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THE CRISIS OF MODERNITY OF THE ARAB-ISLAMIC WORLD
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Abstract

The Westernization of Islam, which began at least two hundred years ago, has two major consequences: a positive one, meaning the enlightenment of the elites which tried to reform Islam; and a negative one, "the perverse effect of contact with the West", as the experts often call it, which consists of the development of religious sects within the Muslim societies. The direct and striking conclusion, upon first analysis, is that Islamic fundamentalism is the product of Western modernity. Of course, the line of explanation has its origin in colonial times, seen as a major disappointment by those Muslims who believed in the benefits of a European-style modernity, and continues with the Cold War period, with the examples of Saudi Arabia, Pakistan and Afghanistan, where the mobilization of Islamist elements was beneficial in the fight against the Soviet enemy and the active proselytism practiced by the latter.

Keywords: Islam, Jihad, fundamentalism, Terrorism, Faith, Shiite, Sunni, Kamikaze, ISIS

Introduction

There's a lot of talk nowadays, in the Western world, rather than the Arab-Islamic world, about a crisis of modernity crossing from one end to the other the territories which are under the rule of Islam. Modernity, in its common Western meaning, is a notion most often associated in Islamic environments, with the Western way of life, with the laicism of Western social structures. Of course, there are different types of modernity or manifestations of it in different contexts, and taking this notion as a unitary block is, as we shall see, to the detriment of an accurate perception of the phenomenon of modernity in the Arab-Islamic space.

In the course of time, three attitudes towards modernity became apparent.

Law and rights in Islam

"A defining characteristic of the Muslim legal discourse is the assumption that ***the Quran (Qur'an / Koran)*** *is God's Communication to humanity... God speaks in the Quran and among the things He transmits there is also the law to which He requests His community to submit."*[1] *So here we have a law of sacred origin, which may not be violated except under the threat of sanctions emanating from the same resort, the same way it can only be amended by the original resort. In addition to this text, Islam has additional regulatory means, such as Sunna – the model of the sinless life Prophet Muhammad led*[2]*,* ***ijma*** *– the community consensus on carrying out the law, as well as the* ***comments to the Quran*** *– done by means of*

[1] Robert Gleave, *The 'First Source' of Islamic Law: Muslim Legal Exegesis of the Quran,* in Richard O' Dair, Andrew Lewis, (ed.), *Law and Religion. Current Legal Issues,* 2001, vol. 4, Oxford University Press, 2001, p. 145, *et.al.*;

[2] "It is true that, on its part, the Quran speaks of *Allah*'s *Sunnah*, meaning by it God's principles of action in humans; however, tradition has reserved the word for the manner of acting, for customs or Muhammad's parables. These precedents are the norm of Muslim life, at all levels.", F. Schuon, *op.cit,* p. 107;

a "complex hermeneutic theory, with the help of which jurists were able to interpret the Quran (and the words of the Prophet) in a manner as extended as possible. The theory was, in the beginning, quintessentially teleological. It was conceived in such a manner as to provide a jurist with the tools allowing him to discover what God meant to say in the Quran."[3]

On the other hand, the Quran "presents itself as <discerning> *(furqan*) between truth and error."[4] In other words, God's Word is the discernment between truth and error! From here results the difficulty in separating the two, hence the value of initiation and knowledge, and, therefore, the privileged place that theoretical knowledge used to have/has (*epistheme*, as the Greeks would say!). Therefore, everything outside knowledge is inevitably under the sign/spectrum of falsity, error and inadequacy. Which is what characterizing the frenzy and the binding trait of fundamentalism. Also, knowledge cannot take place at once, it happens in time and according to the demands of time! Each jurist will advance from one meaning to another up to the point where his instruments of knowledge lead him. "The availability of this important written information, which is indeed crucial, inevitably influences the position in the social hierarchy of people who can read, the learned, cultured people."[5]

The rejection of modernity

There is a first group that has rejected and still rejects the ideas promoted by modernity, associating them with westernization, with the fear of loss of identity. This fear of the Muslims stems from the absolute opposition between the fundamental views of the two worlds. In the Oriental world, the individual is literally "absorbed" by the family, and in a broader sense by the community. The West only takes into consideration the individual. For all Muslims, private life is governed by the rules of the clan society, the status of a believer requiring membership to the community.

Muslims consider themselves superior to Westerners in all respects. The neurosis occurred when Islam was confronted with the technical and military superiority of the West. From their perspective, only Satan could make the materialist and atheist West triumph. This explains the immense hope brought into the Muslim world by Khomeini in 1979. Islam no longer bent before the West, but asserted itself violently. The broad support received by Saddam Hussein from the Muslim public opinion, during the Gulf War, as well as the events that led to the 2003 crisis could be interpreted according to the same pattern.

But the refusal of modernity may also have non-violent expressions, as demonstrated by the Wahhabism developed in Saudi Arabia. This integrating movement, which has existed since the 18th century, denounces any innovation brought to Islam by secondary sources of law and requests a return to the fundamentals of the desert.

Traditional values and modernity

Another group combines modern ideas with traditional values, proposing a reconciliation of Islam with modernity and science. The initiators of this reformist current are Jamal al-Din al Afghani, Muhammad Abdouh Rashid Rida, Fadil bin Ashur, Ben Badis and Allal al Fasi. From their perspective, Islam is tolerant and rational; it is not hostile to progress and agrees with the technical innovations of the West.

