls[3]: "to be moral is analog with assuming a firm commitment forehand, because the principles of morality must be recognized even when they are in your disadvantage".

Law was not created with its present laic physiognomy. The authority which the juridical order represents initially had its source in the divine origin attributed to legal rules. The authority of the law, as it has been observed, is built upon three different forces: the material force, of coercion, characteristic to law and which is effective when used against a minority, the majority giving its moral support to the law; the force of reason regarding the logical necessity of law and its being respected by man as a social being, considered to be present only in an insignificant minority, even in civilized societies; the mystic sentiment based on affection, intuition, the belief in divinity.

Religion has been one of the most fertile material sources of law. For the way in which religious moral has interlaced with the law, in the period of dissolution of the primitive community and of the emergence of the state, two of the best known testimonies of the ancient civilizations are significant: he Code of Hammurabi of the ancient Babylon and The Ten Commandments f the Jews as shown in the Old Testament.

The Code of Hammurabi consists of 282 articles and dates from between 1792-1750 BCE. The belief in the divine origin of the code, in the fact that it represents the will of a divinity, results from the fact that on the stone column in which the code was carved, there was discovered a drawing representing Hammurabi in the moment when he receives the laws from the hands of the god Shamash. Protecting the most important institutions of the early Babylonian society, the Code of Hammurabi guaranteed ownership over land, slaves and other goods. Also, it contained provisions regarding purchase agreements, private enterprise contacts, contracts of employment, of lease, credit, marriage and divorce, inheritance, adoption, etc[4]. The necessity to respect these provisions was justified by the state's leading powers as a request of the divinity. Because of this, in the aforementioned regulations it is

---

[1] Immanuel Kant, *Critica raţiunii practice,* IRI Publishing House, Bucharest, 1997, p. 47.
[2] Gheorghe G. Antonescu, *Din problemele pedagogiei moderne*, Cartea Românească Publishing House, Bucharest, 1924, p. 58.
[3] John Rawls, *Dreptatea ca echitate*, în *Teorii ale dreptăţii,,* editor A. MIROIU, Alternative Publishing House, Bucharest, 1996, pp. 69-84.
[4] See *Codul lui Hammurapi*, translated by I. Negoiţă, Bucharest, 1935.

difficult to observe how far the moral element stretches, in its religious form, and where the juridical element begins.

The detachment of juridical norms from the customs peculiar to primitive moral was done gradually. A certain period of time there were maintained elements of the blood feuds from the primitive community. In the Code of Hammurabi there are still to be encountered remains of customary regulations from the tribal system: responsibility of the community for the wrongdoings of one of its members, in the situation in which the culprit was not discovered; responsibility o the children for the acts of their parents; banishment of the culprit from his hometown or from his family.

As far as the Ten Commandments (or the Decalogue of the Old Testament) are concerned, some of these were only applied to members of the clan or tribe, while the killing of enemies from another tribe was not only accepted, but prescribed[1]. The first five of the commandments remained to our day only rules of religious moral. On the other hand, the other five were transposed into the field of law. It is not a question of copying the five religious commandments from the Old Testament, because in itself it represent nothing more than a synthesis of a millenary experience, of a line of oriental peoples, representing n important document in the history of culture.

The prescriptions of religious moral have also imposed themselves in the field of law due to the fact that they refer to general-human values which were imposed in the context of human coexistence[2]. However, religion cannot be reduced to the position of a propulsive force for the realization of law. The law-religion relationship has varied from one people to another and from one historic period o another. It has been considered that there can be distinguished, in general, he following phases[3]: total confusion, in the field of public law as well as in the one of private law, between law and religion; the progressive emancipation of private law from religion; the separation between religion and law, at least formally, on political ground. In the first phase, the confusion between religion and public law was based on the common authority to which the creation of the norms was attributed and it manifested either in the form of theocracy[4] (the direct governance of society by gods and the monarchy of vine right), or in the form of government through representatives of the divinity[5]. The second phase begins to form an outline following the emergence of new factors in the evolution of society, of economical, social and political nature. The increase in population in roman society, the formation of certain classes that did not participate in the roman religion, reserved exclusively to citizens, the abundant immigration, all resulted in the necessity of acts and procedures which could also be used b those who were no citizens, regarding marriage, testaments, contracts etc. These lose their religious character. Family law will remain almost until the French Revolution a filed reserved to religion. The two categories of norms, with and without religious character will coexist without there being a complete emancipation of law from religion. The French Revolution marks the secularization of pubic law. It refers to a chance in the authority which issues the norms, as Rousseau, who entitled his system "a civil religion", well observed. In the same way that the absolute monarch could dispose of the life and wealth of his subjects in the name of God, so the

---

[1] See Tibor Husar, *Morala şi societatea*, Politics Publishing House, Bucharest, 1967, p. 161.
[2] Gheorghe Boboş, *Despre fundamentul moral al dreptului*, Studia Universitaria Babeş-Bolyai, Jurisprudentia, XXXIII, 2, 1988, p. 5.
[3] Alexandru Vălimărescu, *Tratat de Enciclopedia Dreptului,* Lumina Lex Publishing House, Bucharest, 1999, p. 88.
[4] Existing at the Egyptians, the Pharaoh being regarded as a god, or at the Jews, in the primitive era, where society as governed by Jehovah.
[5]Encountered at most of the ancient people, Persians, Chinese, Greeks, and Romans.

"general will", as understood by Rousseau, will dispose of the life and wealth of citizens. "The Declaration of the Rights of Man and of the Citizen" of 1789 is the event that will represent the starting point for the "secularization" of law[1].

The evolving law of differentiation must be approached critically, in a broader context, the issuing and sanctioning authority not being the only aspect which must be evaluated. The coexistence and interference between law and religion is deeper when it comes to principles, values on which they are based. Analyzing for example the teachings of the 12 Apostles, we can identify mandatory norms and prohibitive norms: "… to love God and thy neighbor, thou shall not kill, to not be unchaste, to not lie, to not be avid for wealth, to not steal, to not be false, enraged, envious, mean, proud, to be loving, kind, merciful and enduringly patient, without wickedness, peaceful and good, loveless of disunion and wanting for reconciliation, to be just, giving towards those in need and to pray and to confess...". These are religious – Christian – norms because their author is God and they regard the relations between men and Him, having an absolute character also because their sanctions are of divine origin and refer to the loss of eternal life. There are however norms belonging to other categories which impose a similar conduct, prohibiting theft, murder, falsehood, not giving assistance to others etc. By committing a theft, the culprit enters three different relations: moral, religious and juridical, it being a conduct regulated by three different authorities. Basically, there is no human action not regulated religiously, while the law regulates a smaller rane of conducts.

In the opinion of some authors[2] the assessment that the Bible, the Koran, the Manarvadharmasastra contain juridical norms and religious precepts is subject to criticism. The confusion, according to these authors, lies in the way the three books are represented, because they refer to the organization of society through the perspective of the Divine not to a separation between the worldly authority and the supernatural authority. A religious interdiction regarding day to day life has a worldly aspect only if the laic institution rests under the sign of a recognized religious institution. In other words, the significance of the Bible, as a whole, does not allow us to remove a normative sentence and to declare it juridical only because it regulates a contractual obligation. Therefore, the norms comprised in the three books are religious and not at all juridical. It may happen however that they be imposed to the population with the aid of the state's force of coercion. When this happens, it means that the state has assimilated the norm and by completing with a laic sanction to be applied in the case of a violation, has formed a relation between state and individual and not one between individual and divinity. We are form that moment in the presence of a juridical norm which has absorbed a value from a religious norm.

In the ancient history of our country, religious has sometimes been confused with the formal source o law. Jurisprudence underlines "the religious influence of the first norms and juridical institutions" which they attribute to "the accumulation in the same hands of religious and state power"[3]. Religion, manifesting as a distinct social force, has exerted a decisive influence upon the state factor, determining it to incorporate in juridical norms the achievement of religious education, on the one hand, and on the other hand it imposed its doctrine precepts on law. This was possible especially in places where a dominant religion and law coexisted in the same geographic area. Many are the texts that highlight this aspect

[1] Ion Craiovan, *Tratat elementar de teoria generală a dreptului,* All Beck Publishing House, Bucharest, 2001, p. 147.
[2] Gheorghe Mihai, Radu Motica, *Fundamentele dreptului. Teoria şi filosofia dreptului.* All Publishing House, Bucharest, 1997, pp. 88-89.
[3] Vladimir Hanga, *Istoria dreptului românesc,* Romanian Academy Publishing House, Bucharest, 1980, p. 62.

regarding the Geto-Dacians. Plato affirms in Charmides that Zamolxes took part in leading the social affairs, intervening whenever the state was confronted with special conflict situations. To carry out the desire to unify the Dacians and to form the first independent state, Burebista resorted to an important religious support. Criton in *Getica* states that the Getae kings fully use the belief in gods, which they systematically advocated in front of their subjects, thus accomplishing "great deeds". Strabo, in his historical work, also affirms that Burebista couldn't have controlled the Getae if he hadn't resorted to the support of the High Priest Deceneu. The latter was worshiped by the Geto-Dacians who, at his request, even accepted to cut their grape vines and live without wine. Jordanes, in turn, stated that Deceneu enjoyed "almost regal power (*pene regiam potestatem*)" in the eyes of the people, situation which enabled the finally successful initiative to introduce written laws[1].

By studying the relation between religion and law one can observe that their point of convergence is moral. Through it, a religious precept transforms into a juridical one or a legal norm justifies its existence. It is a religious moral, whose basis is divine reason, it being just only on this basis. Legal systems whose primary cause is religion dominated the Middle Ages and also exist in the present. For example, the legal system existing today in some Muslim countries is still, in its substance, determined by the Koran. Gradually, there is a secularization of the institutions leading to a more or less pronounced separation between religious and laic functions and institutions, up to the severance between state and church. Even in this latter situation, there is maintained a latent and diffused connection, al a psycho-social level, between law and religion. The relation between the two incorporates many aspects. Firstly, there is an initial cause, gradually turned into influence, in the modern and postmodern epoch expressed through complementarity, whose criterion is moral. The influence between aw and religion is mutual, it being also possible for law to represent a material source for canonic law. If roman or byzantine laws took in their norms sentences and sometimes definitions or explanations of the Christian faith, alongside religious and moral norms or norms regarding the organization of the church, later these very laws would influence the content of canonic law norms. In the modern age, the constitutions, along with various legal regulations, are the inevitable sources of church law. As far as the influence o laic normative idea over religious ones is concerned, one can notice the fact that the German people brought from paganism the idea that even the greatest sins can be expiated through money (*Redemptiones*), that the strongest has the right to impose his will on the weaker and that God favors the one who has the right and intervenes directly, a divine sentence or an ordeal (*Urtheils*) can settle the problem of establishing the truth. In this way, punishments settle by the church were replaced with redemptions. Among the divine trials and ordeals first as the duel and then other legal tests: the ordeal by fire water, cross and communion[2]. In the contemporary era, the influence of religion and canonic law over legal systems can be observed especially in the way some moral precepts derived from the belief in Divinity were incorporated in juridical motivation and the lawmaker's way of reasoning in issuing legal norms. An example may be found in the Constitution of the United States of America, based on principles of which some are inspired by Divine Law. Such a principle, still valid nowadays, is the one established by the Philadelphia Declaration of 1776, which states the fact that "… all men are created equal" and that "they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness". In our country, the 1923 Constitution contains ample regulations regarding the status of the

[1] Ibidem, p. 63.
[2] Eusebiu Popoviciu, *Istoria Bisericească,* vol. I, Bucharest, 1900, pp. 723-724.

Orthodox Church and of the Greek-Catholic Church – which are considered to be, *expresis verbis*, Romanian churches – as well as regarding the status of cults in general. These provisions were a solid formal source of our canonic law. Such provisions are no longer found in the 1991 Constitution, where there is no mention of the Church and its legal structures, of its relation with society and with other legally acknowledged churches from inside the country or from abroad. The inclusion or exclusion of references to the Church in a state's Constitution may offer a clue as to the relation between juridical norms and religious ones. This relation is a very close one in states where the Church maintains a preeminent place in society. For example, I the Republic of Ireland, a law that would permit the free execution of abortions was not passed because it would contradict the precepts, the norms of the Catholic Church.

Conclusions

We cannot analyze moral ad judicial norms and their role in regulating social relations without reference to religious norms. The connection between moral, religion and law is an ancient one. This connection is maintained today, even if more dimmed, it being evident at the level of principles of conduct which govern society.

Bibliography:

Ion Craiovan, *Tratat elementar de teoria generală a dreptului,* All Beck Publishing House, Bucharest, 2001;

Alexandru Vălimărescu, *Tratat de Enciclopedia Dreptului*, Lumina Lex Publishing House, Bucharest, 1999;

Immanuel Kant, *Critica raţiunii practice,* IRI Publishing House, Bucharest, 1997;

Gheorghe Mihai, Radu Motica, *Fundamentele dreptului. Teoria şi filosofia dreptului.* All Publishing House, Bucharest, 1997*;*

John Rawls, *Dreptatea ca echitate, în Teorii ale dreptăţii,* Alternative Publishing House, Bucharest, 1996;

Gheorghe Boboş, *Despre fundamentul moral al dreptului,* Studia Universitaria Babeş-Bolyai, Jurisprudentia, XXXIII, 2, 1988;

Vladimir Hanga, *Istoria dreptului românesc,* Romanian Academy Publishing House, Bucharest, 1980;

Emilia Stere, *Din istoria doctrinelor morale,* Vol.3, Scientific and Enciclopedic Publishing House, Bucharest, 1979;

Cornel Popa, *Praxiologia şi teoria generală a normelor în Filozofie. Materialism dialectic şi istoric,* Bucharest, Didactic and Pedagogic Publishing House, 1975;

Cornel Popa, *Preliminarii la o teorie generală a normelor,* Philosophy Magazine, no. 12/1969;

Tibor Husar, *Morala şi societatea,* Politics Publishing House, Bucharest, 1967;

Eugeniu Speranţia, *Introducere în filosofia dreptului,* Cartea Românească Publishing House, Cluj, 1964;

Codul lui Hammurapi, Traducere de I. Negoiţă, Bucharest, 1935;

Gheorghe G. Antonescu, *Din problemele pedagogiei moderne,* Cartea Românească Publishing House, Bucharest, 1924;

Eusebiu Popoviciu, *Istoria Bisericească,* Vol. I, Bucharest, 1900.

A VIEW UPON THE EVOLUTION OF RELIGIOUS AND JURIDICAL PERSPECTIVES ON WITCHCRAFT

Fodor Gabriela Aura*

Abstract

As part of the cultural and spiritual heritage of the modern world, the belief in magical practices and witchcraft has intersected through time not only with the great current religions, but also with the laic juridical order. Often treated as a form of frau, the practice of witchcraft has recently become a legally recognized profession.

Key words: *law, witchcraft, religious trials, fraud.*

Introduction

The belief in the existence of supernatural forces and their possibility to interact with the human world has always represented a motive of unrest for reason, as a reaction to the unknown. All the more, the ability of a person to control these forces, for this is what witchcraft claims to enable, will generate a social response either of rejection, or of cautious acceptance. The law guarantees freedom of conscience, but it is at the same time it is called to ensure social order, which some practices may endanger. However, occult beliefs are perhaps the most ancient and, on the other hand, all religions imply the existence of the supernatural.

Witchcraft and its relation with official religions

Witchcraft is a concept hard to encase in a universally accepted definition, because the characteristics and practices that could be contained by this vast term have varied not only from one another to another, but also in different regions. In some situations it is even difficult for someone unacquainted with the subject to notice the differences between accepted religious practices and rituals or their effects that could represent forbidden forces. As Mircea Eliade observed, "even a quick examination of Indian and Tibetan documents will convince an unprejudiced reader that European witchcraft cannot be a product of religious or political persecution or a demonic sect devoted to Satan and the promotion of evil…it is also believed about them [yogis and Indo-Tibetan magicians] that they fly through the air, become invisible, kill from a distance, control demons…"[1]. However, what seems to be unanimously accepted regarding witchcraft is the malefic, forbidden character of these interventions in human lives. Nevertheless, there didn't always exist this definite blaming of all forms of its current acceptation manifestations.

Starting with the primitive era, magical practices appear as an answer for the apparitions and phenomena that could not yet be explained. The conviction formed, even if based only on grounds of psychological nature, of security, that certain gestures or graphic representations have the power to prevent some events or sources of misfortune or on the contrary, to generate favorable situations. The efficacy of magic represented a fern belief, even without being of a religious kind. It had a comforting character, and the one who professed it never even thought to transform the world in which he existed into a better one,

* Master's student, Cluj-Napoca Faculty of Law of the "Dimitrie Cantemir" Christian University of Bucharest, aura_fodor@yahoo.com

[1] Mircea Eliade, *Ocultism, vrăjitorie şi mode culturale*, Humanitas Publishing House, Bucharest, 2006, p. 92.

as all major religions suggest to their believers, because it was mostly a logical explanation adequate to the primitive level of understanding the phenomena[1].

As I have mentioned, these belief evolved continuously, but they were still not associate only with a prohibited occupation. The great ancient cultures knew and accepted the existence of magi, prophets or soothsayers. They were almost always members of a sacerdotal college and practiced their profession being regarded with the highest esteem by everyone[2]. Also, the Carpatho-Danubian-Pontic population did not know, in their far past, o distinction between positive and negative magic, the generic name under which they were referred to being "charms" (*farmece*)[3].

Nevertheless, in time there appeared a distinction between those who used supernatural forces for or against people. A good example is provided by the Latin writer Apuleius, who in his book *Metmorphoses or the Golden Ass*, presents an episode where one of the characters must spend the night guarding the corpse of one recently deceased from the witches that could defile it for their magic rituals, but at the same time, an Egyptian prophet brings back from the world of the dead the spirit of the same deceased so justice may be done regarding the circumstances of his death, situation that does not rouse hostile reactions from those present[4].

As to the relation with monotheist religions, for them to impose themselves in front of beliefs deeply rooted in the collective conscience, they will resort to condemning all forms of such rituals, which in time came to be regarded as superstitions. The first Christians will continue to respect the practices inherited from their ancestors for many centuries until the Church stepped in to forbid its followers any connection with the spirit, it remaining the only one with the right to interpret the so-called "visions" of sacred personae[5]. Still, in some cases they opted for the substitution of some pagan elements with new ones, accepted ones, and the old mythical-magic conceptions will be adapted as required by clerical demands. The fire cult will be indirectly accepted in the form of burning candles and spices inside the church the benevolent gds will be transformed in saints, each disease receiving its vanquisher, like St. Medardus for toothaches or St. Lazarus for leprosy, there being a change only in the shape, not in the substance of the old beliefs[6].

In many contemporary cultures, the belief in witchcraft continues to exist. In South Africa, for example, fear of the occult has even intensified, citizens resorting frequently to justice to right a wrong created through such a form of aggression. The witch, in their conception, uses supernatural force in order to harm others or to gain something at the expense of others. Witchcraft is a human, not divine, action, because witches are only mortals acting against their victims out of mundane motivations such as jealousy or revenge[7]. But protection from such persons may be achieved through other means as well, respectively with the help of traditional healers, term used to replace the depreciatory "witchdoctor". The latter in turn claim to draw their powers from supernatural forces and the relations with the

---

[1] Gheorghe V. Brătescu, *Vrăjitoria de-a lungul timpului,* Politic Publishing House, Bucharest, 1985, p. 20-21.
[2] *Ibidem,* p. 81.
[3] *Ibidem,* p. 53.
[4] Fragment consulted in: Apuleius, *Metamorfoze sau Măgarul de aur,* Leda Publishing House, Bucharest, 2005, p. 61-72.
[5] Gheorghe V. Brătescu, *op.cit.* p. 42.
[6] *Ibidem,* p. 144.
[7] Nelson Tebbe, *Witchcraft and Statecraft: Liberal Democracy in Africa,* The Georgetown Law Journal, vol. 96, 2007, pp.190-191,
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010148 (last accessed: September 2011).

ancestors, although most of them use modern means in the treatments[1]. As an example from other states, the pagan religious movement Wicca is not practiced in secret. Some decisions of Unite States Court even acknowledge it as a religion. (Roberts v. Ravenwood Church of Wicca - 1982, Dettmer v. Landon – 1985)[2]. Thus we can observe that magic practices continue to coexist alongside official religions.

According to some anthropologists, religion and magic, despite the important existing differences, are not absolutely opposite, because they have a universally human character, magic establishing a relation between the reasoning man and the supernatural. The differences refer more to their status is society, especially the position of their representatives and their official recognition[3].

Early legal reactions to witchcraft. The Religious trials

Due to the fact that magic practices have known a spectacular development especially in the ancient era, the emergence of frauds and imposters, who sought to gain profit by fraud using different tricks, is favored. It is therefore the state's duty to step in to protect social order. Still, not all forms under which occult arts manifest may be sanctioned, because in the eyes of many they were not simple illusions, but convictions. What had to be punished was the harmful result. The Church, in turn, will make a stand, moderately at first, because witchcraft was considered a vulgar superstition that had to be fought against, not sanctioned. The first Christian monarch to act against witchcraft was Constantine the Great. Throughout the V-IX centuries charms and fortunetelling were tolerated, there only being applied fines, incarceration until repenting or moderate torture, and Pop Gregory VII will forbid the punishment of witches for pestilence or calamities, since these disasters were of divine origin, as punishment for the sin of men[4]. In England there are mentions of witchcraft in medieval laws, but the first laws to treat it as a serious crime appear in the XVIth century, issued by Henry VIII and Elizabeth I. In Hungarian, Polish and Czech legislations there also exist, towards the end of the Middle Ages, documents condemning witchcraft, whose offences were considered as common ones, like theft or assassination[5]. As such, trial against persons accused of witchcraft were solved by secular courts.

In time however, the Church steps in greatly in the legal frame, parallel with a shift in attitude towards witchcraft. Between the XIVth and XVIth century it ceased to be considered as superstition and was seen as the worst form of heresy and on this theme were based the motives of a judicial proceeding. As far as court procedure is concerned, the motive for a trial becomes of great importance. If the motive was faith itself, the Inquisition would handle the case; if there was an offense against men or goods (various damages caused through witchcraft), the case would be solved by a secular court. But the witch strikes at man and his possessions following a "religious" option. That is why interventions from the religious power in the trials will increase, which means that the judicial proceeding against wrongdoers is a civil procedure as far as the punishment of the crime is concerned, but at the same time it is a religious proceeding, because in this way they considered to strike the very

[1] *Ibidem,* pp. 187 and 194.
[2] http://www.religioustolerance.org/wic_rel.htm
[3] *Magia şi vrăjitoria în Europa din Evul Mediu până astăzi,* under the coordination of Robert Muchembled, Humanitas Publishing House, Bucharest, 1997, pp. 327-328.
[4] Gheorghe V. Brătescu, *op.cit.* pp. 151-152.
[5] *Magia şi vrăjitoria,* p. 232.

source of the evil[1]. For the first time an exact sign of equality is placed between heretics and witches in the XVth century, in the case from Arras. This step was thought necessary for eliminating witchcraft because the mere accusation of establishing an anti-ecclesiastic pact would not have been sufficient for the blame of witchcraft, while an alliance with the devil, under the form of the witches' cult, represented a greater threat. The advantage of such a concept was the fact that there was created a common enemy of the Church and of the political power, because the heretic, through his choices, attacks the essence of faith and of the Church, while the witch targeted especially the civil society, persons[2].

But why was it necessary for the two greatest powers of the state to unite in such a way in order to fight against a series of acts considered till not long ago superstitions and, very often, fictitious? Wouldn't it have sufficed to punish fraud or perhaps the disturbance of public order, without the long lasting religious persecution? For this we must take into consideration the historical context in which these doings became widespread. One opinion, which would also explain the state's intervention in the trials, attributes the phenomena to the social, political and economical crisis of the late Middle Ages. In this way, responsibility was transferred from the Church and the state to imaginary demons in human form. Preoccupied with their activities, the impoverished and disgruntled masses blamed the devil's work, and not the corrupt clergy or the rapacious nobility. The latter even emerged as their protectors against the omnipresent enemy[3].

The perspective of Romanian Law the international context

At present, the state, through law, does no longer step in to combat or support a certain religion, but has the duty to respect and guaranty freedom of conscience for everyone, by creating a frame in which each faith can unfold within the limits imposed by public order.

Regarding witchcraft, there are still a series of problems posed to the justice system. Most of the time, what is sanctioned is the promise of a result that is impossible, fictitious, by those who practice magic, in this case being faced with fraud. Faith in itself is no longer a motive for intervention, but its consequences can become a source of conflict. There can arise situations where there request is to sanction someone for an unfortunate event claimed to have been obtained through witchcraft or of punishing those who, convinced of the existence of such forces, act themselves against the alleged witch.

We will analyze these latter cases first, using as examples decisions of South African Courts, to observe the manner in which a person's firm belief can influence legal decisions. The major tendency is to ease punishment for Africans who prove a sincere belief in witchcraft, treating it as a mistake of fact or an extenuating circumstance[4]. This solution would appear to incorporate, even without formal recognition from the state, the traditions belonging to a group in the process of achieving justice. Still, this answer is not without inconveniences. It may lead to discrimination against other forms of faith, which normally wouldn't be considered, sometimes being ridiculed or treated as manifestations of insanity, or that belong to groups without such ancient traditions. Also, it creates a gateway for the excusing private repressions or of forms of religious fanaticism which should not be able to

---

[1] Natale Benazzi, Matteo D'Amico, *Cartea neagră a Inchiziţiei. Reconstituirea marilor procese,* Saeculum I.O. Publishing House, Bucharest, 2001, p.191-192; for a view regarding the way in which these trials were carried out pp. 194-207

[2] *Ibidem,* p. 175.

[3] Marvin Harris, *Cows, Pigs, Wars and Witches. The Riddles of Culture,* Vintage Book, Randon House Inc. New York, 1989, p. 237.

[4] Nelson Tebbe, *op.cit*. p. 211.

justify an antisocial behavior. To this extent, the same South African courts were faced with the necessity to apply harsher punishments in order to discourage a series of brutal attacks on presumed witches[1]. These observations are valid for any faith, acknowledged or not by state or society. An example for this is the much publicized Tanacu case, where among others, in was ruled that the argument of exorcism is not accepted because the Romanian Orthodox Church does not have the notion of exorcizing[2]. Even if such a practice was officially recognized, it shouldn't reflect significantly on a person's legal responsibility, because a society openly declared laic, where equality is guaranteed, cannot be selective in the justification of practices that possess a deep antisocial character based on the belief of the majority. Still, one cannot deny the great influence which a belief has over the behavior of a person, and the subjective side of a crime needs to be studied with care.

The results aren't always as serious as murder and other damages brought especially to a person's patrimony deserve the attention of the authorities. Most states have adopted a wide range of legislation forbidding the practice of witchcraft or have chosen to treat it as fraud[3]. The Romanian system opted for this latter solution. But this implies, according to the legal text, to present as true an untrue fact, namely to invent and to make another person believe in a reality of which the other party is well aware that it doesn't exist. But can we sanction a person who acted with the firm conviction that his practices are real, and the lack of result is due to other forces? We could consider it as an obligation of means. Of course, this generates the almost impossible situation of testing someone's faith, and the "efforts made" are equally impossible to assess objectively. The gullibility of the victim is what those guilty of fraud are betting on, but there is a difference between belief and gullibility. It just thus to act based on result? The persons who resort to such means do it with an initial faith in them, then, when the desired result is not obtained, to resort to the charge of fraud. One might as well accuse the doctor that is not able to ensure the efficacy of the prescribed treatment. Such a case was considered fraud only when the doctor, in order to sell a medicine at a higher cost than the real one, attributed qualities to it which it did not have[4]. The difference would rest in the guaranteed result expressed by the practitioners of witchcraft, the subjective element existent in the assessment of the verity of such promises and the objective element that is present concerning medical treatments, based on the evolution of science and the patient's reaction to those prescribed. But why are we inclined to regard with less suspicion the medical profession? In other cultures or even in the history of our own culture there didn't always exist this security. This is the work of another subjective criterion, namely the belief in a certain infallibility and superiority of science in comparison with religion and of religion in front of other practices which the evolution of society has qualified as superstitions. Trust in reason is the one that dictates in such a case.

Recently, Through Government Decision no. 1352 of 23 December 2010 regarding the approval of the structure of the Classification of Occupations in Romania – the level of base groups, according to the international standard classification of occupations ISCO 08, the profession of fortuneteller (*prezicător)* and those assimilated were officially recognized.

---

[1] *Ibidem,* p. 214.

[2]http://www.infolegal.ro/motivarea-iccj-in-cazul-condamnarii-definitiva-a-preotuluidaniel-corogeanu/2008/07/19/ (last accessed: Octomber 2011).

[3] Fraudulent Mediums Act, England,; Witchcraft Suppression Act, South Arica, tempered by The Traditional Health Practitioners Act; Criminal Law Codification and Reform Act 23 of 2004, Zimbabwe, also tempered by Traditional Medical Practitioners Act 38 of 1981; North Carolina General Statute 14-401.5, declared unconstitutional.

[4] Hunedoara Tribunal, criminal decision 879/1976, R.R.D. no. 5/1977, p. 61 (example taken from din Octavian Pop, *Opinii doctrinare şi practică judiciară privind infracţiunea de înşelăciune,* Mirton Publishing House, Timişoara, 2003, p. 30, footnote 28).

It would appear difficult now to classify as fraud all forms of witchcraft, after receiving such a "vote of confidence" from the state. This makes us wonder however, how these people will be evaluated, in order to sanction possible charlatans. As it has been stated, "that some extraordinary predictions came true…these were exceptions and no fortuneteller could be capable of reading the future every day and at a fixed hour… Admitting that they have a gift, if it exists, it couldn't react on command and to make a profession out of such a gift requires first of all a serious dose of psychology".[1]

Conclusions

Apparently a problem easy to solve, from the perspective of a modern mind that rejects superstitions, the relation between witchcraft and justice is made more difficult through by the intervention of religion. The state, which must insure the peaceful development of social relations, should not sanction based on whether those who resort to those who practice magic got the desired result or not, but at the same time, it cannot completely forbid any form of occult practices because freedom of conscience is guaranteed. The only solution might seem the cautious consideration by courts of a powerful behavioral catalyst in the form of spiritual convictions.

Bibliography:

www.infolegal.ro;

www.religioustolerance.org;

Colette Arnould*, Istoria vrăjitoriei în Occident,* Lider Publishing House, Bucharest, 2008;

Nelson Tebbe, *Witchcraft and Statecraft: Liberal Democracy in Africa,* The Georgetown Law Journal, vol. 96, 2007;

Mircea Eliade*, Ocultism, vrăjitorie şi mode culturale,* Humanitas Publishing House, Bucharest, 2006;

Apuleius*, Metamorfoze sau Măgarul de aur*, Leda Publishing House, Bucharest, 2005;

Octavian Pop*, Opinii doctrinare şi practică judiciară privind infracţiunea de înşelăciune,* Mirton Publishing House, Timişoara, 2003;

Natale Benazzi, Matteo D'Amico*, Cartea neagră a Inchiziţiei. Reconstituirea marilor procese*, Saeculum I.O. Publishing House, Bucharest, 2001;

Magia şi vrăjitoria în Europa din Evul Mediu până astăzi, sub conducerea lui Robert Muchembled, Humanitas Publishing House, Bucharest, 1997;

Marvin Harris, *Cows, Pigs, Wars and Witches. The Riddles of Culture*, Vintage Book, Randon House Inc., New York, 1989;

Gheorghe V. Brătescu*, Vrăjitoria de-a lungul timpului*, Politic Publishing House, Bucharest, 1985.

[1] Colette Arnould, *Istoria vrăjitoriei în Occident,* Lider Publishing House, Bucharest, 2008, p. 301.

ISSUE OF HUMAN EUTHANASIA: LIFE HOLINESS OR RIGHT TO DEATH

Gavrilă Simona Petrina*

Abstract

Statistics have proved that there are people with terminal illnesses, people who endure awful ordeals and who end up praying for their life, but who cannot be helped to keep their dignity through an euthanasia. Both religious beliefs and relevant legislative norms of most law systems contradict "the right to a dignifying death", declared by the supporters of euthanasia and medically assisted suicide.

Key words: *euthanasia, medically assisted suicide,right to life.*

Introduction

If dying is inevitable, the only aspects where the human being can influence his/her destiny, through the permanent range of choices which he/she makes in his/her life, are related to the way and the moment of dying. Most of the law systems restrict this freedom by forbidding euthanasia or assisted death.

Euthanasia is the deliberate act of ending a patient's life, for the purpose of putting an end to his/her sufferance. Medically assisted suicide (SAM) means the death of a patient as a direct result of the "help" provided by a doctor. Irrespective of the arguments used for euthanasia or SAM, the result always consists in killing the patient.

Relevant legal regulations

Statistics have proved that there are people with terminal illnesses, people who endure awful ordeals and who end up praying for their life, but who cannot be helped to keep their dignity through an euthanasia. Nevertheless legal systems provide different solutions for this issue.

The Romanian law forbids this practice by incriminating in the penal code both passive euthanasia (art. 179 of the Penal Code: Facilitation or determination of suicide) and active euthanasia which pertains to the provisions of art. 175 of the Penal Code letter a (felony murder).

The New Penal Code[1], art. 190 incriminates the offence of "Murder at the victim's request", which consists in the murder at the explicit, serious, conscious and repeated request of the victim who has been suffering from an incurable illness or a severe medically certified disability which causes permanent and unbearable sufferance. The punishment stipulated by law is imprisonment between 1 and 5 years.

At present, the Code of medical deontology of 2005 stipulates in art. 121: "Euthanasia is definitely forbidden, i.e. the use of substances or means to cause the death of a patient, irrespective of the severity and the illness prognostic, even if insistently requested by a perfectly conscious patient. ", and in art. 122: "The doctor shall not assist or encourage

* Lecturer PhD. Gavrilă Simona Petrina, „Dunărea de Jos" University Galați, Faculty of Legal, Social and Political Sciences, Law Department, gavrilasimonapetrina@yahoo.com

[1] Law no. 286 regarding the Penal Code, published in the Official Gazette no. 510 of 24.07.2009.

suicide or self-injury by advice, recommendations, instrument lending or provision of means. The doctor shall refuse any explanation or help for this purpose ".

The Declaration of Geneva made by the World Medical Association in 1948 says: "I will maintain the utmost respect for human life, from its very beginnings."

The right to life has been included in the Canadian Chart for Rights and Freedoms. The same principle has been implemented by the European Convention on Human Rights, stating the following: "The right of each person to life shall be protected by law. no person should be deprived of his life on purpose …"

The Recommendation 1418 of the Parliamentary Assembly of the Council of Europe of 1999 regarding the human rights and the dignity of patients with terminal illnesses and of dying patients has noticed for the first time the fact that these persons require special care services, for this purpose requesting member states to protect the right to self-determination of the patients with terminal illnesses and of the dying patients, without admitting the right of a person to choose the moment and the way of his/her own death.

More precisely, the Recommendation 1418 requests Member States to support the interdiction regarding the deliberate deprivation of life for a patient with terminal illness or a dying patient as long as it is well known the fact that the right to life, especially regarding patients with terminal illnesses or dying patients, is guaranteed by Member States in accordance with the provisions of art. 2 of the European Convention on Human Rights; it is also well known that the desire to die of a patient with terminal illness or of a dying patient cannot be a legal justification for performing deliberate actions with the purpose of causing death.

The ethical question remains – could it ever be right to kill even if the purpose is to put an end to one's sufferance? In most countries, the law is very clear. Killing a patient, even if the purpose is to put an end to his/her sufferance, is considered homicide. For this reason, euthanasia is illegal in Canada and in most countries[1]. Some states have preferred an attenuated option for this interdiction, namely they have declared mitigating circumstances in certain conditions[2].

---

[1] In Portugal, art. 134 of the Penal Code incriminates the murder at the request of a patient and art. 133 incriminates compassionate euthanasia; in Cyprus, art. 218 of the Penal Code forbids assisted suicide; The Law of Georgia on Health Care (Legea privind Asistenta pentru Sănătate din Georgia) stipulates in article 151 the interdiction for medical personnel and any other person to perform euthanasia or to take part in it; the Professional code of Italian doctors expressly forbids euthanasia in art. 36, i.e. a doctor, even if at the request of the patient, cannot practice or facilitate treatments able to cause the patient's death; article 45 of the Deontological Code of doctors in Luxemburg forbids euthanasia, stipulating that the doctor has no right to deliberately cause the death of his/her patient; in Albany, the Deontological Code of 1998 stipulated (regarding euthanasia) that comforting sufferance and pain is one of the main duties of a doctor and the precipitation of a person's life end is contrary to medical ethics; the Czech republic forbids in the Ethical Code of the Chamber of Doctors, euthanasia and assisted suicide; euthanasia is expressly prohibited by the deontological and ethical codes of Poland, Portugal and Slovakia.

[2] In Norway, art. 236 of the Penal code forbids any person to assist the one who intends to commit suicide, but art. 235 stipulates a mitigating circumstance, i.e. for the previously mentioned act, the punishment may be reduced or may have an easier form if the author has acted motivated by his/her compassion for a patient with a terminal illness; Danish legislation only allows passive euthanasia consisting in refraining oneself from the very beginning to provide the treatment which extends life or to interrupt it, provided that the patient's treatment is useless and the patient is dying. In Germany, The Federal Medical Association (Asociatia Federala Medicala) has published a guide called "Principles of the Federal medical Association on medical accompanied dying" (Principiile Asociatiei Federale Medicale privind moartea asistata), which contains indications according to which the measures taken for life extension can be omitted or interrupted, at the patient's will, provided that these measures only delay the patient's death and the illness evolution cannot be stopped. In Finland, The Finish Medical Association (Asociatia Medicala Finlandeza) has published a medical ethics book, where passive euthanasia is described and accepted, i.e. when the patient's condition cannot be improved and the patient is dying, the measures taken for life extension can be interrupted.

At present, Netherlands[1] and Belgium[2] have legalized euthanasia. SAM is also legal in Netherlands and Oregon, USA. In Switzerland, assisted suicide has been legalized by a person who does not to medical personnel.

The issue of euthanasia has also been largely debated in Great Britain where, since 2003 to present, four options have been forwarded for a norm which regulates euthanasia and assisted suicide: *Assisted Dying for the Terminally Ill Bill*[3]. Despite the firm support of the "right to death" from associations such as "Voluntary Euthanasia Society" or "The British Humanist Association"[4], as a consequence of social opposition, including the adepts of religions other than Christian ones who have declared their opposition[5].

Determining the issue

The natural and extremely legitimated question is: Why? Which are the reasons for which a natural right, such as the right to life, cannot be accompanied by its correlative, that is: the right to death, the right to a dignifying death? According to the specialty literature, the freedom of a person goes as far as it enters into conflict with the freedom of a fellow man.

No law system incriminates the suicide attempt as, by committing the act, someone else's right to life is not infringed. In such conditions, a question arises: what prejudice can cause the society the choice of a perfectly rational man asking a professional to offer him/her a death as less painful as possible, a choice conditioned by a previous analysis which certifies, according to the current scientific development level, the fact that the patient has all the reasons for having such wishes?

Human life has intrinsic value. Judeo-Christian traditions claim that human beings have been created in God's own image and consequently, human life has dignity, holiness and is inviolable. Traditionally, the principle that no one should kill is based on this dignity and holiness.

One cannot claim in a simplistic way that the reasons for which the law refuses to offer this benefit to suffering people are related to the Christian principle which preaches an attitude of destiny acceptance, irrespective of the difficulties which the human being must endure as, on the one hand, most of the states which forbid euthanasia are laic states and, on the other hand, any state must consider the interests of all its citizens, meaning the interests of those with a religious orientation other than Christianity. Therefore, in order to indicate the

---

[1] In Holland, euthanasia is an offence incriminated by art. 293 of the Penal Code. Nevertheless, the act called "The termination of Life on Request and Assisted Suicide (Review Procedure) Act" (Legea privind sfârşitul vieţii la cerere si sinuciderea asistata - Proceduri de control), adopted by the Dutch Parliament, has stipulated that euthanasia is not considered an offence and shall not be punished if several conditions are met, i.e. the attending physician shall not be punished according to the Penal Code if he/she has strictly observed the criteria expressly provided by law and has reported this act, and an inspection committee shall determine if the legal requirements have been fully observed. The cumulative conditions to be met are: patients' sufferance is unbearable and there are no chances for improvement; the patient's request to be euthanized is voluntary and persistent and it cannot be considered if influenced by others or if the patient suffers from a mental illness or an intoxication with different substances which may influence will; the patient shall be fully aware of his own condition, perspectives and options; the patient's condition shall be confirmed by a second independent doctor; the euthanasia shall be performed in a proper medical manner, in the presence of a doctor and the patient shall be at least 12; note that all patients aged between 12 and 16 years old shall have their parents' approval.

[2] Although Belgium is one of the states which has enacted euthanasia in 2002, the Medical Deontological Code includes explicit regulations regarding euthanasia. Therefore, according to article 95, a doctor cannot deliberately cause the death of a patient and shall not help him/her commit suicide.

[3] http://www.bbc.co.uk/ethics/euthanasia/overview/asstdyingbill_1.shtml.

[4] http://www.humanism.org.uk/campaigns/ethical-issues/assisted-dying.

[5] **See http://www.carenotkilling.org.uk/?show=227:** The Response of the Muslim Council of Britain to Lord Joffe's Bill.

reasons for which the legalization of such practices is rejected, the answer should be more complex and nuanced.

From a non-religious perspective, this principle could be based on the dignity and inviolability of human life, independently from the existence of God. The Hippocratic Oath claims the same principle: "do not prescribe lethal medication, do not give any advice which may cause death, do not cause an abortion". Hippocrates lived in the 5th century BC, thus the principle of life holiness appeared before Christian doctrines.

Pros and cons for euthanasia

Having analyzed the statements of the followers of both currents, the following aspects have been summarized:

The supporters of euthanasia take advantage of the "patient's autonomy", who should be free to make a decision. But the euthanasia regulations, where it is permitted, imply that one or several doctors shall eventually end up making a decision which they should not make, that is, if a patient's life deserves or not to be maintained or shortened. The legalization of euthanasia or SAM shall eventually increase the power of doctors against patients and shall decrease significantly the autonomy of patients. For that matter, since 1806, the German doctor Christoph William Hufeland has claimed that "It is not up to doctors if life is happy or unhappy, if it deserves or not to be lived, and combining these elements into his/her decision, the doctor would become the most dangerous person in the country".[1]

The legalization of euthanasia shall produce a fundamental change in the doctor-patient relationship. The attitude change of the doctors who participate in euthanasia has been eloquently illustrated by the following conversation between Lord McColl, a surgery professor, and a Dutch doctor on the first experience of euthanasia. "Oh!" he said, "we have been agonizing for days. It was awful, anyway, the second case was much easier and the third, I noticed it was "piece of cake"[2].

Some have also claimed that it is immoral to rather let a person die in excruciating pain, thus validating some methods worthy of Mengele and his Nazis, than listen to his/her prayers and end up his/her sufferance, considering that medicine is a science of life up to one point when, due to the lack of means, it becomes a science of death and we – the people – should get used to this reality.

But, one should note that, although euthanasia was initially considered for safe groups such as patients with terminal illness, sooner or later it would be used for other groups of patients, such as old people, disabled patients, patients with emotional issues, with infirmities and even for disabled newborns. A modification of the legislation shall lead to a disregard of human life, generally of the vulnerable members of the society[3]. "Once

---

[1] Cited in Wesley J Smith. *Forced exit. The slippery slope form assisted suicide to legalized murder*. Spence Publishing, Dallas. 2003. p. 84.

[2]http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo051010/text/51010-16.htm#51010-16_spnew0, Lord McColl in a lecture at House of Lords, UK; Lords Hansard, October 10, 2005, .

[3] Three reports elaborated within a 10 year period by Danish researchers show that in Netherlands, at least 1000 patients are euthanized each year without their consent or will. This is murder. The first report, published in 1991 show that in 1000 of the cases (the equivalent of 0.8% of total deaths), the doctors have prescribed medication with the clear intent to precipitate the end without having the explicit request of the patient. The following two reports, of 1996 and 2001, confirm these disclosures.

In 2001, another thousand deaths (0.7% of total deaths) has been recorded, against the will or free consent of patients. (Van der Maas PJ et al.: Euthanasia and other medical decisions regarding life end. Lancet 1991; 338: 669-74. Van der Maas PJ et al.: Euthanasia, medically assisted suicide and other medical practices which precipitate death in Netherlands, 1990-1995.NEJM 1996; 335: 1699-705. Onwuteaka-Philipsen BJ et al.: Euthanasia and other

accepted, euthanasia is incontrollable due to philosophical, rational and practical reasons. Patients would die with and against their wish if such legislations was introduced."[1].

Another argument used against the legalization of euthanasia or SAM is that pressure would be put on sick people and on those who feel that, due to their illness, infirmity and expensive treatment, they have become useless to the society and especially to their relatives.

This is shown in the following example, in Netherlands : A 65 year old woman, suffering from incurable cancer, has been discharged from a hospital. Her doctor talked to her about euthanasia. The patient refused euthanasia on religious grounds. Yet, due to the aggravation of her condition, she became sicker and sicker and she considered herself a burden for her husband. Consequently, she asked for an euthanasia and died. The case was reported, but the prosecutor found nothing wrong.[2].

In a study on patients with terminal illness, those patients with substantial care needs tended to feel that they were an economic burden for the others. This group was more willing to consider euthanasia or SAM[3].

The very autonomy of the wish to die has been contested by the opponents of euthanasia. Thus, the wish to die would be the expression of depression, pain or of a weak control of symptoms, rather than an authentic wish. The wish to die and live shall change frequently in time, especially if the pain or depression is treated.

In Oregon, where SAM was legalized, one of two patients requesting SAM has changed his/her mind after having started treatment, as a consequence of pain control, anti-depressive medication prescription or hospitalization in a sanatorium. Yet, in the case of patients whose symptoms have not been controlled, only 15% of those who have initially requested medically assisted suicide changed their mind[4].

In a report on the patients with terminal illness, a total of 60% would have accepted euthanasia in a hypothetical situation, although only 10.6% have answered promptly that they would choose euthanasia or SAM. The factors associated to the fact that it would be more likely for them to request euthanasia was the need for appreciation, depression, special care needs and pain. At a new interview, in 6 months, half of the patients with terminal illness who have requested euthanasia have changed their mind, whereas an almost equal number has started to consider these interventions[5].

For half of the patients with terminal illness, the momentary wish to die as fast as possible was common, but only 9% of the patients were really aware of the genuine wish to die. The wish to die was stronger for those with unbearable pains, without family support, but the strongest wish was of those with severe depression. Almost 60% of those patients who have expressed their clear wish to die were depressive, whereas depression was found only at 8% of those who have not manifested their wish to die. The author concludes: "The wish to

---

decisions regarding life end in Netherlands in 1990, 1995 and 2001. Lancet online June 17, 2003. http://image.thelancet.com/extras/03art3297web.pdf).

[1] The Declaration of the British Association for Palliative Medicine and of the National Council for Asylum Services and Specialized Palliative Care, a declaration issued against the proposals for the legalization of euthanasia and SAM, 2003.

[2] Dr. Peter Hildering, President, League of Danish Doctors within a lecture at House of Lords, UK, May 7, 2003.

[3] Emanuel J Ezekiel, Fairclough L. Diane, Slutsman Julia, Emanuel L. Linda, *Understanding economic and other burdens of patients and their caregivers*, Annals of Internal Medicine, 2000; 132:451-9.

[4] Ganzini, Linda, Nelson D. Heidi, Schmidt A.Terri , Kraemer F. Dale,. Delorit A. Molly, Lee A. Melinda, *Physicians' experience with the Oregon Death with Dignity Act*. New England Journal of Medicine, 2000, 342: 557-63.

[5] Emanuel J. Ezekiel, Fairclough L.Diane, Emanuel L.Linda, *Attitudes and desires related to euthanasia and physician-assisted suicide among terminally ill patients and their caregivers*. JAMA 2000;284:2460-8

die of patients with terminal illness has been frequently associated to depression – a treatable cause – and this may decrease in time. A documented debate on euthanasia should recognize the importance of psychiatric grounds as well as the change of the sick people's wish to die."[1]

Conclusions

Irrespective of the opinion a person may have regarding the issue of euthanasia and no matter if euthanasia will be enacted in several states or not at a certain moment, the whole humankind should consider the fact that the actual drama of the patients with an incurable or terminal illness is in the psychological plan, therefore most of the times when the patient expresses his/her wish to die, actually he/she does not express the wish to be killed, but the despair of not being supported, loved and helped to die with dignity.

This hidden and profound meaning of the « wish to die » has also been highlighted in the Statement on euthanasia published by the Congregation for the Doctrine of Belief, May 5, 1980: "The prayers of patients with very serious illnesses, who sometimes ask for their death, shall not be understood as the expression of an actual will for euthanasia; most of the times these are requests for help and affection of some disturbed souls ".

Selective bibliography:

Wesley J Smith. *Forced exit. The slippery slope form assisted suicide to legalized murder*, Spence Publishing, Dallas, 2003;

Bregje D Onwuteaka-Philipsen, Agnes van der Heide, Dirk Koper, Ingeborg Keij-Deerenberg, Judith A C Rietjens, Mette L Rurup, Astrid M Vrakking, Jean Jacques Georges, Martien T Muller, Gerrit van der Wal, Paul J van der Maas*: Euthanasia and other end-of-life decisions in the Netherlands in 1990, 1995, and 2001*. Lancet online 17 Iunie 2003;

Ganzini Linda, Nelson D. Heidi, Schmidt A.Terri, Kraemer F. Dale, Delorit A. Molly, Lee A. Melinda, *Physicians' experience with the Oregon Death with Dignity Act*. New England Journal of Medicine, 2000, 342: 557-63;

Emanuel J. Ezekiel, Fairclough L.Diane, Emanuel L.Linda, *Attitudes and desires related to euthanasia and physician-assisted suicide among terminally ill patients and their caregivers*. JAMA 2000;284:2460-8;

Paul J van der Maas; G van der Wal; I Haverkate; C L de Graaff; J G Kester, Chochinov Harvey Max, Wilson G. Keith, Enns Murray, Mowchun Neil, Lander Sheila, Levitt Martin, Clinch J. Jenifer, *Desire for death in the terminally ill*, *Am J Psychiatry*. 1995 Aug;152(8):1185-91;

Loghin Octavian., Toader Tudorel, *Drept penal român. Parte specială*, Casa de editură şi presă Şansa SRL, Bucureşti, 1994;

Pijnenborg L Van der Maas, Johannes M Van Delden, Loes Pijnenborg, Caspar W.N. Looman: *Euthanasia and other medical decisions concerning the end of life*. Lancet 1991; 338: 669-74;

http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo051010/text/51010-16.htm#51010-16_spnew0;

http://www.bbc.co.uk/ethics/euthanasia/overview/asstdyingbill_1.shtml;

http://www.humanism.org.uk/campaigns/ethical-issues/assisted-dying;

http://www.carenotkilling.org.uk/?show=227.

[1] Chochinov Harvey Max , Wilson G. Keith, Enns Murray, Mowchun Neil, Lander Sheila, Levitt Martin, Clinch J. Jenifer, *Desire for death in the terminally ill*, Am J Psychiatry. 1995 Aug;152(8):1185-91.

CONTINGENCIES OF CRIMINAL PROCEDURE WITH RELIGION

Nicolae Grofu[*]

Abstract

The article addresses the issue of the relationship between criminal procedure law and religion in a diachronic perspective. The author analyzes the models of criminal procedure and the evolution of criminal procedure regulations in reference to religious elements.

Keywords: *Criminal Procedure, religion, contingencies.*

Introduction

In the history of criminal procedure exist three models of criminal procedure, which have worked sometimes exclusively, sometimes simultaneously in the same period of time: accusatorial, inquisitorial and mixed. The first two are typical and do not define themselves in opposition to each other[1]*, and the third is eclectic and tries to reconcile the other two.*

1. Preliminary considerations on models of criminal procedure

Criminal Procedure reflects on the one hand, the type of relations between the state, judicial bodies and citizens, and on the other hand, political and social values and cultural needs of a determined community, in a certain historical period of its development. Criminal procedure expresses the balance between the requirements of crime repression and those of individuals' interests' protection, which indicates the weight given to each of these three essential parts of the procedure: prosecution, defense and trial[2].

In the procedural regulations of various laws, these three models were represented only by their essential and constant characteristics, which varied in their content from one period to another and from one legislation to another; in pure form, attributed theoretically, they did not exist almost nowhere in legislative regulations and practical realities[3].

2. Models of criminal procedure in historical perspective

a. Accusatorial system

From a historical point of view, due to its particular characters which do not involve complexity in judicial organizing and in the way a trial is conducted[4], it is considered that the accusatorial procedure was first published, being characterized by the freedom of producing evidence [5], by orality and publicity of the trial [1]. This system was used in different types of ancient laws in the first part of the Middle Ages[2].

---

[*] Associate Researcher, Institute of Legal Research "Acad. Andrei Rădulescu" of the Romanian Academy, University Lecturer, Ph.D. student, "Al. I. Cuza" Police Academy, Bucharest, nicugrofu@yahoo.com.

[1] See Jean Pradel, *Defence du système inquisitoire*, Regards sur l'actualité no. 3/2004, Reformes de la justice pénale, La documentation française, Paris, 2004, p. 57 apud Gheorghiţă Mateuţ, *Tratat de procedură penală. Partea generală*, vol. I, C. H. Beck Publishing House, Bucharest, 2007, p. 145.

[2] See Gheorghiţă Mateuţ, *op.cit.* p. 135.

[3] See Vintilă Dongoroz, *Explicaţii introductive*, in "Explicaţii teoretice ale Codului de procedură penală. Partea generală" by Vintilă Dongoroz, Siegfried Kahane, George Antoniu, Constantin Bulai, Nicoleta Iliescu, Rodica Mihaela Stănoiu, vol. I, Romanian Academy Publishing House, Bucharest, 1975, p. 20.

[4] The process was initiated by a prosecutor who may have been the victim of the crime or of any other person.

[5] Evidence had to be gathered by the accuser, but the person under investigation was entitled to bring counter-evidence and, after his own will, to declare the truth, contrary to the truth or remain silent.

b. Inquisitorial system

In its traditional purity, inquisitorial model is firstly characterized by certain particular features, namely: prosecution, defense and court activities were no longer distinct, preparatory phase of the procedure was part of the process, so that the evidence gathered before the trial could be used during the trial; the body which had to gather evidence and to hear the case - emblematic figure of the Inquisition - had the power to initiate, ex officio, the process; clues were legally regulated, assessed and could not be fought, the suspect could be interviewed to obtain a declaration, even against his will and if a spontaneous confession was refused, the testimony was taken through the use of torture; the procedure was written and secret; there were no parties, but only accused; the case was resolved by the court, in general, without debate[3].

In a rudimentary form, this model was used in some cases even in ancient times[4], but it appears in its typical form with the enhancing of the central power (royalty) in the Middle Ages and with the organization of the canonical (Catholic) inquisitorial justice. This system has seen many variations in different procedural regulations (ordinances, codes) that existed before modern laws.

c. Mixed system

Mixed model combined parts regarded as acceptable and useful of two typical systems: the preliminary phase of the trial is regulated according to inquisitorial system (ex officio procedure, written and secret) and trial phase according to accusers system (oral, adversarial and advertising). This is a partial overlap because there are numerous deviations from typical systems[5]. Regulations under a mixed system were adopted, with the particularities of each, in all modern procedural law[6]. Although through this structure was meant unification, in a happy theoretical synthesis, of inquisitorial and accusers characters, the mixed model has shown some pretty obvious defects[7].

---

[1] Evidence and counter-evidence were discussed oral and in public only before the court, which maintain a passive role, solving the cause according to the gathered evidence and in case of doubt they would appeal to evidence with a sacred character.

[2] See, for details, Vintilă Dongoroz, in *Tratat de drept şi procedură penală*, by Ion Tanoviceanu, 2nd edition, vol. IV, revised and completed by Vintilă Dongoroz, Corneliu Chiseliţă, Ştefan Laday, Eugen C. Decusară, Publishing House Curierul Judiciar, Bucharest, 1927, p. 72.

[3] See, in the same direction, Vintilă Dongoroz, in *Tratat* vol. IV supra cit. pp. 72-73; Vintilă Dongoroz, *Explicaţii introductive* supra cit. p. 21; Gheorghiţă Mateuţ, *op.cit.* p. 145.

[4] Becchanes process offers a live scene of a remarkable exact history regarding inquisitorial criminal procedure law (See, for details, Théodore Mommsen, *Le droit pénal romain*, Albert Fontemoing, Paris, 1907, p. 169).

[5] As an example, criminal proceedings may be started not only in office as in the inquisitorial system, but also to direct action of the victim as in accusatorial system; freedom of evidence is allowed in the preliminary phase, as in the accusatorial system; the possibility of secret meetings during the judging stage, as in the inquisitorial system, etc.

[6] See Vintilă Dongoroz, *Explicaţii introductive* supra cit. p. 21.

[7] For example, in the previous Italian Criminal Procedure Code, in the preparatory phase of instruction, where evidence were collected, was allowed a reduced participation of the defense and, therefore, few guarantees were offered to the people investigated; trial phase, rather than being the central moment of the process where evidence was debated orally, was in fact weak and even crushed by the minutes read, which, being drawn to a close moment after committing the facts, have exerted a great pressure on judges; witnesses heard by the court, when they did not remember precisely the events because of the time elapsed, have often showed that retain their previous statements made during investigations, without the presence of the investigated persons defenders (See, for details, Roberto E. Kostoris, *Un modello di diritto comparato: il Codice di procedura penale italiano (1988)*, Penal Law Review no. 4/2010, p. 148-149).

3. The evolution of criminal procedural rules in relation to religion

The rules of jurisdiction and those relating to evidence and means of evidence have formed the core of the criminal trial, being found in a smaller or larger amount, in criminal laws of all ages[1]. These rules, like the criminal procedure law, have reflected legal concepts of those periods as part of the superstructure[2].

In ancient times, the criminal trial had a religious, sacred and random character, because - in the absence of evidence that could be easily administered or when the significance of evidence was not convincing - was called the divine court (ordeals). Romans were seeking to discover and punish the intention of those who committed *crimen.* For Germans (as Tacitus, *De moribus germanorum)* the result of the offense counted, but as the Romans, most criminal cases were resolved in private; *Wergeld*, became *fredus* and later became *bannus regius* was the fine accompanying damage recovery. Gradually, religious institutions have involved in justice affairs, in order to at one time reserving the right to punish almost all offences, no matter how far from the facts that religion would have been[3].

In England, although was recognized the publicity of the debate, sentencing was of great cruelty[4].

In the Middle Ages, in the Germanic statutes (surrenders), ordeals were gradually replaced by the judicial oath and the judicial duel. During the feudal period both in secular laws (established by ordinance) and in canonical laws (represented by decree) appeared legal evidence, with a default value established before trial[5]. Ordinances of 1539 and 1670 had established the inquisitorial system in laic justice, which remained in force until the French Revolution.[6]

Under the influence of Enlightenment ideas, gradually, was abolished the oath of the accused, legal evidence were restricted, torture was abolished and, therefore, was adopted the principle of freedom of evidence. In this era, special codes containing criminal procedure regulations began to be developed.

The French criminal instruction code from 1808 served as a model to almost all the laws of criminal procedure drafted in the nineteenth century, both in terms of regulations systemization and in terms of elimination of most samples and means of evidence of sacral order or obtained by coercion.

In our country, since the fifteenth century, during the reign of Alexandru cel Bun, there were some regulations, which contain procedural rules in addition to canonical provisions; other precise data are not known because the documents of that era were not kept[7].

---

[1] See Vintilă Dongoroz, *Explicaţii introductive* supra cit. p. 19.

[2] See Vasile Papadopol, in *Principii de drept*, Scientific Publishing House, Bucharest, 1959, p. 531 şi 717. The superstructure is represented by political, legal, religious, artistic and philosophical concepts of the society and by the institutions corresponding to these concepts. Both the state and the law are generated by the economic base, as part of the superstructure of the economic base: the state as a political superstructure and the law as a legal superstructure. Of all forms of the superstructure, the state – is the most powerful and expressive tool - has an important role in defending its economic and social base; it enshrines in laws the rules that preserve the *status quo* determined by its base and through its bodies ensures the application.

[3] See Iulian Teodorescu, *Curs de drept penal şi procedură penală*, new edition revised, annotated and completed, vol. II, Alex Th. Doicescu Publishing House, Bucharest, 1929, p. 12-15.

[4] For example, common penalties in V-X centuries were mutilation, eye removal, confiscation, slavery.

[5] Perhaps the most important evidence was the confession of the accused, which was generally obtained by torture, in both its forms - preparatory matter to obtain testimony and prior issue to show to the other participants.

[6] See Adhémar Esmein, *Histoire de la procedure criminelle en France*, Paris, 1882 apud Vintilă Dongoroz, in Ion Tanoviceanu, *Tratat* vol. IV supra cit. p. 68.

[7] See Iulian Teodorescu, op.cit. p. 19-20.

The old regulations[1] (of Vasile Lupu, in Moldova, and Matei Basarab, in the Romanian Country) contained very few procedural provisions, jurisdiction and the enforcement of criminal sanctions was governed by customary land (customary law) and by the public dignities system[2].

In the Rule of Vasile Lupu, we find, in an early form, the enunciation of principles of criminal procedure: judges from the fair (appointed officials) are made aware that their decisions should be guided only by justice, and if they weren't fully confidence to seek clarification from the county judge. Judge from the fair shouldn't listen to the prince of the Country when work would have seemed as "to work or hang continuously, knowing that he is innocent"[3].

Rules of Criminal Procedure appeared in Prince Alexander Ipsilanti's Pravilniceasca Condică (Rules Ledger) in 1780, rules that were clearly influenced by Enlightenment ideas of the eighteenth century. The habits of the land, and Ipsilanti's ledger excluded any rules on legal evidence and the use of torture; the common evidence in the absence of obvious evidence was the proof of the jury (who swore in favor of the accused or the victim) and the number of which vary by the severity of the offence[4].

Analyzing Pravilniceasca Condică[5], Professor Vintilă Dongoroz has identified ordinances involving and establish indirectly some fundamental principles of criminal law, before all European laws (principles as *nullum crimen, nulla poena sine lege and* personality of the penalty were drafted by the Pravilinceasca Condică nine years before the French Declaration of Human Rights), but also of criminal procedure law (separate courts for each cause of guilt, establishing official principle by ordinances which gave the responsibility to governors – vel armaș, vel spătar, stewards -pursuing the guilty and stopping the chase, even at the request of the victim, without the ruler's consent). In Bucharest, in addition to the two civil departments, was established the Department of guilt, to condemn all crimes and misdemeanors, being led by an armaș. Two other jurisdictions were responsible for requests of little importance: agia, police jurisdiction, was supervising fairs not to make cunning, and spătăria was competent to judge fines and light offences. In counties, stewards receive judicial tasks in criminal matters, joined by a judge, who only in the absence the steward judged correctional affairs; in counties, serious issues remained in the competence of the Department of guilt.

In the nineteenth century, before the joint of Romanian principalities, were drafted rules of criminal procedure, in a restrictive way, as in Part VI of Caragea's Law [6] in 1817 in

[1] Their content has influences of the Roman law, and especially of the Byzantine canonic law.
[2] See Vintilă Dongoroz, *Explicații introductive* supra cit. p. 19.
[3] art. 35 from "Cartea Românească de învățătură de la pravilele împărătești și de la alte județe cu zisa și toată cheltuiala lui Vasile Voevodul și Domnul Țării Moldovei, de multe scripturi tălmăcită, din limba elinească pre limba Românească, în tiparul domnesc s'au tipărit în Mânăstirea a trei Sfetitele în Iași de la Christos 1646" apud Iulian Teodorescu, *op.cit.* p. 21.
[4] See Vintilă Dongoroz, *Explicații introductive* supra cit. p. 19.
[5] Article *Rânduielile privind dreptul penal în Pravilniceasca Condică*, not-published, apud Petre Strihan, In memoriam Vintilă Dongoroz, Studii și cercetări juridice Magazine no. 3/1976, pp. 291-302.
[6] Alexander Ipsilanti's judicial work regarding criminal courts is maintained.

Moldova, or in a developed way, as in Part I of Sturdza's criminal code in 1826, in Moldova[1] and in Barbu Ştirbei's criminal procedure code in 1850[1], in Muntenia.

Organic Regulation, which establishes the institution of the prosecutor for the first time in our country, introduces conciliation courts, which were judging any fact whose punishment did not exceed three days in jail. For Bucharest was created police court and for each county one forensic court, whose decision went on appeal to the court of Bucharest and Craiova and ultimately to the High Court, against the decision of the High Court could appeal to the Lord, which for lack of unanimity of the votes of judges, could send back the cause to the High Court, and the new decision was strengthened by the Lord and became final[2].

The rules of these statutes corresponded to time requirements, which were reflected in the laws of criminal procedure in Western Europe.

After the joint of Romanian countries, the Criminal Procedure Code was adopted in 1864, made after the French criminal instruction code in 1808. This code was in force until 1937, when it was replaced by the Code of Criminal Procedure in1936 which unified the country's criminal procedure law, removing the differences which existed between the law in 1864 and those in Transylvania[3], Bucovina[4] and Basarabia[5]. The Criminal Procedure Code in 1936, with the successive changes made to him after 1945, amendments that have changed the socio-political content of this code and properly normative parts of its contents, remained in force until 1969, when was replaced by the Code of Criminal Procedure in 1968, which is currently in force[6]. The new Criminal Procedure Code [7] shall enter into force on the date set in the law for its implementation, which is in draft posted on the website of the Ministry of Justice and Civil Liberties.

It should be noted that, gradually, the impact of religion on criminal trial fade with the modern codification of criminal procedure and the introduction of procedural rules under the influence of ensuring human rights and fundamental freedoms.

---

[1] This Forensic Code, consisting of 263 paragraphs and including both criminal and criminal procedure provisions, was applied until the entry into force of the Criminal Procedure Code of 1864. For example, in its ¶ 2, are previewed elements of some principles (active role, finding the truth) in procedural case: the judge must carefully judge, even if the person testifies, he must establish convictions and other evidence apart from that confession.

[1] This Code, under strong French influence, was begun in 1838 under the reign of Bibescu, as "Kondika de procedură criminalicească", and was completed in 1850.

[2] See Iulian Teodorescu, *op.cit.* p. 19-20.

[3] In the Criminal Procedure Code of 1896, the Hungarian legislator adopted the accusatorial system, the public action was exercised by the prosecutor, but in some cases the injured party may start a public action independent to the Public Ministry (Iulian Teodorescu, *op.cit.* p. 24-25). Hungarian Criminal Procedure Code is based on the same principles as the Austrian in 1873, in some respects is even more liberal than this one (See Corneliu Chiseliţă, in Ion Tanoviceanu, *Tratat* vol. IV supra cit. p. XV from Preface).

[4] In Bucovina, up to 1775, was applied Moldavian law, and after its annexation to the Habsburg Empire, Austrian law was applied. Austrian Criminal Code of 1803 contains provisions of Criminal Procedure, specific to the inquisitorial model: the procedure was written and secret, the judge could be invested in office, the jury was not known. After 1850, under French influence, proceedings became oral and public; the jury was introduced to trial crimes in the press and the worst (See Iulian Teodorescu, *op.cit.* pp. 24-25).

The Code of 1873 is based on accusatorial principles, which enshrine the separation of judicial functions, of the prosecution and defense, the accuser (public prosecutor) being *Dominus litis;* the detainee had the right to appeal against the orders of arrest and prosecution; evidence were administrated in the session of the trial, preliminary research and instruction had only a preparatory purpose; assessment of evidence was free; nullities which could attack a sentence were listed specifically (See Corneliu Chiseliţă, in Ion Tanoviceanu, *Tratat* vol. IV supra cit. p. XIII-XV from Preface).

[5] In Basarabia until 1812 was applied the Moldovian law, and after its seizure, Czarist Empire legislation, where existed the private accuser, as in the Hungarian criminal procedure. Since 1919, Romanian criminal procedure Code of 1864 has expanded.

[6] See Vintilă Dongoroz, *Explicaţii introductive* supra cit. p. 20.

[7] Law no. 135 of 1 July 2010, published in the Official Gazette no. 486 of 15 July 2010.

De lege lata, references to religion in procedural law exist in the matter of establishing the jurisdiction of the Court of Appeal, after the person's quality (art. 28 [1] Criminal Procedure Code) and witness oath before the hearing[1] (art. 85 Criminal Procedure Code). The witness before the hearing makes the following oath[2]: "I swear to tell the truth and shall not hide anything I know. So help me God!" and in this time he keeps his hand on the cross or the Bible; the witness with another religion than the Christian religion is not bound by the latter aspect. Also, is given the opportunity to change the reference made to the divine in the oath to the religious belief of the witness.

However the witness without religious confession will not give a religious oath, but swears by honor and conscience to tell the truth and not to hide anything he knows. However, witnesses which for reasons of conscience or religion will not say the oath, shall say in front of the judicial bodies that they oblige themselves to contribute at finding the truth.

Conclusions

Examining various criminal procedure rules and their evolution over time, may be supported the theory according to which there is no abstract system of legality that applies to all ages and all stages of history, but each historical period has its specific rules for its legality, which reflects its own legal conceptions[3].

Bibliography:

R. E. Kostoris, *Un modello di diritto comparato: il Codice di procedura penale italiano (1988)*, Penal Law Review no. 4/2010;

Elena-Ana Nechita, Criminalistică. Tehnică şi tactică criminalistică, 2nd edition, revised and enlarged, PRO Universitaria Publishing House, Bucharest, 2009;

G. Antoniu, *Observaţii la proiectul noului Cod de procedură penală (I)*, Penal Law Review no. 4/2008;

Gh. Mateuţ, *Tratat de procedură penală. Partea generală*, vol. I, C. H. Beck Publishing House, Bucharest, 2007;

J. Pradel, *Defence du système inquisitoire*, Regards sur l'actualité no. 3/2004, Reformes de la justice pénale, La documentation française, Paris, 2004;

P. Strihan, *In memoriam Vintilă Dongoroz*, Studii şi cercetări juridice Review no. 3/1976;

V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, Nicoleta Iliescu, Rodica Mihaela Stănoiu, Explicaţii teoretice ale Codului de procedură penală. Partea generală, vol. I, Romanian Academy Publishing House, Bucharest, 1975;

V. Papadopol, in *Principii de drept*, Scientific Publishing House, Bucharest, 1959;

I. Teodorescu, *Curs de drept penal şi procedură penală*, new edition revised, annotated and completed, vol. II, Alex Th. Doicescu Publishing House, Bucharest, 1929;

I. Tanoviceanu, *Tratat de drept şi procedură penală*, 2nd edition, vol. IV, revised and comleted by V. Dongoroz, C. Chiseliţă, Şt. Laday, E. C. Decusară, Curierul Judiciar Publishing House, Bucharest, 1927;

[1] See, for details regarding witnesses hearing tactics in the criminal process, Elena-Ana Nechita, *Criminalistică. Tehnică şi tactică criminalistică*, 2nd edition, revised and enlarged, PRO Universitaria Publishing House, Bucharest, 2009, pp. 113-116.

[2] The minor under the age of 14 does not testify under an oath, but he is warned to tell the truth.

[3] See, in the same sense, George Antoniu, *Observaţii la proiectul noului Cod de procedură penală (I)*, Penal Law Review no. 4/2008, p. 16.

Th. Mommsen, *Le droit pénal romain*, Albert Fontemoing Publishing House, Paris, 1907;

A. Esmein, *Histoire de la procedure criminelle en France*, Paris, 1882.

*** Law no. 135 of July 1, 2010 on the Criminal Procedure Code, Official Gazette of Romania no. 486 of July 15, 2010;

*** Law no. 29/1968 - Criminal Procedure Code, published in the Official Gazette no. 145-146 of November 12, 1968;

*** Criminal Procedure Code of Charles II, published in the Official Gazette no. 66 of March 19, 1936;

*** Criminal Procedure Code, published in the Official Gazette on December 2, 1864;

*** Cartea Românească de învăţătură de la pravilele împărăteşti şi de la alte judeţe cu zisa şi toată cheltuiala lui Vasile Voevodul şi Domnul Țării Moldovei, de multe scripturi tălmăcită, din limba elinească pre limba Românească, în tiparul domnesc s'au tipărit în Mânăstirea a trei Sfetitele în Iaşi de la Christos 1646.

PROTECTION OF CONSCIENCE AND RELIGIOUS FREEDOM IN THE LABOUR RELATIONSHIPS

Ada Hurbean*
Laura Cetean-Voiculescu**

Abstract

Theme analyzed addresses discrimination in labor relations, with special regard to freedom of religion and conscience and how this fundamental freedom is regulated and protected in individual labor law. In this context, it seems appropriate to analyze the conscience clause - one of the optional clauses which can be negotiated and inserted in the individual labor contract, but also the consequences of violetion of the employee's religious and conscience freedom.

Key words: *labor realtions, antidiscrimination principle, conscience clause, religious freedom.*

Introduction

It is undeniable that the legal and the religious, moral norms are indissolubly legal. Reported to the history of right, it can be observed that, for a long period of time, there was no difference between the two norms: the legal norm appeared as a religious rule, mainly to assure its mandatory character, in lack of some state instruments of constraint.

The first distinction between the two concepts we find it in the Roman law, because the legal norms were designed by the term of Jus, and the religious ones by Fas. Even in these conditions, in the old times of the Roman law, the legal norms were covered by a religious meaning, both as a linguistic expression and as for its content. The religious and the legal norms were considered to be the result of the same divine will, and therefore their content expressed, using moral-religious concepts, only that voluntas Dei, imposed as lex vitae.

In the Roman law, too, we find the forerunner of the individual employment contract and that of the labour relationships – Locatio operarum, namely the contract used for hiring the services of a free man. Being a consensual contract, the renting contract from the Roman law represented the most evaluated form that the technique of creating the obligations[1] has known, in balance with the solemn contracts, dominated by a rigorous formalism shaped by the spelling of some magic-religious formulas.

Otherwise, this regard on the labour relationships was initially consecrated by the very old Civil Code, the individual employment contract being regulated together with the corporate and transport contracts, as a form of renting the works (art. 1413 Civil Code, known under the nomination of renting work contract)[2]. Only in 1929, it was distinctively stipulated by the law of labour contracts.

* Ph.D. Lecturer of Law and Social Sciences Faculty, "1 Decembrie 1918" University of Alba Iulia, mail address adahro@yahoo.com
** Ph.D. Lecturer of Law and Social Sciences Faculty, "1 Decembrie 1918" University of Alba Iulia, mail address lauravoiculescu@yahoo.com.
[1] E. Molcuț, D. Oancea, *Drept roman*, Universul Publishing House, Bucharest, 1993, p. 274.
[2] Matei B. Cantacuzino, *Elementele dreptului civil*, edited by Gabriela Bucur, Marian Florescu, All Educațional Publishing House, Bucharest, 1998, p. 646.

Nowadays, the labour relationships that appear, in principle, based on a labour contract, benefit of stipulations according to which the employee's fundamental freedoms and rights are defended by corroboration with the disposals of the Basic Law, on one hand, and with the international and European regulations in matter, on the other hand. Thus, the Romanian Constitution, in art. 29, consecrates the principle of free conscience, according to which "the freedom of conscience and of opinion, as well as the freedom of religious beliefs shall not be restricted in any form whatsoever. Nobody can be compelled to adopt an opinion or to join a religious cult, against his beliefs", and "the liberty of conscience is guaranteed; it shall appear under the spirit of tolerance and mutual respect". Under these circumstances, the Labour Code stipulates the equality of treatment and the forbidden of discrimination, inclusively that based on religious criteria, using the terminology and the notions consecrated by the international and European norms. In concrete, art. 5 of the Labour Code expressly forbids both the direct discriminations and the indirect ones towards an employee, based on "criteria of sex, sexual orientation, genetic characteristics, age, nationality, race, colour, ethnic, religion, political option, social origin, handicap, family situation or responsibility, union membership or activity". The general character provisions of the Labour Code must be corroborated with the disposals of the Emergency Ordinance no. 137/2000 (republished) concerning the prevention and sanction of all forms of discrimination. This Ordinance defines in art. 2 the notion of discrimination as being: any act of differentiation, exclusion, restriction or preference based on one or more criteria of discrimination, including the religious one that has as purpose or effect the restriction or removing the recognition, use or exertion, under conditions of equality, of fundamental human rights and freedoms, or of rights recognised by law, in any field. Also, provisions, criteria or practices, apparently neutral, which disadvantage certain persons towards other persons, are considered to be discriminatory, unless these provisions, criteria or practices are objectively justified by a legitimate purpose, and the means used are necessary and adequate.

In case of equal treatment in the individual labour relationships, in our opinion, there must be followed two directions: firstly, it must be assured the legislative framework to allow the provision of legal equality both for the employers and for the employees, and secondly, the employer's obligation not to commit any act of direct or indirect discrimination towards an employee, based on criteria of sex, sexual orientation, genetic characteristics, age, nationality, race, colour, ethnic, religion, political option, social origin, handicap, family situation or responsibility, union membership or activity.

As we have already shown, the general legislative framework is ensured by the general disposals in matter, it is found in the principles that govern the labour relationships (namely the principle of non-discrimination), but also in special disposals of the Labour Code. Thus, the equal treatment based on religious criteria is provided by art. 139 of the Labour Code too, that regulates the legal holidays. More exactly, according to actual stipulations, the legal holidays free of work coincide (excepting 1st and 2nd of January, 1st of May and 1st of December) with the major Christian religious holidays, respectively: the first two Easter days, the first two Pentecost days, the Assumption, the first two Christmas days. More, it is stipulated that are considered free, holidays, two days for each of the three anual religious holidays, declared so by the legal religious cults, other than the Christian ones.

Employer's obligation of not applying discriminatory treatment, regardless the employee's religious beliefs, refers to the conclusion, modification, suspension or ending the legal labour rapport. It also concerns the establishment of duty's attributions, of the wage, the professional promotion, and disciplinary sanctions.

In the same context, it must be mentioned the possibility of including in the individual employment contract an additional clause, namely the conscience clause. We find ourselves in front of a clause exclusively regulated by the practice in matter, but accepted as thus, based on art. 20 ¶ 2 of the Labour Code.

The conscience clause is that clause, which, once introduced in the individual employment contract, entitles the employee to not accomplish a legal work order, in so far as, if it were implemented, it would conflict with the various options determined by the employee's conscience.

The typical situation of including and application of this clause applies in the case of media employees producers. Yet, other employees, such as those in the cultural creation, scientific, medical and legal area (legal advisers), can not be excluded.

From the employee's point of view, the object of the conscience clause can be based, in our opinion, on the following reasons: religious (for example, the refusal to write critically about the legal cult, which includes the concerned employee, or to make atheistic propaganda); morals (for instance, the refusal to write materials which produce an apologia for some life habits contrary to the traditions of the Romanian people or to a certain local community); political (i.e., the refusal to write critically about the ideology or political platform of a particular political party); scientific (such as the refusal to participate in development of works in the applied or fundamental research, judged as non-productive, even harmful or dangerous to humans or human society[1]); courtesy (such as the refusal to use harsh expressions or descriptions at one/some people).

In turn, the employer recognizes the employee's right to refuse to execute a legal work order, to the extent that, in one case or another, the conscience clause shall interfere.

In principle, the non-performance of a legal work order can (at the employer's discretion) lead to disciplinary sanction of the concerned employee. But the existence of the conscience clause in the individual employment contract can provide protection to the employee against a disciplinary liability, in a given situation. In each case, the employee must however prove with pertinence that he can not execute the legal work order because of his conscientious objection. If the employee fails to prove, conclusively, that there is such an obstacle, he shall either proceed to the execution of the legal order given by the employer, or (if he still refuses) he shall be liable to be disciplinary sanctioned.

Of course, the illegal work order shall not be executed by the employee, in any case. So, *the conscience clause regards exclusively the employee's possibility to refuse the execution of a legal work order, without incurring disciplinary consequences*. In a sense, the conscience clause can be treated as a (contractual) clause of free disciplinary liability of the concerned employee.

No employee can invoke the conscience clause (the objection) in order not to carry out a legal obligation imposed by a peremptory norm (for example, the employee may not be absent from work in a given day, when legally it is a working day, just by claiming the conscience clause); no employee can invoke a mere difference of opinions between him and the employer (in which case he must carry out the employer's order if it is legal), but only the conscience clause[2].

If the employee considers that he has been the victim of a discriminatory act from the part of the employer, then an individual employment conflict will emerge, conflict that can be resolved through mediation accordingly to art. 2 ¶ 10 of the Government Ordinance no. 137/2000. Otherwise, it can be legally resolved. Anyway, as a consequence of a

[1] In this respect, see R. Gidro, *Opinii asupra unor dispoziţii din proiectul Codului muncii cu privire la încheierea şi conţinutul contractului individual de muncă*, R.R.D.M. no. 1/2002, p. 25.

[2] See G. Couturier, *Droit du travail, Les relations individuelles du travail*, Presses Universitaires de France, Paris, 1990, p. 354.

discriminatory act, it can emerge both individual and collective labour conflicts, respectively, conflicts of interests or rights[1].

The establishment of the discriminatory acts towards an employee or a group of employees can lead: to the disciplinary liability of the responsible for the discriminatory act, to the patrimonial liability of the employer, based on art. 69 of the Labour Code, or to the penal liability according to 137/2000 G.O., republished.

Furthermore, the discriminated employees have the right to demand the return to the situation previous to the discriminatory situation or the repeal of the situation created through discrimination.

If we refer to the discriminatory denial of employment, than the return to the initial situation also involves the rescission of the modality used by the employer to verify the employee's skills. Accordingly, the employer will be obliged to organize another competition or exam, so as the discriminated complainant to take part, too.

If the discriminatory act is done during the labour relationships, the employer would be obliged, depending on the case, to pay the remaining part of the wage, to establish the appropriate duty tasks, to respect the employee's right to take part to a professional training, to apply the disciplinary sanctions proportional with his guilt, and not based on discriminatory criteria, and, in principle, to elude the discriminatory act and its consequences[2].

On the other hand, the persons who consider to be discriminated, including the employees too, may notice the National Council for Combating Discrimination[3] that represents the state authority concerning the discrimination problems. It is an autonomous authority, with legal personality, under parliamentary control and a guarantor for the obedience and application of the non-discrimination principle, according to the applicable internal legislation and the international documents signed by Romania, too.

The Council's writ may be done within one year from the deed, or from the date at which the concerned person might have found out about it. The Council settles the writ by decision of the Steering Board, and the parties' summon is compulsive.

The concerned person has the obligation to prove the existence of some deeds that allow assuming the presence of a direct or indirect discrimination. The person against whom was formulated the writ is obliged to prove that his acts does not represent a discrimination. Any kind of proof can be invoked in front of the Board, including video and audio records or statistical data.

The Steering Board's decision to reconcile the writ is adopted within 90 days from the writ, and it is communicated to the parties within 15 days from its adoption and it leads effects from the communication day. The decision may be attacked at the contentious business falling within the competence of the administrative courts, as stipulated by law.

In this particular case[4], the National Council for Combating Discrimination was noticed by the petitioner (natural person) to note a discriminatory situation created by the provisions of art. 134 of Law no. 53/2003 (Labour Code), on the granting of holidays that are not working to people belonging to non-Christian religions. Therefore, the petitioner claims that the mentioned article produces a discriminatory effect for the persons belonging to Christian denominations, compared to those from non-Christian religions recognized by the

[1] I. T. Ştefănescu, *Tratat de dreptul muncii*, pp. 525-526.
[2] I. T. Ştefănescu, *op.cit.* p. 526.
[3] Governmental Decision no. 1194/2001.
[4] File no. 262/2008, petition no. 5017/28.03.2008 addressed to the National Council for Combating the Discrimination, petitioner ABM, plaintiff the Ministry of Labour, Family and the Equal Opportunities.

state. Thus, he considers that, the two days plus the two annual religious holidays given by the letter f) of ¶ 134 of the Labour Code[1], exclusively for the citizens belonging to non-Christian religions recognized by the Romanian state can be considered only in addition, representing a privilege and an unconstitutional discrimination. Furthermore, the petitioner considers that, the solution for this discriminatory situation would be the change of the law's text, so that it would explicitly and unambiguously stipulate the same total annual legal not-working holidays for all citizens, regardless their religious denomination.

The Steering Board notes that, in fact, the petitioner notifies the National Council for Combating Discrimination on an ipso jure situation resulting from the Labour Code. More exactly, the National Council is called to rule on a generic circumstance resulting from a law that establishes, according to the applicant's view, discriminations, contrary to art. 16 of the Romanian Constitution.

However, the complaint, as it is made, as well as the defendant's allegations, are not likely to highlight any element which would allow, in terms of the purpose or of the created effect, the retention of a factual behaviour of restriction, preference, exclusion or distinction, applied directly to the complainant, in relation with persons in similar situations, thanks to a determined criterion, and that had as legal consequence the damage of a legal right provided by law for his benefit.

Also, correlative to the petition's object and reported to the created discrimination, according to the petitioner, through the provisions of art. 134 ¶ 1 of the Law no. 53/2003, the Steering Board does not analyse *sui generis* the establishment manner, by law, of some rights for certain categories of persons differently from other persons or categories of persons. From this point of view, the examination of per se legislative solutions, chosen by the legislator and their compliance with the principle of equality stipulated in the Romanian Constitution, rest with the Constitutional Court.

Conclusions

Finally, we must specify that the notification by the employee of the court is not conditioned by a previous appeal of the National Council for Combating Discrimination. The application is exempt from judicial tax. The deadline for entering the request is three years and it begins on the date of the offense or on the date on which the person concerned may have been aware of committing it. Quoting the National Council for Combating Discrimination, as an expert, is mandatory.

The interested party has the obligation to prove the existence of some facts which allow supposing the existence of a direct or indirect discrimination, and the person against whom it was filed the complaint has the burden of proving that the facts do not represent discrimination. Any evidence may be invoked in front of the court, including audio and video records or statistics.