Modernity and Westernization

[3] Idem, pp. 145-146;
[4] Idem, p. 49;
[5] Ernest Gellner, *Condiţiile libertăţii. Societatea civilă şi rivalii ei (Conditions of Liberty: Civil Society and its Rivals)*, Editura Polirom (Publishing House), Iaşi, 2008, (Penguin Books, London, 1996), p. 39;

The third approach fully supports the association of modernization with Westernization, promoting the exclusion of the religious factor from political life. The first step in this direction was taken by Kemal Ataturk in Turkey. One can also give the examples of Iran in the time of the Shah, Tunisia – during the reign of Habib Bourguiba or the Ba'athist regimes in Iraq and Syria, based on a non-religious nationalist ideology. However, the last two never went as far as an outright declaration of laicism.

The modernity of a society does not exclusively manifest itself through its degree of economic development, although this could be a good indication, but on several levels of development, of which the mental one seems to me to be vital when associating modernity with the Muslim space. It is known that the modernization of the Arab-Muslim society began in the mid-eighteenth century and is partly due to the first contacts the Maronite Christians in Lebanon had, through Catholic missionaries, as well as through the itinerant theater companies from France and Italy, with the Europe of the Enlightenment, and especially with its spirit. The spiritual discovery of Europe had profound echoes that were not limited to the Christian communities in Lebanon and Syria, but slowly included Muslim and Christian intellectual circles alike, through contact with the philosophy of the Enlightenment, then with the great convulsion of European nationalism which produced nations and destroyed empires.

Arab awakening under the rule of the Ottoman Empire coincided with the awakening of the Balkan peoples under Turkish rule, an intense process of rebirth and formation of new entities amidst the turmoil generated by the ideas of the French Revolution and supported in the field by the increasing awareness of the dismantling of the great empire. The Turkization policy pursued by Sultan Abdel Hamid II, accompanied by the national affirmation of the Balkan peoples and of their national language, caused a response from the Arab intellectual elites, which resides in the revitalization of literary Arabic language, promoted by a number of societies which were established in the Arab provinces of the Ottoman Empire. At the time we are referring to, the Arabic language was the connection uniting the Muslims and Arab Christians from Syria and Lebanon in their joint efforts to gain recognition of their identity. Arabic is used not only by Muslims to define their own identity, but also by Christians who never forget to mention that the Arabic language existed before the revelation of the Quran.

The Arab provinces of the Ottoman Empire experienced, in different forms, the same disintegration social phenomena which are cultural and political at once, or, in other words, an identity disintegration. Modernity and the acceptance of the forms it takes resulted, within the Arab-Muslim society, in the most diverse reactions. Unfortunately for the course of modernity in the Arab-Muslim world, it did not enter the space to which we refer only through cultural and civilizational influences, but remained connected to the colonization process, which marked in a negative way the relations between Western Europe and the Muslim world. In the common perception of Muslim societies, modernity and its spirit are characteristic of the colonizers, whose presence in the colonized countries left memories that are not always pleasant or enticing to extend or imitate.

The ever more acute impression that modernity and all the structures it proposes, especially laicism, make up a sort of script written in the West according to which Muslims are supposed to play a particular role, is among the explanations of the near-failure in implementing certain patterns with a Western background in this space. For the vast majority of Muslims, the first contact with the West happened when these territories were conquered by the great powers of the time, England, France and, in certain areas, Italy. The very idea of taking over a model which is that of the occupant, the same occupant who, in Egypt, for instance, used the rifle in its relations with the natives, instead of any other method, is rejected as a whole.

Reforming Islam from within, through a reconsideration and reassessment of attitudes towards the fundamental texts that regulate social and civic life and their adaptation to the pace of modernity, was the main objective of the reformist current, *nahda*, in Arabic, which animated the life of the elites from the second half of the 19th century through to the Second World War. The two directions developed within the Arab renaissance, one going toward the adoption of a

lay system in state government, the other seeing the secularization of the Muslim state as a loss of identity, each in its own way understood the need to modernize Islam, seen not only as religious reality, but as a social one, too. In fact, this is one of the important issues that we need to keep in mind when talking about Islam, what is commonly called -islam- is not only a religion, but an entire conglomerate which includes social, cultural life, sometimes even political life, specifically the Arab monarchies. The claim of separating religion from politics, as required by the principles of Western laicism, is firstly not understood, and subsequently, rejected. Therefore, the debates regarding Islam's inability to separate the temporal from the spiritual, which is the cause for the failure of its modernization attempts, suffer from irrelevance. From the very beginning, the Islamic society was conceived as a unitary whole, wherein the religious dimension was never well defined, and I am referring primarily to the lack of clerical hierarchies in Islam (in the majority Sunni Islam). The caliph always had the title of "Prince of the Faithful", but the religious factor did not manifest itself in political situations, unlike in the case of the Catholic Church. Religion in Islam is a component of civil life, because this is the area in which it manifested itself in the course of time, so it is pointless to expect Islam to separate the temporal from the spiritual. That would be impossible, given that spirituality never interfered with political power throughout the long history of Islam.

Of course, things are different nowadays, with Islamic parties and movements having been associated with the government by the current political regimes in the Arab-Muslim world, for reasons that are most often referred to as a "legitimacy crisis". Attracting the religious factor, which enjoys strong popular support, and removing it from the civil action area, followed by the institutionalization of religion are, we must say this, a result of the contact with Western-style modernity. There is no need to look far for examples: the anomaly that occurred in the Iran of the Shahs, in 1979, through the establishment of a strange kind of republic (an Islamic republic) as a result of the absolutely hallucinatory merging of two concepts of different origin and interpretation; this is still happening in other Arab countries where desperate regimes draw to their side religious factions that were, until recently, marginalized and ostracized; see the case of Egypt, Tunisia or the Moroccan kingdom, as well as the Hashemite kingdom.