Bibliography:

Ada Hurbean, *Individual employment contract special stipulations other than those provided by the labour code*, CKS 2011-eBook, CD Rom, Pro Universitaria Publishing House, indexat EBSCO, 2011;

Lucia Uță. Florentina. Rotaru, Simona Cristescu, Codul muncii adnotat. Vol. I. art. 1-153, Hamagiu Publishing House, 2008;

[1] "Two days for each of the two annual religious holidays, other than the Christian ones, for the persons belonging to those religious denominations".

Ion Traian Ştefănescu, *Tratat de dreptul muncii*, Wolters Kluwer Publishing House, 2007;

Matei B. Cantacuzino, *Elementele dreptului civil*, Edited by Gabriela Bucur, Marian Florescu, All Educaţional Publishing House, Bucharest, 1998;

Emil Molcuț, Dan Oancea, *Drept roman*, Universul Publishing House, Bucharest, 1993.

SEDUCTION. PAST, PRESENT AND FUTURE

Gheorghe Ivan[*]
Mari Claudia Ivan[**]

Abstract

The new Penal Code of Romania (Law 286/2009) no longer incriminates seduction, thus giving expression to the criticisms made at its address and to the opinion that seduction is considered as a total anachronistic incrimination.

In this study the authors have shown the need to carry on incriminating the act of seduction.

Key words: *seduction, offence, the new penal Code of Romania.*

Introduction

From ancient times man has been preoccupied with protecting the basic social relations so as to ensure his survival. Among these, there have been mentioned those relating to the sexual freedom of females that have not reached the age of 18, with a great impact on the development of their personality (both psychological and moral)[1].

I. Legislative tradition with regard to this matter.

Article 424 of the 1936 Penal Code of Romania incriminated the seduction as follows: The male person who, by formal promises of marriage, determines a female person under 18 years old to have sexual intercourses with him, commits the offence of seduction and shall be punished with correctional imprisonment for up to 1 to 3 years.

II. Analysis of the offence as stipulated by the Penal Code of Romania in force (1969 Penal Code).

1. Concept and definition.

The offence consists of the deed of a male person who, by promises of marriage, determines a female person under 18 years old to have sexual intercourses with him (art. 199 1st ¶, Penal Code).

2. Special juridical object.

The offence of seduction has as special juridical object the social relations related to the sexual liberty of the female person who is under 18 years old.

3. The Material object is represented by the body of a female person under 18 years old.

4. The active subject can be only a male person. The active subject must have the physiological capacity to perform a normal sexual intercourse. Should this condition be fulfilled, the age and the marital status of the male person are irrelevant. A minor male person can be the active subject of the seduction offence, despite the fact that he is not

[*] Science Research Associate, "Andrei Radulescu" Institute for Judicial Research within the Romanian Academy; Ph.D. Assistant Professor, "Dunarea de Jos" University of Galati, Faculty of Judicial, Social and Political Science; Chief Prosecutor – Galati Regional Department, National Anticorruption Directorate; ivan_gheorghe_p@yahoo.com; ivan.gheorghe@ugal.ro.

[**] Bachelor of Laws, University of Bucharest, Faculty of Law; MA student, "Titu Maiorescu" University, Faculty of Law, Bucharest; mariclaudia_i@yahoo.com

1. Gheorghe Ivan, *Criminal Law. Special Part. With Reference to the New Penal Code*, C. H. Beck Publishing House, Bucharest, 2010, p. 203.

allowed to get married[2]. Even if the minor male person may be, in principle, subject of the seduction offence, however it is necessary to establish, in each case, if the promises made by him have or have not a decisive role in obtaining the consent of the female person, because it is possible that these promises shall not have been taken seriously due to the age of the person making them. In this case they do not play a decisive role and the deed will not represent an offence of seduction. A married man may be the subject of the seduction offence, taking the deception committed by a married man to be even more obvious, more cynic than the deception committed by a single man[3]. The seduction offence is however removed if the minor female person knew that the perpetrator was married, because, in such a case, the promises of marriage made could not be taken seriously and, consequently, they do not play a decisive role in obtaining her consent for a sexual intercourse[4].

The penal participation is possible under the form of instigation or complicity. The instigator and the accomplice may be even female persons. The co-authorship is not possible because the seduction offence is a "single author" offence, which is perpetrated *in persona propria* (in ones own person) or *manu propria* (with one's own hand).

5. The passive subject is the minor female under 18 years old. With regard to the age of the victim, the lawgiver establishes only the superior limit and not the inferior one. Should the victim be under 15, only the offence of sexual intercourse with a minor shall be considered, stipulated by art. 198 Penal Cod, even if the determination to sexual intercourse has been made by promises of marriage[5]. Should the minor be between 15 and 18 years old and the promises of marriage had been made by a person mentioned under the art. 198, 2nd par. Penal Code, the seduction offence only shall be considered, the provisions of art. 198 Penal Code having a subsidiary character towards the provisions of art. 199 Penal Code[6].

The fact that the minor female had or had not sexual intercourses is of no interest. If the minor female is widow, married or in divorce, there can be no seduction offence because the promise of marriage that could be done in this case is irrelevant with reference to the existence of the offence[7].

6. Objective side

For the existence of the offence it is required, in first place, a sexual intercourse, meaning the conjunction between the male and the female genital organ. This sexual intercourse must be made with a female person under 18 years old. The perpetrator must persuade the victim to have a sexual intercourse and this determination must be made by promises of marriage and not by other promises or means. Thus, the promises of marriage

2. Iasi Regional Law Court, criminal department, decree no. 148/1966, Romanian Law Review no. 12/1968, p. 161.
3. Traian Pop, *Comments*, in Const. G. Ratescu, I. Ionescu-Dolj, I. Gr. Perieteanu, Vintilă Dongoroz, H. Aznavorian, Traian Pop, Mihail I. Papadopolu, N. Pavelescu, *Carol II Penal Code annotated, Tome II, Special Part,* Socec & Co. Library and Printing House, Bucharest, 1937, p. 656.
4. Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Rodica Mihaela Stănoiu, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Victor Roşca, *Theoretical Explanations of the Romanian Penal Code. Special Part*, Tome III, Romanian Academy Publishing House Bucharest, 1971, p. 377.
5. In the same way, Supreme Court, criminal department, judgment no. 2132/1974, Romanian Law Review no. 3/1975, p. 63. To the contrary, Constanța County Law Court, judgment in criminal case no. 1474.1974, Romanian Law Review no. 3/1977, p. 55, with *Note* by Octavian Cojocaru (the Court has decided that there has to be retained a concurrence of several offences between the seduction offence and the offence of sexual intercourse with a minor).
6. Gheorghe Ivan, *Criminal Law. Special part*, C.H. Beck Printing House, Bucharest, 2009, p. 193. For the concurrence of several offences, see Valerian Cioclei, *Criminal Law. Special Part. Offences against the person*, Universul Juridic Printing House, Bucharest, 2007, p. 217; Valerian Cioclei, *Criminal Law. Special Part. Offences against the person*, C. H. Beck Printing house, Bucharest, 2009, p. 263.
7. In the same way, Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Rodica Mihaela Stănoiu, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Victor Roşca, *Theoretical Explanations of the Romanian Penal Code. Special Part*, Tome III, second edition, Romanian Academy Publishing House and All Beck Publishing House, Bucharest, 2003, p. 356.

should play a decisive part in getting the victim's acceptance for the sexual intercourse. In order to play this role the promises, even insincere, must be made apparently in all seriousness. The decisive role of the promises of marriage is established, in each case, in comparison with the victim and the perpetrator, with the social environment they are coming from, with their level of instruction and education, with the circumstances these promises have been made, with the way they have been exteriorized etc.

As a rule, the absence of entering matrimony is considered as a proof of the false character of the promises made. However, should these promises have been made in good faith and the matrimony not been entered due to circumstances non-imputable to the perpetrator, the deed is not considered as a seduction[8]. The judicial practice functions in this way as well. Thus, it has been shown that there is an offence of seduction if the defendant, after convincing the minor female to have sexual intercourses, started to avoid her and told her that he would not longer marries her[9]. There is no case of seduction offence if the non-accomplishment of the promise of marriage was due to the victim's refusal who initially agreed with it[10]; or if the matrimony did not take place because of the parents' opposition[11].

In the same way, it has been decided that there is no case of seduction offence, without the subjective side of the offence, should the defendant have made promises of marriage - as a result of which the minor female had a sexual intercourse with him – in good faith, but he subsequently discovered that the victim suffered from a disease and she had kept it quiet, thus justifying the withdrawal of the initial promise to enter into matrimony[12].

The immediate effect is a violation of the liberty for a sexual life of a female person under 18 years old.

The causality connection results from the materiality of the deed (*ex re*), proving it is no longer necessary.

7. The subjective side. The offence is committed with intention. Committing it by fault is inconceivable. The perpetrator is aware that he can persuade, by his promises of marriage, an under age female to have sexual intercourse with him. If he did not know the age of the minor female for a certainty, but still he had all the reasons to assume that she was under age, and still committed the deed, he is guilty of having committed the offence with indirect intention. However if he was misleaded by the victim with regard to her age, meaning that she made him believe that she was older than 18, the error of the perpetrator removes the subjective element, the guilt and the criminal aspect of the offence.

For the subjective element of the offence to exist, it is necessary that the promise of marriage should have been made by the perpetrator in order to determine the female person to have sexual intercourse with him and in bad faith, meaning without the intention of keeping his promise. The bad faith may result from the pre-existence of an impediment to enter matrimony, known only by the perpetrator, from the lack of any objective reason which could make the matrimony impossible. Should the promise of marriage be made without the purpose of determining the minor female to have sexual intercourse and in no susceptible

8. In the meaning of the a/m information, see Octavian Loghin, Avram Filipaş, *Romanian Criminal Law. Special Part*, Şansa Printing and Press House S.R.L. Bucharest, 1992, p. 75.

9. Satu Mare County Court, judgment in criminal case no. 301/1981, Romanian Law Review no. 5/1981, p. 70.

10. Supreme Court, criminal department, judgment no.1862/1971, in Vasile Papadopol, Mihai Popovici, *Criminal alphabetical repertoire of judicial practice for 1969 – 1975*, Scientific and Pedagogic Printing House, Bucharest, 1977, p. 393; Timis County Law Court, judgment in criminal case no. 75/1975, Romanian Law Review no. 7/1975, p. 72.

11. Supreme Court, criminal department, judgment in criminal case no. 2581/1955, Book of 1955 Decrees, Tome III, p. 105; Timis County Law Court, judgment in criminal case no. 75/1975, Romanian Law Review no. 7/1975, p. 72.

12. Supreme Court, criminal department, judgment in criminal case no. 8/1965, New Justice no. 8/1965, p. 165.

way to be taken seriously by the victim and if has been ascertained that there is no connection of causality between the promise of marriage and bringing the minor female to have sexual intercourse, than there will be no guilt established. There will be also no guilt if the promise of marriage was sincere, but the matrimony could not be entered due to the victim's fault. This situation may arise when the minor person would refuse herself the matrimony or she would not comply with the legal conditions to enter into a marriage[13].

8. Forms of offence.

The attempt is not punished. *Consumption* is to be considered at the moment of having the sexual intercourse.

The judicial practice underlines the fact that the deed of the defendant who, by false promises of marriage, determines a female person under 18 years old to have sexual intercourse repeatedly for a period of time, is considered as a seduction offence in continuing form stipulated by art. 199 Penal Code with the enforcement of art. 41, 2nd ¶ of Penal Code, even though the promises of marriage have not been reiterated each time the sexual intercourse occurred[14].

9. Sanction. The punishment is 1 for up to 5 years of imprisonment.

10. Legal proceedings. The penal action sets going ex officio.

The reconciliation of the parties removes the criminal liability (art. 199, 2nd ¶ Penal Code). This reconciliation does not presume the marriage between the perpetrator and the victim, even though it also does not exclude it. Reconciliation of the parties according to law (art. 132 Penal Code) is enough. Therefore, the unilateral and extra-judicial declaration of the injured party to be reconciled with the defendant is not enough; such a declaration takes effect only if it is a statement given before the court instance and through the mutual consent of the parties[15].

III. The outlook of 2004 Penal Code of Romania. The same conception – as of the Penal Code lawgiver in force (1969) – had been embraced by the 2004 Penal Code lawgiver, code which has no more entered into force and has been abrogated by the new Penal code[16].

IV. The vision of the new Penal Code of Romania. The new Penal Code (Law 286/2009[17]) no longer incriminates seduction, thus giving expression to the criticisms made at its address and to the opinion that seduction is considered as a total anachronistic incrimination, based on the fact that it protects the institution of marriage in its formal aspect, and on the other hand, literally, the state of virginity of the minor female[18].

---

13. In the meaning of the a/m information, see Vintilă Dongoroz and collaborators, *the a/m work*, Tome III, 2nd edition, pp. 357-358.

14. Caras-Severin County Law Court, judgment in criminal case no. 656/1971 (with Critical Note by I. A. Munteanu and an approving Note by C. Lungu), Romanian Law Review no. 1/1974, p. 150; idem, Vasile Papadopol, Mihai Popovici, *Criminal alphabetical repertoire of judicial practice for 1969 – 1975, a/m work*, pp. 393-394.

15. Bacau County Law Court, judgment in criminal case no. 157/1979, Romanian Law Review no. 1/1980, p. 70. By the acceptance of the referral in the interests of the law, the supreme instance has decided that the cessation of the criminal trial for the offences involving the removal of the criminal liability through reconciliation of the parties, may be ordered by the court instance only when the court ascertains the direct agreement of the defendant and the injured party to totally reconcile, unconditionally and permanently, expressed by the parties in court meeting, in person or by a proxy or by certified documents (High Court of Cassation and Justice, United Departments, Decree no. XXVII of 18 September 2006, published in the Official Gazette no. 190 of 20 March 2007).

16. George Antoniu, *The New Penal Code. Previous Penal Code*. *Comparative Study*, All Beck Printing House, Bucharest, 2004, p. 82.

17. Published in the Official Monitor, Part I, no. 510 fom July 24th 2009. The new Criminal Code will become effective on the day established in the law for its enforcement.

18. Valerian Cioclei, *quoted work*, 2009, p. 261.

Conclusions

Given the situation of the minor female who, by false promises of marriage is misguided by the perpetrator to have sexual intercourse with him, we think that the lawgiver of the new Penal Code has acted thoughtlessly in taking the decision not to incriminate seduction and let an important segment of the social relations out of the penal protection, precisely the social relations pertaining to the sexual liberty of a female person under age, with a very significant impact upon the (psychological and moral) development of her personality. We must not forget that there are many perpetrators who take advantage of the naivety and credulity of an under age and leave profound marks on their thinking, and the judicial practice has encountered such cases.

That is why we consider the incrimination of the seduction offence in the future as well as an appropriate measure and the lawgiver must interfere immediately, before the enforcement of the new Penal Code. The incrimination norm should stipulate the following: "The deed of a male person who, by promises of marriage, determines a female person under 18 years old to have sexual intercourse with him, oral or anal sex, as well as any other sexual act, is punished with 1 up to 5 years of imprisonment. Reconciliation of the parties removes the criminal liability".

Bibliography:

Gheorghe Ivan, *Criminal Law. Special part. With Reference to the New Penal Code* C.H. Beck Printing House, Bucharest, 2010;

Gheorghe Ivan, *Criminal Law. Special part*, C.H. Beck Printing House, Bucharest, 2009;

Valerian Cioclei, *Criminal Law. Special Part. Offences against the person*, C. H. Beck Printing House, Bucharest, 2009;

Valerian Cioclei, *Criminal Law. Special Part. Offences against the person*, Universul Juridic Printing House, Bucharest, 2007;

George Antoniu, *New Penal Code. Previous Penal Code. Comparative Study*, All Beck Printing House, Bucharest, 2004;

Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Rodica Mihaela Stănoiu, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Victor Roşca, *Theoretical Explanations of the Romanian Penal Code. Special Part*, Tome III, 2nd edition, Romanian Academy Publishing House and ALL Beck Publishing House, Bucharest, 2003;

Octavian Loghin, Avram Filipas, *Romanian Criminal Law. Special Part*, "Şansa" Printing and Press House S.R.L., Bucharest, 1992;

Vasile Papadopol, Mihai Popovici, *Criminal alphabetical repertoire of judicial practice for 1969-1975*, Scientific and Pedagogic Printing House, Bucharest, 1977;

Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Rodica Mihaela Stănoiu, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Victor Roşca, *Theoretical Explanations of the Romanian Penal Code. Special Part*, tome III, Romanian Academy Publishing House Bucharest, 1971;

Const. G. Rătescu, I. Ionescu-Dolj, I. Gr. Perieţeanu, Vintilă Dongoroz, H. Aznavorian, Traian Pop, Mihail I. Papadopolu, N. Pavelescu, *Carol II Penal Code annotated*, Tome II, Special Part, Socec & Co. Library and Printing House, Bucharest, 1937.

PROTECTION OF SOCIAL VALUES PROMOTED BY RELEGION BY MEANS OF THE REGULATIONS OF THE NEW CRIMINAL CODE OF ROMANIA

Gheorghe Ivan[*]
Mari Claudia Ivan[**]

Abstract

Considering the important part religion plays in shaping human behavior, it is only fair that the regulations of the new Criminal code of Romania (Law no.286/2009) should also protect the social values promoted by religious cults.

All throughout the study the authors highlighted shared aspects of the crimes against religious freedom and the respect for the deceased.

Key words: *religion, the new Criminal Code of Romania, crimes against religious freedom and respect for the deceased.*

Introduction

Religion diffuses and professes a certain ethic by means of specific moral laws (commandments), such as: you shall not steal, you shall not kill, you shall not live in fornication, you shall not argue, you shall love your neighbor, tolerance, forgiveness of transgressions, piety, etc. Religion brings out a number of noble feelings of man thus shaping his moral behavior[1].

With the important part religion plays in shaping human behavior in mind, it is only fair that the regulations included in the new Criminal Code of Romania (Law no. 286/2009)[2] *should also protect the social values promoted by various religious cults, organized and functioning according to the law. This is achieved in a specific way: by incriminating the acts that may harm religious values.*

1. Incriminating framework. Crimes against religious freedom and respect for the deceased are stipulated in Chapter III of Title VIII – entitled "Crimes harming various relations regarding social cohabitation" in the Special Part of the new Criminal Code of Romania.

Hindrance of the exercise of religious freedom is a crime stipulated in art. 381; the crime of profanation of sacred places and ritualistic objects is a crime stipulated in art. 382; finally, art. 384 refers to the crime of illegal organ and tissue sampling which, of course, have to belong to a corpse.

2. The generic judicial and special objects of crimes. Title VIII of the Special Part of the new Criminal Code includes three groups of distinct crimes- crimes against public law and order (chapter I), crimes against the family (chapter II), crimes against religious freedom and respect for the deceased (chapter III) which however share the same judicial object: the

[*] Science Research Associate, "Andrei Radulescu" Institute for Judicial Research within the Romanian Academy; Ph.D. Assistant Professor, "Dunarea de Jos" University of Galati, Faculty of Judicial, Social and Political Science; Chief Prosecutor – Galati Regional Department, National Anticorruption Directorate, ivan_gheorghe_p@yahoo.com; ivan.gheorghe@ugal.ro.

[**] Bachelor of Laws, University of Bucharest, Faculty of Law; MA student, "Titu Maiorescu" University, Faculty of Law, Bucharest; mariclaudia_i@yahoo.com.

[1] Gheorghe Ivan, *Individualization of the Punishment*, (Bucharest: C.H. Beck Publishing House, 2007, p. 22-23.

[2] Published in the Official Monitor, Part I, no. 510 fom July 24th 2009. The new Criminal Code will become effective on the day established in the law for its enforcement.

social relations for the proper evolution of which, protection of a shared social value is needed: social cohabitation.

The *generic judicial object* of crimes against religious freedom and respect for the deceased consists in the social relations making up the shared judicial object of all the crimes stipulated in Title VIII of the Special Part of the new Criminal Code.

The *special judicial object* consists in the social relations of social cohabitation regarding the respect for the religious freedom and sacred places and ritualistic objects belonging to various religious as well as respect for the memory of the deceased.

3. The material object. Some of the crimes also have a material object, consisting in the body of the victim of the crime [for example, the crime of hindrance of the exercise of religious freedom, in the type versions specified in art. 281, ¶ (2) and (3) of the new Criminal Code] or a personal or real property (for example crimes related to profanation of sacred places or ritualistic objects, corpse and tomb profanation and illegal organ or tissue sampling). Others lack such an object as the incriminated act affects a non material object [for instance hindrance of the exercise of religious freedom, in the type version specified in art. 381, ¶ (1) of the new Criminal Code].

4. The active subject is uncircumstanced as crimes against religious freedom and respect for the deceased may be committed by any person.

Criminal participation is possible in all forms (co-authorship, inducement and complicity).

5. The main passive subject is the state, as the holder of the social value endangered by the incriminated act being committed.

Some of the crimes will also display a *secondary or adjacent passive subject* (the person injured by the committed crime). It can be singular or plural[1]. For instance, for the standard crime specified in ¶ (1) of art. 381 of the new Criminal Code, the plural passive subject includes all persons sharing the religious cult the free exercise of which is hindered or disrupted. Of course this plural passive subject can also be a legal person [such as the patriarchate, mitropoly, archdiocese, bishopric, vicarage, archpriestship, monastery, and orthodox parish, that is the orthodox congregation, both clerics and laymen, residing in a certain area, lead by a parson, according to art. 41 and 43 of the Statutes for the organization and functioning of the Romanian Orthodox Church, approved the Government Resolution no. 53/2008[2]; or the Baptist church, according to art. 8 of the Statutes for the organization and functioning of the Baptist cult-the Romanian Baptist Churches Union, approved by the Government Resolution no. 58/2008[3], though it is not compulsory.

6. The constitutive content includes the provisions regarding the misdemeanor forbidden through the incriminating rule.

The constitutive content includes an objective side and a subjective one.

A. The objective side. With every crime, the objective side mandatorily consists in: a) the material constituent, that is the incriminated action or inaction; b) the immediate

---

[1]Constantin Bulai, *Other crimes harming various social relations regarding social cohabitation (hindrance of cult freedom),* in: *Theoretical Explanations of the Criminal Code of Romania. Special Part,* by Vintilă Dongoroz, Siegfriet Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Mihaela Stănoiu, Victor Roșca, Volume IV, the 2nd edition, The Romanian Academy Publishing House and All Beck Publishing House, Bucharest, 2003, p. 582; Constantin Duvac, *Criminal Law. Special Part, V*olume II, C.H. Beck Publishing House, Bucharest, 2010, p. 267.

[2]Published in the Official Monitor, Part I, no. 50 from January 22nd 2008; http://wwwpatriarhia.ro.

[3] Published in the Official Monitor, Part I, no. 59 from January 25th 2008.

outcome; c) the causality relationship (or link) between the action or inaction which makes up the material constituent and the immediate outcome[1].

a) The material constituent. Considering that the material constituent is referred to by a literal word or phrase, the so-called "*verbum regens",* indicating the forbidden action or inaction, we can state that most of the crimes committed against religious freedom and respect for the deceased area *commissive*, carried out *normatively* through an action (hindrance or disruption of the exercise of the ritual of a religious cult, forcing a person to take part in religious services of a certain cult, etc.). We must mention however that they can in fact be committed both by commission, or action (for instance preventing people from carrying out ritual acts by closing down the premises) and by omission, or inaction (for instance preventing people from carrying out ritual acts by refusing to open the premises).

In the case of two crimes (hindrance of the exercise of religious freedom and profanation of sacred places and ritualistic objects), the material constituent is accompanied by an essential requirement: the incriminated action or inaction has to refer to a religious cult, organized and functioning according to the law. Neither of the two crimes can subsist if this requirement is not met.

b) The immediate outcome consists mainly in bringing about a state of danger for the social relations under the protection of the incriminating rules. Most crimes also entail a material *secondary immediate outcome, (bringing about physical pain or physical injury or placing the victim's health in danger,* when the crime which is committed is hindrance of the exercise of religious freedom by physical coercion – art. 381, ¶ (2) and (3) of the new Criminal Code; damaging a sacred place, when referring to the crime of profanation of sacred places or ritualistic objects – art. 382 of the new Criminal Code; destruction of a corpse, in the case of the crime of corpse and tomb profanation – art. 383 of the new Criminal Code, etc.) or immaterial, that is passing on to a new state [for of the crime of hindrance of the exercise of religious freedom - art. 381, ¶ (1) of the new Criminal Code -, a transition takes place, from a state of respect for the religious freedom to a new, opposite one].

Crimes the immediate outcome of which has to be a result are called material or result crimes (for instance, the destruction of a corpse). In this case the Criminal Code requires that the immediate outcome should be proved as a condition for the existence of the incrimination. On the contrary, crimes that are limited to a state, in terms of an outcome, are called formal or attitude crimes and the law does not require a result to me made obvious.

Both the material and the immaterial result are susceptible of being performed both by injury, that is an actual harm of the object of the crime (destruction of a corpse) and by bringing about a state of danger for the object (for instance, bringing about a state of danger for the victim, etc.).

With crimes where the incrimination refers to an injury are called injury crimes and those related just to danger, are called danger crimes[2].

Material crimes are injury crimes (for instance the destruction of a corpse – art. 383 of the new Criminal Code) and the formal crimes are danger crimes [for instance forcing a person to perform an act which is forbidden by the religious cult (s)he belongs to under threat – art. 381, ¶ (3) of the against religious freedom and respect for the deceased which are danger crimes [for instance tissue and organ removal from a corpse – art. 384 of the new Criminal Code; forcing a person to take part in the religious service of a cult by physical

[1] Gheorghe Ivan, *Criminal Law. Generalities*, C. H. Beck Publishing House, Bucharest, 2008, pp. 43, 46.

[2] Gheorghe Ivan, *Criminal Law. Special Part*, C. H. Beck Publishing House, Bucharest, 2009, pp. 152-154; Gheorghe Ivan, *Criminal Law. Special Part With Reference to the New Criminal Code*, C. H. Beck Publishing House, Bucharest, 2010. pp. 158-160.

violence – art. 381, ¶ (2) of the new Criminal Code] and vice versa, are formal crimes belonging to injury crimes.

The secondary immediate outcome has to become apparent so that the crimes against religious freedom and respect for the deceased may exist. When it arises, the main immediate outcome comes about too.

c) The causality link. Considering the main immediate outcome, crimes against religious freedom and respect for the deceased can be regarded as danger crimes. In such a situation, the causality link results from the materiality of the crime (ex re).

It should not be overlooked that the causality link between the incriminated action or inaction and the secondary immediate outcome has to be established in the case of crimes against religious freedom and respect for the deceased entailing an injury (the destruction of a corpse).

B. The subjective side. Crimes are committed with a direct or indirect intent.

7. Forms of the crime. Crimes against religious freedom and respect for the deceased, as deliberate commissive crimes, are susceptible of a stage development of the activities they are consummated by, therefore teo imperfect forms of the acts are possible, which are: preparation and intent.

Preparation is not incriminated in the new Criminal Code.

Intent, which is possible with all crimes against religious freedom and respect for the deceased, is not punishable.

The consummation of the crime depends on the assumptions of the material constituent and the production of the secondary immediate outcome.

8. Punishment. Crimes are punished with imprisonment. With most crimes, besides imprisonment, fines are also stipulated as punishment.

9. Procedural aspects. In the case of the crime of hindrance of the exercise of religious freedom stipulated in art. 381 of the new Criminal Code, criminal proceedings are initiated upon the preliminary complaint of the injured person, who can be a singular or plural secondary passive subject.

With the other crimes, criminal proceedings are initiated and performed by the appointed prosecutor.

Conclusions

In comparison with the Criminal Code of Romania in force (since 1968), the new Criminal Code of Romania (Law no. 286/2009) places the protection and safeguarding of the values promoted by the religious cults under better regulation. Thus, the existent incriminations (hindrance of the freedom of cults - art. 318 of the Criminal Code in force; tomb profanation – art. 319 of the Criminal Code in force) have been absorbed by the new Criminal Code which changed their marginal name (to hindrance of the exercise of religious freedom and corpse and tomb profanation) and added new normative ways. Moreover, new acts have been incriminated (profanation of sacred places and ritualistic objects – art. 382 of the new Criminal Code; illegal removal of tissue and organs – art. 384 of the new Criminal Code).

Bibliography:

Gheorghe Ivan, *Criminal Law. Special Part with Reference to the Nnew Criminal Code, (*Bucharest: C. H. Beck Publishing House, 2010);

Constantin Duvac, *Criminal Law. Special Part, volume II,* Bucharest: C. H. Beck Publishing House, 2010);

Gheorghe Ivan, *Criminal Law. Special Part, (*Bucharest: C. H. Beck Publishing House, 2009);

The Official Monitor, Part I, no. 510 from July 24th 2009;

Gheorghe Ivan, *Criminal Law. Generalities, (*Bucharest: C. H. Beck Publishing House, 2008);

The Official Monitor, Part I, no. 50 from January 22nd 2008;

The Official Monitor, Part I, no. 59 from January 25th 2008;

Gheorghe Ivan, *Individualization of the Punishment,* (Bucharest: C. H. Beck Publishing House, 2007, p. 22-23);

Vintila Dongoroz, Siegfriet Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Mihaela Stanoiu, Victor Rosca, *Theoretical explanations of the Criminal Code of Romania. Special Part*, volume IV, the 2nd edition, The Romanian Academy Publishing House and All Beck Publishing House, Bucharest, 2003;

http://www.patriarhia.ro.

GREAT BRITAIN`S "SHARI`A" COURTS: BETWEEN RELIGION AND SECULARISM

Codruţa-Ştefania Jucan[*]
Călin-Ştefan Georgia[**]

Abstract

The present paper aims at offering a brief view over the British Shari'a Muslim Arbitration Tribunals from a perspective that draws on both the Islamic cultural environment and the British legal framework within which these British institutions operate.

Key Words: *Shari'a, Muslim Arbitration Tribunal, Islam, Multiculturalism, Legal Harmonization.*

Introduction

As the Global society is becoming evermore multicultural, along with its obvious benefits, this trait increases the complexity of the social interactions exponentially, leading to an evermore complex fabric of society. The technological advances and economic factors that animate the Globalization process also impose its specific dynamism, one which seems to increase from year to year, setting the rhythm for our very existence. In this context, where communication is an analogue to both a functional and stylistic crescendo at the same time, the importance of an efficient communication process has never had this proportion, especially when economical and political goals stand in the balance of inter-cultural dialogue.

In case interactional inconsistencies appear in a multicultural economical dialogue or one of another nature, one of the most common reasons would be a failure of communication, meaning that either the emitter has not properly coded his message for the common interactional denominator and/or that the receiver has not properly decoded the message.

Usually, in case a communication failure occurs in an interaction and the parties mistakenly agree on something, the communication error will resurface later on, manifesting itself in an unpredictable behavior exhibited by one or all of the parties. Of course, this type of incident and its consequences can be undone by the judiciary power of a state, which can issue its judgment based on consecrated legal principles and its legal framework. However, because things are not always this simple, there are two problems that could occur in such a situation. One of them, which we will be relating to but will not insist on is international interactions between entities of different cultures and the other one, which makes up the main theme of the present paper is the relation of a country's citizen with other citizens or civic entities in a cultural context where the society relies on democracy, multiculturalism, religious freedom and other similar values as general guidelines for good governance.

In this regard, the main issues that we are referring to are the incompatibilities between the Islamic Civilization and the Western one and the need to harmonize today's multicultural society from a juridical point of view, taking in account some important economic and social consequences, referring to the example of the British Shari'a Courts,

[*] Lecturer Ph.D. "Dimitrie Cantemir" Christian University, Faculty of Laws, Cluj-Napoca. ijjs@univagora.ro
[**] M.A. student "Babeş-Bolyai" University, Faculty of History and Philosophy, Cluj-Napoca, ijjs@univagora.ro.

functioning under the 1996 Arbitration Act. Because of the limited space of the paper, we will not be relating to the multitude of Islamic doctrines like the Sufi, Wahhabi, Salafi or to all of the recognized Islamic jurisprudence schools as we will also not be referring to the different western legal systems, mainly the French-inspired and Anglo-Saxon one. Instead, we will adopt a holistic approach, making use of the general cultural and juridical environment characteristics to these two cultures.

The Context

In order to further build our arguments, it is necessary to briefly take into account the importance of the harmonization of the interactions between the stately secular authority and the Islamic cultural mechanisms of representation and expression. According to the PEW research forum, there are currently 1.6 billion Muslims in the world, making up 1/5 of the total world population[1], the greatest European Muslim demographic rates being in France, Germany and Great Britain, making Muslim population a very important part of the European Community.

We have chosen the case of the British "Shari'a" Courts as an example because Great Britain is in our opinion a great example of the current European Muslim demographic trend. In this regard, there are two important aspects one must consider. The first one is that there has been a significant increase in the Muslim population in Britain since the 2001 census (74%)[2], leading to an afflux of young people in a country which struggles with the European plight of low demographic trends. Along with the multitude of benefits that this boost in young population brings, there are also some issues that could be improved upon, which brings us to the second aspect, that of the consistent trend of strong cultural identity of the Muslim population, particularly amongst younger people[3] and the need to harmonize the inter-cultural interactions that animate the framework dynamics of a multicultural society.

Islamic Sources of Legitimacy

The Islamic and Western cultures are very different as the sources of authority are concerned and many of the incompatibilities that can lead up to choke points in the intercultural dialogue come from these core differences.

While the source of power and public legitimacy in the Western culture is the "Magna Charta", in Islam all power comes from God, the ultimate and only source of legitimacy. In this regard, Islam traditionally adheres to the principle of Divine governance, a concept that has been greatly underlined and reiterated through Islamic doctrine and has been used in order to accentuate the cultural difference in relation with the western world by more radical Muslim thinkers, like Sayyid Qutb in his theory of "Jahilyyah"[4] and his criticism of the western system within which "man governs man", thusly opening the way towards the abuse of power.

Another interesting and representative difference is the core concept of the right to own property. While in the Western culture, the property right is inextricably linked to a titular holder which directly enjoys all the attributes of property, in Islam on the other hand,

---

[1] The Pew Forum on Religion a Public Life, "Mapping the Global Muslim Population", 2009, accessed on 15.01.2011at: http://pewforum.org/.
[2] Idem.
[3] Munira Mirza, Abi Senthilkumaran *et al. Living Appart Together: The Paradox of Multiculturalism*, Policy Exchange, London, 2007, p. 37 *sqq*.
[4] Sayed Khatab, *The Political Thought of Sayyid Qutb*, Routledge, London, 2006, p. 164.

there can only be only one universal titular holder of property rights, God[1]. As God is the titular holder of everything seen and unseen, man can only do as much as administer the property on behalf of its titular holder. As a result, even though property enjoys some of the same characteristics as in the western culture[2], some traits like inviolability for instance is not as strong nor does property have the same availability as the same concept enjoys in the Western "Magna Charta" based legitimacy systems. One good example of this particularity would be that due to the limited availability of water encountered in the Islam's areas of origin and its importance in the Islamic culture (both for sustainability and for rituals, like "Urdu"[3]), the use of certain portions of land was severely restricted in the interest of the community for ecological, political, economical or other reasons. As a result, the property rights or "property management" right over a given property would not benefit from the same availability on one hand and on the other, assuming that the property is owned by someone, the rights over it could suffer from severe restrictions, practically negating some of the attributes of property and refusing their use for the proprietor[4]. Of course, there are many other differences[5] but we will not be referring to them because of the limited space that we have at our disposal for the present paper.

Although the Islamic legal system shares allot of traits with the western systems, this is mainly because of the need to protect the same values and particularities of certain social interactions and ways of relating to society that occur universally in any civilized society that functions on the basis of social norms recognized and enforced by the community. The problem would be that the approach at protecting these values would not always be the same, leading to a very high possibility that some of the western juridical solutions would not fit the opinion or would even seem absurd to Islamic jurists and the other way around.

Even though some authors do not support the idea that the Islamic legal system is a platform that supports reformation and adaptation to the intricacies of social reality[6] claiming that this is a rigid system, we support a different point of view that relates to Islam as to a complex system of norms that is fully compatible with society's dynamics. In support of our opinion we only invoke one of the most recent efforts in adapting the Islamic juridical system to the modern reality, the 1876 "Mecelle-i Ahkam-i Adliye", the Turkish norms regarding legal transactions put together by a commission presided by Ahmed Cevdet Pasha[7] which blended together dispositions and concepts from the 1804 French Civil Code with religious norms from the Shari'a and Islamic jurisprudence.

Religious Mediation and Arbitration in Britain

Due to the complexity of the social environment, the Courts of Law are faced with an ever-increasing number of cases. Although the main source of resolving disputes, the Courts of Law employ a complex procedure as well as additional resources in order to solve

---

[1] Siraj Sait, Hilary Lim, *Land, Law and Islam*, Zed Books Ltd. London, 2006, p. 27 *sqq.*

[2] John Makdisi, *The Kindred Concepts of Seisin and Hawz in English and Islamic Law* in Peri Bearman, Wolfhari Heinrichs *et al. The Law Applied: Contextualizing Islamic Shari'a*, I. B. Tauris, London, 2008, pp. 22-42.

[3] The ablution ritual that has to be performed before prayer.

[4] Siraj Sait, Hilary Lim, *op.cit.* p. 25 *sqq.*

[5] One of the other important differences would be the different conceptions on "human rights", the western one being embodied by "The Universal Declaration of Human Rights" and the Islamic one by the "Cairo Declaration of Human Rights in Islam".

[6] W. R. Clement, *Reforming the Prophet: The Quest for the Islamic Reformation*, Insomniac Press, Torronto, 2002, *passim.*

[7] Sami Zubaida, *Law and Power in The Islamic World,* I.B.Tauris, London, 2005, p. 132 *sqq.*

a case. On the other hand, in the situation where choosing between secular justice and a cultural-related one, cultural minorities have been known to prefer the former. As a consequence, alternative dispute resolution procedures have enjoyed popularity for both cultural related and economical reasons, adding to the fact that these practices are much more discrete than the normal course of secular justice.

In Great Britain, religious minorities have been known to practice their own form of enacting justice under the legitimacy of arbitration or mediation for a very long time, the Jewish Beth Din Courts[1] being one of the best and most durable examples in this regard, beginning their existence in 1870. Like the Jewish Beth Din Courts, Muslim Shari'a Courts have also been enacting justice within Britain's Muslim communities unofficially but the phenomenon has been developing, taking on greater proportions because of the size of the British Muslim communities. These religious courts of justice began to be seen as a sort of a problem after the 2007 effort of the British Muslim community of establishing Shari'a arbitration tribunals based on the 1996 Arbitration Act, making the decisions of such officially established institutions legally enforceable, at the ruling of an arbiter-judge[2].

The first Muslim Arbitration Court has been organized by the Muslim college in Warwickshire in 2008, being a body of the nation-wide Muslim Arbitration Tribunal but arbitration rulings were already being passed since 2007[3]. Because of the apparent success that these courts have enjoyed within Britain's Muslim communities and as a consequence the government support, by 2009 there were 85 Shari'a Courts all across Great Britain, all being under the authority of the Muslim Arbitration Tribunal and operating according the legal framework of the 1996 Arbitration Act[4].

Since the founding of the Muslim Shari'a Courts and despite the success that these institutions benefited from, they also drew a lot of criticism from a wide range of observers, in our opinion mostly because of the magnitude of the differences between the western secular culture and the Islamic one. Nonetheless, we consider that there are several points of interest that one must address concerning these institutions, even more importantly because this may very well be on the European Union's agenda in the near future.

The Muslim Arbitration Tribunal and its Court Rulings

After the 2007/2008 successful efforts of the British Muslim community of obtaining enforceable Shari'a Court Rulings, there has been a wide panic among the non-Muslim British citizens, fearing that they could be brought before such a court without their consent. This is of course, an irrational fear, as we will argue.

First of all, even though the universal Shari'a source of legitimacy is God and the divinations revealed to the Prophet, in the case of a secular state, God's legitimacy is doubled by the secular legal norms, in this case The 1996 Arbitration Act which officially allow Shari'a Courts to operate throughout Britain and make the Courts' rulings enforceable by law. However, besides the legal basis there is another requirement for a Shari'a arbitration procedure to take place. The 1996 Arbitration Act expressly stipulates[5] that the parties subjected to an arbitration procedure may only enter on if there is an "arbitration agreement"

[1] http://www.theus.org.uk/the_united_synagogue/the_london_beth_din/about_us/
[2] The 1996 Arbitration Act, British Parliament, Section 11 Enforcement of award.
[3] Abdul Taher, *Revealed: UK's first official sharia courts*, The Sunday Times, 14th of September 2008, accessed on the 3rd of October 2011 at http://www.timesonline.co.uk.
[4] Denis MacEoin, *Sharia Law or "One Law For All?"* Civitas: Institute for the Study of Civil Society, London, 2009.
[5] The 1996 Arbitration Act, The British Parliament, Sections 6 and 7.

in place, that the parties have consented to before the arbitration procedure actually materializes.

Some of the negative press reception of these institutions was also spawned from the relative obscurity of the arbitration session. However, this somewhat absence of publicity had its rationale in the nature of arbitration as an alternative dispute resolution procedure. This way, amongst the reasons that people opted for the arbitration procedure was an increased level of discretion, which cannot always be guaranteed during common law procedures because of the publicity of the judicial procedures.

Another issue that can lead to misinterpretations is the legal sphere of the rulings a Shari'a Arbitration Tribunal can pronounce. Many fear that Britain's legal environment could become similar to certain tribal areas where the Muslim community enforces its own localized Shari'a-based legal infrastructure and where criminal justice provisions often take a very harsh and brutal form. Needless to say, if we take in account the British legal framework within which the Muslim Arbitration Tribunal operates, there are absolutely no reasons to suspect that these courts may pass legal judgment on criminal cases[1]. After all, we are referring to a legal system that is built around the monopoly of the coercive power by the state so the supposition that in such a legal system, coercive power could be delegated in this way would not constitute the grounds of a serious argument, even without taking into account human rights or other dimensions of the issue.

Respecting the legal framework within which they operate, Shari'a Arbitration Tribunals can only pass judgment on civil cases, if there is an arbitration agreement in place between the parties, therefore the main body of cases these institutions arbitrate are related to family and inheritance law, commercial and debt disputes as well as family and mosque disputes and similar cases[2]. However, there are two more sensitive subjects which deserve our attention. One such issue is forced marriages which are somewhat customary to the Islamic Civilization but in this case the Shari'a arbitration tribunals must respect the Forced Marriage Civil Protection Act of 2007.

Another issue would be domestic violence but in British law, domestic violence is a general term that refers to a wide range of negative incidents that can occur within a family, ranging from emotional abuse to honor killing[3]. Therefore, even if the Muslim Arbitration Tribunal can rule on cases of domestic violence, it can only do so within the bounds of its civil mandate, the legal judging on any crime taking place being of the competence of the secular Criminal Court.

The last and probably one of the most important issues, which we will not be able to properly discuss because of the limited space of the present paper is the different way that women are related to by Islamic jurisprudence and by the Shari'a. In this regard, men and women are not perfectly equal in status, parting grounds with the western legal systems' gender equality. However, this may be because of the cultural differences that we spoke about in the introductory part of this paper. This is indeed a very big difference but does not always imply a negative discrimination of women although there are a lot of cases in which Muslim men or figures of religious authority take advantage of this traditionalist context.

Recognizing this gender-based differentiation leads us to the last argument on our agenda, that of the procedural remedy of a Shari'a Arbitration Tribunal ruling. Even though such a ruling can be enforced by law, it can also be attacked with the common law procedural

[1] According to Section 82, ¶ 1 of the 1996 Arbitration Act, the document refers only to civil procedures.
[2] www.matribunal.com/cases_fmact.html.
[3] www.womensaid.org.uk

remedies by challenging it and bringing the case to the attention of the British secular civil Court of Law.

Conclusions

The Islamic religious-juridical system is a very important part of the Islamic culture and identity and therefore an important aspect of day-to-day life for an important proportion of Europe's citizens. Even though it may seem as an impossible venture, the harmonization of a secular legal system with a Shari'a based one like the one in Britain may strengthen the foundations of our multicultural societies and bring us one step closer to empathy and to a true understanding of the different cultures that surround us.

Bibliography:

Denis MacEoin, Sharia *Law or "One Law For All?", Civitas: Institute for the Study of Civil Society*, London, 2009;

The Pew Forum on Religion an Public Life, "*Mapping the Global Muslim Population*", 2009;

John Makdisi, *The Kindred Concepts of Seisin and Hawz in English and Islamic Law in Peri Bearman*, Wolfhari Heinrichs et al. The Law Applied: Contextualizing Islamic Shari'a, I. B. Tauris, London, 2008;

Munira Mirza, Abi *Senthilkumaran et al. Living Appart Together: The Paradox of Multiculturalism, Policy Exchange*, London, 2007;

Sayed Khatab, *The Political Thought of Sayyid Qutb*, Routledge, London, 2006;

Siraj Sait, Hilary Lim, Land, *Law and Islam*, Zed Books Ltd., London, 2006;

Sami Zubaida, *Law and Power in The Islamic World*, I.B.Tauris, London, 2005;

W. R. Clement, *Reforming the Prophet: The Quest for the Islamic Reformation*, Insomniac Press, Torronto, 2002;

The 1996 Arbitration Act, British Parliament.

Abdul Taher, Revealed: *UK's first official sharia courts,* The Sunday Times, 14th of September 2008, accessed on the 3rd of October 2011 at http://www.timesonline.co.uk;

www.matribunal.com/cases_fmact.html;

www.womensaid.org.uk;

http://www.theus.org.uk/the_united_synagogue/the_london_beth_din/about_us/.

CONSIDERATIONS ON THE POSITION OF VATICAN IN THE SYSTEM OF PUBLIC INTERNATIONAL LAW

Cristian Jura [*]

Abstract

Offering a territorial identity to the Holy See, the state of Vatican is acknowledge as national territory under international law, although the Holy See is the legal body that manages the international relations, negotiates the international agreements, respectively sends and receives diplomatic representatives.

Key words: *Vatican, public international law, international relations.*

Introduction

Vatican is one of the oldest political and religious existent institutions. It is one of the diplomatic centres of the world, and, in terms of territory, the smallest among the suzerain states. Vatican occupies, as breadth, a territory of only 44 Ha, and has only around 600 permanent inhabitants. Despite all these, it directs and leads million Catholics, spread worldwide.

1. Brief history of Vatican

The name of the place is antic predating Christianity. It is supposed that this part of Rome originally uninhabited (ager vaticanus) was always considered a sacred place or at least unavailable for living, even before the arrival of Christianity[1].

The origin of the word "Vatican" is unknown. Some state that it comes from the name of the Etruscan town, Vatican – disappeared long time ago – and, according to others, (as its Latin etymology certifies) from "Vaticinia" namely the prophecy or prediction of destiny, which used to take made on Vatican hill by Etruscan prophets, and later by roman augurs.

Another theory considers that the name comes from Latin Mons Vaticanus, Vatican Choline. It is a part of Mons Vaticanus and of the former Vatican fields where Saint Petru Basilica was built. Here is situated as well the residence of popes named Apostolic Palace with the Sistine Chapel and the museums of Vatican, as well as with many other buildings. The area was never entirely incorporated in the urban crowd of Rome until the end of past century being separate from the city by Tiber River.

For Christians, Vatican acquired a high signification due to the fact that, in the year 67 our era, Saint Petru was crucified there.

King Constantin, decreeing the "religious pace", built on Vatican hill a basilica, in the honour of Saint Petru. Before him, Constantin accommodated Melhiade pope on Laterano hill, where the popes began to live. In 326 the first church, basilica of Constantin, was built on the tomb of Saint Petru, who was buried in an usual cemetery from that place, and starting then the area began to populate[2].

Leon III surrounded the entire Rome over Tiber with a wall, using the help received from emperor Lotar and the donations gathered from the entire Christian world. The works

[*] Univ. Lecturer Ph.D. Cristian JURA at Law Faculty, Christian University „Dimitrie Cantemir", State Secretary at National Council for Combating Discrimination, e-mail:cristianjura@yahoo.com

[1] Grigore Geamănu – *Drept international public*, vol. II, Didactic and Pedagogic Publishing House, 1983.

[2] Dumitru Mazilu - *Drept international public*, vol. I + II, Lumina Lex Publishing House, Bucharest, 2002.

began in 852. Thus, a strong fortress was built, 40-feet high, the first contour of the future city of Vatican. Later on, Pope Nicolae V built a great part of Vatican palace and founded the Library of Vatican. Therefore, Sixt III built the well-known Sistine Chapel. In April 1506, Iuliu II founded the current basilica of Saint Petru. During the time of Sixt V, the construction of palace and of basilica was completed, and later on, the popes only attached thereof museums and libraries. After the agreement from Lateran it was built the railway, it was founded the post office, a radio station, being established as well telegraphic connections with the outside world.

As for Papal States, they began to exist after the reconciliation of Constantin with the church and pursuant to the agreement between the pope and Carol the Great. The first papal state was founded in 781 in the region which includes Rome, Romagna and the region of the 5 cities (Rimini, Pesaso, Fana, Sinigaglia and Ancon)[1]. But popes were ruling there only by name and until XV century they did not effectively rule they states. When they reached the highest prosperity - at the beginning of XVI century – "the papal states included the dukedoms Padua, Piacenza, Modena, Romagna, Urbino, Spoleto and Castro, Marca Ancona and Bologna provinces, Perugia and Orviettano. Until the year 1860 they had a surface of 15.774 square miles, with a population of three million inhabitants. In the year 1860, when the last Papal States – Romagna, Maca Anota and Urbino – were attached to the new kingdom of Italy, the pope ruled only Rome and Latium province."

The popes, in their secular role, began to arrive to rule the neighbouring regions and by Papal States, they ruled a great part of Italic peninsula for more than one thousand years until the middle of XIX century, when most of the territory of Papal States was occupied by the newly created kingdom of Italy.

In 1871, the Italian government adopted "the law of borders". The Italian state guaranteed that "the personality of Supreme Pontiff is saint and inviolable". By this law, the pope obtained as well the right to maintain troupes for the protection of his patrimony: Italian government is compelled to pay the pope the amount of 3.225.000 liras annually, as permanent and inalienable income, and the pope continues to use his palaces. These palaces, including Vatican and Laterano Palace, became "inappellable properties" and were exempted of taxes[2].

The representatives of foreign governments, accredited near the Holy See, enjoyed all prerogatives and the diplomatic immunity stipulated in the international law. The episcopes were released from the obligation to make an oath before the king.

There were however divergences between Vatican and Italian government, and the main reason of these disputes was the liberal, ancient character – of this govern that was persistently opposing to conclude a concordat with Vatican. Despite all these, in the year 1919, pope Benedict XV, understanding that the conclusion of a concordat was out of question, declared that he was disposed to reach an agreement with Italian govern, even without signing a concordant. After 1922, when fascist regime was installed in Italy, the successor of Benedict, Pope Pius XI, who – pursuant to the declarations of doctor Binchey – he had no sympathy for democratic regime and for parliament institutions, began the treaties for the conclusion of concordat, which would have determined that in Italy, Catholicism became a state religion, and the Catholic Church would have enjoyed an entire range of privileges, among which the right of control over public education.

---

[1] Adrian Năstase, Dumitra Popescu, Florian Coman - *Drept international public*, "Şansa" S.R.L. Publishing House and Press, Bucharest, 1994.
[2] Dumitru Mazilu - *Drept international public*, vol. I + II, Lumina Lex Publishing House, Bucharest, 2002.

In 1870, the possession of pope remained in an uncertain situation when Rome itself was attached by Piemont after a nominal resistance of papal forces. The popes were left between 1870 and 1929 in a situation similar to that of the last Chinese emperor, not disturbed in their palace, but without an official statute acknowledge by Italian state.

Other states maintained the international acknowledgement of the Holy See as a suzerain entity and in practice Italy did not try to interfere. During this period, it was fashionable to speak about pope as "prisoner". The situation was solved on February 11th 1929 under the prime-minister Mussolini by the three treaties from Lateran, which set forth the independent status of Vatican and offered Catholicism a special status in Italy. The Cathedra (seat) of Rome episcope, the pope, is the Basilica from Lateran, the cathedral of Rome. Lateran is one of the seven cholines of Rome, Caelian[1].

The area was thus considered an agricultural land outside the city and it was not included in the area surrounded by the walls of the city. In the year 1929 where were drawn up the documents of the Treaty of Lateran, the fact that a great part of the proposed territory was already surrounded by wall, determined the current form of the state. For some parts of the frontier without walls, there was the line of some buildings which completed the frontier part, and for some parts it was built a modern wall.

After long treaties, it was signed the agreement of Lateran, by which the Vatican territory was acknowledged as independent and suzerain state. Italy acknowledged however the suzerainty of Holy See and undertook to pay to pope 750 million liras in cash and Italian state annuities amounting to one billion Italian liras. Thus, in February 1929, it was founded the State of Vatican in its current form[2].

The territory includes the Saint Petru Square which couldn't be isolated by the rest of Rome and thus, a great part of the imaginary border with Italy follows the extremity of square and units with Piazza Pio XII and Via Paolo VI. Although, from a technical point of view, there were not included in the territory of Vatican pursuant to the Treaty of Lateran, some properties of the Holy See have an extraterritorial status similar to that of foreign embassies. They include the papal summer residence from Castelgandolfo on the hills in the neighbourhood, the Lutheran Basilica, the Basilicas Santa Maria Maggiore and Saint Paul beyond the walls as well as a range of buildings from Gandolfo Castle[3].

These are patrolled by police agents of Vatican and not by Italian Police. In Saint Petru Square the order is assured by both police services.

The entire territory of the state Vatican is registered in 1984 on the list of the Global patrimony of humanity.

2. Chief of state

The chief of the state is the pope, who, besides the executive, legislative and judicial supreme authority, he is also the head of govern. This is a non-hereditary elective monarchy with a suzerain who exercises the absolute authority, namely the legislative, executive and judicial supreme power not only over Vatican state, but also over the Holy See. The suzerain is elected for life in conclave of cardinals under 80 years old. His main subordinates in terms

[1] Carmen Grigore, Ionel Cloşcă - *Drept international public*. Course notes and documents, vol. I, book I, "Dacia Europa Nova" Publishing House, Lugoj, 1996.
[2] Adrian Năstase, Dumitra Popescu, Florian Coman - *Drept international public*, "Şansa" S.R.L. Publishing House and Press, Bucharest, 1994.
[3] Adrian Năstase, Cristian Jura, Bogdan Aurescu – *Drept international public. Sinteze pentru examen*, AII Beck Publishing House, Bucharest, 1999.

of state administration are the State Secretary, the president of Pontifical Committee for the State of Vatican and the governor of Vatican state.

3. Policy of Vatican

Due to historical reasons, the government of state is a unique structure. The most important persons are the State Secretary, the president of pontifical commission for the state of Vatican and the Governor of Vatican. They, as all the other officials, are appointed and recalled by pope.

The governor of Vatican, known sometimes as president, has similar obligations to those of a mayor, including local security, except for international relations. Vatican holds modern bodies of security, the famous Swiss Guard, a military force based on voluntariate formed of Swiss men. The Guard is not an authentic army, but rather a police force and a body guard for pope.

The legislative power is invested in the pontifical commission for the state of Vatican led by a president. Members are the cardinals appointed by pope for a 5-year mandate.

The juridical functions are managed by three law courts — Signatura apostolica, Rota romana and Penitentieria apostolica, which represent as well the juridical tool of the Holy See. The legal system relies on canon or ecclesiastic law; if canonical law is not applicable, special laws of territory are applied, usually adapted to Italian disposals.

Vatican has its own post office, supermarket, bank (the cash machines are the only one in the world which use Latin), railway station, station generator of electric power and publishing house. Vatican issues its own coins and stamps and controls its own internet domain (.va). Vatican Radio, the official radio station, is one of the most influent in Europe. L'Osservatore Romano is the semi-official newspaper. It is published by Catholic laics, but it includes official information[1].

The chief officer is the State Secretary, whose title is similar to that of the minister of foreign affairs of United States of America and who exercises in fact these functions and that of prime-minister in other countries.

The administration of Holy See is separate. The pope governs it by *Roman Curia*. This is formed of the State Secretary, nine congregations, three Tribunals, 11 pontifical councils and a complex of offices which manages the church business on the highest level. The State Secretary coordinates the Curia by State Secretary Cardinal.

Among the most active institutions of state are the Congregation for the doctrine of faith, which supervises the doctrine of church; the Congregation for episcopes, which coordinates the appointments of episcopes in the two Americas and in Europe; the Congregation for the evangelization of people, which supports the missionary activity; the pontifical council for justice and peace, which deals with international peace and social problems.

The Holy See has three tribunals: *Penitentieria Apostolica* which deals with consciousness; *Rota Romana* is liable for appeals, including annulment of marriages and *Signatura Apostolica* the last court of appeal.

The Prefecture for economic business coordinates the finances of the departments of Holy See and supervises the administration of its patrimony, a fund of investment dating since the Treaty of Lateran.

---

[1] Adrian Năstase, Dumitra Popescu, Florian Coman - *Drept international public*, "Şansa" S.R.L. Publishing House and Press, Bucharest, 1994.

4. International relations of Vatican

Due to the limited territory of the state, the foreign embassies attached to the Holy See are situated on the Italian territory of Rome; Italy shelters even its own embassy attached to the Holy See[1].

The Holy See is a permanent observer in the United Nations, in July 2004 received all rights of a member state except for the voting right. According to the Archbishop Celestino Migliore, the permanent observer of Holy See, "we do not have a voting right as this is our choice." He added that Vatican considers its current status as "a fundamental step which does not close any way to the future. Holy See fulfils all conditions to be a member state and if wanted in the future, this resolution won't prevent it to demand this right."

The Holy See entertains formal diplomatic relations with 174 suzerain states, with the European Union and the Order of Malta; 69 of these maintain permanent resident diplomatic missions near the Holy See.

The others have missions of dual accreditation outside Italy since the Holy See does not approve a dual accreditation with an embassy situated in Italy. It also entertains special relations with Russia (mission with an ambassador) and the Organisation for the liberation of Palestine (office with one director). The Holy See maintains 179 permanent diplomatic missions outside (of which 106 are accredited in suzerain states). The diplomatic activities of Holy See are maintained by the State Secretary (Vatican) (coordinated by a State Secretary Cardinal) by the department for the relations with states.

The Holy See is active in the international organisations. It has diplomatic relations with European Union (UE) in Bruxelles; it is a permanent observer attached to the United Nations (UN). The state of Vatican is member or observer in many other international organisations.

In 1971, the Holy See announced its decision to adhere to the Treaty of non-proliferation of nuclear weapons in order to offer its "moral support to the principles which form the base of the treaty itself."

The Holy See has a delegate attached to Arabian League in Cairo.

Conclusions

It is deemed that its state legal personality is not complete (it does not include all elements of complete statehood)[2]:

- It has suzerain jurisdiction, but not complete suzerainty;
- has administrative organisation in religious issues, but public services belong to Italian state;
- the citizenship of Vatican is special and functional (it is acquired under conditions determined by rank and domicile and it is lost upon the occurrence of these conditions without the original citizenship to be affected).

An event with major impact on the state of Vatican in the public international law marked the end of XX century. It is the conclusion of a new treaty between Italy and Vatican on the date of February 18th 1984, treaty which it replaces that of 1929. In the new treaty it is consecrated the abolishment of „special relations" instituted by the Treaty of Lateran, the catholic church and the Italian state being now „independent and suzerain", Catholicism

[1] Adrian Năstase, Cristian Jura, Bogdan Aurescu – *Drept international public. Sinteze pentru examen*, AII Beck Publishing House, Bucharest, 1999.

[2] Adrian Năstase, Cristian Jura, Bogdan Aurescu – *Drept international public. Sinteze pentru examen*, AII Beck Publishing House, Bucharest, 1999.

ceasing to be the official religion of Italy, and teaching religions in Italian schools becomes optional.

On February 1st 2001, Pope Ioan Paul II promulgated the new fundamental Law of the State of Vatican.

Bibliography:

Dumitru Mazilu - *Drept international public*, vol. I + II, Lumina Lex Publishing House, Bucharest, 2002;

Adrian Năstase, Cristian Jura, Bogdan Aurescu – *Drept international public. Sinteze pentru examen*, AII Beck Publishing House, Bucharest, 1999;

Florian Coman - *Drept international public*, vol. II, Ed. Sylvi, Bucharest, 1999;

Carmen Grigore, Ionel Cloşcă - *Drept international public.* Course notes and documents, vol. I, book I, "Dacia Europa Nova" Publishing House, Lugoj, 1996;

Adrian Năstase, Dumitra Popescu, Florian Coman - *Drept international public*, "Şansa" S.R.L. Publishing House and Press, Bucharest, 1994

Grigore Geamănu – *Drept international public*, vol. II, Didactic and Pedagogic Publishing House, 1983;

Dictionar de Drept international public - coord. Ionel Cloşcă, Scientific and Encyclopaedic Publishing House, Bucharest, 1982;

Grigore Geamănu – *Drept international public*, vol. I, Didactic and Pedagogic Publishing House, Bucharest, 1981;

www.vatican.va.

PROTECTION OF THE RIGHT TO FREEDOM OF THOUGHT, CONSCIOUSNESSAND RELIGION FROM THE PERSPECTIVE OF THE NATIONAL COUNCIL FOR COMBATING DISCRIMINATION

Cristian Jura[*]

Abstract

According to the Constitution, religious cult has two significations. A sense of association, of religious organisation and another of practiced ritual. One of the national institutions called to protect the rights mentioned above is National Council for Combating Discrimination.

Key words*: freedom of thought, freedom of consciousness, freedom of religion, National Council for Combating Discrimination.*

Introduction

The freedom of consciousness is regulated by art. 29 of Constitution[1]*, which, together with the freedom of expression, right to information, freedom of meetings and right of association, are known as latitudes.*[2] *Pursuant to the examination of art. 29 of Constitution, it results that the freedom of consciousness is a possibility of natural person to have and to express, in particular or in public, a certain conception on outward things, to share or not a religious belief, to belong or not to a religious cult, to fulfil or not the rite required by this belief.*[3]

One of the national institutions called to protect the rights mentioned above is National Council for Combating Discrimination.

1. Right to freedom of thought, consciousness and religion

The freedom of consciousness has its own long history, larded with intolerance, excommunications and prejudgements, with much sufferance and pain. During this long history, it was formulated the role of law as civilisation factor.

In doctrine[4] it was shown that, when formulating the juridical concept of freedom of consciousness and mainly in the understanding of expression stipulated in art. 29 of Constitution, it is not lacked of interest the stating of three points of view, which were supported and may still be supported.

"*Therefore, if, according to an opinion it is considered that religious freedom includes as well the freedom of consciousness, another conception considers that the freedom*

[*] Univ. Lecturer Ph.D. Cristian JURA at Law Faculty, Christian University „Dimitrie Cantemir", State Secretary at National Council for Combating Discrimination, e-mail:cristianjura@yahoo.com

[1] With the following content „ (1) The freedom of though and opinions, as well as the freedom of religious beliefs cannot be hedged in any manner. No one may be forced to adopt an opinion or to adhere to a religious belief, contrary to its convictions. (2) Freedom of consciousness is secured; it must be expressed in spirit of tolerance and mutual respect (3) The religious cults are free and are organised in terms of their own statutes, in terms of law, (4).In the relations between is forbidden any form, means, acts or actions of religious split. (5) Religious cults are autonomous opposite to state and enjoy its support, including by facilitation of religious assistance, in armies, hospitals, prisons, asylum and orphanages. (6) The parents and tutors have the right to provide according to their own convictions, education to their underage children whose liability is incumbent upon them".

[2] I. Muraru, *Protecţia constituţională a libertăţilor de opinie*, Lumina Lex. Publishing House, Bucharest, 1999.

[3] Constitutional law, Didactic and Pedagogic Publishing House, Bucharest, 1977, pp. 265 – 267.

[4] I. Muraru, Simina Tănăsescu, *Drept constituţional şi instituţii politice*, Lumina Lex. Publishing House, Bucharest, 2001, p. 234

of consciousness and religious freedom are two different freedoms. Eventually, the theory more widely accepted these days is that according to which the freedom of consciousness has a wide sphere including as well religious freedom. More than that, it is accepted as well the existence of freedom of cults, as distinct freedom."[1]

In this respect, as protected by art. 9, the freedom of thought, of consciousness and of religion represents a basic element of a democratic society, according to the European Convention of Human Righs. It appears among the most important elements of the identity of believers and of their conceptions of life, but it is also a precious good among atheists, agnostics, sceptics or for indifferent people. Religious freedom involves, mainly, the act of manifesting one's religion not only collectively, in public and among those who share the same belief, but also individually and privately, it includes, in principle, the right to try to convince your fellows for instance, by education.[2]

Freedom of consciousness has a complex content and includes several aspects. These aspects are and must be analysed only together, because they exist together and configure a single right, a single freedom.

This freedom is stipulated as well by art. 9 of the European Convention. The freedom of consciousness is an essential freedom, it "orders" the existence and content of other liberties, as well as "the freedom of word, the freedom of press, the freedom of association, because, basically, these freedoms are means of expression of thoughts, religion, opinions.[3]

European Court of Human Rights saw in the freedom of religion an essential element that contributes to the formation of believers' identity and conception about life. Therefore, the sphere of this freedom reflects as well on other disposals of Convention: art. 11 in the light of which must be construed the art. 9, in order to protect religious freedom in its associative dimension and in that related to the autonomy of religious communities, art. 2 of Protocol no. l, which allows the children to receive an education according to some philosophical and religious principles and convictions, and the art. 14, which forbid any discrimination, including one based on religion.

Article 29 of Romanian Constitution entitles each person to have its own conception about outward things. The conceptions about world ware theist or atheist. The consciousness of man cannot be and must not be directed towards these conceptions by administrative means, but it must be the result of its freedom of though, of free agency and of the action to exteriorize its thoughts.

Therefore, the Constitution sets forth that no one may be forced to adopt an opinion or to adhere to a religious belief contrary to its convictions.

Any constraint, by any means, is a breach of this natural and indefeasible right, it is a change of the human spirit.

The freedom of consciousness must be understood as well as a factor of spiritual continuity, within the family, the parents having both the right and the obligation to raise and educate their children.

Naturally, the raise and education of children in the family may be done in accordance with the ideas and conceptions of their parents, tutors or adopters, filiation being

---

[1] Gheorghe Iancu, *Drepturile, libertăţile şi îndatoririle fundamentale în România*, All Beck Publishing House 2003, p. 246.
[2] Case Kokkinakis against Greece.
[3] Gheorghe Iancu, *Drepturile, libertăţile şi îndatoririle fundamentale în România*, All Beck Publishing House, 2003, pp. 248-249.

by itself as spiritual relation as well, the parents bearing the moral, social and often legal responsibility for the facts and acts and for the attitudes of their underage children.

According to the Constitution, religious cult has two significations. A sense of association, of religious organisation and another of practiced ritual. However, according to both significations, religious cult means exteriorization of a religious belief both by the union of all those having the same belief in a religious association (church or cult), or by the rituals imposed by such religious beliefs, such as processions, religious meetings etc[1].

The common law in the field of organisation and operation of cults is *Law no. 489 /2006 concerning the religious freedom and the regime of cults which replaced the Decree of the former State Council no. 177 / 1948 concerning the general regime of religious cults.* The occurrence of Law no. 489/2006 related to religious freedom and general regime of cults suppresses the communist regime in Romania applied to the relations between state and religious cults, perpetuated until 1989 by the disposals remained in force of Decree no. 177/1948 and offers a proper frame for a successful integration of Romanian in European Union, relying on a perfect model compatible to that existent in other states members of EU. Law no. 489/2006 sets forth a range of principles which clearly attest the neutrality of Romanian state with respect to all religious cults and institutes express guarantees for full assertion of religious freedoms, as these are defined in the international conventions concerning human rights to which Romania adhered.

This law acknowledges the existence of 18 religious cults in Romania, offering them guarantees in terms of autonomy towards state. No other law of the states members of European Union institutes warranties with respect to the expression of religious freedom for a number so high of cults. The acknowledgement of these cults by Romanian state is the direct consequence of the existence of an inter-confessional space rich in historical experiences of peaceful cohabitation.

In other words, both religious and expression freedom are not regarded within the European system of securing human rights as absolute rights, the Convention considering as well those situations when the two liberties may be in a situation of relative incompatibility. This represents in fact also the theoretical base on which relied the drawing up of art. 13 ¶ 2 of Law no. 489/2006, this disposal considering as well the recent international context marked by intolerance opposite to some religious minorities. Moreover, CEDO jurisprudence acknowledges that, in some situations, "the respect for religious feelings of believers secured by art. 9 may be considered breached by the challenging presentation of the venerated objects from a religious point of view, and such descriptions may be regarded as bad faith breaches of the tolerance spirit which is a characteristic of democratic society" (*Otto-Preminger-Institute against Austria, 1994).* This jurisprudence was subsequently acknowledged *in Wingrove against United Kingdom (1996) or Dubowska and Skup against Poland (1997)*.

2. National Council for Combating Discrimination

Considering the legal ground, NCCD was incorporated by GO 137/2000, amended and completed by a range of normative acts: *Law no. 324/2006* for the amendment and completion of the Governmental Ordinance no. 137/2000 concerning the prevention and sanction of all forms of discrimination, published in the Official Journal of Romania, Part I, no. 626 of July 20th 2006, providing the texts a new numbering. The Governmental Ordinance no. 137/2000 was published in the Official Journal of Romania, Part I, no. 431 of September 2nd 2000 and it was approved with amendments and completions by *Law no.*

[1] I. Muraru, *Protecţia constituţională a libertăţilor de opinie*, Lumina Lex. Publishing House, Bucharest, 1999.

48/2002, published in the Official Journal of Romania, Part I, no. 69 of January 31st 2002. Pursuant to the adoption and approval by law, the Governmental Ordinance no. 137/2000 was amended and completed again by:

- **Governmental Ordinance no. 77/2003** for the amendment and completion of Governmental Ordinance no. 137/2000 concerning the prevention and sanction of all forms of discrimination, published in the Official Journal of Romania, Part I, no. 619 of August 30th 2003, approved with amendments and addenda by *Law no. 27/2004*, published in the Official Journal of Romania, Part I, no. 216 of March 11th 2004;
- **Law no. 324/2006** for the amendment and completion of Governmental Ordinance no. 137/2000 concerning the prevention and sanction of all forms of discrimination, published in the Official Journal of Romania, Part I, no. 626 of July 20th 2006.

The National Council for Combating Discrimination, herein referred to as NCCD, is the *state authority in the field of discrimination, autonomous, with legal personality, under parliamentary control* and also guarantor of fulfilment and application of the principle of non-discrimination, according to applicable internal legislation and the international documents adopted by Romania[1].

In the exercise of its attributions, *the Council carries out its activity independently*, without being restricted or influenced by other institutions and public authorities.

The council is responsible with the application and control of fulfilment of the disposals of GO 137/2000 in its field of activity, as well as concerning the harmonization of the disposals included in these normative or administrative acts which contravene to discrimination principle.

In 2008, the most important clarification of the legal nature of the National Council for Combating Discrimination was offered by the Constitutional Court of Romania. Pursuant to a constitutional challenge of the disposals of art. 16-25 of G.O. no. 137/2000, republished, by the Decision of the Constitutional Court of Romania no. 1.096 of October 15th 2008, published in the Official Journal no. 795 of November 27th 2008, the Constitutional Court passed a judgement related to the legal nature of NCCD in terms of fulfilment of constitutional disposals. The Constitutional Court declared, among others, the following: "*The National Council for Combating Discrimination is an administrative body with jurisdictional attributions, which enjoys the independence necessary for the fulfilment of administrative-jurisdictional act and meets the constitutional disposals stipulated by art.124 concerning the realisation of justice and by art.126 par.(5), which forbids the incorporation of extraordinary courts*".

"*The Council exercises its prerogatives independently, free of any influence of any institution or public authority, with the fulfilment of the disposals of art.1 par.(4) of the fundamental Law, which consecrates the principle of separation and balance of powers within the constitutional democracy*".

With a view to combating the acts of discrimination, the Council exercises its prerogatives in the following field[2]s:

a) prevention of the acts of discrimination.;

b) the mediation of discrimination;

c) investigation, discovery and sanction of the facts of discrimination;

d) supervision of the cases of discrimination pursuant to the determination of some cases of discrimination by NCCD, by subsequent supervision of the persons involved;

---

[1] Cristian Jura, "*Sistemul complementar de protecţie a drepturilor omului şi de combatere a discriminării în România*", "Transilvania" University Publishing House Braşov, 2004.

[2] Cristian Jura, „*Combaterea discriminării în România*", All Beck Publishing House, 2004.

e) providing specialised support to the victims of discrimination.

The National Council for Combating Discrimination has the role to inform and form the Romanian society with a view to eliminate any form of discrimination, to investigate and sanction the acts of discrimination, contributing thus to the creation of a general climate of trust, respect and solidarity, definitive for a democratic and European society.

The council exercises its competences pursuant to the notification of a natural or legal person or ex officio.

There are three categories of parties in case of NCCD procedures: the solicitor, the interested party and the plaintiff. The solicitor is the person who considers itself discriminated and notifies NCCD the fact of discrimination performed against itself. The Council may be notified by any natural person, ONG or any legal entity incorporated that has a legitimate interest with respect to the notified fact. The interested person is the person who has a legitimate interest in combating discrimination and notifies NCCD with respect to the fact of discrimination or who represents a person, a group of persons or a community against which it is considered to have been committed a discrimination act. The ONGs that have as purpose the protection of human rights or which have a legitimate interest in combating discrimination may notify or represent victims of discrimination, under the conditions when discrimination takes place in their field of activity and prejudices a community or a group of persons. The plaintiff is the person against who was formulated the notification with respect to the assumed act of discrimination.

The facts of discriminations are generally included among the contraventional facts, and are sanctioned in terms of gravity with warning or civil penalty. NCCD has the capacity of official examiner and body which applies sanctions.

Within 90 days after receiving the notification, NCCD has the obligation to decide whether the signalised situation is or not a case of sexual harassment and to determine the proper measures. The decision is communicated to the parties involved within 15 days after adopting it and comes into force after the date of communication.

Practically, *NCCD settles a notification by Decision of the Board of Directors*. The Board of Directors of the Council is a collegial, deliberative and decisional body, in charge with the fulfilment of the attributions stipulated by law[1].

In the settlement of the cases of discrimination, the members of the Board of Directors have the capacity of official examiner that applies sanctions for the contraventions set forth by this ordinance. They may delegate their capacity of official examiner to persons from the working system of the Council. On demand of the president, the members of the Board of Directors with bachelor's degrees in juridical sciences may represent the Council in courts in causes related to acts of discrimination.

GO 137/2000 stipulates in art. 1, par. 2, lett d VII, that the principle of equality among citizens, of exclusion of privileges and discrimination is secured mainly in exercising the following civil rights, mainly: the right to freedom of thought, consciousness and religion.

Also, art. 12 of GO 137/2000 stipulates: "it is a contravention, according to this ordinance, any conduit consisting in the determination of leaving the domicile, in deporting or in the hindering of life and living conditions with a view to abandon the traditional domicile of a person or of a group of persons belonging to the same race, nationality, ethnie or *religion*, respectively of a community, without their consent. It represents a breach of the disposals of this ordinance the constraining of a group of persons representing a minority to

[1] Cristian Jura – coordinator "*Consiliul Naţional pentru Combaterea Discriminării*", Bucharest, 2003.

leave the locality, the area or the region where it is living, as well as constraining a group of persons belonging to majority to settle in localities, areas or regions inhabited by a population belonging to national minorities".

Conclusions

According to art. 30/par.7 of Constitution "it is forbidden by law…the urge to national, racial, class or religious hate". Also, art. 29/par.4 of Constitution stipulates that "in the relations between cults it is forbidden any form, means, act or action of religious split". As for the compatibility between the foregoing disposal of Law no. 489/2006 and European Convention of Human Rights, religious freedom is secured by art. 9, being stated that these may form the object of a restriction, provided that it represents "necessary measures, in a democratic society, for […] the protection of right and liberties of other". The freedom of expression is secured by art. 10 of Convention, being possible to be submitted to some restrictions which represent "necessary measures, in a democratic society for […] the protection of reputation or rights of the others". Practically religion is one of the criteria of discrimination expressly stipulated by law and encountered in the entire body of applicable legislation. Therefore, any person or group of persons that considers itself discriminated in terms of this criterion may resort to the National Council for Combating Discrimination.

Bibliography:

Decision of the Constitutional Court of Romania no. 1.096 of October 15th 2008;

Law no. 489 /2006 concerning the religious freedom and the regime of cults;

Constitutional law, Didactic and Pedagogic Publishing House, Bucharest, 1977;

Cristian Jura, „*Sistemul complementar de protecţie a drepturilor omului şi de combatere a discriminării în România*", "Transilvania" University Publishing House Braşov, 2004;

Cristian Jura, "*Combaterea discriminării în România*", All Beck Publishing House, 2004;

Constitution of Romania, 2003;

Cristian Jura – coordinator, "*Consiliul Naţional pentru Combaterea Discriminării*", Bucharest, 2003;

Gheorghe Iancu, *Drepturile, libertăţile şi îndatoririle fundamentale în România*, All Beck Publishing House 2003;

I. Muraru, Simina Tănăsescu, *Drept constituţional şi instituţii politice*, Lumina Lex. Publishing House, Bucharest, 2001;

Governmental Ordinance no. 137/2000 concerning the prevention and sanction of all forms of discrimination;

I. Muraru, *Protecţia constituţională a libertăţilor de opinie*, Lumina Lex. Publishing House, Bucharest, 1999;

Case Dubowska and Skup against Poland (1997);

Case Wingrove against United Kingdom (1996);

Case Kokkinakis against Greece (1994);

Case Otto-Preminger-Institute against Austria (1994);

European Convention for Human Rights, 1950;

www.echr.coe.int

www.cncd.org.ro

HUMAN RIGHTS AND FREEDOM OF RELIGION

Lăzărescu Claudia Ionela*
Lăzărescu Şerban**

Abstract

Man, essentially a social being, is necessarily connected to the others, to the society as a whole, which ensures its existence and development in the sense that, each individual has his own status gathering all the rights that the society provides to or claims from each person.

Key words: *human rights, religious freedom, protocol, convention, rule of law, membership, implementation.*

Introduction

Religious freedom has always been a topic of discussion among people, serveral points of view being expressed.

But, any religion is a personal choice and involves a freely consented practice, publicly expressed, as well as a change that would occur in the acceptance of one or another faith.

Religious freedom is a right that can be analyzed as a civil law (applicable by the State to the civil society).

1. The Institution of the Human Rights

Man, essentially a social being, is necessarily connected to the others, to the society as a whole, which ensures its existence and development in the sense that each individual has his own status, gathering all the rights that the society provides to, or claims from each person[1].

Therefore, given its particular implications and consequences for the human existence, the need to create and maintain equilibrium in the society, the close link between the interests of the individual and the society led to its legal regulation. By the help of law standards, "the libertatis status" of a person was founded, notion that, in time, brougt to the crystallization of the institution called "human rights", representing a solid guarantee of an optimal performance of the previously mentioned relations.

The force of the state appears to be an effective way to harmonize them. This idea found its consecration in art. 29 of the Universal Declaration of Human Rights, that each person is subject to restrictions in exercising its rights provided by law, "in order to recognize and respect the rights and freedoms of the others and in order to meet the requirements of the fair exigencies required by moral, by public order and general welfare in a democratic society''. Note that in the contemporary world,the institution of the human rights is a major requirement and that, while the concepts of the human rights suffered major corrective measures, the institution is presently particularly complex. We can even speak of a process of

* Asist. univ. Lăzărescu Claudia Ionela, Faculty of Law and Public Administration Rm. Vâlcea, Law Department, "Spiru Haret" University, Bucharest; claudia.lazarescu.@spiruharet.ro.

** Asist. univ. Lăzărescu Şerban, Faculty of Law and Public Administration Rm. Vâlcea, Law Department, "Spiru Haret" University, Bucharest; s.lazarescu.dvl@spiruharet.ro.

[1] Horia Diaconescu, "*Violența și efectele sale în dreptul român*", Aius Publishing House, Craiova, 1995.

elaborating international human rights, given their substantial development, driven mainly by the adoption of numerous international conventions.

One can appreciate that the institution is non-bivalent, at the same time being a "national institution, integrated to the constitutional rules of a country or another, affecting a considerable number of law branches" [1].

Beyond all these aspects, we should underline their dominated cause, namely the essence of the science of human rights, that of being "the special branch of social sciences which has as a main object the study of the relationships between people in the light of human dignity, determining the rights and faculties whose overall is necessary to the development of every human personality" [2].

2. The Human Rights – General Remarks

The concept of human rights was the result of humanist ideas and the evolution of their perception of the increasingly intense reception.

From the chronological point of view, the debut can be positioned in the antiquity being concerned with the definition of the man and his position in society and with the formulation of the high moral principles, and of the idea of justice.

In time, new concepts were crystallized, mainly due to the developments in the society, the changes produced in the political and legal areas, the philosophical theories, strongly reflected in the papers and documents of the time.

One can therefore appreciate that, "the development of the concept of human rights was the result of legal settlements with a rich moral and political content, enshrining in the form of documents drafted by lawyers of high prestige, of the principles of political organization, founded in theoretical works of universal value that withstood time. The concept itself of human rights was therefore a synthesis of all that human thought had best, bringing on stage new humanistic principles, incorporating elements of religious thought and the general aspirations of freedom which had been known, with such a force, during the seventeenth and eighteenth centuries"[3].

The human rights were originally stated in the civil and political areas and subsequently in the economical and social too, these steps being recorded in the doctrine as first generation of human rights, with an obvious interdependence. Now, given the international dimension gained by the need to guarantee the human rights, the cooperation of the members to achieve the stated desideratum, a third generation of human rights came into being, as the result of defining the level of theory and practical implementation of new concepts of the right to development, the right to life, the right to peace, the right to a healthy environment for liliving, the right to benefit of the common heritage of humanity.

3. Legal Instruments Internationally Used to Promote the Human Rights

The statements and resolutions are political convergent points of view that paved the way for the adoption of international conventions on the international protection of the human rights.

---

[1] Victor Luncan, Victor Duculescu, "*Drepturile omului – studiu introductiv, culegere de documente internţtionale si acte normative de drept intern",* Lumina Lex Publishing House, Buchares, 1993.

[2] Renne Cassin, main author of the Universal Declaration of Human Rights from 1948 and Nobel Prize for Peace, Nice Coloquim, 1978, organized by the International Institute for Human Rights, requested by UNESCO, with the topic: *The science of human rights, methodology and teaching".*

[3] Victor Luncan, Victor Duculescu, *"Drepturile omului – studiu introductiv, culegere de documente internationale şi acte normative de drept intern"*, Lumina Lex Publishing House, Bucharest, 1993.

These instruments treating the overall issue (e.g. "The Pacts for Human Rights") or some specific issues (e.g. "Women Rights", "The Fight against Genocide", etc.) reaffirms and develops the existing rules of the international law in this respect.

As far as the agreements, coventions and other concrete forms of legal expression are concerned, the following are essential for the topic shown:

- The Convention on Human Rights and Fundamental Freedoms, as amended by Protocol no. 11 entered into force on November 1st, 1998;
- Pact 11 of the Convention on Human Rights and Fundamental Freedoms;
- The Universal Declaration of Human Rights adopted and proclaimed by the UN General Meeting namely by Resolution 217 A (III) of December 10th, 1948;
- The International Covention on Economic, Social and Cultural Rights adopted and opened for signature at United Nations General Meeting of December 16th, 1966 by Resolution 2200 A (XXI).

An important aspect which is worth mentioning is that their ratification involves the states into assuming the obligations contained therein. This means their incorporation into the domestic law.

For Romania, the ratification of the previously mentioned documents was achieved by adopting the following laws and decrees:

- Decree no. 212 published in the Official Gazette of Romania, Part I, no. 146 of November 20th, 1974.
- Law no. 39 published in the Official Gazette of Romania, Part I, no. 193 of June 30th, 1993, ratifying the Protocol of June 28th, 1993.

Another important aspect which is worth mentioning is that all these legal instruments (conventions, pacts, protocols) are the result of recognition by the states (including Romania) of the universal importance of the fundamental human rights and freedoms" whose compliance is an essential factor of peace, justice and welfare to ensure the development of friendly relations and cooperation between them, as among all states" [1];

4. The National Character in the Field of Human Rights

4.1. Brief History

In Romania, the concept of human rights took shape during the priod of achievements connected to the aspirations for freedom and national unity.

In Transylvania, under the influence of the Renaissance, the humanistic ideas developed early on.

On the territory of the nowadays country, there is even a true humanist school in the European context, which underlies the origin, the continuity and unity of the Romanian people.

This school has outstanding exponents as the great scholars Grigore Ureche, Miron Costin, C-tin Cantacuzino, Dimitrie Cantemir, Mitropolitul Dosoftei, Antim Ivireanu.

An important document, which marks the Romanian early concerns on defining the rights and freedoms, is the decree issued on July 15th, 1632 by Leon Tomsa Voda, Prince of Wallachia (1629-1632), considered by the prestigious Romanian researchers (one of them being Valentin Al. Georgescu), as bearing the same importance as the charts issued in other countries, highlighting the "integration of the Romanian principalities in the general development of European society" [2].

---

[1] *Conference for Safety and Cooperation in Europa*, Bucharest, 1975.
[2] Radu Economu *"1631: O Charta a libertăţilor",* in Magazin istoric Review, year XV, no. 10, Oct. 1986.

The influence of the French Revolution was particularly strong in the Romanian principalities where aspirations for unity and national emancipation, combined with the great ideas of the French Revolution, could be found in the programmatic documents of the 1848 revolution in Transylvania, Moldavia and Wallachia.