Arabness and Islam, two concepts that have been in an involution/evolution relationship in the Arab space during the last half of a century

For a better understanding of the current political framework in Arab countries, we believe it is necessary to make a brief analysis of the two currents that are in opposition to each other, disputing their right to govern. We are reminding you that the **lack of good governance** is identified by the latest United Nations Development Report as one of the main causes of the undemocratic situation in the Arab space. The two terms, **Arabness and Islam**, are, above all, two representative identity categories in the Arab-Muslim world. These are the two concepts around which identities were formed and which continue to polarize attention in the claim of belongingness to a certain form of identity.

The analysis of the two words, Arabness and Islam, involves, in fact, an analysis of **two different mental grids,** on the basis of which the Arab world is structured into two political and social thinking systems, which are different, even opposite. The two terms, corresponding to different realities, involve a number of concepts in their evolution, which are divided into two clearly defined groups.

Arabness is a trend known in Arab history since the 8th-9th centuries, when contact with the Persian civilization and the Persians' claims to supremacy in the Caliphate primarily justified by their obvious cultural superiority and civilization at that time, triggered a response reaction from the Arabs, a kind of nationalism *avant la lettre*, with an emphasis rather on the ethnic component. Arabness, the fact of being an Arab, of belonging to the Arab community, *al-*

umma al-arabiyia, gained new values, placing it in a context meant to differentiate the Arabs from the rest of the Muslim world or, to say it better, within the Muslim world[6].

In the modern period, Arabness and Islam became associated with the two currents that make up the political structure of governance in Arab countries; Arabness is most often associated with two other concepts, laicism (which refers to the scientific basis of social organization) and secularism (bringing the profane into social organization). Laicism takes different forms and is perceived in different ways from one country to another. Laicism does not have the same value nor the same meaning that can be generalized for the entire Arab space, it is a phenomenon which is closely related to the modernization of societies.

Those who are concerned with the Arab space and the matter of compatibility between Arab systems, whether lay or based on religious structures, and democratic values, notice differences in the Arab world between the concepts of laicism and secularism, which, although most often used as synonyms, cover different realities in this space. Secularism designates the tendency towards desecration of a vast field of activities among which social organization. The secularization of a society requires a rearrangement of the public space according to the values of political emancipation and freedom, as in the case of the **British model**. In the case of *laïcité*, mostly associated with the **French model**, the struggle for political and social emancipation cannot be separated from the struggle against the domination of religious ideology.

In the Arab world, which should not be submitted to an overall analysis, but rather to a study that should take into account each Arab society individually, the dissociation between the two words, laïcité and secularism, is more clearly defined. There are at least **two reasons** for this: the first is related to the very process of modernization of the Arab countries which manifests itself, at least in the first phase, as the fight against colonial occupation. In this fight, **religious** solidarity was the key factor of social unity. Religion came out of this battle strengthened, having also gained a **geopolitical dimension**, religion ceased to be a mere cult and became an identity carrier. **Current criticism never concerns Islamic religion itself, but the false interpretations it has been given.**

The second aspect which explains why Arab societies may be qualified rather as "secular" than lay is that the call for the modernization of Arab societies came primarily from the **Ulama** (Muslim scholars, doctors of Islamic sciences who can oly envisage the project of Arab societies renaissance as a renewal coming from within and sustained by Islam), the initiators of the modern trend, of revival of Arab society[7].

Moreover, it has become a tradition in the Arab world in the last half century that modernist Muslims should be the privileged allies of the State in the governing process. Their role is twofold: first, the State relies on them to annihilate Muslim conservatives and extremist movements, and secondly, they are useful to the secular political power by giving it additional legitimacy, in a context where many regimes of lay orientation in the Arab world suffer from a lack of legitimacy and low popularity. The Muslim Brotherhood group in Egypt, although officially banned and unrecognized, seems to have made a pact with the power, which allowed it, in the latest legislative elections, to enter Parliament. We notice the " kind behaviour" of the regime in relation to the Muslim Brotherhood group as compared to the fate of the main lay opposition party, Al-Ghadd, whose leader Ayman Nur was sentenced to five years in prison, being accused of various violations he is assumed to have committed when enrolling his party in the election race.

Another example is the Kingdom of Morocco whose king has been financing the opposition of moderate Muslims whom he encourages to the detriment of fundamentalist

[6] Vasile Simileanu, Centre de putere şi actori islamici regionali (Power Centres and Regional Islamic Players), Editura Top Form (Publishing House), 2009, p. 85.

[7] Vasile Simileanu, Statele islamice. Actori geopolitici contemporani (The Islamic States. Contemporary Geopolitical Players), Editura Top Form (Publishing House), 2009, p. 69.

movements. Of course, the list of examples must include the Hashemite Kingdom of Jordan which has Islamist associates in the government.