Under the influence of great thinkers - Nicholas Balcescu, Ghe Lazar, Ion Ghica – the Romanian concept of human rights – "natural rights" was developed from multiple angles, taking into account the interests of the country, in full harmony with the national unity and independence.

The modern constitutional principles of state organization found an eloquent expression in the developing status of the Convention held in Paris -1864, also proclaimed by Alexandru Ioan Cuza in the the Romanian Constitution of 1866, the first modern constitution, inspired by the Belgian constitution, considered the most advanced in Europe at that time.

A particularly clear expression achieved the rights and freedoms in the Constitution of March 29th, 1923 which unequivocally confirmed the right of the Romanians, irrespective of ethnic origin, language or religion, to enjoy freedom of conscience, freedom of education, press, assembly, associations and other freedoms and rights established by law.

Regarded in relation to the 1923 Constitution, the Constitution of 1938 contains obvious limitations. Therefore, only the Romanian citizens are allowed in public office, civil or military positions.

In terms of establishing the system of communist dictatorship, the human rights suffered major amputations and cuts, which were subordinated to the new concept of organizing the state, based on a one-party rule and the prohibition of other parties, the prohibition of any actions or political attitudes that would have been against to the communist ideology.

After 1989, special conditions were created for seting up a genuine democratic system of rights and freedoms, based on the recognition and implementaion of the international standards. In this direction a series of legislative measures were taken.

In the next period, Romania became part of the many international legal instruments, also adopting provisions to adapt its internal legislation to the requirements of the international conventions.

The entire restoration of the legislation was in view, in agreement with the imperatives of the state law with the provisions of the international conventions and, in particular, the Charter of Paris (1990) in which each European state committed to have its legal system based on the democratic principles.

4.2. The Integration into the International Legal Order

The recognition and confirmation of the international human right documents had a great influence on the domestic laws of the states in helping to show respect for the human rights and improvement of the national legislation."The individuals can benefit from the rights and freedoms in the domestic area only through the medium of the state they belong to, and which, by virtue of their sovereignty, also provides practical ways of achieving those rights and freedoms. Without the inclusion of the human rights in the constitutional regulations and without taking the necessary measures for each state to guarantee these rights and liberties, they are devoided of any efficiency" [1].

[1] Victor Luncan, Victor Duculescu, *"Drepturile omului – studiu introductiv, culegere de documente internţtionale şi acte normative de drept intern"*, Lumina Lex Publishing House, 1993.

Thus, as far as Romania es concerned, the Convention on the Human Rights and Fundamental Freedoms, adopted in Rome on November 4th, 1950 and entered into force on September 3rd, 1953 was ratified by Law no. 30 of May 18th, 1994, published in the Official Gazette of Romania No 135 of May 31st, 1994, and thus becoming part of its own law system.

5. Freedom of Religion and Faith

Freedom of religion and belief is a fundamental human right protected by a number of international treaties and declarations, including art. 18 (1) of the International Covenant on Civil and Political Rights (ICCPR).This right encompasses the freedom of thought on all matters and the freedom to manifest religion and belief individually or with others, in public or in private.

In some parts of the world, the practice of a religion of the majority, conflicts with the freedom of religious practice of the minority. The recognition and observance of the stipulations included in all the instruments regarding the human rights, in general, and religious rights and freedoms of all people, whether majority or minority, from the religious point of view, is an obligation that the signatory States Parties assumed.

Generally, the religion means a set of well established dogmas and practices dealing with the human relationship with divinity.

This relationship, as a profound expression of the human nature, is existential in the very understanding of the term, a matter of conscience and, hence, the freedom of everyone to express it, regardless of the methods and practices arising from it.

Conclusions

Individuals can receive benefits from the domestical rights and freedoms only by means of states they belong to. This principle is kown in the doctrine as a principle of subsidiarity over the domestic law.

Romania has a special situation regarding the "self executing" principle mentioned in art. 20 of the Romanian Constitution, meaning that the rights and freedoms of the citizens shall be construed in accordance with the Universal Declaration of the Human Rights, the conventions and other treaties that Romania is part of, in case of inconsistency with the international law, the rights and freedoms of the citizens having the first priority.

Bibliography:

Horia Diaconescu, "*Violence and its effect on Roman law",* Aius Publishing House, Craiova, 1995;

Luncan Victor Victor Duculescu, "*Human Rights - Introductory Study- collection of international and national documents*", Lumina Lex Publishing House, Bucharest, 1993;

Renee Cassin main author of the Universal Declaration of Human Rights in 1948 and holder of the Nobel Peace Prize, The Colloquium of Nice in 1978, organized by The International Institute for Human Rights at the request of UNESCO, on the theme "The Science of Human Rights, Methodology and Teaching";

Conference for the Security and Cooperation in Europe, Bucharest, 1975

Radu Economu, 1631: A Charter of Freedoms; in The History Magazine no. 10, October 1986.

REGULATIONS OF FREEDOM OF CONSCIENCE AND RELIGION IN INTERNATIONAL DOCUMENTS

Maftei Jana[*]
Coman Varvara Licuţa[**]

Abstract

In this study we aimed at analyzing the way the Freedom of conscience and religion are regulated in international documents. To achieve the objectives of this study we examined international declarations, treaties and conventions adopted by several international organizations by means of the empirical, interpretive and comparative methods.

Keywords: *freedom, religion, conscience, convention, declaration.*

1. Introduction

Freedom of conscience and religion was the object of international regulations as frequent conflicts arising from intolerance, the heated controversy between states, institutions, groups or individuals for reasons concerning religion or beliefs needed the states to have the same position to resolve them. The right to the freedom of conscience and religion appears to us as one of the fundamental human rights, it being the center of international concerns and recognized by documents of emblematic value in the field of human rights. This right is universal and takes on special meanings especially with regard to national minorities.

2. Human rights - concept and prerogatives

In K. Vasak's conception, human rights involve in their juridical regulation, the following legal imperatives: observance by each of human rights for others, take into account the life of a social group considered as an entity, and the life of humanity as a whole[1]. Developing the concept of "*human right*" was "*a synthesis operation, consisting of generalization of some well-known ideas (...), in legal documents with a rich moral and political" content*"[2]. Fundamental human rights are those "*prerogatives conferred by internal law and recognized by the international law to each individual, which express fundamental social values and aim at meeting basic human needs and legitimate aspirations in the socio-economic, political, cultural and historical context of a particular society*".[3] Their constitution in fundamental human rights is due to the fact that, they being essential for physical existence, for its material and intellectual development, they are guaranteed by very important documents.

[*] Associate Professor Ph.D. "Danubius" University of Galati, Law Faculty, janamaftei@univ-danubius.ro
[**]University Assist Ph.D. in Progress, "Danubius" University of Galati, Law Faculty, varvara.coman@univ-danubius.ro

[1] Vasak, K. *Les dimensions internationales des droits de l'homme*, vol. UNESCO, Paris, 1978, p. 506.
[2] Duculescu, Victor, *Protecţia juridică a drepturilor omului*, Lumina Lex Publishing House, Bucharest, 2008, p. 23.
[3] Năstase, Adrian, *Drepturile omului, religie a sfârşitului de secol*, Institutul Român pentru Drepturile Omului, Bucharest, 1992, p. 18.

3. International documents establishing freedom of religion and conscience

Regarding the human rights, doctrine held that "*... it has known a long crystallization process, at present portraying itself as an extremely complex institution belonging both to internal and international legal order"*[1]. The matter of equal rights for all people, including the religious orientation of the person and freedom of conscience, even if they were not expressly mentioned, they can be found in international documents on human rights.

Historical development of human rights institution was marked by documents such as *Magna Charta Libertatum* - 1215, the *Bill of rights* - in 1689 and Habeas Corpus - 1679. *U.S. Declaration of Independence July 4,* 1776 provides that people have been created equal, endowed by their Creator with certain inalienable rights; among these rights life, liberty and pursuit of happiness can be found; this act establishes the idea that all governments have been established by people just to guarantee these rights; whenever a form of government becomes contrary to this purpose, people has the right to alter or abolish it and establish a new government. But the document establishing the concept of "*human rights and fundamental liberties"* was the *French Declaration of 1789*, entitled *Declaration of Citizen and Human Rights*[2], which, in its very first article stipulates that "*people are born and remain free and equal in rights*". In art. 10 of the Declaration it is expressly stated that "*no one can be held accountable for his opinions, even religious, if their behavior does not disturb public order events established by law*", according to the prescriptions of art. 4 that "*freedom is to be able to do everything that does not disturb others"*.

Human rights institution has seen a continuous and strong development, and after the Second World War human rights issues went beyond the borders of the national state, it led to the formation of a distinct branch of law, to what is called "*international law of human rights"*[3]. During this time inter-state cooperation has resulted in the adoption of some fundamental texts on human rights, having a universality character, under the care of the United Nations. It can be said that these documents are the basis of the entire international legal construction concerning human rights, as the provisions of these documents are real international human rights standards. Thus, in 1945 the *United Nations Charter* is adopted following the Conference in San Francisco. In its preamble, the Charter proclaims "*the faith in fundamental human rights, in dignity and value of human person, in equal right of men to women, as well as of large and small nations*". The U.N. Charter has the great merit of having introduced human rights in the international order[4]

Article 1 ¶ (3) of the United Nations Charter states the following fundamental purpose of the UN: "*achieving international cooperation in resolving international economic, social, cultural or humanitarian problems, and promoting and encouraging respect for human rights and fundamental liberties for all without distinction as to race, sex, language or* religion". According to the UN Charter, the UN member states are obliged to promote "higher living standards, full usage of manpower and conditions for progress and economic and social development; the solution of international problems in the economic, social and public health fields as well as other related problems and international cooperation in the fields of culture and education; universal and effective observance of human rights and fundamental liberties for all without distinction as to race, sex, language, *religion*.

---

[1] Duculescu, Victor, *Protecția juridică a drepturilor omului*, Lumina Lex Publishing House, Bucharest, 1994, pp. 18-19.

[2] Rials, Stéphane, *Declarația drepturilor omului și cetățeanului*, Polirom Publishing House, Bucharest, 2002.

[3] Selejan-Guțan, Bianca; Crăciunean, Laura-Maria, *Drept internațional public*, Hamangiu Publishing House, Bucharest, 2008, p. 100; Vasak, K. *op.cit.* p. 77; Năstase, Adrian, *op.cit.* p. 38.

[4] Selejan-Guțan, Bianca; Crăciunean, Laura-Maria, *op.cit.* p. 101.

1948 remains in the history of human rights as an important milestone for this matter, as on December 10th, the Universal Declaration of Human Rights was proclaimed and adopted by the UN General Assembly designed as the framework document that enshrines human rights and fundamental liberties at a global level[1]. *The Universal Declaration of Human Rights* is the first comprehensive document on human rights adopted by an international organization. The declaration is the first important overall international document, with vocation of universality in this area and it is based on the need for a minimum standard to be observed internationally, for a shared understanding about human rights and liberties. It takes into account the human condition as a whole, including both freedom of speech and beliefs and the relief from fear and misery[2]

This document proposes in its Preamble a common standard that all peoples and all nations should go towards "*so that all the people and all society bodies, taking into account this declaration, to strive, by teaching and education, to promote observance of these rights and liberties and by progressive national and international measures, to assure their universal and effective recognition and application both by the Member States themselves and within the territories under their jurisdiction*". A list of civil, political, economic and social rights recognized to each person is mentioned in its content, but not as a national of a state, but of that of human being: "*all human beings are born free and* equal in rights" (art. 1) "*Any human being has the right to life, freedom and personal security"* (art. 3).

It can be said that the Universal Declaration of Human Rights marked the transition from the "citizen rights" to "*human rights"*[3], the beginning of establishing a set of international instruments concerning regional and national human rights and fundamental liberties, of a system of principles mandatory for the entire international community.

In the category of civil and political rights the Universal Declaration of Human Rights includes also the right of man to *freedom of thinking, conscience and religion:* "*Everyone has the right to freedom of thinking, conscience and religion: this right includes freedom to change religion or belief and freedom to manifest religion or belief, alone or with others, both in public and in private, by teaching, religious practices, worship and rituals"* (art. 18).

This document is not a treaty, therefore has no binding power. The recommendation character that the Universal Declaration of Human Rights has for the Member states of the organization, as stated by the UN Charter (art. 13, ¶ 1), imposed the need for its provisions to be included in international treaties, making it mandatory for the States participating to them. In this respect, in 1951, at the sixth session, UN General Assembly adopted a resolution asking the Commission on Human Rights "*to draw... two International Pacts on Human Rights, one on Civil and Political Rights, the other on Economic, Social and Cultural Rights"* (Resolution 543/VI). In 1966, the UN General Assembly adopted two pacts on human rights: International Pact on Economic, social and cultural human rights and the International Pact on Civil and Political Rights, which turned the provisions of the Universal Declaration of Human Rights into the legal obligations for states that accept them. Both the International Pacts adopted by the UN General Assembly session by Resolution XXI 220A/XXI and open for signature in December 1966 have a status of international treaties legally binding the States Parties. In their preamble, the general principle according to which "*recognition of inherent dignity of all human family members and their equal and inalienable*

[1] Mazilu, Dumitru, *Dreptul internațional public, vol. I*, Lumina Lex Publishing House, Bucharest, 2010, p. 319.
[2] Pușcă, Benone; Pușcă, Andy, *Drept internațional public*, "Danubius" Academic Foundation Publishing House, Galați, 2000, p. 169.
[3] Moroianu Zlătescu, Irina, *Drepturile omului: un sistem în evoluție*, I.R.D.O. Publishing House, Bucharest, 2007, p. 25.

rights represents the foundation of freedom, justice and peace in the world" is stated; therefore, these rights are considered to derive from the inherent dignity of the human person.

The Pacts establish the obligation of States Parties to ensure equal rights of men and women and also prohibit discrimination based on race, culture, sex, language, *religion*, political or other opinion, national or social origin, property or birth.

In art 18, the Pact on Civil and Political Rights states that: "*1. Everyone has the right to freedom of thinking, conscience and religion, this right includes the freedom to have or adopt a religion or belief of his choice as well as freedom to manifest religion or belief, either individually or jointly, both in public and in private by worship and rituals, by practice and education.*

2. No one shall be subject to any constraint that might impair his freedom to have or adopt a religion or belief of his choice.

3. Freedom to manifest religion or beliefs may be subject only to restrictions provided by law and necessary to protect safety, order, and public health or morals or the fundamental rights and liberties of others.

4. States Parties to the present Pact undertake to observe the liberty of parents and, when applicable, of legal guardians, to ensure religious and moral education of their children according to their own convictions".

Article 27 provides, on the states in which ethnic, religious or linguistic minorities exist that "*persons belonging to such minorities shall not be deprived of the right to have, in common with other members of their group, their own cultural life, to practice their own religion or to use their own language* ".

The obligations undertaken by States Parties by ratifying the International Pact on Civil and Political Rights are set out in art. 2, ¶ 1: "*each State Party to the present Pact undertakes to respect and guarantee the rights recognized in the present Pact to all persons within its territory and subject to its jurisdiction, without any distinction such as race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or other status"*. Paragraph 2 of art. 2 requires states parties "*to adopt those legal measures or any other measures necessary to carry out the exertion of the rights"* guaranteed by the Pact.

The pact strictly prohibits "*any incitement to national, racial or religious hatred that constitutes an incitement to discrimination, hostility or violence"* (art. 20).

On November 25th, 1981 the UN General Assembly adopted the *Declaration on the Elimination of All Forms of Intolerance and Discrimination based upon religion or beliefs*, which enshrines the right of everyone to the freedom of thinking, conscience and religion. From art 1 results that this right involves on one hand the freedom to have a religion or other belief of his choice, and on the other hand the freedom to manifest religion or belief, individually or jointly, both in public, and in private, by worship or rituals, practices and education. Any other form of coercion that may affect the freedom to have a religion or belief of his choice is also forbidden. The only limitation of the freedom to manifest religion or belief must consist only in the restrictions set by law, which are necessary for public protection and security, for public order, health or morals or the fundamental rights and liberties of the other. Under this reservation, art 6 lists the liberties implied by the right to freedom of thinking, conscience, religion or belief: the freedom to practice a cult and to hold meetings on religion or belief and to establish and maintain temples for these purposes; the freedom to establish and maintain appropriate charitable or humanitarian institutions; freedom to manufacture, to acquire and use, in appropriate quantities, the objects and the material required by rituals or usage of a religion or belief; freedom to write, print and distribute publications on these topics, the freedom to teach a religion or belief in places suitable for this purpose; freedom to seek and receive voluntary, financial contributions or otherwise, from individuals and institutions; freedom to form, to appoint, to elect or

designate by succession corresponding leaders, according to the needs and standards of any religion or belief; freedom to observe days of rest and to celebrate holidays and ceremonies according to his/her religion or belief; freedom to establish and maintain national and international communications with individuals and communities in terms of religion or belief.

By the terms used in the declaration, after the express mentioning of the prohibition of discrimination on grounds of religion or belief, by intolerance and discrimination, we must understand "*any distinction, exclusion, restriction or preference based on religion or belief and having as their object or effect the suppression or limitation of the recognition, enjoyment or exertion of human rights and fundamental freedoms on equal basis"*. Regardless of whom this should occur, a state or an institution, a group or an individual, art 3 of the declaration qualifies discrimination between human beings on grounds of religion or belief as "*an offense against human dignity and a violation of the UN Charter principles".*

The Universal Declaration of Human Rights was actually the inspiration of all instruments in the field, which today make up all the legal rules in the field of human rights. Also the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based upon religion or belief* refers to its provisions when it states that discrimination on grounds of religion or belief "*must be condemned as a violation of human rights and fundamental liberties proclaimed in the Universal Declaration of Human Rights, and as an obstacle to friendly and peaceful relations between nations"*.

In 1992 and again in the United Nations General Assembly, the *Declaration on the Rights of persons belonging to national or ethnic, linguistic and religious minorities* was adopted, in which the Member States, considering that promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to their political and social stability and stressing that constant promotion and realization of the rights of persons belonging to national or ethnic minorities, to religious and linguistic minorities as an integral part of society's development and within the democratic framework based on the supremacy of law, would contribute to strengthening the friendship and cooperation between peoples and states, is committed to protecting the existence and identity of national or ethnic, cultural, religious or linguistic minorities within their territories and to encourage the creation of conditions for the promotion of that identity, including by adopting legislative measures. For this purpose, art. 4-9 establish the responsibility of states, specialized institutions and other organizations in United Nations system a series of obligations such as: to ensure minorities full and effective exertion of all rights and fundamental liberties without any discrimination and in full equality to the law; to create favorable conditions for persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except for those specific practices that contravene national law or that are contrary to the international standards.

The Council of Europe, an international organization that has set to protect human rights and representing the cooperation framework to find viable solutions to problems the European society faces, has the merit of adopting the European Convention for the protection of man and citizen on the 4th of November 1950. Through the European Convention on Human Rights an effective system of efficient international legal guarantees of human rights and fundamental liberties was created. Article 9, entitled Freedom of thinking, conscience and religion establishes the right of everyone to freedom of thought, conscience and religion, right that implies "freedom to change religion or belief" and also "*freedom to manifest religion or belief individually or jointly, in public or in private, by worship, teaching, practice and rituals"*. The same article considers that in a democratic society the freedom to manifest one's religion or beliefs cannot be subject to other restrictions than those provisioned by law. By the Framework Convention for the Protection of National Minorities from Strasbourg on the 1st of February 1995, the Council of Europe member states have

committed to recognize "*the right to manifest religion or belief and the right to establish institutions, organizations and religious associations"* to every person belonging to national minorities.

The European Union, by the actions taken and by adopted documents, has shown its ongoing concern for human rights in general and for assuring the freedom of conscience and religion in particular. Considering that human dignity would be impaired in the absence of this freedom, *the European Union Charter of Fundamental Rights*, solemnly proclaimed by the Council, Parliament and Commission, signed on the 7th of December 2000, adopted on the 12th of December 2007, and which has become legally binding at the same time with the entry into force of the Treaty of Lisbon on the 1st of December 2009, recognizes in art 10 the right to freedom of thought, conscience and religion as belonging to any person and, similarly to the regulations of European Convention on Human Rights, it settles that "*this right includes the freedom to change religion or belief as well as the freedom to manifest religion or belief individually or jointly, in public or in private, through worship, teaching, practice and rituals"*. The right of parents to ensure education and teaching of their children according to their religious beliefs enshrined in art 14 ¶ 3, and the text of art. 22 stipulates respect for cultural, religious and linguistic diversity within the Union[1].

Conclusions

The religious component of human society, together with the freedom of conscience, the historical tradition of a community located in a certain area, contributes to social cohesion through the settlement of a common behavior rules and provides identity to the group. Although the joint activity of the states within the international organizations has resulted in the adoption of several documents designed to enshrine and guarantee freedom of conscience and religion and their forms of expression, yet today religious intolerance and discrimination generate violence and persecution in many parts of the world and it often appears to us in its most hideous form: religious terrorism. The famous phrase "*the XXIst century will be religious or it shall not be at all",* sometimes attributed to Malraux, but which the mentioned author himself denied, has the merit of "*Restoring God in history".*[2] Freedom of religion is able to provide peace of mankind.

Bibliography:

Nechita Elena-Ana, *Libera circulaţie a persoanelor în spaţiul Uniunii Europene (The Free Circulation of People within the European Union Territory),* AGORA University Press, 2010;

Duculescu, Victor *Protecţia juridică a drepturilor omului*, Lumina Lex Publishing House, Bucharest, 2008;

Schlumberger, Laurent. *Dieu, l'absence et la clarté: essai sur la pertinence du protestantisme*. Lyon: Olivétan, 2004;

Rials, Stéphane, *Declaraţia drepturilor omului şi cetăţeanului*, Polirom Publishing House, Bucharest, 2002;

Năstase, Adrian, *Drepturile omului, religie a sfârşitului de secol*, Institutul Român pentru Drepturile Omului, Bucharest, 1992;

Vasak, K., *Les dimensions internationales des droits de l'homme*, vol. UNESCO,

[1] Nechita Elena-Ana, *Libera circulaţie a persoanelor în spaţiul Uniunii Europene (The Free Circulation of People within the European Union Territory),* AGORA University Press, 2010, p. 9.

[2] Schlumberger, Laurent. *Dieu, l'absence et la clarté: essai sur la pertinence du protestantisme*. Lyon: Olivétan, 2004, pp. 21-22.

Paris, 1978.

RELIGION AND ITS IMPACT ON CRIMINAL INVESTIGATION

Elena-Ana Nechita*

Abstract

The article is aimed at presenting the characteristics of criminal investigation in the case of offenses of a dominantly religious nature. To this end, we started by showing the importance of the bio-psycho-social coordinates in developing delinquent behaviour, with an emphasis on the religious component, we went on to the hearings stage, taking into account the characteristics of the hearings preparation, both during prosecution, and during a trial, when the witness takes an oath, followed by the characteristics of the research at the crime scene, and have concluded with a round-up of rehabilitation programs for persons deprived of freedom which are centered on religion.

Keywords: *religion, investigation, crime, criminal justice, rehabilitation.*

Introduction

I. Among the bio-psycho-social coordinates that influence human behaviour, religion plays an important role. Generally, when we refer to religion, we think of an individual living in a particular geographic area, defined by a particular religion, in a community that has a particular religious appartenance, from a family that considers religion among the social values necessary in forming a person that is legally right and, hopefully, socially right too.

I. The functioning of society is dependent on the compliance of the individuals and groups that compose it with the generally-accepted moral, social, legal and cultural normative model. The international migration phenomenon has an impact on these norms, both in relation to the volume of the migratory flows, and through other characteristics: age, sex, social status, religion, ethnicity, etc. with multiple determining effects on population[1].

Religion and family play an important role in raising and educating a child – the future adult, possibly subject of a crime, whether an active or a passive one.

These components can have a positive or negative influence on the crime trend at a given time, both in terms of the number of offenses and of their type. It can also lead to a reduction in domestic abuse, the consumption of illegal drugs[2] and ethnobotanicals[3] or the suicide rate. Thus, there is less public spending on social assistance, on persons deprived of liberty or medical treatments[4]. Beneficial effects are also felt in the fields of re-education and communication, both in the establishment of inter-institutional relations: church, school, penitentiaries, health facilities or social assistance or counselling services, and of relations

* Ph.D. Professor, AGORA University, Faculty of Law and Economics, Head of Department Law, e-mail:anaelena2009@yahoo.com

[1] Nicolaie Iancu, *Legal migration of Romanians and Illegal Emigration via Romania,* in *Social work perspectives on quasi-coercive treatment of offenders*, SPECTO 2009, West University Publisher House, Timişoara, 2009, p. 213.

[2] Romanian legislation: Law no. 143/2000 on combating illicit drug trafficking and consumption, originally published in The Official Gazette no. 362 of 3 August 2000, with subsequent additions, including those brought by Emergency Ordinance no. 6/2010, published in The Official Gazette no. 100 of 15 February, 2010, and by Government Decision no. 575/2010.

[3] Romanian legislation: Law no. 339/2005 on the legal regime of the stupefacient and psychotropic plants, substances and mixtures, with subsequent additions, including those brought by Emergency Ordinance no. 6/2010 and Government decision no. 575/2010.

[4] Participation in religious activities may lead to an increase in the educational level, improvement of physical and mental health, an active and long life.

between generations: children, parents, grandparents, with positive consequences on future generations.

Researches over the past decade have shown that religious practices are beneficial to society, promoting the welfare of individuals, families, and of the community, in general. This is also the conclusion of a study[1] by Patrick F. Fagan, who argues that poor people who attend religious services regularly lead a healthier life, have a stable family, strong relationships and appropriate behaviour between family members.

Another study[2] regarding the influence of family characteristics and religion[3] on individuals and on the trajectory of juvenile delinquency reveals the following:

- living with both parents discourages young people from adopting negative patterns since adolescence;
- the support of their parents, both emotional and economic, reduces the risk for teenagers to be involved in criminal activity;
- participation of the family members in religious activities increases the effect of parental affection and, thus, the security level of the adolescent, reducing the effect of external factors with negative repercussions on the individual's behaviour.

II. *The tactics of hearings.* In order to choose the most appropriate tactics for hearing people and especially in preparing the hearings, it is important to take into account the bio-psycho-social coordinates of the person to be heard. They are as follows[4]:

a) The offender's age is an indicator of the degree of his/her physical and mental development, as well as his/her social position. It is also important in terms of the dynamics and structure of the crimes[5] or in relation to the educational measures and sanctions of criminal law applicable to juvenile offenders[6].

b) The offender's sex, somatic diseases and physical deficiencies, ethnic and racial characteristics, physical characteristics engender certain reactions to external stimuli[7];

c) Religion and belonging to certain religious groups. Criminology and religion researchers draw attention to the fact that behaviour is influenced by and may be deviant even when viewed in relation to church attendance by an individual or the importance that religion has in his life. Deviant behaviours are sometimes encountered in practice in relation to certain religious commitments[8].

---

[1] Patrick F. Fagan, *The Impact of Religious Practice on Social Stability, 2006* http://www.heritage.org/research/reports/2006/12/why-religion-matters-even-more-the-impact-of-religious-practice-on-social-stability, accessed on 22.09.2011.

[6] Richard J. Petts**,** *Family and Religious Characteristics' Influence on Delinquency Trajectories from Adolescence to Young Adulthood*, in American Sociological Review, abstract, *http://asr.sagepub.com/content/74/3/465.short*, accessed on 22.09.2011.

[3] For detalies a see C. Otovescu. *Protecţia juridică a drepturilor omului*, Scrisul Românesc Publishing House, Craiova, 2006, pp. 68-69.

[4] Elena-Ana Nechita, *Forensic Science. Forensic Technique and Tactics*, PRO Universitaria Publishing House, second edition revised and enlarged, Bucharest, 2009, p. 154.

[5] Depending on age, crimes have characteristics that lead the judicial body to a certain category of potential offenders. Adolescents and youth tend to commit offenses involving physical force and bravery, folly, while adulthood and old age are characterized by offenses that require reasoning, calculation, prudence and life experience.

[6] See Laura-Roxana Popoviciu, *Criminal Law. The General Part*, PRO Universitaria Publishing House, Bucharest, 2011, p. 276.

[7] Physiologists cannot ignore a fundamental feature of the individual, which is reacting differently to the same stimulus.

[8] See Evans, TD, FT Cullen, RG Dunaway, and VS Burton Jr. 1996. *"Religion and Crime Reexamined: The Impact of Religion, Secular Controls, and Social Ecology on Adult Criminality" Criminology*, pp. 195-217; Richard J. Petts, *op.cit.*

d) Family can inoculate certain misconceptions about life, lack of self-restraint, or can ignore children's natural material and spiritual necessities, the lack of mutual affection, certain vices of the parents (drinking) or repeated misunderstandings between parents and children can have negative influences on the latters.

e) Teachers, classmates know that individual's situation, his situation in school, certain artistic preferences, places he frequents, his entourage, spirit of collegiality.

f) Preparation, both physical and mental, helps the judicial body in choosing the best hearings tactics for it to reach its goal.

g) Data collection in the workplace is very important, because the work environment exercises a strong influence on the individual. Thus, the defendant's behaviour towards colleagues and heads, a high or low level of education, non-compliance with workplace rules, tolerance towards acts of indiscipline, absence without leave help sketch a spiritual portrait of a person.

In preparing the hearings, these social microenvironments provide, most often, clear and accurate information about the personality of the defendant to be heard and, moreover, may help clarify certain aspects regarding the way, the means and circumstances under which the crime was committed.

Any mental deficiency, disorder or illness may have the most unexpected consequences on the behaviour of a person before, during and after the hearing takes place.

After obtaining as much information as possible about the suspect, evidence establishing without a doubt the guilt in committing the crimes, the judicial body sets the date, time and place of the hearings, and can even make a plan for this purpose, of course, only if deemed necessary[1].

The hearings plan that is drawn up will contain the issues to be cleared up and the succession of approaching them, background or detail questions to address the person under investigation, materials that will be presented, while, of course, keeping in mind the possibility for new items to occur during the hearings.

Clothing and the general appearance of the suspected person, his/her verbal and non-verbal expression will help define the defendant's personality.

In preparing the hearings and during the hearings itself, religion and the other components referred to above, as well as economic factors, the degree of civilization, the repeated ingestion of various substances, will result in certain characteristics of the hearings.

Throughout the phases of the hearings, such as the pre-hearing discussions, the phase of free reports and the question-and-answer phase, the degree of emotional involvement or a particular conduct determined by a belief that the person being heard holds will come out. Also, clues that may lead to the development of different hypotheses regarding the religious commitments that a person has taken either in their imagination or in reality will be noticed.

Court proceedings and oath-taking in court. Also, people called to stand in court may play various roles in the trial. Thus, when the defendant is heard, he is allowed to tell everything he knows about the offense for which he was indicted, then he can be asked questions by the court president and directly by the other members of the panel, by the prosecutor, by the injured party, by the civil party, by the civilly responsible party, by the other defendants and by the heard defendant's lawyer[2].

If there are several defendants, each of them is examined in the presence of the other defendants unless, in the interest of truth, the court may decide the separate hearing of any of

---

[1] Elena-Ana Nechita, *Forensic Science. Forensic Technique and Tactics*, PRO Universitaria Publishing House, second edition revised and enlarged, Bucharest, 2009, p. 147.

[2] See Article 323 of the Romanian Criminal Procedure Code.

the defendants, without the others being present. The statements taken in isolation are then obligatorily read to the other defendants, after being heard[1].

When the defendant no longer remembers certain facts or circumstances or when there are contradictions between the statements made by the defendant in court and previous ones, the president may request explanations and read parts of or full previous statements. If the defendant refuses to give statements, the court orders the reading of statements that he has previously made[2].

In the case of witness hearing, before starting the hearings, the effect religion has on the procedural activity becomes clear. Thus, depending on the statements he makes regarding membership of a particular religion or about the lack of confession, he will take an oath or pronounce the formula provided by the Romanian law for theses cases.

According to the Romanian Criminal Procedure Code, the witness takes the following oath[3]: "I swear to tell the truth and not hide anything I know. So help me God!" During the oath, the witness has his/her hand on the cross or the Bible[4]. The reference to divinity in the oath formula changes according to the witness's religious belief. The provisions of art. 85 ¶ 2 are not applicable to witnesses of a religion other than Christian. Witnesses of no confession will take the following oath: "I swear on my honour and conscience that I shall tell the truth and not hide anything I know". Witnesses who, for reasons of conscience or religion, are not sworn, will say in court the following formula: "I undertake that I shall tell the truth and not hide anything I know". Are exempted from taking the oath minors under the age of 14 years, but they are reminded that they should tell the truth.

In other legislations[5], depending on the declaration of faith by the witness or interpreter, the same formula of an oath is taken in court, whether it is a general assertive statement or has a religious content. Differences are given on the one hand by the entity invoked when taking the oath: for example, Almighty God, Allah, Gita, and, on the other hand, by the object touched with one's hand when taking the oath: for Christians – the Bible, for Muslims – the Koran, for Hindus – Gita, for the Hebrew – the Old Testament.

III. *Investigation of the crime scene.* Whether we are dealing with religious-motivated crimes against persons[6], crimes affecting relations of social coexistence or suicides, the investigation of the crime scene will be complex and must be based on the rules of criminal tactics and the provisions of criminal procedure.

Also, the Romanian Criminal Code. The Special Part, in art. 319, provides the crime of grave desecration, an offense that has as a special judicial object the protection of relations of social coexistence whose formation, progress and development depend on the defense of the collective sentiment of piety and respect for human corpses, funeral urns, tombs and funerary monuments[7].

At the crime scene, there will be specific traces, relevant of the manner in which the act was committed and of the means used in committing it. An important role at the forensic investigation stage is played by the psychological processes that led to the materialisation of criminal activities. Thus, religious practices with their specific charcateristics, the type of

[1] See Article 324 of the Romanian Criminal Procedure Code.
[2] See Article 325 of the Romanian Criminal Procedure Code.
[3] See Article 85 ¶ 1 of the Romanian Criminal Procedure Code.
[4] See Article 85 ¶ 2 of the Romanian Criminal Procedure Code.
[5] See http://www.askthefamilylawyer.co.uk/?page_id=35, accessed on 20.10.2011.
[6] The Criminal Code. The Special Part contains crimes against the person in Title II. The title is divided into four chapters, as follows: Chapter I. Crimes against life, limb and health, Chapter II. Crimes against personal freedom, Chapter III. Crimes related to sex life, Chapter IV. Offenses against dignity.
[7] C. Duvac, *Criminal Law. The Special Part*, vol. II, C.H.Beck Publishing House, Bucharest, 2010, p. 271.

occult or religious activity, and the perpetrator's intent of using a particular practice with a particular purpose in mind (to free himself, to heal, to take revenge, to carry out a specific requirement of a power they believe in, to scare, or to condemn a particular community, etc.) will occupy the central place in the investigation of crimes of this type.

In addition to reproduction traces, biological or fire traces, often traces or objects of religious significance will be discovered, suggesting a certain faith of the person who committed the crime or suicide[1]. Also certain occult practices may be highlighted, in which case there may be found at the crime scene: traces of animal blood, slaughtered animals, objects positioned in a particular manner having a special meaning for the person or the group to which it belongs, religious-themed graffiti, expressing either feelings of approval, or hatred of a particular religion.

The interpretation of traces will be done in close cooperation with religion experts who will help decipher signs, symbols or messages that could lead to establishing a circle of suspects. Thus, the causal link between the criminal action and the consequences of the crime can be proved and the motive and the purpose of committing the crime can be revealed, eventually leading to the individualization of the concrete scene.

The peculiarities of the crime scene will be revealed also due to the fact that the investigation of the scene takes place on two levels:

- One, of a pronounced technical character, where different specialists carry out specific activities aimed at discovering, highlighting, examining, preserving, taking away and using through technical methods and procedures, all the changes in the reference system caused by the offense committed.

- Another, characterized by the carrying out of various activities, among which we may mention: the identification and hearing of the victims, of eyewitnesses, of the perpetrators, of other people who hold information about the circumstances in which the crime was committed; the carrying out of searches; taking away objects and documents found at the crime scene which are important for the research; interpretation of the existence, nature, status, position, shape of the traces and material means of proof, together with technicians present on the spot; reconstruction of the actual situations existing before, during and after the crime, by the other members of the team, whom I will call from now on investigators and who have the status of prosecution bodies[2].

In the methodology of crime investigation, the expertise developed in the case will provide details and will clarify the circumstances of the offense. An important role among expertises is occupied by the expert psychiatric that will bring to the attention of forensic specialists and of the court the perpetrator's psychological profile.

IV. Freedom of religion for persons executing custodial sentences. Romanian legislation contains provisions regarding the freedom of conscience and opinion, as well as the freedom of religion for persons executing custodial sentences, according to which these freedoms may not be restricted[3]. As a result, the programs of religious[4] gatherings are organized so as to allow the sentenced persons to participate, based on free consent, to the

[1] In practice there are frequent cases of suicide, group suicide.

[2] G. I. Olteanu, *Considerations on Crime Scene Investigation Tactics*, AIT Laboratories Inc. Publishing House, 2004, p. 3.

[3] See Article 4 of Law no. 275/2006 on the execution of punishments and of the measures imposed by the judicial bodies during the criminal trial, published in The Official Gazette no. 627 of 20 July, 2006, with amendments and additions brought by Law no. 83/2010 amending and supplementing Law no. 275/2006 on the execution of punishments and of the measures imposed by the judicial bodies during the criminal trial, published in The Official Gazette no. 329 of 19 May 2010.

[4] A see C. Otovescu, op.cit. pp. 68-69.

religious services or meetings organized in prisons. The respect for the rights of the convicted persons to obtain and hold religious publications and objects of worship according to their faith is also guaranteed.

Studies on this topic have revealed the fact that religious activities in prisons have a positive impact on the rehabilitation of persons sentenced to custodial sentences. Prison authorities conduct, in this regard, religious activities, on the one hand, in prison and among the families of people who are convicted, and, on the other hand, after the release of persons who have executed custodial sentence, aiming to provide advice and support during the period of social reintegration.

Not only penitentiaries, through the staff trained to run the religious activities, services or meetings initiate such programs[1], but also representatives of the religions in Romania, and non-governmental organizations, on a voluntary basis.

Statistics have made clear the fact that convicted people who executed custodial sentences and were involved in religious programs of rehabilitation are significantly less prone to be convicted again for crimes against the person, especially against life, limb and health, or crimes related to sex life.

Worldwide, religious programs for prisoners are among the most common forms of rehabilitation programs. Among all other types of personal enhancement programs offered in prison, religious activities have attracted the largest number of participants. For example, a survey in the USA showed that 32 percent of the sentenced people included in the sample reported involvement in religious activities such as Bible studies and church services, 20 percent reported taking part in self-improvement programs, and 17 percent reported having been involved in counseling. This national survey aimed to verify the observation made by many volunteers from among the religious communities pursuing such programs in prisons and places of correction for years, namely that many prisoners attend and participate in religious programs[2].

Religious programs offered in U.S. prisons are based on the principle of volunteering and aim at the spiritual welfare of prisoners, providing both pastoral care and counseling and religious or interfaith education, training and practice. Also, a specialized person is assigned for each convict, to coordinate specific religious programs and services. All persons sentenced to deprivation of liberty have equal access to religious resources, services, counseling, regardless of the religion they have.

In addition to the religious factor to be taken into consideration in the formation of deviant behaviour, the occurrence of religious-motivated crimes or the victims of such crimes, we must take into account the concept of "potential of victimal receptivity", which means the degree of victim vulnerability of an individual. The specialty literature stresses that the crime – victim report is complex and in order to understand it a psychological and psychosocial analysis is required[3].

In the specialty literature, there is a preoccupation with finding a way to calculate the "*vulnerability index"*, which can be determined based on two categories of factors[4].

---

[1] For example, exhibitions of painting, cards, and trinkets organized at various religious holidays.

[2] Byron R. Johnson, David B. Larson, Timothy C. Pitts, *Religious Programs, Institutional Adjustment, and Recidivism among Former Inmates in Prison Fellowship Programs,* in Justice Quarterly, 14 March 1997, no. 1, http://www.leaderu.com/humanities/johnson.html, accessed on 28/09/2011.

[3]. Butoi, Teodora Ioana-Butoi, *Legal Psychology*. *A University Treatise*, Vol I, România de Mâine Foundation Publishing House, Bucharest, 2001, p. 103.

[4] N. Mitrofan, V. Zdrenghea, T. Butoi, *Legal Psychology*, Publishing and Press House "Şansa" Ltd. Bucharest, 1992, p. 71.

The first category includes personal factors (such as the mentally retarded or those with a normal lower IQ, new immigrants, individuals with modest acquisitions, the very old or fragile, women, minors, etc.), and the the second category consists of situational factors (milieu, frequented places, drinking, extramarital relations)[1].

Conclusions

Religion and family play an important role in raising and educating a child – the future adult, possibly subject of a crime, whether an active or a passive one.

These components can have a positive or negative influence on the crime trend at a given time, both in terms of the number of offenses and of their type. It can also lead to a reduction in domestic abuse, the consumption of illegal drugs and ethnobotanicals or the suicide rate. Thus, there is less public spending on social assistance, persons deprived of liberty or medical treatments.

Beneficial effects are also felt in the fields of re-education and communication, both in the establishment of inter-institutional relations: church, school, penitentiaries, health facilities or social assistance or counselling services, and of relations between generations: children, parents, grandparents, with positive consequences on future generations.

In addition to reproduction traces, biological or fire traces, often traces or objects of religious significance will be discovered, suggesting a certain faith of the person who committed the crime or suicide.

Bibliography:

C. Duvac, *Criminal Law. The Special Part*, vol. II, C. H. Beck Publishing House, Bucharest, 2010;

Elena-Ana Nechita, *Forensic Science. Forensic Technique and Tactics*, PRO Universitaria Publishing House, second edition revised and enlarged, Bucharest, 2009;

N. Iancu, *Legal Migration of Romanians and Illegal Emigration via Romania,* in *Social Work Perspectives on Quasi-coercive Treatment of Offenders*, SPECTO 2009, West University Publisher House, Timişoara, 2009;

C. Otovescu., *Protecţia juridică a drepturilor omului*, Scrisul Românesc Publishing House, Craiova, 2006;

Patrick F. Fagan, *The Impact of Religious Practice on Social Stability*, http://www.heritage.org/research/reports/2006/12/why-religion-matters-even-more-the-impact-of-religious-practice-on-social-stability, accessed on 22/09/2011;

Richard J. Petts, *Family and Religious Characteristics' Influence on Delinquency Trajectories from Adolescence to Young Adulthood,* in American Sociological Review, abstract, http://asr.sagepub.com/content/74/3/465.short, accessed on 22/09/2011;

*** Law no. 275/2006 on the execution of punishments and of the measures imposed by the judicial bodies during the criminal trial, published in The Official Gazette no. 627 of 20 July, 2006, with amendments and additions brought by Law no. 83/2010 amending and supplementing Law no. 275/2006 on the execution of punishments and of the measures imposed by the judicial bodies during the criminal trial, published in The Official Gazette no. 329 of 19 May 2010;

*** Law no. 339/2005 on the legal regime of the stupefacient and psychotropic plants, substances and mixtures, with subsequent additions, including those brought by Emergency Ordinance no. 6/2010 and Government Decision no. 575/2010;

[1] I. Buş, *Legal Psychology*, Cluj-Napoca, 1997, p. 87; N. Mitrofan, V. Zdrenghea, T. Butoi, *op.cit.* p. 73.