Religion cannot be ruled out when making an analysis of Arab modernity, especially after Arab and Pan-Arab nationalism, which was in its heyday in the '60s and '70s of the last century, has failed miserably in achieving the ideals proposed. In the consciousness of the Arab masses, nationalism is connected to the failure of Arabs in the Palestinian issue, culminating in the defeat of the great Arab leader Gamal Abdel Nasser and the subsequent recognition of the State of Israel by his successor, Anwar Sadat. Failure in the Palestinian issue, which for Pan-Arab nationalists became a permanent landmark of their doctrine, caused an overturn in the dominant political trends in Arab countries. I am talking about the return to religious spectrum on the political stage, showing a clear need for another landmark with the force of representativeness in the collective mind, that of the street.

The relationship between religion and modernity is different in different areas of the Arab space. Thus, in societies of the Near East where cultural modernity known as the *Nahda* (Arabic Renaissance) began before colonial occupation (but not without suffering influences of Western modernity), **the relation between religion and political identity is weaker.** In these societies, Arabness, which is an entirely lay concept, occupies a significant territory.

In the Gulf countries, where modernity is purely technical, **religion remains the dominant force in society.** An eloquent model is that of Saudi Arabia where the Wahhabi rigorism is the State religion and the social norm. Gulf countries, be it the United Arab Emirates, Bahrain, Qatar or Oman, are among the important, strategic, allies of the United States in the Middle East, which supported Washington's intervention in Afghanistan. The wish of the United States to turn the Greater Middle East into a space of democracy and security turns out to be a difficult task which cannot be imposed from outside. In the case of Iraq, the organization of free elections did not ensure the democratization of society, if we are to bring into question the most recent development. Also, the Palestinian society did not become more democratic after the Islamist group Hamas won the elections in a free and fair manner (according to international observers). It also appears that freedom of choice did not guarantee the coming to power of a democratic president in the case of the Islamic Republic of Iran. These three cases have shown, as Ignacio Ramonet noticed, that organizing free elections is not enough to guarantee the installation of democracy in a society. Following the same paradigm, being lay in the Arab world does not necessarily mean being democratic (see the cases of Egypt, Syria, Tunisia, Iraq, until recently), although many Western leaders hid behind this idea to justify their support for secular (lay) dictatorships in the East. It is also equally false to think that all Islamic democrats or liberals are necessarily lay. They do not claim to be attached to realities that do not belong to Islam, but have found in the distant or recent history of Islam reformist, liberal trends, which propose internal versions and methods of modernization. There are inside Islam liberal models that combine religion with a rational way of understanding things, Mu'tazilites being such an example, or the reformists from the end of the 19th and early 20th centuries. It is shocking to the common Western perception of Islam to speak of liberal Islam. In the same way, it may seem bizarre to talk of Islamic pluralism, which is, however justified in historical terms. Islam is pluralistic, by its very constitutional nature; the first argument in support of this assertion is the manner in which Islamic religion relates to the prophets of the other religions, recognizing their mission and integrating them in its own religious reality. Starting from this comprehensive vision, to which we may add the attitude of Islam towards non-Muslims living in *dar al-islam* (the territories of Islam), now, as well as throughout history, we arrive at a more realistic picture of what is meant, in the common usage, by pluralism, which is exemplified in Islam both in ethnic and religious terms.

Religion and politics are today, in the Arab world, in a sort of compromise maintained with the agreement of both parties. The Islamic fundamentalist movement, which is in a visible upward trend nowadays, as a result of the failure of the political system proposed

by the current governments, and which rejects any form of laïcité, threatening all modernization efforts made so far, is not the manifestation of an ideological continuity in the history of Islam. On the contrary, it represents a break with its recent history. This integrism is not supported by any Islamic dogma, and even less by the reformist and moderate Islam which lately seems to have become a possible dialogue partner in Arab societies.

Islamism embodies the rejection by the broad masses of a failed model of modernization of society; it is an orientation towards another option. Should we consider this return to religion as a general tendency that characterizes the West and the East alike? Could this be a confirmation of Malraux's prediction? A reorganization of the world grouped around the three monotheistic religions, this time in the Judeo-Christianity versus Islam formula? According to an increasing number of specialists (among whom Georges Corm), the Judeo-Christian roots of modern Western laïcité, after giving up the pluralism of the Greek-Roman system of thought on which Renaissance was built, exclude from the equation the third largest monotheistic religion, Islam. There are also talks about a false laïcité of the West, with the looming presence of the religious unconscious, which did not disappear along with modern nationalism, but underwent a transmutation of its epicenter, from the church, understood as a community of believers, towards the ethnic or national community.

However, we tend to believe that the relations established between the two worlds cannot simply be explained through the conflicting interpretations grid, with religion as a starting point. As we have tried to show, other issues must be considered, as well, especially when the discussion goes towards the ability of Arab countries to become democratic, to adopt a system of organization which is alien to them, both by structure and mentality. The troubling question for Western intellectual circles regards the ability of these societies to appropriate a system that Europe built for centuries and which was generated by its own culture. Is Islam capable of creating its own system of revival, beyond Western intentions? The answer could be yes, but not in the political conditions present in Arab countries nowadays. Reform from within must be based on a well-developed civil society which should support the huge social effort.

Islam in the West

The situation of minority Islam, meaning that which is outside of what Muslims call dar al-islam (house of Islam or Islamic territories)[8], is different for at least one reason, that of the need to adapt to the characteristics of Western societies. In this case, there are two dominant directions: either integration in the respective society, by recognizing all its components, as attempted in France, or choosing a way of life inside Muslim communities, as seen in the United Kingdom (Britain).

The line that separates the modern West from the archaic and fabulous Middle East, is strongly maintained by the Western media because this two-sided image is too convenient to allow giving it up; it serves as an explanation in far too many cases to be left aside without remorse. Unfortunately, an increasing number of observers of the phenomenon think that the Middle East has its share of blame in this game, through the pathetic way in which it responds the challenges from the West.

How does the West maintain this clear line between him and the Oriental world? Let's take a sneak peek into the concerns of Western Orientalists (by taking over a topic launched several years ago by Edward Said in "Orientalism"); what is the predominant concern for them? Which are the most frequent topics they are persistently interested in? If we look in the bookshops of the major Western capitals, we will be surprised to find side by side dozens of volumes whose titles contain words like "terrorism", "fundamentalism", "Islamic movements", etc.

[8] Anghel Andreescu, Nicolae Radu, Jihadul islamic (Islamic Jihad), Editura Ministerului Internelor şi Reformei Administrative (Publishing House of the Ministry of Interior and Administrative Reform), 2008

At the moment, the interest of Western cultured media is entirely focused on explaining the universal phenomenon of Islamic terrorism. It is the only subject that publishing houses aware of the market value of such a book are interested in.

But there are, in the Arab-Muslim world, other realities outside the marginal phenomenon of fundamentalism and religious integrism. There are prominent intellectuals with concerns worthy of the highest interest, and the author gives the example of the Syrian Muhammad Shahrur who proposed a new interpretation of the Quranic text, using the modern means of linguistics, thus placing the concepts conveyed by the Quran in their historical context, which was much different from the one we live in today. Shahrur's book has enjoyed tremendous success in the Arab world, but it has remained totally unknown in the West, ignored, deliberately, according to the author, by translators and by those who manage the translation market. It could not be told to the Western public that in the Arab world the Quranic text is openly discussed or that there is an exegesis of such a text, which all common Westerners should know about is that Bin Laden and the likes are inspired by its verses. This is not a carefully sought minor example, it is a characteristic of the pluralistic Islamic spirit. This is, of course, another bizarre combination of terms according to the common Western perception.

Another idea that the West wants to have well established in the Western collective mind is dealing with Islam as a global phenomenon, without shades and colours. The attempt to level a highly diversified reality, as that of Islam, is done, without a doubt, with a definite purpose in mind. One can easily see, from a simple language analysis analysis, how convenient and justifying such an approach is. Consider, for example, the way in which the various Islamist organizations operating in the regions of the Arab-Muslim world are viewed, and therefore imposed the general perception. They are all classified as terrorist, a term which unifies them and is intended to divert attention from their specific character. Putting on the same plane the global terrorist organization al-Qaeda with the Hamas organization or the Hezbollah party movement, whereas their motivations clearly and undeniably separate them from each other, is not only wrong, it is also dangerous for the understanding of certain situations and especially for finding the proper solution for them[9].

Conclusion

Manipulating concepts can be a double-edged sword; oversimplification of situations to the point where they become caricatural, can come at a huge price. In the past few months, there have been more and more talks about a new hallucinatory concept, the Islamo-fascism or Islamo-Nazism, a trouvaille of the US administration (the term was used for the first time on August 7th, 2006, in a speech by President George W. Bush, who also put in circulation the term "crusade", used as a description for the war against Iraq, launched in March 2003; cf. Stefan Durand, "Fascisme, Islam et grossiers amalgames" in Le Monde Diplomatique, November 2006), circulated by one of the greatest American Orientalists, Bernard Lewis, currently adviser at the White House. An increasingly provocative terminology is used in Western discourse, and those who use it rely on its emotional charge. The association made between Islamist groups and Nazism generates horrific images in the mind of the receiver, thousands of Hitlers threatening to destroy the West.

Bibliography

1. Robert Gleave, *The 'First Source' of Islamic Law: Muslim Legal Exegesis of the Quran,* in Richard O'Dair, Andrew Lewis, (ed.), *Law and Religion. Current Legal*

[9] Bârna C, Terorismul şi religia islamică (Terrorism and the Islamic Religion), Revista Geopolitica (Geopolitical Magazine), Bucharest, 2014.

Issues, 2001, vol. 4, Oxford University Press, 2001, p. 145, et.al.
2. Ernest Gellner, Condiţiile libertăţii. Societatea civilă şi rivalii ei (Conditions of Liberty: Civil Society and its Rivals), Editura Polirom (Publishing House), Iaşi, 2008, (Penguin Books, London, 1996).
3. Vasile Simileanu, Statele islamice. Actori geopolitici contemporani (The Islamic States. Contemporary Geopolitical Players), Editura Top Form (Publishing House), 2009.
4. Vasile Simileanu, Spaţiul islamic. Geopolitica aplicată (The Islamic Space. Applied Geopolitics), Editura Top Form (Publishing House), 2009.
5. Vasile Simileanu, Crizele şi conflictele spaţiului islamic (Crises and Conflicts of the Islamic Space), Editura Top Form (Publishing House), 2009.
6. Anghel Andreescu, Nicolae Radu, Jihadul islamic (Islamic Jihad), Editura Ministerului Internelor şi Reformei Administrative (Publishing House of the Ministry of Interior and Administrative Reform, 2008.
7. Bârna C, Terorismul şi religia islamică (Terrorism and the Islamic Religion), Revista Geopolitica (Geopolitical Magazine), Bucharest, 2014.