G.I. Olteanu, *Considerations on Crime Scene Investigation Tactics*, AIT Laboratories Inc. Publishing House, 2004;

T. Butoi, Teodora Ioana-Butoi, *Legal Psychology*. *A University Treatise*, Vol I, România de Mâine Foundation Publishing House, Bucharest, 2001;

*** Law no. 143/2000 on combating illicit drug trafficking and consumption, originally published in The Official Gazette no. 362 of 3 August 2000, with subsequent additions, including those brought by Emergency Ordinance no. 6/2010, published in The Official Gazette no. 100 of 15 February, 2010, and by Government Decision no. 575/2010;

I. Buș, *Legal Psychology*, Cluj-Napoca, 1997;

Evans, T. D., F. T. Cullen, R. G. Dunaway, and V. S. Burton Jr. 1996, *Religion and Crime Reexamined: The Impact of Religion, Secular Controls, and Social Ecology on Adult Criminality, Criminology*;

Byron R. Johnson, David B. Larson, Timothy C. Pitts, *Religious Programs, Institutional Adjustment, and Recidivism among Former Inmates in Prison Fellowship Programs,* in Justice Quarterly, 14 March 1997, no. 1;
http://www.leaderu.com/humanities/johnson.html, accessed on 28/09/2011;

N. Mitrofan, V. Zdrenghea, T. Butoi, *Legal Psychology*, "Șansa" Publishing and Press House Ltd., Bucharest, 1992.

THE WOMEN'S RIGHTS IN THE ISLAMIC WORLD

Otovescu Frăsie Cristina [*]

Abstract

In this article I wish to evidence the human rights in the main juridic documents from the Islamic system. The human rights in the Islamic system are protected and guaranteed by Allah. It is very important for the women's rights shown in different documents to be presented.

Key words: *human rights, Islamic system, wife's right, Muslim law, woman.*

Introduction

Both on the international and internal level, it can be noticed the affirmation and the protection of the human rights in concordance with the Islamic law.

Initially, the Muslim law was integrated organically into the Islam's religion. Mainly, the Muslim law keeps and perpetuates the tradition but, nowadays, are made efforts of modernization concerning the law system[1].

The main juridic documents that stipulate the woman's right in the Islamic world

The material sources of the Muslim law are the customary rules from Mesopotamia, Syria and Medina and the historic sources are the Koran (it has 500 verses that refer to the law), Sunnah (encompasses facts and beliefs attributed by the tradition to the Prophet), Idjima (assembly of percepts of the teachers) and Idjitihad (represents the jurisprudence). Both the man's rights and freedoms are regulated under the powerful influence of these material and historic sources of the Muslim law. But, during the last period of time, the situation has changed and the system started to adapt to the modern requests and practices in the human rights field[2].

The human rights in the Islamic system are protected and guaranteed by Allah. From the traditional point of view, under all the aspects of the public and private life were governed by the law system called Sharia, which is a collection of developments, historic formulations of the Islamic religious law, a vast body of jurisprudence in which the jurists expressed their opinion referring to the meaning of the Koran and Sunnah and to the juridic consequences of these opinions[3].

Among the important features of the Muslim woman can be seen her deep belief in the Mighty Allah and the candid conviction that everything in this Universe, the faith of the world, is submissive to the Will and Order of Allah. Also, everything that happens to a person couldn't have been avoided and everything that doesn't happen couldn't have been changed the other way round[4].

---

[*] Assist. Prof. Ph.D. Faculty of Law and Administrative Sciences, University of Craiova; Departament: Public Law and Administrative Sciences, Coordinator of Department of Human Rights Studies at Social Institute *Oltenia,* University of Craiova; otocris@yahoo.com.

[1] Dumitru Mazilu, *Drepturile omului*, Lumina Lex Publishing House, Bucharest, 2000, p. 76-77.

[2] *Idem.*

[3] Raluca Miga Beşteliu, *Protecţia internaţională a drepturilor omului*, the 4th edition, revised, Universul Juridic Publishing House, Bucharest, 2008, p. 94-95.

[4] http://www.islam.ro/pdf/26222724Femeia-musulmana.pdf, p. 7.

"Due to cultural and not religious beliefs, in some cases, when women have the right to work and are educated, women's job opportunities may in practice be unequal to those of men. In Egypt for example, women have limited opportunities to work in the private sector because women are still expected to put their role in the family first, which causes men to be seen as more reliable in the long term. Islamic law however, permits women to work in Islamic conditions:

- The work should not require the man or the woman to violate Islamic law (e.g., serving alcohol), and be mindful of the woman's safety.
- If the work requires the woman to leave her home, she must maintain her 'modesty' just as with men"[1].

The Universal Islamic Declaration on the Human Rights was adopted in Paris, on December 19th 1981, at the UNESCO residence. The rights stipulated in this Declaration are: the right to life, the right to freedom, the right to equality, the right to justice, the right to a fair trial, the right to protection against the power abuses, the right to protection from torture, the right to protection of honor and good name, the right to shelter, the rights of the minorities, the right to participation to the public life, the right to the freedom of thought, religion and speech, the right to the religious freedom, the right to free association, economic rights, the right to the protection of property, the rights and the obligations of the workers, the right to have everything needed for the living.

Within the right regarding the starting of a family, are provided the duties that the spouses have, in the articles from a-i.

The Islamic marriage is the right of all people through which it is constituted the legal way to start a family, to have children and to respect the spiritual virtues. According to sharia[2], the spouses have equal right and obligations one to another[3] and the education of the children belongs to the father. The spouses must respect each other by virtue of the love that unites them and the husband must support the wife and children.

The children have the right to a good education and they don't have to work at early ages and shouldn't receive tasks that could overburden them and delay their growth or to deprive them of the right to play and study.

In case that the parents couldn't fulfill their obligations towards the children, they will be taken under the responsibility of the society. The supporting expenses of the child will come from the treasury of the Muslims (state's public treasury)[4].

All the people will receive material support, as well as care and protection, from his family during his childhood, old age or incapacity. Parents are entitled to material support as well as care and protection from their children. Parents are entitled to material support as well as care and protection from their children. Also, motherhood is entitled to special respect.

Within the family[5], men and women are to share in their obligations and responsibilities according to their sex, their natural endowments, talents and inclinations. This responsibility encompasses more than the nucleus represented by parents and children,

[1] http://en.wikipedia.org/wiki/Women_in_Islam#cite_note-aqy-43.
[2] Sharia: the totality of the Islamic law, with all its political and religious forms.
[3] "If they wish for reconciliation and they have rights similar to those against them in a just manner: yet men have a stage above them": Koran 2, 228.
[4] For more details, see Maria Pescaru, *Asistenţa şi protecţia drepturilor copilului,* University of Piteşti Publishing House, Piteşti, 2010, p. 156.
[5] *Ibidem,* p. 167.

it extends to the relatives and blood-relatives of the mother. Young people can't be obliged to marry with a person against his/her will.

As regarding the provisions of the article that refers to the *wife's right*, can be mentioned:

a) live in the house in which her husband lives;
b) the husband support the wife during the marriage and during the statutory period of waiting, in the event of divorce[1], and that the man from which she separated to take over the expenses for the children she nurses or keeps;
c) The wife has the right to these expenses without taking into account its financial situation and the personal properties.
d) The wife has the right to ask her husband the amiable dissolution of the marriage contract through hul' (the buying back of the woman from the marriage)[2]; she has the right to ask the dissolution of marriage in accordance with the terms of the Law, according to the provisions of sharia.
e) The wife has the right to inherit from her husband. The same thing with her parents, her children and other relatives[3];
f) The spouses must respect each other private (intimate) life and to unravel her secrets in case there is a deformity or a moral issue. This right must be observed after the dissolution of the marriage too[4].

The article referring to *the right to education* stipulates its importance during the family and school. The children have the right to receive a proper education from their parents; they must, in exchange, to respect and honor their parents. Also, the education is a right all the people should enjoy. Men and women are obliged to try to fully develop his/her natural endowments and the society should offer all the humans the possibility to study[5].

The Arab Charter on Human Rights includes civil and political rights, economic, social and cultural rights. "Each State party to the present Charter undertakes to ensure that every individual located within its territory and subject to its jurisdiction, shall have the right to enjoy all the rights and freedoms recognised in this Charter, without distinction on the basis of race, colour sex, language, religion, political opinion, national or social origin, wealth, birth or other status, and without any discrimination between men and women6. Sentences of death shall not be carried-out on persons below eighteen years of age, or a pregnant woman, until she gives birth, or a nursing mother, until two years have passed from the date of her child's birth"[7].

"Every person has the right to protect himself/herself, because all the human beings are equal before God", said the sheik Abdel Hamid al-Atrach, the president Al-Azhar, the

[1] Men have authority over women because God has made the one superior to the other, and because they spend their wealth to maintain them. (Koran 4, 34); And if they should be pregnant, then spend on them until they give birth (Koran 65, 6).
[2] And it is not lawful for you to take back any part of what you have given them, except when both fear that they cannot remain within the bounds of Allah (Koran 2, 229).
[3] And for the wives is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave (Koran 4, 12).
[4] And do not forget graciousness between you (Koran 2, 237).
[5] Those people to which God wishes the best, He teaches the religion. I am only an intermediary; the Mighty God is Who offers (according to Abû Bakr and 'Umar). The people can choose to learn the things that correspond to their talents and capacities: All the people are successful in the fields they were created for (according to Abû Bakr, 'Umar, Abû Dâ'ûd andTirmidî).
[6] Article 2, *The Arab Charter on Human Rights, http://www.unhcr.org/refworld/docid/3ae6b38540.html.*
[7] Article 12, *Ibidem.*

highest authority of the Sunnite Islam. He declared that the women have the right to respond in the same way they are treated by the men. The Turkish leader Fathallah Jouloun added that "women can answer with two blows for one received", if there exists conjugal violence. These measures were announced because the mortality rate among the women from the Arab world increased alarmingly in the last period of time; for example, in Egypt, 35% of the women are killed annually by their husbands[1].

Conclusions

Several societies wished the occidentalization of the Muslim women, but they didn't succeed in each time because they were educated according to the Islamic moral and didn't change their opinion; one could notice the strong belief of the Muslim woman and the extremely important role that the Islam has in her way of thinking, mentality and feelings.
Yet, must be observed the devotion of the Muslim woman towards the Islam and the Islamic culture.

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".

Bibliography:

Pescaru, Maria, *Asistenţa şi protecţia drepturilor copilului*, University of Piteşti Publishing House, Piteşti, 2010;

Raluca Miga Beşteliu, *Protecţia internaţională a drepturilor omului*, the 4th edition, revised, Universul Juridic Publishing House, Bucharest, 2008;

Dumitru Mazilu, *Drepturile omului*, Lumina Lex Publishing House, Bucharest, 2000;

Sharia;

Koran;

The Arab Charter on Human Rights;

The Universal Islamic Declaration on the Human Rights;

http://www.islam.ro/pdf/26222724Femeia-musulmana.pdf;

http://www.antena3.ro/externe/revolutie-in-lumea-araba-femeile-au-oficial-dreptul-sa-si-loveasca-sotii-56446.html;

http://en.wikipedia.org/wiki/Women_in_Islam#cite_note-aqy-43.

[1] http://www.antena3.ro/externe/revolutie-in-lumea-araba-femeile-au-oficial-dreptul-sa-si-loveasca-sotii-56446.html

DIVINE PUNISHMENTS, A MODEL FOR THE JURIDICAL SANCTIONS ESTABLISHED BY

Paraschiv Daniel-Ştefan[*]

Abstract

Since the most ancient times of our civilisation, the conduct of individuals was governed by religious perception, by the punishing powerof divinities, however,along the way and over the centuries, the organizational pattern of society evolved, the sanctions being now applied by humans, for breaching lthe laws that they adopted, but which still embodied strong religious conotations.

Key words: *divine punishments, laws, juridical sanctions.*

Introduction

In tis wide meaning, the term „sanction" refers to a spiritual or physical suffering beared by someone for provoking, at his turn, a damage or suffering – in an unjustifiable or unjust mode- to another person, thus leading to a balance, just as before the accident occured, of the aritmethics of unaffected interests of the participants from the mentioned conflict.[1]

Juridical sanction is a creation of the law (pozitive law), a juridical institution derived (the consequence of the precept, in case it is ignored) and an instrument for achieving and reintegrating the juridical order (it gives authority to the precept and reestablishes the rule of law, by applying it).[2]

Concerning the punishments attributed to God or other divinities

The issue of punishments attributed to divinity is totally different in the Christian world compared to the Muslim world, where religion represents an important source of law, made possible by the strong influence of the Koran.

In the analysis of the punishments attributed to God, we must first make a difference between which of them are said to be applied by Him and which are established and applied by humans, in His name.

In the beginning of human kind, the world was dominated by faith in the punishing power of divinities, the later being interpreted as divine punishments for the numerous natura phenomenons harmful to humans.

The punishments considered to be applied by God may be *spiritual* (sadness, ignorance, error, will infirmity) or *physical* (hunger, war, spoliation, captivity, sickness). To

[*] Doctoral University Assitant, "Spiru Haret" University, Faculty of Law and Public Administration, Râmnicu Vâlcea, drept_vl.paraschiv.daniel@spiruharet.ro.

[1] The quantification operation is a customary characteristic of science, in general, the ideal of each scientific discipline, being that of its mathematization. The equivalence relation which resulted in the framework of the law, from the rational operation of quantification can be encountered in juridical domains such as civil contracts, indemnities, application of punishment judging by the intentions with which the harmful act was committed, the nature and size o the damage produced, etc. In this respect, see Mircea Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv*, C.H. Beck publishing, Bucharest, 1999, p. 354.

[2] Vintilă Dongoroz, *Drept penal* (Treaty – retype the course from the year 1939), Romanian Academy Publishing House, Bucharest, 2000, p. 8.

all these will also be added the *punishment* of the forces of nature: earthquakes, lightning, drought, floods, hail, etc.[1]

It can be stated that the first punishment applied by God was the banishment of Lucifer and other angels who has rebbeled against Him. Other punishments "applied" by God may be considered: the banishment of Adam and Eve from Heaven as a punishment for their disobedient attitude regarding His command and concerning the "forbidden fruit"; the punishment of Cain for killing his brother Abel[2]; the great flood "sent" to punish humans as they has streamed away from the religious precepts; the distruction of Sodoma and Gomora for punishing those guilty of sexual perversions which took place in the walls of those cities.[3]

Over the course of the veolution of ages, sanctions began to be applied by the power of humans as well, but embodying strong conotations from the sphere of divine forces.[4] Law was considered a result of the will of the divinity, creating a competing atmosphere between the graduants of the law and theological schoolsfor "grabing" the right to punish, the clerics being, in most cases bachelors in secular and theological law.[5]

In the Muslim world, the Koran being the limestone of the believers is also a source of law, and laws (*shari'a* – right path) also contain precepts from the Koran. Thus, the realtionship betwen religion and justice in the Muslin world is much stronger than the existing connection in the Christian world.

Any divine punishment, says the Koran constitutes the inversion of an inversion: as sin represents an inversion related to primordial equilibrium, one can speack of "offenses" brought to Allah.[6] Divine punishments have their origin in disequilibrium and human nature.

Some Muslims believe that the most important attribute of Allah is justice, from which his power to apply punishments. They say that people sanction illegally, as do not have an authority in this sens.[7]

The mentioned theory is also present among the Christian Orthodox, but it proves to be gentler concerning the right to penally sanctionate. Christians believe that human justice, in general, is relative because of the original sin, thus a just sanction would not exist, independent of its kind because the soul is the one who transmits energy to the action |(action being the act of punishing) and he has lost his purity by becomin impure and what is impure gives birth to impurities (the punishment is thus impure).[8]

Amont the punishments establisghed by Allah, we mention: keeping locked in the house until their death or straping in shirts and the beating of the women who shamed the man, cutting the thieves' hands[1], cutting the lips with scissors of fire,[2] the punishment given

---

[1] Constantin Pavel, *Problema răului la Fericitul Augustin*, Biblical and Missional Institute of the Romanian Orthodox Church Publishing Hosue, Bucharest, 1996, p. 101.
[2] One may state that this is the first infringement ever known by humans.
[3] George Minios, *Istoria infernurilor* (translation from French by Alexandra Cunita). Humanitas Publishing House, Bucharest, 1998, p. 19
[4] Thus, as an example, a relation between the human justice and divinity may be deduced from the regime of the tax penitence, according to which the confessor appeared a judge who interrogated and pronounced sentences, after which weighed the errors of the offenders. He established penitence by following the principle *contraria contrariis*, imposing: the gourmet post, the work of the lazy, abstinance for the lustful etc, as well as for the period of the post whose duration was stipulated in certain lists, depending on the gravity of the "mistakes" committed.
[5] Georges Minois, op.cit. p. 19.
[6] Schuon Frithj, *Să înţelegem islamul. Introducere în spiritualitatea lumii musulmane*, Humanitas Publishing House, Bucharest 1994, p. 103.
[7] Mujtaba Musavi Lari Sayyid, *Dumnezeu şi atributele sale, lecţii de doctrină islamică*, translation by Ana Catanea and Andrei Miroiu, Argus Publishing House, 1998, p. 141.
[8] George Remete, *Dogmatica Ortodoxă,* Orthodox diocese publishing, Alba-Iulia, 1997, p. 199.
[1] *Coranul* (translation by Silvestru Octavian Isopescul), ETA Publishing House, Cluj, 1992, p. 99.
[2] Georges Minois, op.cit. p. 143.

by Allah to the two angels who were condemned to sit upside down in a weel tied by their legs until the end of the world because they had dared to drink from a woman, which is prohibited by Allah.[1]

Apparition of juridical sanctions after the model of divine punishments

Over the ages, people imposed on themselves certain norms of conduct, as they considered to be in harmony with the divinities, trying to guide their lives by obeying certain rules with the help of which hoped to curry favor with the supernatural forces (for example, the sacrifices). Similarly, they tried to acquire the punishing method of divinities and they interpreted signs of nature as being heavenly „punishments". For example, people considered that a heavy rain which damaged their crops was a punishment from God for working during the celebration days.

Many juridical works also embodied provisions of a religious nature, such as "*Practica Inquisitionis haereticae Pravitatis"*, of the inquisitor fromToulouse, Bernard Guy, a Dominican monk,in which it is also presented an Episcopal condemnation sentence of a person guilty of having desecrated the Holy Communion and other sacred objects.[2] Similarly, laws which had religious precepts existed, for example, *Lex Cornelia*, in which the punishments applicable to those who serve the devil are shown.

There also existed strong connections between the human justice and the divity among the ancient people, namely the Sumerians and Asiro-Bayilonian who attributted judicial powers to the divinities, as there is a blend between the human and divine punishments.

The Jewes cultivated the idea that there was no difference between crime and sin, penal law and religious law. Any condemnable act was also a crime against God, a desacration of His Ubiquitous and His sacred name.[3]

Religious mistakes, such as worshiping idols, ritual mistakes, violating taboos concerning impure objects and some social mistakes were rigorously encoded in the Mosaic Law, the latter being considered of divine origine, thus priests played an essential role in exertion it, as human and divine punishments tended to be confused.

What affected society most were not the disobedient attitutes towards God's will, but the anti-social acts committed by humans,which disturbed the public order, actions which weakened the comminity from different points of view (for example killing a person, member of a tribe displayed various consequences: weakened the work force of the tribe, weakened the ability to procure food or defend against animals and other tribes, etc), thus such facts began to be noticed by the leaders of the harmed society. They had a certain power over the other people, but a justification was needed, a right to punish. As in that period religion exerted a great influence over people, the right to punish was justified by invoking the names of divinities.

Examples of punishing antisocial acts were represented by religious writings (the Bible, the Koran, etc). In these books the divinities, by means of the prophetic voice, brought to the knowledge of the people what was established to be immoral, what was in contradiction with harmonios cohabitation among humans.Thus, in the Bible it is shown that the person who stole a calf would have to pay five calfs. Later, people considered that the value of this amount was not enough to repair the damage or that this kind punishment had

---

[1] Dimitrie Cantemir, *Sistemul sau întocmirea religii muhammedane*, Minerva Publishing House, Bucharest, 1977, p. 336 et seq.

[2] Alfonso di Nola, *Diavolul, chipurile, isprăvile, istoria Satanei şi prezenţa sa malefică la toate popoarele din Antichitate până astăzi,* Bic All Publishing House, Bucharest, 2001, p. 241.

[3] Georges Minois, op.cit. p. 76.

no general preventive nature, so, having the religious punishing models, they created other punishments which they considered oppresive enough to put an end to the harmful actions.

As time passed, the juridical method of thinking had highly evolved, thus changing the criteria for creating new sanctions. Similarly, they modified themselves in different aspects: execution method, quantum (fines), duration (those which restrict liberty) and others have disppeared and not applied anymore except in certain regions of the globe (for example fagot, corporal punishments).

Similar to divine punishment, the juridical sanction implies a suffering, an evil which responds to the evil produced by committing the harmful act (*mallum passionis propter mallum actionis*)[1].

Similarly, both types of punishments are necessary in order to defend the social values, and their hardship is determined by the gravity of the acts committed and the dangerousness of the offenders.

Juridical sanctions are, however, regulated by juridical norms and are put into practice by the constraint force of the states, while the „divine" punishments are stipulated in religious norms and cannot be exercised by means of the judicial state organs.

Conclusions

The main motive for applying punishments, including legal ones was, in the beginning, the *instinct* of responding to violance by means of another physical violence, much stronger[2], namely the feeling of *vengeanc*e of the one affected by the unjust breach of his rights. Other motives for applying punishments would be the necessity of ensuring *order* in the influential sphere of the mentioned community and the desire to have *prevented* the harmful acts from affecting the society members.[3] The prescriptions of legal sanctions for certain acts were founded on religious norms, which are meant to contribute to the maintainance of social order. Even in the present divinity is invoked, as people hope, when they believe that the justice performed by our fellow men is unjust, that there is a Supreme Court, impartial, that ill judge everyone in the end. Moreover, even the act of taking an oath by the witnesses which present themselves before the judicial bodies in order to be heard has a religious connotation.

Bibliography:

Alfonso di Nola, *Diavolul, chipurile, isprăvile, istoria Satanei şi prezenţa sa malefică la toate popoarele din Antichitate până astăzi,* Bic All Publishing House, Bucharest, 2001;

Vintilă Dongoroz, *Drept penal (Treaty – retype the course from the year 1939)*, Romanian Academy Publishing House, Bucharest, 2000;

Mircea Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv,* C. H. Beck Publishing House, Bucharest, 1999;

George Minios, *Istoria infernurilor (translation from French by Alexandra Cunita)*. Humanitas Publishing House, Bucharest, 1998;

[1] Costică Bulai, *Manual de drept penal. Partea generală,* All Publishing House, Bucharest, 1997, p. 283.

[2] Thus, in the primitive society, the affected individual would instinctively respond by an immediate action, without saving the proportions of violence (Ion Craiova, Elementary treaty of the general theory of law, All Becks Publishing House, Bucharest, 2001, p 284.

[3] In the beginnings of our history, these motives were less responsible than the motive of revenge, but, along the way, the relation changed in favor of the impersonal motives, which weights much more today- especially in the framework of law where their presence is totals in the majority of the world states- firstly due to the fact that a tendency towards conflict perpetuation between certain subjects has been observed, when at the basis of the punishment lay motives such as vengeance.

Mujtaba Musavi Lari Sayyid, *Dumnezeu şi atributele sale, lecţii de doctrină islamică,* translation by Ana Catanea and Andrei Miroiu, Argus Publishing House, 1998;

George Remete, *Dogmatica Ortodoxă,* Orthodox Diocese Publishing House, Alba-Iulia, 1997;

Costică Bulai, *Manual de drept penal. Partea generală*, All Publishing House, Bucharest, 1997;

Constantin Pavel, *Problema răului la Fericitul Augustin,* Biblical and Missional Institute of the Romanian Orthodox Church Publishing House, Bucharest, 1996;

Schuon Frithj, *Să înţelegem islamul. Introducere în spiritualitatea lumii musulmane*, Humanitas Publishing House, Bucharest 1994;

Coranul (translation by Silvestru Octavian Isopescul), ETA Publishing House, Cluj-Napoca, 1992;

Dimitrie Cantemir, *Sistemul sau întocmirea religii muhammedane*, Minerva Publishing House, Bucharest, 1977.

ASPECTS REGARDING THE LACK OF CORRELATION OF CERTAIN RELIGIOUS RULES AND PRACTICES WITH THE LEGAL DISPOSITIONS ADOPTED BY THE STATE

Paraschiv Elena[*]

Abstract

As a rule, religious practices do not normally violate the social order; however, there are cases when legal state regulations are breached, resulting in harmful consequences, especially in the framework of certain cults, which insidiously urge their adepts to adopt an anarchical behavior, most of the time pursuing the accomplishment of their illicit material interests.

Key words: *religious movements, laws, social order.*

Introduction

Social life is generally governed by laws adopted by the state authorities, however when mentioning the reglementation for the internal order of certain groups formed inside a state or international community- which may comprise a political, economical, social, religious, scientifical, sports cultural, etc nature- their right to create unique and individual norms[1] *stipulated in statutes, regulations, colective contracts, canons is recognized.They form the so-called autonomous right, which is subordinated*[2] *to the right of the origin of state by means of which the manner of establishment, organisation and functioning of the group formations mentioned*[3] *is regulated.*

Brief considerations regarding the canonic right

Since ancient times, the need to establish certain rules of conduct in any human community proved to be a necessity without which the cohabitation of its members would have been rendered impossible. This determined the imposition of certain norms of conduct which, together with the evolution of society and formation of states, constituted the premise for the appearance of modern law systems.

All which makes reference to laws and rights and is generally related to people's relationships in society, is also valid when considering the life of believers in a church, in quality of members of that church, as neither churches nor a church life may evade state regulations, the later being present and taking action in the life of a church, as well as in other forms of organized church life in general.Thus, any individual, in his quality of member or citizen of a state as well as in his quality of member or servent of any kind of religious grouping, must live in conformity with the regulations imposed on the life and activity of all humans[4] by the legal provisions.

---

[*] Lecturer Ph.D. "Spiru Haret" University, Faculty of Law and Public Administration, Râmnicu Vâlcea, bnp_elenaparaschiv@hotmail.com.

[1] Ion Dogaru, Dan Claudiu Dănişor, *Teoria generală a dreptului,* Scientific Publishing House, Bucharest, 1999, p. 200.

[2] Norms that govern the internal order of public or private groups are subsidiary to legal state norms in the sense that the former must not contradict the laws in force.

[3] Sofia Popescu, *Teoria generală a dreptului,* Lumina Lex Publishing House, Bucharest, 2000, pp. 162-163.

[4] Nicolae-Ioan Floca, *Drept canonic ortodox, legislaţie şi administraţie bisericească*, vol I, Biblical and Missional Institute of the Romanian Orthodox Church Publishing House, Bucharest, 1922, p. 28.

Throughout history, the church has granted an important significance to the juridical element in various ways, making use of a variety of acceptions, sometimes assigning it an exaggerated role by including it among the revelating elements that uphold the divine nature and sometimes understating it or even declaring it irreconcilable with the nature of church.[1] Thus, the juridical factor, operating in the life of the church was named: *divine law, eternal law, divine right, natural law, natural right* or simply, *law*, in the sense of "Old Law", or "New Law", namely belonging to the Old or New Testament. It was also reffered to as: *commandment, ordinance, canon, ecclesiastical law, settlement, teaching,* etc.

These denominations have different meanings, emphasizing certain aspects which may be strongly connected or just evasively pointing out at the term law.

The notion of "*divine law*" was used by the Hebrew or other oriental nations, as well as by the Romans and Greeks under the name of "*Jus sacrum*" or "*Jus divinum*", as it was only natural that the church founded in the Jewish and Greco-Roman culture area which in many aspects was a continuity of the Mosaic religion, to assimilate *tale quale* the notion of *divine right*.

In ecclesiastical ordinances, the term "right", independent of the way it was mentioned, generally embodies and continues to have a content which surpasses the juridical sphere, as it continously prevails religious and ethical elements.

The meaning of the term *canonic right* is in fact the Christian religious right that embodies all the principles and legal provisions after which the entire Christian church is being organized and governed, namely all Christian confessions.

The denomination of the canonic right comes from the fact that ecclesiactical laws are named *canons, guidance* and not very simply, laws-a term specific to normative acts adopted by the state. The canonic right is also named *ecclesiastical law*, as canons belong to the church.

Canonical norms are regulations by means of which the church authority establishes the way in which the members of the church must act or behave in order to fulfill the missions entrusted to them so that their activity will be considered efficient and will be positively appreciated in relation to the religious belief and the religious and ethical principles resulting from it.

Moral-religious values which are avoided by the canonical norms represent religious purposes and positive conduct, such as: truth, sanctity, goodness, responsibility, equity, justice, liberty etc.They express fundamental requirements of the behaviour of a believer in the framework of religious church communities.

The adoption of certain rules of conduct (canons) for defending religious values aimes to establish the behaviour of servants and believers in the framework of the church which imprints a normative character on the canons.

Aspects regarding the lack of correlation between certain norms and practices of religios movements and the laws adopted by the state

The rule of law constitutes the essential premise of social cohesion, being conditioned by the existence of normative systems and the living translation of their content.[2]

As an instrument of social control, law may function in good conditions only together with the existance of a *legitimate foundation* of the normative system, of the way of interpreting juridical norms and sanctions applied when these norms are breached, as well as

[1] Ion Matei, *Contribuţiuni la istoria dreptului bisericesc*, Bucharest, 1922.
[2] Antonie Iorgovan, *Drept administrativ*, volume I, All Beck Publishing House, Bucharest, 2001, p. 13

the jurisdictional activity.[1] As a consequence, the reglementations of religious cults and the activities developed in their framework must be in conformity with the legal state norms, thus contributing to the consolidation of social order and to the protection of generally acknowledged values.

Throught time various ordinances, customs, traditions, religiour norms, moral norms were established, and all were elaborated by the different ecclesiastical bodies, called councils.

Like any juridical norm, the canonical norm is, basically, *imperative*, *general* and *abstract*, has a *repetitive* applicability (while still in force) and establishes a typical conduct or standard conduct, after which the members of the church and believers guide their moral-religious activity within the framework of the church.

Practicing the canon Law is made possible by individual juridical documents, issued under the canonical regulations, according to specific procedures, by the church bodies which are invested with ecclesiastical authority, and the sanctions (punishments, canons, epitimie) principally aim at the guilty person's conscience, appearing as a predominantly moral constraint whose objective is to rectify the "*sinner*" and not his "*death*" (applying physical punishments). Thus, the finality of canonical norms is essentially different from the state laws, as, apart from their concrete role- that of establishing a state of order in organizing activities which are specific to the church and to the relantionships among believers– the church law should first of all pursue the accomplishment of the church's general objective, the realization of the supreme religious goal, namely the salvation of all believers[2] and a change in their conduct for the good, in the sense of conforming to legal, religious or moral norms existing in society, respecting their fellow humans and the other values generally acknowledged and accepted.

Generally, norms and activities comprising a religious nature are not in contradiction with the regulations and the legal state law, however, particularly certain practices of the "new religious movements", even though in some cases do not present a strictly illicit nature, are harmfull for the social life by prejudicing the values accepted by the state. Thus, certain cults promote active or abstentionist conducts which bring negative effects upon their members, such as suicidal acts which are sometimes accompanied by killing other persons by detonating the explosive placed on the suicide bombers or refusal of medical support (by example, transfusions) of the persons who are in danger.[3] Also, because of their propagated ideas and practices, some cults represent a real thread for society by mental destabilization, requesting compulsory material contributions from „believers", rupture from the surrounding environment, public order disturbances, etc.[4]

Certain norms and activities of some movements comprising a religious nature are in contradiction with state reglementations by means of fiscal frauds, the breach of work legislation and social security, etc.[5] Thus, certain religious cults experince a considerable

---

[1] Daniel-Ştefan Paraschiv, *Limite în perfecţionarea legislaţiei româneşti spre integrarea europeană,* in the European Integration and Romanian right.From the communications presented at the scientific session of the Romanian Academy Juridical Research Institute 2006, Tempus Dacoromânia Comterra Publishing, Bucharest, 2006, p. 319.

[2] Ion Moldovan, *Sfintele canoane şi raportul lor cu Revelaţia divină*, Metropolitan Church of Banat 1-3/ 1977.

[3] As an example,at the beginning of the month of September, the TV posts announced that a girl had died in the hospital because her relatives were opposed to conducting blood transfusions which were necessary for the improvement of her health condition because she belonged to the religious cult "Jehovah's Witnesses".

[4] Radu Muresan, *Aspecte particulare ale relaţiei dintre stat şi noile mişcări religioase*. Romanian Patriarchate Magazine, year LIX, No. 12, January- June 2008, Bucharest, p. 214.

[5] Renée Koering-Joulin, *Activités sectaires et droit pénal*, Le Monde, 25 September, 1997.

material prosperity by using the work force of parishioners for free or with very low costs, by not paying the taxes and fees on buildings or by means of the incomes from economical and commercial activities, performed by money laundering, which is achieved in some cases under the form of receiving „donations" from abroad of sums of money which were actually transferred from outside the borders without paying related charges, by the receipt of compulsory fees from the cult members (an example being the *tithe*, which implies a contribution amounting to the tenth part of the total income obtained), etc.

Although they benefit from numerous exemptions or tax reductions, religiuos organizations generally put into practice, a semnificative tax evasion by not declaring incomes which are thus not submitted to taxing, by product commercialization without paying the VAT, etc. thus breaching tax and criminal reglementations in the domain.

Similarly, certain religious cults violate the state legislation by menas of the harmful attitude displayed by the members towards their minors, in accordance with the precepts propagated. Even if in accordance with the international or national instruments, the right of the parents is recognized to ensure the children's education"in conformity with their own religious and philosophical beliefs"[1], their education must be exercised considering the superior interest of the minors[2], thus the ones guilty of committing harmful acts against their own children because of their religious beliefs (unhealthy nutrition, consumption of alcohol, psychotropic substances,etc., refusal of medical care, etc) completely ignore certain reglementations stipulated in the Penal Code, which sanctions the bad treatment applied to minors (art. 307), the refusal to combat sickness (art. 308) or endangering a person incapable of taking care of itself (art. 314).

Due to the precepts promoted by certain cults, their adepts also violate norms which regulate family relationships or social life by adopting harmful conducts to others.

Conclusions

Religious liberty was proclaimed even by the Universal Declaration of Human Rights[3], and the protection of the religious identity is necessary for all the members of the human society which share or express a religious faith, independent of their ethnic origin and their minority or majority status.[4]

A thorough research from the part of the state authorities on the manner in which legal norms are observed in the framework of religious movements is imposed and also taking measures against those who commit acts which violate the rule of law. Also, improving the legislation in the sense of prohibiting those harmful religious practices which are not yet regulated by juridical norms proves to be necessary, so that only the religious activities which contribute to the education of citizens in the spirit of good and respect for the state laws and moral regulations acknowledged by society come into being.

---

[1] Children's rights declaration, adopted by the UNO's General Assembly, on the 20th of November 1959.

[2] By the Convention regarding the children's rights adopted by the General Assembly of the UNO on the 29th of November 1989, which entered in force on the 2nd of September 1990 (ratified by Romania through the Law no. 18/ 1990) the Children's right Committee was created which ensures the observance of the minors' rights in the signatory states of this Convention.

[3] Art. 18 from the Universal declaration of human rights, adopted on the 10th of December 1948, at the General Assembly resolution of UNO, no. 217A (III).

[4] Nicolae Dura, *Drepturile şi libertăţile omului în gândirea juridică europeană,* in the Official Romanian Patriarchic Bulletin, year CXXIV, no. 4-6, April-June 2006, Bucharest, p. 331.

Bibliography:

Radu Mureşan, *Aspecte particulare ale relaţiei dintre stat şi noile mişcări religioase. Romanian Patriarchate Magazine*, year LIX, No. 12, January- June 2008, Bucharest, 2008;

Nicolae Dura, *Drepturile şi libertăţile omului în gândirea juridică europeană*, in the Official Romanian Patriarchic Bulletin, year CXXIV, no. 4-6, April-June 2006, Bucharest, 2006;

Daniel-Ştefan Paraschiv, *Limite în perfecţionarea legislaţiei româneşti spre integrarea european.* From the communications presented at the scientific session of the Romanian Academy Juridical Research Institute 2006, Tempus Dacoromânia Comterra Publishing House, Bucharest, 2006;

Antonie Iorgovan, *Drept administrativ*, volume I, All Beck Publishing House, Bucharest, 2001;

Sofia Popescu, *Teoria generală a dreptului*, Lumina Lex Publishing House, Bucharest, 2000;

Ion Dogaru, Dan Claudiu Dănişor, *Teoria generală a dreptului,* Scientific Publishing House, Bucharest, 1999;

Renée Koering-Joulin, *Activités sectaires et droit pénal*, Le Monde, 25 September, 1997;

Ion Moldovan, *Sfintele canoane şi raportul lor cu Revelaţia divină*, Metropolitan Church of Banat 1-3/ 1977;

Nicolae-Ioan Floca, *Drept canonic ortodox, legislaţie şi administraţie bisericească*, vol I, Biblical and Missional Institute of the Romanian Orthodox Church Publishing House, Bucharest, 1922;

Ion Matei, *Contribuţiuni la istoria dreptului bisericesc*, Bucharest, 1922.

ENSURING AND PROTECTING THE RELIGIOUS LIBERTY. LIMITS IN EXERCISING THIS RIGHT

Paraschiv Ramona-Gabriela[*]

Abstract

Religious liberty, as an essential component of the freedom of thought, is guaranteed and is assured juridical protection not only by legal provisions adopted by the democratic states, but also by international reglementations which comprise a regional or universal nature.

Key words: *legal limits, religious liberty, reglementations.*

Introduction

The liberty of religion belongs to the cathegory of freedoms of thought, along with the freedom of thought and the freedom of concience.

These freedoms, along with the right to gatherings, the right of the parents to be respected regarding their beliefs in child education and the liberty of expression, acquired not only an actual individual dimension (having opinions and beliefs), but also a socila and political one (expressing them), dimensions which are absolutely characteristic to the human rights[1]*, guaranteed by the state and the international organisms which ensure their protection by specific methods.*

Conceptual clarifications

Etymologically, the term "protection" comes from the Latin word "*protectionis*", which means *defense, protection, sheltering*.

By *juridical protection of the human rights,* we actually mean an assembly of juridical norms and concrete measures taken by the states of the world in order to protect the human being, and, *ipso facto*, the plenary affirmation of the spiritual and material human life, and by *human rights*, we make reference to all which is revendicated and permitted by man, in conformity with a social or juridical norm, from where the different nature of these rights which find their basisi not only in *jus naturale* and in *jus gentium*, but also in the moral conduct regulations accepted and practiced in a democratic society.[2]

The word "law" is the translation of "*jus*", which comes from the Sanskrit "*jaos*", sygnifying something requested or permitted in conformity with social-ethical norms. The Romans used this expression with the meaning of "saint", "good", but as time passed, this moral principle also acquired a juridical meaning, as the term "*justitia*" comprised both a moral principle and a juridical one.

The ancient relationship between law and ethics, between "right" and "good", between law and religion and fundamented by the fact that, before the laicization of law, the

[*] Doctoral university assistant, "Dimitrie Cantemir" Christian University, Bucharest, Faculty of Law, ramonaparaschiv@rocketmail.com.

[1] Frédéric Sudre, *Drept european şi internaţional al drepturilor omului*, Polirom Publishing House, 2006, p. 343.

[2] Nicolae Dură, *Drepturile şi libertăţile omului în gândirea juridică europeană,* Official Romanian Patriarchy Bulletin, year CXXIV, no. 4-6, April-June 2006, Bucharest, p. 327.

serving of justice was made in the name of the "sacred law", implicitly assumed to be a direct emanation of the *divine will*[1].

In the Romanian right from before the events of December 1989 nobody spoke of "human rights", but only "citizen rights"[2], after the juridical French model of thinking which was specific to the Revolution of 1789, when the European religious "man" was replaced with one belonging to a citadel in which "liberty, equality and fraternity" should govern betwen the "*citizens*" of the same social and political status.

The internationalization of the human rights was accomplished by the „*Universal Declaration of the Human Rights*"[3], according to which these rights belong to *all individuals as human beings,* thus the vocation of universality[4]. Subsequently, numerous international instruments were adopted by which the human rights are guaranteed, including religious liberty, and protection measures are being established, thus giving birth to a genuine branch of international law of the human rights.

Religious liberty in international reglementations. Limits in exercising it

The Universal Declaration of Human Rights states that "any man has a right to freedom of thought, conscience and religion", this including "the liberty to change one's religion or belief, as well as the liberty to express one's religion or belief together with others or by one's self, both privately and publicly".[5] In the International Pact regarding the political and civil rights[6], it is stipulated that „nobody will be submitted to any constraint, or may influence one's liberty of being part or adopting a religion or belief on one's free choice", and "the liberty of expressing one's religion or beliefs cannot be submitted to anyone apart from the restrictions stipulated by the law and necessary for the protection of security, order and public health or of ethics or fundamental rights and liberties of others". In the European convention of human rights[7] the same rights which imply respect for the diversity of beliefs by the public authorities in order to guarantee each person a perfect spiritual independance[8] are being stipulated. The liberty of thought, conscience and religion referes to: the right to have one's beliefs[9] and the right of the individual to express his beliefs.[1]

---

[1] Nicolae Dură, *Dreptul şi religia. Normele juridice şi normele religios-morale*, in the Annals of the Ovidius University, Series: Law and Administrative Sciences, volume I, 2003, pp. 15-23, which show that in the time of Cuza Voda, "direptatea" was understood and defined as "a sacred thing surpassing all others" according to the texts from the Great Pravila in Targoviste, from the year 1652.

[2] Tudor Draganu, *Drept constituţional*, Didactic and Pedagogical publishing, Bucharest, 1972, p. 209; Ioan Muraru, *Drept constituţional - cetăţenia română şi drepturile fundamentale*, CMUB, 1973, p. 35; Nicolae Prişca, *Drept constituţional*, Didactic and Pedagogical publishing, Bucharest, 1977, p. 207, etc.

[3] Adopted on the 10th of December 1948, at the General Assembly resolution of UNO, no. 217A (III).

[4] Ovidiu Petrescu, *Convenţia europeană a drepturilor omului şi dreptul penal român*, Lumina Lex Publishing, Bucharest, 2006, p. 34.

[5] Art. 18 from the Universal Declaration of Human Rights.

[6] Art. 18, 2 and 3 from the International Pact concerning the political and civil rights, adopted on the 16th of December 1966, at the General Assembly resolution of UNO, no. 2100A (XX), at New York and entered in force on the 23rd of March 1976; signed by Romania on the 27th of June 1968 and ratified by the Decree 212/ 31st of October 1974, published in the Official Gazette no. 146/20th of November 1974.

[7] The European Convention of human rights also denominated the Convention for the protection of human rights and fundamental freedoms, was adopted in Rome, on the 4th of November and entered in force on the 3rd of September 1953.Romania ratified this convention on the 31st of May 1954.

[8] According to art. 9,1 pnt.1 from the Convention "Any person has the right to freedom of thought, conscience and religion; this right includes the liberty to change one's religion or belief in an individual or collective manner, in public or in private, by means of cult, education, practices and fulfillment of rituals.

[9] The right to have one's own beliefs protects the interior force, the domain of personal beliefs and religious beliefs which is not subjected to limitations. This right represents the liberty of each person to have or adopt certain beliefs

The right to express one's beliefs may be subject to restrictions necessary in maintaining public order[2], such as, reconciliating the interests of different groups in order to guarantee the repect for everyone's beliefs. The public order clause permits, in this case, the protection of the freedom of liberty, conscience and religion of others, and in the same time, prevents proselythism by abusive pressures.Also, the national security or public health and morality[3] must not be affected.

The liberty of individuals to express their religion also includes participating in the religious community life, which must function in a peaceful manner, without the arbitrary interference of the state, especially within its internal organization. The freedom of thought, conscience and religion does not, however, entitle the individual to refuse one's legal obligations (for instance, the fulfillment of the military service) in the name of certain superior demands dictated by one's own conscience.

The right of the parents to ensure the education of their children „in conformity with one's own philosophical and religious beliefs" is stipulated in the Children's rights declaration, from the 20th of November 1959. In accordance with the later, the responsibility of the child's education is primarely given to the parents, who must exercise it in the superior interest of the child, thus also targeting the child's protection against the indoctrination that totalitary regims may organize by means of education.[4]

The International Parct regarding the political and civil rights (art. 18 par. 4) [5] and the American Convention regarding human rights (art. 12, par. 4)[6] also includes the index of freedom of thought, conscience and religion, the freedom of parents to decide regarding the education of their children[7], including religious education.

The exertion of this right may be, however, subjected to certain restrictions in conformity with the law and necessary in the interest of national security, of the public order or aiming at protection of health, public ethics or childrens' rights and liberties.[8]

Ensuring religious liberty in Romania and its limits

Freedoms of thought, respectively the freedom of thought, conscience and religion are also stipulated in the legislation of our country, at the same time ensuring the means of manifestation and garantees which will ensure their being respected. Thus, in the art. 29 from

---

or a religion, by his own free choice, to be devoid of beliefs or religious faith or to be free to change one's religion or beliefs.

[1] The right of the individual to express its beliefs implies that any person may manifest its own beliefs, individually or collectively, in a public or private framework.

[2] According to art. 9, ¶ 1, 2 from the Convention "The liberty to express one's religion or beliefs cannot be subjected to restrictions other that those stipulated in the law, and which embody necessary measures in a democratic society, aiming at public safety, protection of order, health and public ethics for protection of rights and liberties of others."

[3] Art 19, 3 from the International Pact regarding political and civil rights and art. 9, 2 from the European Convention of human rights.

[4] On the 29th of November 1989 the Committee for children's rights which ensures that the minors' rights are being respected in the signatory states of the Convention regarding the children's rights was created and was adopted by the UNO General Assembly, which entered in force on the 2nd of September 1990, ratified by Romania by the Law no. 18/1990.

[5] "The State Parties shall undertake at the present Pact to respect the liberty of parents, and, when it is the case, of legal tutors, to ensure the moral and religious education of their children, in conformity with their own beliefs".

[6] Adopted at the Inter-American specialized Conference regarding human rights, San Jose, Costa Rica, 22nd of November 1969.

[7] This principle is not clearly included in the European Convention of human rights, because of the controversies between the adversaries and partisans of free education. The majority of the states tend to eliminate any obligation of assistance.

[8] Art. 21 from the International Pact regarding political and civil rights.

the Constitution, it is stipulated that freedom of thought and opinions, as well as liberty of religious faith may not be restricted by any form.Nobody can be forced to adopt an opinion or to adhere to a belief contrary to his own beliefs. Similarly, liberty of conscience is guarantees; it must manifest itself in a spirit of tolerance and mutual respect.

Religious cults are free and are organized according to one's own status, *in conformity with the law*, and among its relationships any *forms, means, acts or actions of religious enmity* are prohibited. These are autonomous to the state and enjoy its support, including by the facilitation of religious assitance in the army, in hospitals, in penitenciaries, in asylums and orphanages.

Parents or tutors have the right to ensure, in accordance with their own beliefs, the education of minors, for whom they are responsible.

In accordance with art. 30, line 1-3 from the Constitution, Romanian citizens are ensured of these freedoms of conscience,and even the possibility of manifesting their beliefs in the social and political life of the country, being ensured of the liberty to express their thoughts, opinions, beliefs or different types of creations,the censorship of any type being prohibited.

All these provisions embodied in the Romanian Constitution are in concordance with the dispositions of the European Convention of human rights and the practice of the European Court of human rights, as well as with the reglementations comprised in other international instruments refering to the freedom of thought, conscience and religious beliefs or the spirit of tolerance and mutual respect between individuals with different beliefs or who practice other religious cults.

Religious liberty is also ensured by ordinary laws, as reglementations in accordance to which those who prejudice them ar being sanctioned do exist,for example the incrimnating prohibition of the freedom of cults.

Thus, in accordance with art. 318 from the Penal Code, acts of restricting or disturbing the freedom of exertion of a certain religious cult which is organized and functions in accordance with the law are sanctioned, or acts which force a person to participate in the religious services of a cult or accomplish a religious act concerning the exertion of a cult.

The mentioned regulation is also mentioned in the Penal Code adopted by the Law no. 286/2009, but the new regulation(art. 381) also stipulates that the penal action for such deeds is put in motion only at the prior complaint if the injured person.

Conclusions

The religious freedom of people is guaranteed and protected not onlu by international regulations, but also regulations of the democratic states.

Similarly, however, religious cults must function in conformity with the laws in force, and each individual –as a state member or as a servant to whatever religious group- must live in conformity with the rules stipulated by the rules of law, which are compulsory for the life and activity of all people.[1]

The reglementation adopted by the state and international organisms, the juridical principles and the science of law, as a whole, present an incredible utility and also represent equivalent sources both for the culture and religious culture, but also for the practical oriebtation in church dilemas, as they appear in every age.[2]

---

[1] Nicolae Floca, *Drept canonic ortodox, legislaţie şi administraţie bisericească*, volume I, Biblical and Missional Institute of the Romanian Orthodox Church Publishing House, Bucharest, 1992, p. 28.

[2] Elena Paraschiv, *Izvoarele formale ale dreptului*, C.H. Beck Publising House, Bucharest, 2007, p. 188.

Bibliography:

Elena Paraschiv, *Izvoarele formale ale dreptului*, C.H. Beck Publising House, Bucharest, 2007;

Frédéric Sudre, *Drept european şi internaţional al drepturilor omului,* Polirom Publishing House, 2006;

Nicolae Dură, *Drepturile şi libertăţile omului în gândirea juridică europeană*, Official Romanian Patriarchy Bulletin, year CXXIV, no. 4-6, April-June 2006, Bucharest, 2006;

Ovidiu Petrescu, *Convenţia europeană a drepturilor omului şi dreptul penal român,* Lumina Lex Publishing House, Bucharest, 2006;

Nicolae Dură, *Dreptul şi religia. Normele juridice şi normele religios-morale,* in the Annals of the "Ovidius" University, Series: Law and Administrative Sciences, volume I, 2003;

Nicolae Floca, *Drept canonic ortodox, legislaţie şi administraţie bisericească,* volume I, Biblical and Missional Institute of the Romanian Orthodox Church Publishing House, Bucharest, 1992;

Nicolae Prişca, *Drept constituţional,* Didactic and Pedagogical Publishing House, Bucharest, 1977;

Ioan Muraru, *Drept constituţional - cetăţenia română şi drepturile fundamentale*, CMUB, 1973;

Tudor Drăganu, *Drept constituţional*, Didactic and Pedagogical Publishing House, Bucharest, 1972.

THE PROPHETS OF THE OLD TESTAMENT AND THE IDEA OF SOCIAL JUSTICE

Viorel Cristian Popa*

Abstract

The present study attempts to compare the social issues of a very old age, the age of the Judaic society, namely the VIII-V centuryies BC, and the age of the present-day Christianity. We express our conviction that the social issues of the Old Testament are very actual and that the prophets of the Old Testament offer solutions to their solving.

Key words: *prophets, justice, unjustice, priests, Christian church*.

Introduction

An analysis of the divine message sent by the prophets of the Old Testament determines us naturally to ponder on the question: to what extent the books of the prophets are still current for the message that the Christian Church is preaching today? We wonder if the prophetic writings remained merely a document that enclosed in its pages a message conveyed only to the biblical Israel doubtless representing a stage of the divine revelation, addressed to the chosen people, or whether it still renders an urge or an attitude to the present Church as to respond to the nowadays realities? In other words, to what extent can the prophetic message help the Christian Church nowadays, which has to be a serving Church?

The idea of jutice in the sayings of the prophets

The great number of those who approached the analysis of the prophetic books from the exegetical point of view, omiletical or cathehetical, pleeds for the actualization of the message launched by the prophets[1] many centuries ago[2].

Certainly the content of the prophetic books aims at special situations of the Israel people from the prophetical ages, but their message encapsulate truths applied to the Christian church today. The special interest for the content of the prophetical books emphasizes its actuality for the members of the Church fully engaged in the living of the Christian life.

In total different historical conditions compared to those of the prophets we can surprisingly state that there are similar social issues in nowadays society. In the present-day world, Christians face situations or social issues so vehemently critisized by the prophets. So long as the lacks condemned by the prophets are being maintained, the actuality of their message is obvious, being an inspired instance of attitude and a real help for the Church[3].

For the Christians and especially for the priests, the life and the message of the Old Testament prophets are more than illustrative and classical instances worhy of being followed. Their teachings are an integrative part of our great Judeo-Christian spiritual

* Doctor in Divinity, lecturer at University of Oradea, Faculty of Orthodox Theology, priest, e-mail: viorel_popa_cristi@yahoo.com

[1] Pr. Dr. Mircea Basarab, *Cartea profetului Amos, introducere, traducere şi comentariu*, in Studii Teologice Magazine, Year XXXI (1979), no. 5-10.

[2] I have limited myself in this study at the period of the prophets' writers of the Old Testament (VIII-V centuries BC).

[3] Pr. Dr. Mircea Basarab, *op.cit.*

heritage. In His life on Earth, our Saviour Jesus Christ often made remarks to the writings of the prophets, for strenghtening His preaching and for proving His messianical mission.

Through His coming as Messiah, Christ fulfills the message of the prophets. When He started his mission in Galilee, solemly heralding His messianical calling, our Saviour quoted from the book of Isaiah in which He speaks about the restauration of the poor's state, proclaiming freedom for the captives and the brokenhearted. Entering the Synanogue in the Sabath day, He was given to read the book of the prophet Isaiah[1]: *The Spirit of the Sovereign LORD is on me, because the LORD has anointed me to proclaim good news to the poor. He has sent me to bind up the brokenhearted, to proclaim freedom for the captive, and release from darkness for the prisoners, to proclaim the year of the LORD's favor and the day of vengeance of our God, to comfort all who mourn, and provide for those who grieve in Zion—to bestow on them a crown of beauty instead of ashes, the oil of joy instead of mourning, and a garment of praise instead of a spirit of despair. (*Isaiah 61, 1-2; Luke 4, 16-22). This message clearly renders the restauration of the true justice in the Judaic society and by extension to the whole Christian community that was to be born.

Even from the very outset, Christian church labelled itself *The New Israel,* continuing and fulfilling the revelation of the Old Testament. The Hebrew Bible was accepted and integrated in the Canon of the Holy Scriptures and lies at the foundation of the declaration of Church faith and teaching. Thus, we can assert that the spirit of the Judaic religion has not burn out once with the epoch wherein its power developed and evinced, but it perpetualizes continually in the Christian living[2]. That's why the knowledge of the writings of the Old Testament prophets is a basic duty of every Christian believer.

For those who conceive and run the social-economic business of the world's nations, the progressive ideas of the inspired men of the Old Testament are an unexhaustible source of generous ideas and of real help in our attempts at discovering means of uplifting and improving the life of the masses[3].

The ideea of social justice and the fight for its fulfillment constitutes one of the basic characteristics of the Old Testament. In a special sense, the prophetic books are full of venomous sentences addressed to those who commit unjust practices. According to the prophets, the source of present unjustice resides in the greedy egotism led to the extremes. These unjust actions are not even by far the result of some natural law or any fatalism[4]. The prophets rise with a strong vehemence against this egotism: *hear the word of the LORD, you rulers of Sodom; listen to the instruction of our God, you people of Gomorrah! Wash and make yourselves clean,Take your evil deeds out of my sight;stop doing wrong.Learn to do right; seek justice, Defend the oppressed.Take up the cause of the fatherless; plead the case of the widow!... If you are willing and obedient, you will eat the best from the land* (Isaiah1,10,16-17,19). Prophet Micah says also: *He has shown you, O mortal, what is good.And what does the LORD require of you? To act justly and to love mercy and to walk humbly with your God.* (6, 8)

Christian church, having at its basic foundation the prophetic message and the teaching of the Saviour, has to take attitude against unjustice and its position can't be other than that of the prophets in their time. A categorical "No", similar to that uttered by the

---

[1] Pr. dr. Ştefan Slevoacă, *Aspecte actuale ale predicii profeţilor Vechiului Testament*, in Studii Teologice Magazine, Anul XXXII(1980), no.1-2.
[2] *Ibidem.*
[3] *Ibidem.*
[4] Pr. prof. dr. Dumitru Belu, *Vechiul Testament ca izvor omiletic*, in Mitropolia Ardealului Magazine, Year II (1957), no. 11-12.

prophets against the lushury and the wealth of the contemporaries determined to live only for their stomach has to enflame the Christians of our century facing the new forms of lushury and wealth gained in unjust ways[1].

The Church demands its believers to lead a rational life, being aware of the purpose for which they were created, thus avoiding unjustice and persecuting the others and at the same time condemning forcefully the abuses that come in any contradiction with the spirit of justice. For the prophets, as well as for the Christian church, the surroundings wherein the prophets did their activity and in which the Church follows its mission in present-day life is conceived as a history of the divine activity.

In the prophetic mentality of the Israelite, the world, in general, emerges as an outstanding and progressive unveiling of the divine plan revealed in a perspective of whose dimensions surpass the human conceptions[2].

In the name of Jehovah, the prophets convey to the contemporaries the message received, which can be shaped many times in different obvious social forms. For this fact, the prophets of the Old Testament have been regarded many times as revolutionaries. We can easily ascertain that they remain far from any revolutionary turmoil. According to their religious conception, the prophets transcend everything in a superior plan and their efforts in the social aspect originate in their conception about a creating and all-making God. In this respect, the Christian church considers the sermons of the prophets as being inspired by God, trying to aim their social activity at the same viewpoint. The contemporary Christian in his social engagement has for its departure point the faith in one God, Creator of the universe and All-providing, a just God whose desire is that justice and love should manifest fully in the relations between people[3]. Thus, the prophet Jeremiah says: *Let not the wise boast of their wisdom or the strong boast of their strenght or the rich boast of their riches, but let the one who boasts boast about this, that they have the understanding to know me, that I am the LORD, who exercises kindness, justice and righteousness on earth, for in these I delight, declares the LORD.* (9, 23-24). Similar words utters prophet Isaiah: *The fruit of righteousness will be peace; the effect of righteousness will be quietness and confidence forever* (32:17), or: *I will make justice the measuring line and righteousness the plumb line; hail will sweep away your refuge, the lie, and water will overflow your hiding place* (Isaiah 28:17).

In the New Testament, as a fulfillment of those said by the prophets of the Old Testament, the evangelist Mathew writes the words of our Saviour: But seek ye first the *kingdom of God, and his righteousness; and all these things shall be added unto you. (*6:33).The saint apostle Paul says also that: *for the fruit of the light consists in all goodness, righteousness and truth* (Ephesians: 5, 9).

The relationship between God and the faithful, in the case in which it is sincere and true is reflected clearly in the relations of the justice manifested among the members of the community. In its efforts for fulfilling justice and of some human relations among the members of the community, Christianity today has to regard the prophets as to a model and copy their attitude,being known that the prophets have been inspiring over the centuries our conduct towards people[4].

The preoccupation for the man and his problems is not a discovery or a novelty for contemporary theology. The Happiest into remeberance Patriarch Justinian said: *Our calling*

---

[1] C.F.Geyer, *Prophetie als Revolution*, in *Bibel und Kirche*, Heft 4, 1969.
[2] *Ibidem.*
[3] Pr.dr. Mircea Basarab, *op.cit*.
[4] *Ibidem.*

for the deepening of the social side of the evangelical message and its embodiment in our daily lives must be considered...not like a theological novelty, but as a digging out of an old treasure, left and lost in the covers of the Holy Book and of The Holy Christian traditions.

Never before like in the last centuries had the servants of the Christian Church been confronted with such vital issues to put in balance the very value of the evangelical teachings for the organizing of a human way of existence built on the principle of the equal rights for all people to wellbeing and happiness[1]. The message is more actual than ever as in this period of the beginning of the 20th century, characterised mainly by a prolonged transition with effects more than often destructive for the Christians of our century, the problems that preoccupy the life of the members of Christian community haven't disappeared but, on the contrary, amplified.

That's why, the Christian church, following the examples covered in the pages of the Holy Book claims that it has to be present and active in all the sufferings and in all hopes for the better of the humankind[2].

Through this heighlighting of the special preoccupation for the human being and his serving we have to look at the actuality of the prophets' message and their strife to serve the contemporaries. Theologians and believers will find anytime in the pages of the prophetic sermon the perfect harmony between serving God and serving people, their example standing as an instance of courage, moral, social, and religious engagement. We can assert that justice, love and mercy done with the humble spirit, themes oftem encountered in the sermon of the prophets, are present-day needs.

An American theologian said that the prophetic mission is not only instructive. The reforms expected in the prophetic writings are an expression of the influence of the Holy Spirit upon the history and, in this way, normative. The ideas that lie at their foundation mirror the divine will for uplifting the humankind to a higher stage of freedom and wellbeing[3].

At a closer analysis of the prophetic message, a fact becomes obvious, namely that the prophets were people of their time, preoccupied by all aspects regarding the nation, engaged with all their being in solving these issues. The prophets felt that a huge responsability lay on their shoulders as representatives of Jehovah and had the conscience that if they didn't signal unjustice and the other evil doings that haunted the society of their time, they would be liable of the worst punishment. Maybe nobody didn't exemplify more dramatically this responsability as prophet Ezekiel: "*son of man, I have made you a watchman for the people of Israel; so hear the word I speak and give them warning from me. When I say to the wicked, 'You wicked person, you will surely die,' and you do not speak out to dissuade them from their ways, that wicked person will die for[a] their sin, and I will hold you accountable for their blood. But if you do warn the wicked person to turn from their ways and they do not do so, they will die for their sin, though you yourself will be saved"* Ezekiel 33:7-9).

The pastors of new Israel have to be led in their activity by the same consciousness as well as the Christian priests who have the calling of being interpreters of the will of God before people. They have the duty to engage fully in the solving of the problems wherewith the sons of our century confront with. There is no doubt that the primordial preoccupation of

---

[1] *Apostolat social*, vol. III, Bucharest, 1966.
[2] Patriarhul Justinian, *Apostolat social*, vol. X, Bucharest, 1971.
[3] Walter Rauschenbusch, *Christianity and the social crisis*, New York, 1964.

the pastors is the sanctifying of the faithful people that is serving their pastoral interests. But priests are also called to deal with the mundane interests of the believers[1].

The Christian mission does not only consist in preaching Christ, but also in being Christian in everyday life, according to the words of Saint Apostle Paul: *So whether you eat or drink or whatever you do, do it all for the glory of God* (I Corinthians 10, 31). Thus it is demanded from us to lead a balanced life, being known that extremes have always been dangerous.

The great calling of nowadays priests is like the one of old time priests" to wrest and broke down to earth, to built and plow", namely to combat against unjustice and the evil deeds of contemporary society and to courageously proclaim everything that is right, true, honest and worthy of believing[2]. The priests have to speak up against all transgressions, be it individual or social with the impetuosity of the Judaic priests when faced with all forms of unjustice as in modern world we have the same responsability which made tremble an Isaiah, Ezekiel or Amos, as much as all the prophets of the Old Testament.

In the sermon of the prophets we can find a deep humanism concerning the social relations, a great simpathy for the poor classes and a tough aversion against the wealthy, unfairly and greedy enriched. At the beginning, the Jews had common property upon the land. Then a new sharing of production means took place based on the individual private property and the trading. As it happens more than often, the rich got richer ever more and the lower classes got even poorer being finally pushed to the most awful limits of misery. The rich used to build big lushrous furnished houses made of stone, being dressed in expensive clothes and partied at expensive feasts. Their women wore embelished with rings, bracelets, earrings, noserings, perfumes and talismans as prophet Isaiah says. (Isaiah 3,18-23). All in all, so actual! Priests and magistrates fully shared the same lushury and strokes. In this atmosphere of tension and unjustice the cries of protest of the prophets could be loudly heard:

The LORD enters into judgment with the elders and princes of His people,"it is you who have devoured the vineyard;The plunder of the poor is in your houses. "What do you mean by crushing My people and grinding the face of the poor?"declares the Lord GOD of hosts (Isaiah 3,14-15) or They (the rulers of the people) *who hate good and love evil; who tear the skin from my people and the flesh from their bones* (Micah 3:2). The prophets hit with the sword of word the people at parties*: But instead, joy and gladness, Slaying oxen and killing sheep, Eating meat and drinking wine: "Let us eat and drink, for tomorrow we die!" Then it was revealed in my hearing by the LORD of hosts, "Surely for this iniquity there will be no atonement for you, Even to your death", says the Lord GOD of hosts* (Isaiah 22, 13-14). The greedy members of the rural aristocracy were also admonished with the same sword of word by the prophets: *Woe to you who add house to house and join field to field till no space is left and you live alone in the land* (Isaiah 5, 8).

Not even the servants at the altar were spared. They were scolded for the trangressions made and for the lack of interest for the flock that was being given to them: *Son of man, prophesy against the shepherds of Israel. Prophesy, and say to them: This is what the Lord GOD says to the shepherds: Woe to the shepherds of Israel, who have been feeding themselves! Shouldn't the shepherds feed their flock? You eat the fat, wear the wool, and butcher the fatlings, but you do not tend the flock* (Ezekiel 34, 2-3). We can't but say that the issues of nowadays society are similar to those in the age of the prophets, sometimes they are

[1] Pr.dr. Ştefan Slevoacă, *op.cit*.
[2] *Ibidem.*

diminished, sometimes highlighted in such a way that the harsh words of the prophets send us directly to the contemporary society, sometimes old issues fade out and are replaced by similar sins. As clerics in all steps of sacramental hierarchy, we have the duty of the prophets to solve the issues that emerge in the core of the Christian community.

If the social oppresion, unjustice, greediness for money, yearning for pleasures don't cease, irrespective of the society wherein these sins nest, the divine justice will burst out upon that society: *for among my people are found wicked men: they lay wait, as he that setteth snares; they set a trap, they catch men.As a cage is full of birds, so are their houses full of deceit: therefore they are become great, and waxen rich. They are waxen fat, they shine: yea, they overpass the deeds of the wicked: they judge not the cause, the cause of the fatherless, yet they prosper; and the right of the needy do they not judge. Shall I not visit for these things? Said the LORD: shall not my soul be avenged on such a nation as this?* (Jeremiah 5, 26-29). The state of poverty, unjust and misery of a certain community is nothing but the result of fulfilling God's commandments. So how can we fulfill the divine justice when some states that declare themselves *civilised* request us to lift sin at the level of virtue, as to become *civilised*, perpetually invoking the theory of human rights and forgetting about the justice of God?

In order to solve, as much as possible, the issues preoccupying the contemporary society, the zeal and implication of the prophets remain an eternal model.

The protest presented in the prophetic message determined us to talk about a religion of the prophets that seemed to be in contradiction with the forms and rituals practised in Israel. There could be noticed within the cult a contradiction between the will of God and the commitment of the Israelite[1]. Engaged on the way of formalism, the cult became an accessory of the political and social evolution in Israel, the sanctuaries have become a place for pilgrimage in which the ritualism and formalism of the rich encountered the intention of maximizing the political system and the social organization of the people[2]. In some moments, the situation is more than actual. For instance, in the period of the political and elective campaigns, our leaders seem to be more faithful than ever, but in a very short while, after reaching their goals, they forget about God and the Church. Everything appears as an attempt to cheat God and the Church. Such worshippers apperar more as offenders of the divine justice and greatfulness than faithful believers interested in their own rightousness.

There is the need to clarify things according to the example of the prophets and our Savior Jesus Christ, who was an untamed scolder of those who were *straining out the gnat but swallowing the camel*, trying to ellude the divine justice. The Saint Apostle Paul said that: *for the letter kills but the Spirit gives life* (II Corinthians 3, 6). His warning is valid in every field, but never more truthful than in the liturgical universe.

Christianity can not be a caricature, as some people may think, reducing it to a complex system of ascetical rules or cheap rituals. Christianity needs to be a lighthouse to light the steps of the believers in everyday life, urging them continually to seek peace, truth, justice and beauty, as in Judaism did the old biblical prophets.

Conclusions

Only after the entire creture is liberated from the egotism whose outset is unjustice and sin, we shall be able to detect the start of a new era dominated by justice, peace and brotherhood. In order to install the epoch of universal peace, anticipated by the prophets of

[1] E. Wurthwein, *Kultpolemik oder Kultbescheid? Beobachtungen zu Thema "Prophetie und Kult"*, in "*Tradition und Situation*", Gotingen, 1963.
[2] Pr.dr. Mircea Basarab, *op.cit*.

the Old Testament, a world of justice, brotherhood, and unclinged faith in God, liberated by formalism and uncaring, there is an urgent need for people of contemporary Christianity, dignified zealous priests, people of God who will have the courage and the gift to *re-establish, in the limits of the absolute, the social and liturgical Christian universe, so much threatened.*

In this sense, the example of life and activity of the prophets of Old Testament is one worhy of following, and that's why, the theology of the prophets is so actual and will last as long as the Earth lasts. Following their example, we have to do as much as we can in order to avoid getting used to unjustice and the sins of contemporary society. The right and the jutice are divine gifts and they have to be defended at any cost and occasion. There is no right and justice without religion and no religion without right and justice.

Bibliography:

Alexandru Schmeman, *Din apă şi din duh*, Symbol Publishing House, 1992;

Slevoacă, Pr.dr. Ștefan, *Aspecte actuale ale predicii profeţilor Vechiului Testament*, in Studii Teologice Magazine, Year XXXII (1980), no.1-2;

Justinian, Patriarhul, *Apostolat social*, vol. X, Bucharest, 1971;

Abrudan, Pr.dr., Dumitru, *Mântuirea şi sensul ei comunitar în scrierile profetice ale Vechiului Testament*, in Studii Teologice Magazine, Year XXVII (1975), no. 1-2;

Rauschenbusch Walter, *Christianity and the social crisis*, New York, 1964.

HOMOSEXUALITY, RELIGION, LAW

Popescu I. Alexandra Mirela[*]
Olah Lavinia [**]

Abstract

Frequently subjects of hostility on the grounds that they didn't accepted the sexual behavior socially approved, over time, homosexuals were subject of a legal treatment ranging from tolerance to total repression, influenced especially by religious morality.

Keywords: *sexual freedom, homosexuality, religious morality, right to privacy and private life.*

Introduction

Reduced to male-female, legitimated only within marriage, sexuality has remained long time a highly sensitive matter for national laws, consequence of the fact that dominant morality would not accurately reflect the actual sexual behavior, but had the power to constrain it. Moral panics haven't had a repressive effect, the main goal being to prevent the exploitation of competing models of sexual behavior[1]*. This explains why people of sexual minority, affected by restrictive limits imposed by the stats, have chosen to notify supranational courts of appeal to protect their sexual orientation.*

1. Short historical view

Seeing the homosexual act as "the only form of sustainable and authentic spiritual eroticism"[2], the ancient Greeks and Romans perceived homosexuality as a form of „perfect love, the origin of humanity, born of the arrogance of people to the gods"[3]. Therefore, homosexual behavior was not only accepted but also encouraged at the time, being accepted as a simple manifestation of sexual freedom of the person who only this way could exercise her's sexuality. However, we can't speak of unanimity of views, there were still voices supporting immoral character of this practice. That is way Aristotle is forced to establish a difference between homosexuality born as a natural given, and homosexuality developed over time, due to habit, only this one could be condemned, in his opinion, under morality angle[4], perspective that would be reversed in time.

Giving up the tolerant attitude of precursors, Christians would severely stigmatize non procreative relations and therefore, homosexual practices[5]. So, if in antiquity, the argument of nature allowed this form of sexual union, religious doctrine takes a contrary

[*] Ph.D. student, University of Craiova, Faculty of law and Administrative Sciences, through the project: POSDRU/88/1.5/S/49516 "Creşterea atractivităţii, calităţii şi eficienţei studiilor universitare de doctorat prin acordarea de burse doctorale", (e-mail: popescumirela24@yahoo.com).

[**] Lecturer, Ph.D. Faculty of Law and Administrative Sciences, University of Pitesti (e-mail: lavinia_olah@yahoo.com).

[1] McLaren Angus, *Sexualitatea secolului XX. O istorie*, Trei Publishing House, Bucharest, 2002, p. 15.
[2] Boswell John, *Christianisme, tolérance sociale et homosexualité. Les homosexuels en Europe occidentale du début de l'ère chrétienne au XIVe siècle,* Ed. Galimard, Paris, 1985, pp. 92-124.
[3] Platon, *Le banquet*, Ed. Les Belles Lettres, Paris, 1989, p. 37.
[4] Aristotel, *Problemes*, Section I-IV, trad. Pierre Louis, Les Belles Lettres, Paris, 1991, pp. 80-90.
[5] Mecary Caroline, La Pradelle Geraud, *Les Droits des Homosexuelles. Liberte, egalite, fraternite?*, Ed. Press Universitaire de France, Paris, 1997, p. 16.

view, claiming the exclusion from society and their condemnation of all homosexual individuals through criminal procedures[1]. There are eloquent, in this regard, Saint Augustine's Confessions which describes homosexual acts as "infamous crimes and opposed to nature, which are violating the society by brutal and disgusting disorder"[2]. Under these conditions, homosexuality is been stripped of any emotional dimension, reduced to carnal perversion and likely to compromise the foundations of the natural development of the whole world.

A change of perspective is found together with sec. XVIII, when homosexuality, while continuing to be condemned on moral side, is no longer perceived as a divine sin, but rather as a threat to society order[3]. According to Montesquieu, Kant and Voltaire, blaming homosexuality was justified because it was a real danger to social values, but, instead, criminal prosecution was not justified[4]. This attitude is confirmed by medicine a few decades later, that's way homosexuality is included in the list of mental diseases, emphasizing the character of this pathological practice. It should be noted that since the XIV-th century, not homosexual act is being considered, but the homosexual person, seen by medical science as a new topic. Other specialists, such as Freud, for example, refuse to consider homosexuality a mental malady on the grounds that "the organization of individual sexual pleasure is the result of a specific history (...) and predisposition toward homosexuality is universal in the human species"[5]. In his opinion, homosexuality was understood as a variation of sexual function, caused by a specific non-sexual development and, therefore, it was a great injustice the persecution of homosexual person. Despite other arguments of this kind, homosexuality continued to be regarded as a mental dysfunction and only in the 20th century the World Health Organization has concluded to withdraw it from the list of mental diseases.

2. The European Court of human rights and homosexual person: a new approach

If before 1981, homosexuality was considered a crime by various national legislations, being invocated legitimate purposes such as religious morality or public order, gradually, more and more applications of homosexuals secured in front of European Court of human rights, demanding their right to respect private and intimate life, lead to a new legal approach that didn't remained without reply in member States of the European Convention of Human Rights, leading to a policy of sexual liberation.

2.1. The law applicable before 1981

The European Court of human rights had to analyze, on the occasion of the 20th century, the national laws who chose to make homosexuality a crime. There were a lot of applications raised before the Court of supranational appeal by homosexual persons which condemned discriminatory treatment to which they were subjected to. They invoked in their criticism the right to respect private life, right guaranteed by art. 8 of the European Convention on human rights, and the principle of non-discrimination, provided by art. 14 of that same convention.

---

[1] Borrilo D. *L'homophobie*, Ed, PUF, colecția *Que je sais?*, Paris, 2000, pp. 37-38.
[2] Sf. Augustin, *Confessions*, trad. Arnauld Anchilly, Manchecourt, Ed. Gallimard, 2003, Cap. VIII, Cartea III, p.104.

[3] Rez M. *Police et sodomie a Paris au 18-eme siècle: du péché au désordre,* The magazine of modern and contemporary history, no. 29, Paris, 1982, pp. 118-123.
[4] Beccaria Cesare, *Des délits et des peines*, Ed. Flammarion, Paris, 1991, pp. 158-159.
[5] Freud Sigmund, *Trois essais sur la théorie sexuelle*, Ed. Gallimard, Paris, 1987, pp. 37-54.

Although the Commission acknowledges, at some point, that sex life is an important aspect of privacy life, however it outlined the legitimate purposes by virtue of which a State could interfere in the intimate and private sphere of person, so that the criminalization of homosexuality was not itself unlawful. In order to justify it position, the Commission took into consideration art. 8, ¶ 2 of the ECHR and said that homosexuality can be considered a crime if the reasons of public order or public health and morals so require[1], indicating expressly an obligation on public authorities to protect the rights of third parties, in particular in the case of minors[2]. By the end of the 1970s, the Commission considered as constant that complaints lodged by homosexuals against certain national provisions were incompatible with the ECHR articles, the requests being in consequence rejected.

A distinct attitude can be seen in 1977, at which time, at the complaint of a British citizen, condemned by national law for practicing homosexual relationships with a minor, Commission accepts the request and reorient its position on homosexual persons complaints[3]. Although admits that it isn't a violation of art. 8 or art. 14 ECHR, invoked by the petitioner in his action, however, the Commission stated that sex life depends on the privacy of any person and that the evolution of morality allows evaluation of the application. Analyzing the case, the Court held that State interference in the sphere of privacy was justified by "legitimate reasons" allowed by the above mentioned conventional text. European policy has, in fact, another aspect, namely the protection of minors[4].

2.2. Changing the optics: business Dudgeon c/Great Britain[5]

The deal Dudgeon clearly marks a change of perspective regarding homosexuality. Jeffrey Dudgeon, Irish citizen, introduced on May 22, 1976, a complaint before European Commission, denouncing Northern-Irish criminal law which forbidden on an absolute manner the homosexual relations, even if they ware spent in private space and between adult people. The applicant rested in its action on art. 8 and 14 of the ECHR. The application is submitted and accepted by the Commission and then by the Court to assess the compatibility of legislation with articles of the Convention. In the judgment of 22 September 1981, the Court decides that sex life is "an intimate aspect of privacy" and estimated that the legislation of that State is a constant and unjustified limit of privacy life[6], since it penalized a practice who related to sexual freedom and privacy of each person.

Although the Court recognized that prohibiting homosexual acts is justified by the protection of public morals, however, the Court of Strasbourg critique the limit up to which those violations were a necessity in a democratic society. Indeed, the possibility of States in matters of moral appreciation is extremely comprehensive, however, the Court considered that the nature of the activities in question, involving very intimate aspects of privacy, didn't authorize an interference of the state, clearly disproportional in relation to the aim pursued. Accordingly, British law violated the conventional text. Although it recognized a violation of art. 8, the European Court refused to review the case in terms of art. 14 of the Convention, inequality of treatment was not, in this case, "a fundamental aspect of the dispute"[7]. Therefore, the Court refused to take into account a possible discrimination against people with another sexual orientation at this time.

---

[1] European Commission, request no. 261/57, 16 December 1957, Vol I, p. 255.
[2] Sudre Francisck, Marguenaud J-P, Andriant Simbazovina J, Goutenoire A. Levinet M. *Les grands arrêts de la C.E.D.H.* Ed. PUF, Paris, 2003, p. 412.
[3] European Commission, request no. 7215/75, 7 July1977.
[4] European Commission, request no. 530/59, 4 January 1960.
[5] Business Dudgeon c/U.K. request nr 45, 22 October 1981.
[6] Shutter O. *Homosexualité, discours, droit,* Interdisciplinary Journal of legal studies, Paris, 1993, p. 88.
[7] Dudgeon c/U.K. op.cit.

3. Limits to the protection of privacy life of the homosexual person

Although the sexual freedom of the person is guaranteed, however, the Strasbourg Court refuses to extend the field protection of art. 8 ECHR to recognize a right to family life homosexual persons. Therefore it continues to admit the difference of sex as a fundamental condition for the conclusion of a legal marriage. Even if the organs of the Convention recognize the right to private life and a certain sexual equality, in practice, this doesn't lead to a recognition of a genuine right to family life for homosexual's couples, although this right is guaranteed also by art. 8 of the ECHR. Court affirms constantly that "despite the evolution of civilization against homosexuality, homosexual relationships do not reveal a truly sustainable right to family life, protected by art. 8"[1], reason for that the Court excludes also a possible right for adoption to homosexuals' couples. Although, there are national laws which allow such rights, this does not result into a general obligation for the other states, more conservative in attitude.

4. Comparative law

At European level, there are divergent juridical opinions regarding homosexual person. The first State who recognized gay legal partnership was Denmark, according to the Law of 1 July 1989[2]. The law requires that one of the members of the couple has to have Danish nationality and has to live in Denmark, registration of the Union having the same conditions as civil marriage has. Also, doe to this law, homosexual couples have the right to adopt and to access medically assisted procreation. Similar legislation have others states such as Norway, Sweden or Belgium, who are open into attitude towards sexual freedom of the person, regardless sexual orientation.

Romania, state quite conservative and protective of moral rules can be considered an atypical example regarding homosexuality issues. Initially, the Romanian Constitutional Court, following the model of the European Court of human rights, declared, since 1994, that the Romanian criminal rules which punished homosexuality were unconstitutional, on the grounds that they limited unreasonably the right to private and intimate life[3]. Also, the Rumanian Court found that "is already accepted the idea that homosexual relationships between adult persons who consented to them, is an intimate dimension of life" and, there for, they cannot be sanctioned anymore, so it decides that "between art. 8 of the European Convention on human rights and art. 200, ¶ 1 of the Romanian Criminal code is such a disparity"[4]. However, the Romanian legislature decided not to repeal the text in question[5], although it was declared unconstitutional, acting instead to modify it. Combining the original text with the word "in public", paradoxically, the new regulations manage to increase the confusion which comes from the issue raised under discussion.

In other words, now they were punished only "sexual relations between persons of the same sex, committed in public or those who produced a public scandal", as stable, art. 200 of Romanian Criminal Code now amended. The imprecision of the new text of law could only deepen the feeling of uncertainty of the legal situation of people with a different sexual

[1] Request no. 9369/81, X and Y c/U.K. 3 May 1983, vol 32, p. 220-4; Request no. 12512/86, J and P c/U.K. 13 July 1987; Request no. 14753/89 C.M and L.M.c/U.K. 9 December 1989.
[2] *The registred partneship act*, which entered into force on 1 October 1989.
[3] Romanian Constitutional Court, Decision no.81/15 July 1994.
[4] Ibidem.
[5] Art. 200, Romanian Criminal Code.

orientation, reason for which, in 2001, that article was totally repealed. Although homosexuality has escaped of criminal character, however, the Romanian rules in force do not recognize homosexual persons other rights, such as right to marry, for instance, allowing only "freely union between a man and a woman"[1], or right to adopt.

Conclusions

Currently, under the influence of European judges, new legal reflections on homosexuality encourage the transition from penalty to a claim of non-discrimination and equality of rights. In other words, just as well pointed out the European Court, homosexuality should be linked to the sexual freedom of the person, a fundamental aspect of intimate and private life, to determine whether the conditions under which this right may be restricted have been or not respected by the State concerned.

Bibliography:

Sf. Augustin, *Confessions*, trad. Arnauld Anchilly, Manchecourt, Ed. Gallimard, Cap. VIII, Cartea III, 2003;

Sudre F., Marguenaud J-P, Andriant Simbazovina J, Goutenoire A., Levinet M., *Les grands arrêts de la C.E.D.H.*, Ed. PUF, Paris, 2003;

McLaren Angus, *Sexualitatea secolului XX. O istorie*, Ed. Trei, Bucharest, 2002;

Borrilo Daniel., L'homophobie, Ed, PUF, colecţia Que je sais?, Paris, *2000;*

Filipescu I.P., *Tratat de dreptul familiei*, Ed All Beck, Bucharest, 1999;

Mecary Caroline, *La Pradelle Geraud, Les Droits des Homosexuelles. Liberte, egalite, fraternite?,* Ed. Press Universitaire de France, Paris, 1997;

Romanian Constitutional Court, Decision no.81/15 July 1994;

Shutter O., *Homosexualité, discours, droit,* Interdisciplinary Journal of legal studies, Paris, 1993;

Aristotel, *Problemes*, Section I-IV, trad. Pierre Louis, Les Belles Lettres, Paris, 1991;

Beccaria Cesare, *Des délits et des peines*, Ed. Flammarion, Paris, 1991;

Request no. 9369/81, X and Y c/U.K., 3 May 1983, vol 32, p. 220-4; Request no. 12512/86, J and P c/U.K., 13 July 1987; Request no. 14753/89 C.M and L.M.c/U.K., 9 December 1989;

Platon, *Le banquet*, Ed. Les Belles Lettres, Paris, 1989;

The registred partneship act, which entered into force on 1 October 1989;

Freud Sigmund, *Trois essais sur la théorie sexuelle*, Ed. Gallimard, Paris, 1987;

Boswell John, *Christianisme, tolérance sociale et homosexualité. Les homosexuels en Europe occidentale du début de l'ère chrétienne au XIVe siècle*, Ed. Galimard, Paris, 1985;

Rez M., *Police et sodomie a Paris au 18-eme siècle: du péché au désordre*, The magazine of modern and contemporary history, no. 29, Paris, 1982;

Business Dudgeon c/U.K., request no. 45, 22 October 1981;

European Commission, request no. 7215/75, 7 July1977;

European Commission, request no. 530/59, 4 January 1960;

European Commission, request no. 261/57, 16 December 1957,Vol I.

[1] Filipescu I.P. *Tratat de dreptul familiei*, All Beck Publishing House, Bucharest, 1999, p. 14.

CHARGING INTEREST. FROM CANONICAL INTERDICTION TO COMMERCIAL USE

Paul Popovici*

Abstract

As concluded in a previous article[1], in our opinion, under the new status of the Romanian Orthodox Church (BOR), the clergy are allowed, within certain limits, the exercise of acts of trade. But is it allowed for them to carry out financial activities? It is well known that charging interest was prohibited by Eastern Christianity. Canons edicts in this regard are based on certain Scriptural provisions, arising both from The Old Testament and from The New Testament. However, nowadays we witness that the Church does not only use bank accounts, but even offers to loan interest-bearing money[2].