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THE TRANSMITTANCE OF PASSIVE SIDE OF THE OBLIGATIONAL REPORT IN THE VISION OF PROJECTS OF UNIFICATION OF LAW AT A EUROPEAN LEVEL, COMPARED WITH THE INTERNAL NORMATIVE DISPOSITIONS.
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Abstract:
National civil law is reshaping its existence within the process of standardization of law at a European level, process that has begun at the end of the XX century and is in a permanent "maturation", having an obvious tendency towards adopting a unique legislation, proposing legal principles applicable to all member states. This study is about the main projects of Europeanization of law regarding the transmittance of debt, by comparing that with the internal normative dispositions.

Keywords: cession of debt, debtor, creditor, European Civil Code, uniformization

Introduction

Nowadays, although there is no such thing as a European Code within civil matters, compulsory for the member states, there are a series of projects that relate, as a result of research of scientific researches, academics and jurists of the member states of the European Union, existing thus a special concern towards the provisioning of the contractual laws.

Such projects, which mark the tendency of unification of the private law are: The Principles of the European Contract Law, presented by the Lando Commission, the Draft of European Code of Contracts (The Gandolfi Code, or the Padua Project), edited by the Academy of European Private Lawyers of Padua, the Project of the Common Reference Frame, proposed by the Study Group for a European Civil Code, the Commune and Contractual Terminology and the Commune Contractual Principles, elaborated by the Society of Compared Legislature and the Henri Capitant Association, the UNIDROIT Principles.

1. European Contract Code

The first project of European provisioning analyzed is the **European Contract Code Project**[1], known under the name of **The Padua Project** or the **Gandolfi Code**, from the name of its coordinator Giuseppe Gandolfi.

This project proposes a systemic approach, analyzing all three variants of assignment: the assignment of rights, the assignment of debt and the assignment of contract.

[1] http://www.accademiagiusprivatistieuropei.it/

We will analyze, within this context, only one of the three types of assignment, namely the assignment of debt, which is presented within the contents of three articles: art. 125-127.

The creators of this project of Code do not grant any attention to the definition of this judicial instrument, but would rather make a straight forward presentation of the modalities in which a debt may be transferred. Thus, article 125[2] states that the transfer of a debt takes place in two ways: a. through the transfer consisting in the „succession, when the obligation is transferred objectively intact to a third party who is joined to the original debtor or replaces the latter as indicated in Article 126", the obligational report remaining intact in what regards its object; b. „by conventional extinction of the original debt and the simultaneous setting-up of a new obligation with a different debtor", meaning through *subjective novation*.

Although the introductory text of the two modalities expressly refers to a "transfer" of a debt, we may observe that, in reality, only the first case allows a so-called transfer of debt, the second one (subjective novation) has an extinctive effect, to which it is attached the birth of a new obligation at the same time the old one is completed.

The first method of debt translation, regulated through article 125 of the Project refers to a translation of debt through "succession within the obligational report".

The term "succession", although used within internal legal language as a referral to the transmittance *mortis causa* of obligational reports, is used within this context with the signification of a conventional translation among living of an obligation sprung from a contractual report.

It regards the mechanism through which the new debtor inherits the old one within the obligational report. This method includes not only the possibility of the new debtor to inherit the old one, but also the possibility for the first to be held responsible along the initial debtor for the execution of the obligation.

The 2nd paragraph of the same article strengthens the idea inserted by the 1st paragraph, stating as a **rule the solidarity among debtors**, and as exception, the liberation of the initial debtor, a request that must have a previous agreement.

The 3rd paragraph introduces a new rule, imposing, as a priority, the first method of transfer, specifying expressly that the subjective novation must be previously agreed upon and must be a result of the trilateral agreement of the initial debtor, claimer and subsequent or succedent debtor. In case of doubt, the same article institutes the presumption that the "assignment" has been made through succession.

The 5th paragraph allows the assignment of debt to be performed by one or more debtors.

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[2] Art. 125 - 1. There are two modes of assigning a debt: a) by succession, when the obligation is transferred objectively intact to a third party who is joined to the original debtor or replaces the latter as indicated in Article 126 below; b) by conventional extinction of the original debt and the simultaneous setting-up of a new obligation with a different debtor.

2. In the first of the cases in para. 1, the new debtor is bound in solido with the original debtor unless the creditor expressly releases the latter.

3. A novation occurs only if expressly and unambiguously agreed by the parties in their trilateral agreement. In case of doubt the assignment is presumed to be made by succession.

4. Apart from the provisions of paras. 2 and 3 of this Article, the parties can make the assignment of debt in the manner they consider most suited to their interests, for example as in Art. 126 below.

5. The debt can be assigned to one or more new debtors.

6. When the assignment occurs by operation of law or as an accessory of the transfer of goods or set of goods, the assignment is subject to the provisions of this section, as far as applicable, failing other specific rules.

We appreciate that this article allows a *total or partial assignment of debt*, all debtors, both initial and subsequent, being held, as a rule, by a solidary obligation and not a divisible one.

Of course, parties may set through convention that the obligations between subsequent debtors to be divisible, and the obligation of the initial debtor to be subsidiary to the one of the new debtor, the first being liable only if the new debtor does not execute the assumed obligation.

Besides, there is an important difference between the provisions of the Code project and the dispositions of the Romanian legislature within the new Civil Code.

Thus the Romanian Civil code uses a different naming in what regards the transfer of debt, that of "overtaking of debt" rather than the "assignment of debt" used by the Gandolfi Code.

But it's not just the terminology that is different, but also the methods through which a translation of debt would be possible.

Thus, while the Gandolfi Code adds the subjective novation as a method to transmit the debt, although its main effect is extinctive, spreading to the accessories and warranties of the assigned debt, the Romanian Civil Code does not include novation in the methods of obligation transmission, but it resumes to the effective assignment of debt, through a contract perfected by the initial debtor and the subsequent debtor with the agreement of the creditor and by a contract perfected directly by the creditor and the new debtor.

Another difference resides in the nature of the obligations in the reports of the two debtors.

Thus, unlike the Gandolfi Code which institutes as a rule the solidarity of the two debtors, the Romanian Civil Code institutes as a rule the liberation of the initial debtor, as an effect of its replacement with the new debtor, with no mention to the nature of the obligational relationship specific to the imperfect claim taking over, meaning without the liberation of the debtor.

Critics proposed different methods: be it a solidary obligation or an obligation divisible amongst debtors, or the obligation of the initial debtor would be subsidiary to the obligation of the new debtor.

Another element of difference between the two provisions is presented in the absence of a mention within the Romanian Civil Code in what regards the possibility of debt taking over should produce towards more debtors (such a disposition is comprised within the 5th point of article 125 of the Padua Project).

Although such a provisioning lacks, the Romanian legislator, using a singular form in what regards the party which would assume the debt, we appreciate that, within the principle of free will, nothing would impeach the parties to prefer that the claim taking-over should be done among more debtors, towards which the obligation would be solidary.

Another difference among the two provisions is introduced by point 6 of article 125 of the Padua Project. This text, on one hand, admits that the transfer of debt may intervene indirectly, in virtue of the law (the legal assignment of debt), or as an accessory element within the transfer of an asset or a transfer of assets, but, on the other hand, it admits that these types of transfers of debt are set under the dispositions of the present section, in lack of specific dispositions. Thus, the editors of the project set the present section as the commune provisioning in the matters of the transfer of rights, yet any specific dispositions may derogate from those comprised within the mentioned articles.

The national doctrine though, considered that the provisions of the Civil Code in the matter of debt assumption do not apply in the case of an assignment/assumption of debt *ex lege* or the case of an indirect debt assumption as a result of the assumption of an asset or perfection of an assignment of contract, but only in the case of the conventional debt assumption, and for all other above cases the specific provision of each operation apply.

Article 126 presents the mechanism through which "the assignment of debt" produces its effects.

Thus, through a convention of the debtor and a third party, the third party may engage towards the first party to complete the obligation completing the benefit to which the debtor engaged, but such an agreement produces only internal effects among the debtor and the third party.

Article 1599 of the Romanian Civil Code also has a similar disposition, stating, as a method of debt assumption, the contract perfected between a third party and the debtor, with the agreement of the creditor. It is though true that the national legislator did not assume the phrasing that would indicate that this contract "produces internal effects between the debtor and the third party", yet, the Romanian doctrine, taking into account the compared law, began to use the notion of "internal assumption of debt", to refer to effects that produce strictly in the report of the debtor and the third party.

The 2nd paragraph of article 126 of the Padua Project repeats the already presented provisions of the 2nd paragraph of article 126 from the same project, stating as a rule the passive solidarity among the initial debtor and the third party which would have the quality of debtor, in lack of a contrary stipulation from the creditor.

We already mentioned that the Romanian legislator preferred to inverse the rule with the exception, stipulating as a rule the liberation of the initial debtor, yet without establishing what is the relational obligation in case the creditor means to hold liable the initial debtor along the new one.

The 3rd paragraph gives possibility to perfect such an agreement for the creditor and the third party, the latter being held to complete the obligation of the initial debtor, and, in lack of contrary stipulation, the creditor would hold the third party, which perfected along the initial debtor.

Although through this method of debt transfer, the initial debtor is excluded from the contract, which is perfected only by agreement of the creditor and the third party, it still has the possibility to oppose, annulling the mentioned agreement, as provisioned by article 126, 3rd paragraph.

The possibility mentioned by paragraph 3 offers a real "privilege" to the debtor, whom, although is not required to agree upon the validity of debt transfer through the convention between the creditor and the third party, may impeach the result of its effects, by opposing it.

In a different approach, the efficacy of the convention that compels the third party to pay the debt is affected by a *negatory resolvent condition.*

The main effect of the agreement between creditor and third parties is the transfer of debt towards the third party, the latter being liable in solidary, along the initial debtor, in lack of a contrary stipulation. Thus, if the debtor would oppose, this effect will not occur, if the rule provisioned by the 3rd paragraph is applied, which would mean that the third party couldn't pay the creditor the debt owned by the first debtor.

Unlike inefficacity which applies to the assignment of debt in cases that the creditor did not agree (in this case, as stated above, producing internal effects, between the debtor and third party), in the case of inefficacity for debtor opposition to the assignment of debt through contract between creditor and third party, since the effect of transmission of a such contract would produce among the creditor and the third party, the inefficacity comes to eliminate this effect, although the contract remains valid.

Point 4 of article 126 introduces another method through which the transfer of debt may occur, namely by "*compulsory preliminary convention followed by an act of successive transfer* and thus, of disposition, *of the claim".* The convention and the successive act may be perfected by the creditor (through agreement with the third party) or by the initial debtor

(through agreement with the third party), but, which, for efficacy, must receive the creditor's agreement.