Keywords: *financial activities, usury, clergy, trade, interest.*

Introduction

The question of financial interest, as viewed from a spiritual perspective, is both essential and pendent. The importance of interest resides in the fact that the entire economy, starting with the financial sector, functions on the principle expressed by the act of charging interest. A strong criticism has been directed towards interest by outstanding personalities performing in the spiritual sphere. Interest is considered disavow-able by many people with spiritual inclinations. Interest has even been considered as functioning on the principle of gambling, even if it is revenue obtained from transactions and investments.

Brief diachrony

Surprisingly, the history of financial interest is not a recent one. Neither is it tributary to nowadays banking institutions. Interest appears in the early age of the history of mankind.

The first mention of an interest seems to be that in the code of Hammurabi (about 1800 B. C.). It stated the maximum quantum of interest according to the nature of the goods: 33 ⅓ % per year for cereals that had to be given back through other goods, and 20% per year for silver[3]. Breaking the legal provision, that is taking a bigger percentage of interest than the maximum legal one, was punished. In ancient Greece, the rules of Solon would not limit the rate of the interest. Due to a huge crisis, bigger than any other known, the provisions would reduce or annul numerous debts. The law of twelve tables would limit interest at 8⅓ % per year. The break of this disposition was severely punished, with the payment of the fourfold of the loan[4].

---

* Senior Lecturer, Ph.D. "Dimitrie Cantemir" University, Facultaty of Law, Cluj-Napoca; email: paul.popovici@pedagogia.ro.

[1] P. Popovici, *Incompatibilitatea de a exercita comerţul. Revizuirea unui caz*, in "Studia Universitatis Babeş-Bolyai. Iurisprudentia", no. 1/2011, pp. 141-147 (in Romanian), (http://studia.law.ubbcluj.ro/articol.php?articolId=375).

[2] See Casa de Ajutor Reciproc a Clericilor şi Mirenilor I.F.N. Iaşi (Mutual Help of Clergy and Laics, Iaşi) http://www.mmb.ro/ro/comunicate/o_instituie_non_bancara_i_non_profit_in_sprijinul_angajailor_arhiepiscopiei_iailor.html.

[3] J. R. McIntosh, *Ancient Mesopotamia: new perspectives*, ABC & CLIO, 2005, p. 207.

[4] S. Homer, R. Sylla, *A History of Interest Rates*, 4th ed. John Wiley & Sons, 2005, pp. 3-4. Note that in the Roman world companies can be funded with the purpose of giving loans with interest, Vl. Hanga, Roman law in Dacia, in

Unlike in Antiquity, the Middle Ages will know no fix and stable rates of interest associated to financial loan. The rates of interest vary a lot (between 5 and 120%)[1], the medieval criteria of establishing the rates of interest remain obscure to us[2].

The modern and contemporary times brought about the least expected fluctuations of the rates of interest. The financial complexity and the diversity of conditions in every state made possible extreme rates of financial interest. For example, in the last century, there were recorded numerous fluctuations of the rates of interest between these two extremes: 0,01% (at New York) and 10.000% (at Berlin).

It has to be mentioned that the unprecedented diversification of financial services resulted in variation of rates even within the same bank at the same time[3].

These are facts arising from legal provisions. In the following sections of this study we shall analyse how they were perceived and regulated by the religious and ethical authorities along time.

Biblical, philosophical and patristic tradition

For Christians, the interdiction of receiving any form of financial interest is formulated in the Scriptures, having even older traces.

The main source of canonical law is the Bible[4]. Therefore, any analyses should start with the provisions of the sacred texts regarding the question of interest.

Thus, in the Old Testament, the loan with interest was prohibited categorically on moral grounds when its parts were co-ethnical individuals[5]. It was allowed towards individuals from a different "bloodline"[6].

But what was the context in which it this regulation emerged, and what was intended through it? Interest had been a practice approved and used in ancient states. For some population and states, charging interest was a common place. The exception was the money borrowed by the temples, case in which it represented a genuine form of social protection[7].

These old-testamentary provisions were undertaken by the new-testamentary provisions as well[8]. In the later case, the moral dimension receives a higher significance[9]. However, the new-testamentary age knows the practice of loan with interest. Later, the old prohibition to borrow money with interest seems to have been abandoned, as inferred from the subtext of a synoptic pericope[10].

Vl. Hanga (volume co-ordinator), *Dreptul roman pe teritoriul Daciei* ("History of Romanian law"), RSR Academy, Bucharest, 1980, p. 111 (in Romanian).

[1] S. Homer, R. Sylla, *op.cit.* pp. 5-6.

[2] As for the Romanian Principates, Transylvania only has reported the existence of the loan with interest, loan governed by the political authority – V. Şotropa, *Contracte reale*, în Vl. Hanga (volume co-ordinator), *op.cit.* p. 564.

[3] S. Homer, R. Sylla, *op.cit.* pp. 4-5.

[4] V. I. Phidas, *Drept canonic. O perspectivă ortodoxă*, translated by A. Dinu, Trinitas, Iaşi, 2008, p. 15. (in Romanian).

[5] *Exodus* 22: 25, *Leviticus* 36: 37, *Deuteronomy* 23: 19, *Neemia* 5: 10, *Psalm* 14: 5, *Jeremiah* 15: 10, *Jezekiel* 18: 8, 9, 13.

[6] *Deuteronomy* 23: 20.

[7] G. Leick, *The Babylonians: An Introduction*, Routledge, 2003, p. 78.

[8] Actually, as it has been observed, "all that is essential in Christianity has rooted first in Judaism" – C. von Schönborn, *Oamenii, Biserica, Ţara*. *Creştinismul ca provocare socială*, translated by T. Petrache, R. Neţoiu, Anastasia Publishing House, Bucharest, 2000, p. 191 (in Romanian).

[9] *Luke* 6: 31-36.

[10] The Parable of the Talents – *Matthew* 25: 27, *Luke* 19: 23.

But the fact that in ancient times one could meet many Jews offering money with interest inside Christian communities was due to the preservation of the same old rule: the prohibition of loans between individuals of the same religion[1].

In order to understand properly the ecclesial perspective on this issue, one must highlight, even briefly, the Roman and Greek philosophical sources that constituted also veritable historical sources. The ancient Greek legislation allowed the act of charging interest, but Plato and Aristotle[2] vehemently condemned it. According to Aristotle, money is life-less and infertile, it has no spontaneous capacity to bear fruit, hence the conclusion that "the birth of money from money" is contrary to nature and constitutes a violation of justice. Justice means that an exchange involves equal amounts of exchangeable sums[3].

Although the most influential Roman philosophers shared the views of the Greek ones, the Roman law system allowed the interest, by setting a maximum quantum of interest, maintained throughout the time up to the Code of Justinian[4].

Based on Scriptures and on Roman and Greek philosophical sources, Fathers and writers of the Church[5] condemned explicitly and aversely the act of charging interest, since it was in contradiction with the teachings of the Gospels, teachings cultivating philanthropy and charity[6].

Prohibition of interest-charging by the canons

Given the central role of the Bible in Christian life and spirituality, in the question of loan with interest, the influence of the Scriptures was not an indirect one, of an abstract nature. On the contrary, it even took the form of literal interpretation. Canonical collections make known that activities considered inappropriate or incompatible with the status of clergy were prohibited altogether. Among these were included and usurious loans.

For example: „The bishop or presbyter or deacon, who claims any usury, from those who borrow, should either cease that or be defrocked"[7]. This first canon is developed with variations of the main basic idea, Ecumenical Council (held in 325) [8] and then resumed, almost *tale quale* by another ecumenical council, called Quinisext (or Trulan, held in 692)[9].

A question arises: what must have caused for such a strong prescription and firmly sanctioned conduct to be resumed no less than at two general ecclesial meetings and at other meetings of some local councils[10]? Apart from the ecclesial meetings, the question of usury appears also in the prescriptions of some consecrated church personalities.

---

[1] D. R. Carr, *Judaism in Christendom*, in J. Neusner, A. J. Avery-Peck (eds.), *The Blackwell companion to Judaism*, Blackwell, 2004, p. 145.
[2] Aristotel, *Politics*, I, 10, 1258 b 7.
[3] T. F. Divine, *Usury*, în T. Carson, „New Catholic Encyclopedia", 2nd ed. Thomson & Gale, 2003, p. 353.
[4] *Ibidem.*
[5] Clement of Alexandria condamns usury in *About marriage*, V, 55 – *Alexandrian Christianity. Selected Translations of Clement and Origen*, H. Chadwick, J. E. L. Oulton (eds.), Westminster John Knox Press, 2006, p. 65.
[6] T. F. Divine, *op.cit.* p. 353.
[7] Canon 44 *apostolic*.
[8] Can. 17 I *ecumenic*.
[9] Can. 10 *Trulan*.
[10] Can. 4 *Laodiceea* (anul 343). Also see canons 5 and 16 *Cartagina* (anul 419), as well as the canon 14 of *Basil the Great* (†397) and canon 6 of *Gregory of Nyssa* (~†395).

Commentators have noted that, when provisions are repeated in turn at the various councils, it is almost evident that in practice these provisions were not respected, despite firm rules or the categorical moral conduct imposed[1].

The Romanian canonical doctrine stated that the apostolic canon "not only prohibits usury, or exaggerated, confiscatory rate, but it prohibits any interest, because, according to Christian doctrine, interest is a sin[2] and has been forbidden even since the Old Testament"[3]. Another author has simplified things even more, settling a deliberate or non-deliberate confusion of terms, so there is no room for any nuance: "Interest is usury or lending money as with rent"[4], which is, at least economically and legally, an overbid[5]. One can also take into account the opinion recording the prohibition of usury, but the acceptance of granting a loan with interest[6].

As for our opinion, we manifest a certain reserve towards a categorical and also prohibitive interpretation. Such a reductionist interpretation could not explain in a coherent and canonical way the existence of banks, which pay to all depositors regardless of their status (and therefore they pay to clergy and ecclesial structures alike), interest on amounts given, and the existence of financial structures that provide to non-profit ecclesiastical structures money on loan with interest, as noted above.

Moreover, canonical text refers to usury prohibition itself, i.e. an interest over the maximum allowed by the legislation of the time. This in fact is "shameful profit" obtained unfairly and without justification through actual work.

The prohibition of charging interest seems to have had a social and economic substrate: for the poor would have been burdensome the addition to the loan repayment of an interest in the maximum quantum allowed by civil law (12% / year in the Roman Empire)[7].

Medieval and modern philosophy

Early scholastic philosophers condemned unequivocally the interest charging. Among the arguments that were used, along with those borrowed from Aristotle, there was an analogy with *mutuum*, for which no charge was paid. However, condemning interest-charging based on these intrinsic reasons became nuanced with other extrinsic reasons - such as the loss of profit opportunities as a result of loaning the money to another person. In such cases, the interest-charging was justified, and it is such an interpretation that has allowed the emergence, consolidation and practice of liberal views on interest[8].

---

[1] P. L'Huillier, *Dreptul bisericesc la Sinoadele ecumenice I-IV*, translated by Al. I. Stan, Gnosis, Bucharest, 2000, p. 127 (in Romanian).

[2] *Matthew* 5: 42, *Luke* 6, 30, 34, 35.

[3] I. N. Floca, *Canoanele Bisericii Ortodoxe. Note şi comentarii*, ed. a III-a îmbunătăţită, Sibiu, 2005, p. 34 (in Romanian). The same opinion is shared by others: N. Milaş, *Canoanele Bisericii Ortodoxe însoţite de comentarii*, vol. I, partea I, *(Introducere, Nomocanonul în XIV titluri şi Canoanele apostolice)*, translated by N. Popovici, U. Kovincici, Tipografia Diecezană, Arad, 1930, p. 254 (in Romanian).

[4] N. Sachelarie, *Pravila bisericească*, ed. a III-a, Parohia Valea Plopului, 1999, no. 630 (in Romanian).

[5] Such a confusion, however, was excusable in the early centuries of Christianity as terminological distinction between interest and usury was not fixed – R. Higginson, *Market Economics, Morality of*, în J.-Y. Lacoste (ed.), "Encyclopedia of Christian theology", vol. II, *G-O*, Routledge, 2005, p. 981.

[6] N. Popovici, *Manual de drept bisericesc oriental cu privire specială la dreptul particular al Bisericii ort. Române (inclusiv noua lege pentru organizarea bisericească din anul 1925*, vol. I, partea I şi II, Tiparul Tipografiei Diecezane Ort. Rom. Arad, 1925, p. 114 (in Romanian).

[7] H. Chadwick, *The Church in Ancient Society. From Galilee to Gregory the Great*, Oxford University Press, 2001, p. 203.

[8] T. F. Divine, *op.cit.* p. 353-354.

The commercial revolution of the XIIIth and XIVth centuries finally determined real "fights" between the various ecclesiastical structures and merchants: if the first desired the eradication of loan with interest, the latter needed financial resources, and thus obtained them on the terms of conditional return together with an interest at a convenient rate, an interest which should bring some profit to the creditor[1].

Arising from this, late scholastic knew two orientations: pro and contrary to using interest. It should be noted that the permissive supporters have brought new nuances in the analysis of this matter, thus eliminating even the minor Aristotelian premise that is the fruitless quality, the sterility of money. A new idea emerged, opposed to the ancient idea of seeing the money as infertile. If there are two types of loans: for consumption and production, it means that money has been productive or quasi-productive Hence it was concluded that the present value of money does not equal the future value of it. It is the interest itself that can make that equalization[2].

A new perspective on interest

That is why "interest" is a constant companion of money-loans when they are either required or offered by authorized credit institutions. Nevertheless, it is reprehensible, and canons are fully effectual when the amount becomes excessive and therefore immoral. In other words, when the limits of interest are excessive in relation to the loan, it is not only illegal, but it is immoral above all. As stated, it is easy to imagine that any reasonable person may consent voluntarily, due to one's commonsensical values, to pay $ 107 a year in exchange of the $ 100 offered on the spot[3].

Conclusions

Modernity did not take into account the canonical provisions due to its peculiar reasons. At first sight, we can say that modernity broke the canonical provisions with the serenity. A closer analysis, however, commonsensically distinguishes usury from the loan with interest. Economic development and especially the financial and banking development led inevitably to a mercantile society based on pragmatic principles. These early modern times economic changes have led to the re-evaluation of the interdiction hovering about the loan with interest. From the point of view of the ecclesiastical law, the loan with interest has become licit, only on the terms that interest should not be excessive[4].

Bibliography:

Popovici, P. (2011**).** *Incompatibilitatea de a exercita comerţul. Revizuirea unui caz, in "SUBB. Iurisprudentia"*, no. 1, pp. 141-147 **(**in Romanian**);**

Phidas, V. I. (2008). *Drept canonic. O perspectivă ortodoxă,* translated by A. Dinu, Trinitas, Iaşi (in Romanian);

Chadwick, H., Oulton, J. E. L. (eds.) (2006). *Alexandrian Christianity. Selected Translations of Clement and Origen,* Westminster John Knox Press;

Ferrari, S. (2006*). Adapting divine law to change: the experience of the Roman Catholic Church* (with some reference to Jewish and Islamic law), in "Cardozo Law Review", vol. 28, no. 1, pp. 53-65;

[1] J. Chown, *A history of money. From AD 800*, Routledge, 1996, p. 3.
[2] T. F. Divine, *op.cit.* p. 354.
[3] B. W. Dempsey, *Interest and Usury*, Dennis Dobson Ltd, London, 1948, p. 4.
[4] S. Ferrari, *Adapting divine law to change: the experience of the Roman Catholic Church (with some reference to Jewish and Islamic law)*, în "Cardozo Law Review", vol. 28, no. 1 / 2006, p. 55.

Floca, I. N. (2005). *Canoanele Bisericii Ortodoxe. Note şi comentarii*, 3rd ed. Sibiu (in Romanian);

Homer, S., Sylla, R. (2005). *A History of Interest Rates*, 4th ed. John Wiley;

Lacoste, J.-Y. (ed.) (2005). *Encyclopedia of Christian theology*, vol. II, G-O, Routledge;

McIntosh, J. R. (2005). *Ancient Mesopotamia: new perspectives*, ABC & CLIO;

Neusner, J., Avery-Peck, A. J. (eds.) (2004). *The Blackwell companion to Judaism*, Blackwell;

Carson, T. (ed.) (2003). *New Catholic Encyclopedia*", 2nd ed. Thomson & Gale;

Leick G. (2003). *The Babylonians: An Introduction*, Routledge;

L'Huillier, P. (2000). *Dreptul bisericesc la Sinoadele ecumenice I-IV*, transated by Al. I. Stan, Gnosis, Bucharest (in Romanian);

Schönborn, C. von (2000). *Oamenii, Biserica, Ţara. Creştinismul ca provocare socială*, translated by T. Petrache, R. Neţoiu, Anastasia, Bucharest, 2000 (in Romanian);

Chadwick, H. (2001). *The Church in Ancient Society. From Galilee to Gregory the Great*, Oxford University Press;

Sachelarie, N. (1999). *Pravila bisericească,* ed. a III-a, Parohia Valea Plopului, 1999 (in Romanian);

Chown, J. (1996). *A history of money*. From AD 800, Routledge;

Hanga, Vl. (volume co-ordinator) (1980). *Istoria dreptului românesc* ("History of Romanian law"), vol. 1, Academia RSR, Bucharest (in Romanian);

Dempsey, B. W. (1948). *Interest and Usury*, Dennis Dobson Ltd, London;

Milaş, N. (1930). *Canoanele Bisericii Ortodoxe însoţite de comentarii*, vol. I, partea I, (Introducere, Nomocanonul în XIV titluri şi Canoanele apostolice), translated by N. Popovici, U. Kovincici, Tipografia Diecezană, Arad (in Romanian);

Popovici, N. (1925). Manual *de drept bisericesc oriental cu privire specială la dreptul particular al Bisericii ort. Române* (inclusiv noua lege pentru organizarea bisericească din anul 1925, vol. I, partea I şi II, Tiparul Tipografiei Diecezane Ort. Rom., Arad (in Romanian).

THE MORAL DIMENSION OF LAW

Savu Iuliana[*]

Abstract

The analysis of the occurrence of law shows that it was formed and acquired personality by gradual separation from moral norms and customs. Therefore it can be said that morals precedes law and that both have evolved in close interdependence, being themes of analysis and reflection for philosophers and legal experts.

Key words: *Law, morals, conscience, sanctions, social norms.*

Introduction

Human society appears as a complex overlay of realities, which are real media for the existence, development and expression of people's consciousness and facts. Thus, human activity is done in practice within a framework that is simultaneously social, political, economic, natural, cultural, ideological, etc.

Social realities know a great diversity and get a complex and dynamic character, adequate to the society in which they take place.

The great diversity of social relations determine the existence of a multiplicity of social norms aimed at influencing people's behaviour, which also include ethical (moral) and legal norms, which are in an undeniable relationship.

Law *(ro. drept, lat. dirigo, dirigere)* – is a socio-human science whose research object is the legal reality that is an inalienable dimension of the human existence in particular socio-historical conditions.

Moral is a science that studies the norms of behaviour in society, teaching us to do "good" and avoid "evil".

Moral can be defined as the science of good and happiness, the science of mores, "all the rules governing the relations between people" (P. Sollier).

Ştefan Odobleja (*Consonantist Psychology*, Bucharest, 1982) believes that moral is:

- the science of prevention and therapeutics of evil;
- philosophy and physical and mental hygiene of social life;
- the science of social balance;
- the science of morality and immorality, rights and duties, vices and virtues;
- the science of agreement or consonance between the individuals' interests or between the individual's interests and the society's interests;
- the science of harmony and balance between self and society.

Moral is all the skills, feelings and beliefs, attitudes and mentalities, principles and norms, values and ideals regarding the relations between the individual and the society, which manifest in deeds and actions, in an individual's behaviour.

The sphere of the concept of morals includes moral conscience (*beliefs, concepts, values, ideals*), norms or moral principles and moral relations; the latter become objective through facts and actions at a social level. Both the moral facts and the attitudes are estimated based on the fundamental ethical categories: good and evil, duty, responsibility, etc.

[*] Didactic and scientific degree/profession: Conf.univ.dr. Institution of origin: "Spiru Haret" University, Faculty of Juridical and Adminstrative Sciences, Braşov; e-mail address: savuiulia2008@yahoo.com

Moral rules involve a pattern of the necessary conduct, and, also, sanctions of moral character in case of non-compliance. Moral sanctions are given by the social environment through public opprobrium in response to certain attitudes or immoral behaviour of an individual; at the same time they are conceived inside the individual, who becomes aware of his action and has regrets and is filled with remorse, etc.

It is impossible to apply legal rules, laws on an individual's inner, on a person's moral beliefs, because laws are designed for the outward acts. Inner life enjoys some privacy in which outsiders can not enter by force. The legally sanctioned individuals are likely to keep their own moral values intact, no matter if they are very well or less well understood by him.

For moral norms, physical constraint is only an addition to the proper moral sanction provided that the immoral act is also prohibited by the state's laws.

The complex interaction between the morals and law has concerned legal thinking since antiquity. Ancient statutes expressly invoke moral principles, leaving the impression of being identical to the legal rules and norms. This fact does not indicate a fault theory (which can possibly be reproached the further legal knowledge for confusing morals with law), but the circumstances which were characteristic of the initial stage of law, found in an undifferentiated stage with the morals.

For the ancient Greeks, ethics (*from ethos = mores, habit, character*), as part of the philosophical concept, is to define the notion of good, with its correlatives duty, virtue, happiness, etc., which, as shown, also belong to law. They had an ethical vision on law; although justice was deducted from compliance with law, the law itself was extracted from the moral principle of fairness.

The Roman practicality, attached to traditional rules and norms, also set law under morals. For Cicero, law did not derive from one's will but from nature; justice is natural and therefore necessary.

If law was, in the ancient people's concept, melted in ethics, in the Middle Ages it has been assigned a priority status. Thus, the religious ideology, which was dominant, inferred from the religious writings that the nature of law as divine will reveal to the human being. "*Lex humana"* is the law made by people after the holy commandments; it should be respected not by its specifically content, but by the will that communicates this to people. Thus the condition of the morals legitimates itself in law. Morals took the form of some legal provisions.

Following the movement of emphasis made by the Renaissance philosophy and culture, in which human values return, on a more complex level, to the grandeur and axiological justification of the antiquity, in the modern age there is a strong reaction to the dogmatic conception. For Hugo Grotius (*De jure belli ac pacis* – 1625), law lies in man's rational nature. The wilderness of war, the plunder and the cruelty that accompanied it, can not be removed except by everyone's adherence to a fund of universal principles of law. He formulated four such principles: *honouring our commitments; respecting all that is of another (property, life, honour, etc.); repairing the damage caused to someone; fair punishment for criminals.*

Later, the advancement of knowledge in law did not delay the referral of the real differences between law and morality. Thus, Christian Thomasius (*Fundamenta juris naturae et gentium ex sensu communi deducta* – 1705) distinguished between the mission of law, consisting in providing external relations between people by regulations that make *perfect obligation*, which could be sanctioned, and the mission of morals, connected with the inner life of consciousness, which makes *imperfect obligations*, which cannot be guaranteed.

This thesis, which has retained authority until today, is considered as "*the real distinction between law and moral*". If in moral, by the choice made, the same subject's action faces another action, in law different subjects' actions face other actions. Therefore,

morals would be unilateral and law, bilateral. As Mircea Djuvara explains in his *Essays on the Philosophy of Law*, "in moral, justice is done on an inner act; hence, it is the agent's subjective purpose which must be the good itself, as long as the agent may conceive it with all sincerity".

In the case of law, on the contrary, justice is done on the externalized action in its entirety, including its purpose; so, this act, in its wholeness and objective purpose, must be justice.

The difference between the nature of an exterior act, individualized in a precise manner, in a certain time and physical space, and that of a purely internal activity, object of simple immediate intuition, explains all the differences that may be observed between law and morals.

Of course, we can not think of the phrase '*inner life'* without linking it to the morals and the moral conscience, because these, which are social by their existence, do not impose themselves as an exterior given, but they are "assimilated and internalized in the form of morals; the moral subject relates creatively to the moral norms". At the same time, law does not elude inner life. Thus, based on the concept of consciousness, the arguments brought by legal practice that take into account such items as intention, vices of consent, good or bad faith acquire real value.

Both law and morals are normative disciplines; they guide and govern human behaviour. Between law and morals there is a unit, they are not conflicting, but complementary. Law incorporates most moral precepts. The sphere of morality is more comprehensive than that of the law, as it determines people's behaviour in various social relationships. (Bentham: "Law and morals are two concentric circles, where the moral forms the biggest circle and law the smallest one"). But it does not mean that all rules and regulations of law would be included in the sphere of morals. There are legal rules which do not include directly a moral appreciation, such as criminal or civil procedural laws, economic rules, and state's traffic laws, which have a purely instrumental role. But if the moral requirements do not have in all cases corresponding normative legal rules, it does not follow that legal rules with a technical character would not implicitly have a meaning and a purpose which, if not of moral essence, at least are consistent with the aspirations and moral norms.

Also, there are cases in which some laws are at odds with the principles of morality, because of a certain moral that no longer resonates with the law from a historical, evolutionary point of view. Thus, legal norms are part of social norms involving, among other things, moral norms, too. No matter how many dysfunction or contradictions are between these two, as integral parts of the global system of social norms, they have the same essence as the organic entireness they are part of. Therefore, the compliance or infringement issue can not remain indifferent to moral.

Also there are values that are promoted by law and by morality at the same time, such as: truth, justice, and freedom. The lack of a minimum moral of a law would lead to its violation. One should not think that law and morals are totally identical. Between them there are similarities and differences resulting from the goals they have, the nature, purpose and content of the sanctions or penalties, and from the way the rules and norms are created. Law relies on institutional regulations, unlike morals, to which non-institutional regulation is specific. If legal statements are developed by certain state's bodies, subject to certain procedures that give a formal character to a norm, this being a condition of recognition, the moral norm appears spontaneously and informally during the process of social coexistence.

These differences were called by Ihering the "Cape Horn" of law, i.e. the dangerous cliffs into which many legal systems clashed violently.

Morals gives law its most important rules, norms and principles for becoming written legally binding laws, helping to achieve the goals of the morals.

Conclusions

Between legal rules and norms and moral norms, there is a strong correlation, a specific type of link, which makes the two categories of norms to be intertwined, to complement each other, to borrow from each other the most realistic and valuable items.

Modern law has to include in the contents of legal norms, acts and statues, those provisions of morals which are dominant in a human community and make them agree with the state's interests, the general will of the society and its development.

Bibiography:

Iuliana Savu, *Elemente de teoria statului şi dreptului,* "România de Mâine" Foundation Publishing House, Bucharest, 2011;

Noul dicţionar universal al Limbii române, Litera Internaţional Publishing House, 3rd edition, Bucharest, 2008;

Gheorghe Bică, Ioan Vlad ş.a., *Introducere în istoria dreptului*, "România de Mâine" Foundation Publishing House, Bucharest, 2007;

Sofia Popescu. *Teoria Generală a Dreptului*, Lumina Lex Publishing House, 2000;

Nicolae Popa, *Teoria Generală a Dreptului*, Actami Publishing House, 1998;

Mircea Djuvara, *Eseuri de filosofie a dreptului*, Trei Publishing House, 1997;

Alan Montefiore, *Introducere modernă în filozofia moralei,* Scientific Publishing House, Bucharest, 1972;

M. Luburici, *Teoria Generală a Dreptului*, Oscar Print Publishing House, Bucharest, 2003;

Internet: www.wikipedia.org.

IS THERE A RELATIONSHIP BETWEEN MORALITY, LAW AND RELIGION?

Tătăran Anca[*]

Abstract

Between religion and law it has always been a close relationship, although they are two totally different concepts. The connecting element is represented by the human being. Religion teaches us to be good, to respect our peers and so does the Law as a legal entity. By laws we have to contribute to the social order. In any constitutional state, laws are made to be respected, and he who violates them must take responsibility for their own acts. Therefore, it comes out naturally that both religion and Law have only one goal: to arrange, to establish standards of decency, in order to live in a sinless society like the Church may say or no offence society like the Law would say.

Key words: *religion, law, morality, crime, sin, justice, punishment, law, church, rehabilitation, public order.*

Introduction

For a long time a question arises: what is right is also moral? And inverted. The answer is not that simple. Not infrequently happens, that what to a defender of law seems to be right, after analyzing the evidence in his possession, to be also moral. Why? Very simple, because even those compelling (irrefutable) evidence can be false or counterfeit. But what seems to be moral, most of the time is also right.

To continue, however, this idea first of all we must define Law and ethics, justice and morality. So, how can we define Law? Over time the definition of this concept was a challenge. Ancient philosophers largely resumed the idea of law as a compliance with good, highest good, as the ultimate reason or simply with the truth. Among the most striking examples in this way would be the following definitions:

- Socrates: "Between harm someone and do an injustice, there is no discrimination and injustice is certainly an evil and a disgrace. To make an injustice, means doing the bad things, and not making an injustice, is to do evil".[1]
- Aristotle: "Justice is the supreme virtue in which all receive their own, as required by law, and justice is the best of virtues, the most perfect, which includes all other virtues or all virtue".[2]
- Ulpianus, one of the masters of legal definitions, considers that the right means "to live honestly, not harm another and to give everyone his due".[3]

Today, in common language the word Law has assigned three meanings: justice, equity and law. The first is understood as the higher value or sense of entitlement, to give everyone which belongs to (by law). The second, meaning is seen as that which is created by applying state law, the action itself to do justice, that situation in which injustice is removed. The last one is understood as the justice embodied in the law, it represents the way in witch justice is done.

---

[*] Teaching assistant, AGORA University, Faculty of Law and Economics, e-mail:ancatataran86@yahoo.es

[1] D. Moțiu, *Teoria generală a dreptului. Însemnări de curs. Tematică de seminar. Bibliografie. Crestomație,* Oradea's University Publishing House, pp. 22-23.

[2] Idem.

[3] Idem.

Law can be defined as a system of rules of conduct, developed or recognized by the state power that guides human behavior in accordance with the values, of that society, establishing legal rights and obligations of which mandatory abidance is provided, when needed by the coercive force of public power.[1]

The existence of the Law is given by need to establish social rules, rules of conduct that are imperative. Law becomes a necessary tool for any society in the establishment of rules according to certain social values. They show as a unitary system of rules of conduct issued by state power or appeared in another form (that habit, for instance) whose mandatory compliance is ensured, if necessary, by coercive force of the state.[2]

Understanding the evolution of the law over time implies the knowledge – among others – of shaping and developing specific ways of expressing the essence and its content in different historical stages.[3] In their early form, custom rules were inspired by moral and religious precepts. Table XII of the Act, the laws of Solon, Dracon`s Laws confirm it`s complex character - moral, religious, criminal, civil.[4]

Ancient civilizations: the Babylonians, the Egyptians, the Romans were confusing the notions of law and morality. It should be noted however that - at that time - no distinction were made between religious, moral and legal norms, because both were considered to be the result of the same divine will and their content does nothing more than to express the moral and religious precepts that "voluntas Dei" itself as "lex vitae" (life time).[5]

Gradually a new element is introduced to express the notion of law, namely that of "truth", which expresses the idea of supreme power in the right anchor.

Morality and moral norms

Morality represents a set of ideas, precepts, and rules about good and evil, right and wrong, just and unjust. Morality as rational system of rules for their own conduct is based on the belief intimate and personal conscience of each individual in his behavior, moral rule mobile was the domestic debt rule of person, first of all for himself.[6]

Moral rules come with penalties of the same nature. These penalties may be outside the subject and the social environment that is a reaction (the community) to the immoral act in this case we are dealing with different forms of manifestation of public opprobrium, or may be internal, subjective consciousness in the field, they the most powerful and effective form of regret, remorse, pangs of conscience or scruples of conscience.[7]

Morality is as old as the society and plays an important role in regulating the social relations in ensuring and maintaining social order. Having as fundamental values some principles like justice, truth – values also protected and promoted by law – from the outset was set the question of analyzing the similarities and differences between them.[8]

---

[1] Ioan Ceterchi şi Ion Craiovan, *Introducere în Teoria generală a Dreptului,* All Publishing House, Bucharest, 1993, p. 28.
[2] Pr. Prof. Dr. Constantin Rus, *Drept bisericesc, Anul III, Pr – Sem I+II,* p. 4, *http://www.teologiearad.ro/?p=594.*
[3] Cutuma ca izvor de drept. Scurt istoric, http://www.studiijuridice.ro/referate_juridice/teoria_generala_a_dreptului_tgd/3122-cutuma-ca-izvor-de-drept-scurt-istoric.html
[4] Idem.
[5] Pr. prof. dr. Nicolae V. Dura, Articolul *„Dreptul si religia - normele juridice si normele religios-morale"* http://www.crestinortodox.ro/drept-bisericesc/dreptul-religia-normele-juridice-normele-religios-morale-69944.html.
[6] Pr. Prof. Dr. Constantin Rus, *Op. cit.*, p. 29.
[7] Idem.
[8] Idem.

In reality, lawyers, almost unanimously believe that between law and morality there is an organic correlation, extremely close, but each with its own identity.

Morality as a system of rules is based on the belief intimate and personal conscience of each individual in his behavior.[1] Since antiquity, legal and political thought was concerned with the relationship between law and morality.

Between the two concepts are alike similarities as differences. Both represent a set of rules of conduct. But a first difference is that moral norms are not necessarily uniform but varies depending on the nature of the social group, the community - national, religious, while the right is to ensure legal order unit within a society. Another difference relates to sanctions: the rule of law is ensured by the force of constraint of the state, while the moral are as contempt sanction, public opprobrium, and remorse.

Moral rules are spontaneous in their appearance, while the rule of law, except custom, is the result of conscious and organized creations. Rules of morality and religion have the most similarities. The Law development led gradually to desacralization and secularization of the institutions, but the process is different from one religion to another.[2] And today there are legal systems, such as the Islamic for example, which are strongly influenced by religious morality (Qur'an is the "Bible" and "code" Islamic nations).

In theological terms the similarities and differences between law and morality are the following[3]:

- *Similarities:*

- Both depart from God;
- Both involve a higher authority and demand obedience to it, as shown in Romans 13, 16: "all souls to obey the High domination, because there is no authority than God, and those that are, are ordained of God".
- Both involve listening, rules and punishments;

- *Differences:*

- Regulates the first report moral man with God, while the report covers only the right of the people;
- First governing moral life of man's spiritual intimacy and then seen human action, while the right covers only external actions on the principle Latin "praetor of internis non judicata";
- The rules of morality are unchanging, while the rules of positive law may be subject to change;
- Morality as means of resolving not to allow physical force, even when the right incentives.

It is worth mentioning that are promoted by means of moral principles, but at the same time and morality has a certain influence on the development of the law, as well as its application. The close connection between what is right and what is moral, between law and religion is supported not only by the historical reality of human life, but also by some theorists of law, hence a natural conclusion as possible: there should be as without morals, without affirmation of the principles of humanistic moral, healthy, to always have in mind the good, justice, justice, equity, equality as stated by the law moral, biblical origin, but are required and universal human rights.

The Church from a legal point and the religious Law

Whenever you try to define religion - which means, of course, that it be viewed in full, the essence and functionality - we face a situation not only difficult but also bizarre.[1]

---

[1] http://idd.euro.ubbcluj.ro/interactiv/cursuri/CarmenLazar/Dreptul-in-sistemul-reglementarilor-sociale.html.
[2] Pr. Prof. Dr. Constantin Rus, *Op. cit.,p*. 30.
[3] *Idem.*

Through his character the institutional, social functionality ensures their religion, which, during the ordinances based on the exploitation of man by man, was to contribute to a certain type of social existence.[2]

From a dogmatic point of view, the Church is the communion and community people with God through Christ in the Holy Spirit, in which they, through faith in Christ that is based on divine revelation contained in Holy Scripture and Holy Tradition and Holy Spirit in the Holy sacraments acquire their salvation.[3] In legal terms, the Church is all people who believe in Jesus Christ are baptized in the name of the Holy Trinity, the same unity of faith (sacraments), and are led to salvation by the Holy Apostles and their successors' legitimate bishops and priests; head of the church is Jesus Christ Himself.[4]

But the Church is an institution of spiritual nature, "its laws based on the law, have compulsory power, but not binding as civil laws, criminal, administrative, commercial, etc. Therefore, in terms of character laws, "the religious Law bases its authority on the moral aspect of actions", and not coercive (constraining) as the civil laws.[5] In fact, you should know that in church, any offense shall be tried first as sin, and, after its seriousness, and seriousness of the crime is estimated, where so and evaluation through the Christian moral law.[6]

Legally speaking in Law we have criminal offense, in religious terms is called sin. Just as in Law there is a Criminal Code in which are structured all the offences and which we should avoid in committing them, as well the Church has it`s rigors - The seven commandments. Many of them overlap with the Norm of law: you shall not kill, you shall not steal. From here, we can therefore turn the conclusion that between religion and Law there is a strong connection. As a means of coercion, to hold accountable those who commit such acts have the right imprisonment, denial of certain rights, fines, etc. In religion we are given canons. Although priests believe that a canon is not a punishment but rather liberation of the soul. Canon assumed a correction, a change for the better and not a torment, punishment. Its role, say high priests of the Church is not a means by which you try to achieve something but refers to a handbook, a means to improve and ease the soul.

Justice in religion, morality and law

Recognizing the Law as a specific social organization technique of the coercive social order, we can put it into other ways of ordering antagonistic community that even as we pursue similar or even identical purposes, have the same mode of expression.[7] Revealing examples in this respect could be the social norms related to religion or morality. We can specifically, take a crime case. This is a prohibited act by each of these social norms. In terms of religion, murder attracts a penalty for the perpetrator, an idea which is approaching the right plan, although the penalty is a higher order. In addition, this analogy can be applied only if that person is an entity superior consciousness, because without such a perception on the world organization, the social norms lose any influence.[8]

If a criminal will be excluded from public life, as in morally punished by marginalizing him by its living members of society, rather he will want to avoid this type of

---

[1] Petru Berar, *Religia în lumea contemporană*, Political Publishing House, Bucharest, 1983, p. 5.
[2] Idem.
[3] Pr. Prof. Dr. Constantin Rus, *Op. cit.*, p. 8.
[4] Idem.
[5] Pr. prof. dr. Nicolae V. Dura, *Op. cit.*
[6] Idem.
[7] Teslovan Roxana-Beatrice, *Relația dintre drept, adevăr și dreptate*, http://www.cluj-napoca.elsa.ro/rela%C8%9Bia-dintre-drept-adevar-%C8%99i-dreptate.
[8] Idem.

punishment instead "for" the law, because man is defined and exists in relation with others, not only in relation to himself. Provisions required by the plan remained applicable to today's religious precisely because they have managed to establish itself and legally.

So, one can easily see the links established between justice and social norms, especially legal ones, their interdependence is perhaps what community is organizing, transforming it in a orderly system, ruled by regularities towards they report consistently.[1]

The relationship straight-truth-justice is characterized by interdependence, because any modification to one of these elements will produce a transformation of the other two, and ignoring one would decline, in long-term the decline of society.

Conclusions

Moral sphere is much larger than the right, because people's behavior in various standardized social relations, this does not mean that all rules of law are included in the scope of morality. Procedural rules in civil and criminal or other legal rules do not include technical and organizational self and moral appreciation. But if moral requirements are not in all cases corresponding to the normative legal rules, doesn`t result that legal rules of a technical nature would not have, therefore, in subsidiary, a significance and a finality, that if they are not moral essence itself, is not, ultimately, consistent, by their social function, the public, with aspirations and moral norms.[2] We also encounter situations in which some rule of law is at odds with moral principles, given only on a certain moral that a right may no longer resonate in historical and evolutionary terms. Thus, legal normativity is part of social normativeness, involving, among others, and moral normativity, any malfunctions or contradictions would be between these two elements of social normativeness, they, as part of the global system of social normativeness, I can not have the same essence as all organic part.[3]

Religious values constitute central elements of societal values that shape the rules, principles and institutions governing society.[4] Institutional policies affect those underlying societal values by reinforcing and entrenching societal beliefs or seeking to change them.[5] Scholars recognize that the multiple interactions between religion and law are so embedded in particular cultures that broad generalizations have limited utility.[6]

In the end, it can be said that justice and truth itself in objective law because human beings always felt the need to have something tangible to which to report in terms of establishing the correctness, or and the desire to find themselves in relation to others in a society governed by relativism.[7]

The unique nature of religion may make it problematic to protect religious liberty directly by singling out religious activity for special treatment.[8] Finally, it may be that the nature of law, religion, and religious pluralism needs to be rethought before we can properly consider the relationship between law and religion.[9]

"Perhaps their differences rest on more fundamental disagreements regarding their conceptions of religion, religious pluralism, and the nature and rule of law. What are these

---

[1] Idem.
[2] *http://www.bisericasatanista.org/relatia-dintre-drept-si-morala.html.*
[3] Idem.
[4] LAW AND RELIGION, by Gad Barzilai (ed.). Aldershot, England; Vol. 17 No. 8 (August, 2007) pp. 649-650, www.bsos.umd.edu/gvpt/.../barzilai0807.html.
[5] Idem.
[6] Idem.
[7] http://www.cluj-napoca.elsa.ro/rela%C8%9Bia-dintre-drept-adevar-%C8%99i-dreptate.
[8] *www.aals.org/.../lawandreligion/...*
[9] Idem.

presuppositions and where do they come from? Are there other possible positions based on different understandings of religion, religious pluralism, and the rule of law? How do conceptions of religion, religious pluralism, and law shape our thinking about the proper role of religion in pluralistic democratic society?[1]"

There are lots of questions without answers or we can say rhetorical questions and they always will be concerning Law and religion. Perhaps will run much ink on paper regarding the relationship between the two. One thing is certain: it can not be one without the other.

Bibliography:

D. Moţiu, *Teoria generală a dreptului. Însemnări de curs. Tematică de seminar. Bibliografie. Crestomaţie*, Oradea's University Publishing House;

Law and religion, by Gad Barzilai (ed.). Aldershot, England; Vol. 17 No. 8 (August, 2007); www.bsos.umd.edu/gvpt/.../barzilai0807.html.

Ioan Ceterchi şi Ion Craiovan, *Introducere în Teoria generală a Dreptului,* All Publishing House, Bucharest, 1993;

Petru Berar, *Religia în lumea contemporană*, Political Publishing House, Bucharest, 1983;

http://www.teologiearad.ro/?p=594;

http://www.studiijuridice.ro/referate_juridice/teoria_generala_a_dreptului_tgd/3122-cutuma-ca-izvor-de-drept-scurt-istoric.html

http://www.crestinortodox.ro/drept-bisericesc/dreptul-religia-normele-juridice-normele-religios-morale-69944.html;

http://idd.euro.ubbcluj.ro/interactiv/cursuri/CarmenLazar/Dreptul-in-sistemul-reglementarilor-sociale.html;

http://www.cluj-napoca.elsa.ro/rela%C8%9Bia-dintre-drept-adevar-%C8%99i-dreptate;

http://www.bisericasatanista.org/relatia-dintre-drept-si-morala.html.;

www.aals.org/.../lawandreligion/...

[1] Idem.