The third party, as stated by point 5, may be or may not be a debtor of the main debtor. If so, then the payment of debt will be claimed on the will of the latter to compensate the payment of its own debt. If it is not a debtor of the first debtor, it will have the right to be compensated, if there is no contrary convention, by reimbursement or indemnity, the payment made, from the initial debtor, which took advantage of the pay by having a debt covered with its own creditor.

Article 126 point 6 also refers to the subjective novation of debt, which occurs by tripartite agreement perfected by the creditor, debtor and third party.

The effects of debt assignment are provisioned by article 127 of the Project, which differentiates between the novation agreement, which would deplete an old debt, by giving birth simultaneously to a new one in the patrimony of the new debtor and the "transmission through succession", case in which the "new debtor may oppose the creditor the exceptions which originated with the old debtor".

The Romanian Civil Code emphasizes an ascertainment, which, constitutes, in fact, a limitation of this rule, establishing that the new debtor will not be able to oppose the creditor "the compensation or any other personal exception of the initial debtor" and "nor any defense means established on the judicial report between the new debtor and the initial debtor, even if that report has been the determinant motif to assign".

In the case of liberation by the creditor of the initial debtor, the same article states that "warranties tied to the claim are completed, and by exception they remain valid, but only if those whom constituted them give their express consent in what regards their validation".

Again, the provisions of the Romanian Civil Code are embracing a different view compared to the provisions of the European Project, stating that the assumption of debt "has no effect on the existence of claim warranties, apart from the case when they cannot be separated from the debtor". Thus, article 1602 of the Romanian Civil Code, starting from the idea that debt assumption supposes, usually, a transfer of an unchanged debt, with all constituted accessories and warranties, limits the completion of the warranties to the situation in which they are tied to the debtor or, case being, if it regards the obligation of the fidejussor or the third party which constituted a warranty in order to create the claim and did not agree to the assumption.

The creditor which accepted the obligation of the third party – as the 2nd paragraph states – cannot hold liable the initial debtor if, previously, it has not demanded an execution of the debt from the third party which agreed to the claim.

Therefore, even if it appears permanently within this Project, the rule of debtor solidarity, paragraph 2 of article 127 stipulates an order in which the two debtors are compelled to execute the contract, giving priority to the new debtor and, only in case of refusal, the creditor may ask payment from the second.

The above mentioned provision strains, somewhat, from the rule according to which a passive solidarity would assume the possibility of the creditor to satisfy in full the claim from any of its debtors, mainly its concern being the possibility to claim liabilities from the debtor that has most possibility of solvency, but with no limitation to an order of preference in the execution of the claim.

The Romanian Civil law, provisioning the matter of debt assumption, did not cover the reports that are created between the debtors, when the liberation of the initial debtor is not provided. Yet, a disposition that is similar to the one in the Project is mentioned within the matter of contract assignment, article 1318 Civil Code stating that "if the assignee is not liberated, the assigned contractor may claim liabilities from the latter when the assignor does not complete its obligations". Therefore, at the case of a contract assignment, the legislator establishes the order of preference to the execution of the contract, giving priority to the

assignor debtor, and giving the assignee a subsidiary and conditioned liability, conditioned by the notification procedure, provisioned by article 1318.

2. The Project of the Principles of European Contract

The second legal document submitted to analysis is the **Project of the Principles of European Contract Law**[3], elaborated by the Committee for European contract law, also entitled the Lando Project (from professor Ole Lando, which chaired the Committee's works), being another major effort in the matter of standardizing the European legislature within civil matters, mostly the contract laws.

PECL provisions, same as Project Padua, all three types of assignment (claim, debt, contract), yet it dedicates an asymmetrical analysis, insisting especially upon the assignment of claim (16 articles), but reminding only briefly, in two articles, the assignment of debt and in a single article, the assignment of contract.

As the assignment of claim and assignment of contract have separate chapters and sections, we will analyze, within this context, only the assignment of debt, as it has been regarded by the editors of Project Lando.

The assignment of debt is provisioned, as mentioned above, by two articles: 12:101 and 12:102 (French version).

The marginal name given to this operation does not coincide to the one found in Project Padua, which expressly stated the "assignment of debt", unlike the PECL which uses the formula "*substitution of a new debtor"*.

Article 12:101 is dedicated to general provisions, establishing that "a third party may engage to substitute the debtor, with the agreement of the debtor or the creditor, the substituted debtor being liberated by its obligations"[4].

We observe that the PECL text averts slightly from the one of the Padua Project, establishing primarily *the rule of liberation of the initial debtor by its substitution with a new debtor*, unlike the Padua Project, which stated as a rule that the first debtor could be held liable, both being held solidary liable to the payment of the debt.

Establishing this rule of debtor liberation, the analyzed legal system coincides with the provision chosen by the Romanian legislator, which, in the case of debt assumption, establishes that the initial debtor will be liberated if the creditor does not expressly state it understands to hold the latter liable to the payment of debt.

Yet, unlike the Romanian Civil Code, which excepts from the liberation of debtor rule the situation in which the new debtor was unsolvable at the date it assumed the debt, but the creditor consented to the assumption, with no knowledge of the situation (article 1601 Civil Code), PECL does not elaborate regarding such details, considering a sufficient provision the general rule of debtor liberation.

Paragraph 2 of article 12:101 provisions the possibility that the creditor would express an anticipated consent to the future substitution of its debtor, yet the substitution would not produce effects until the new debtor would have notified the agreement it perfected with the original debtor.

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[3] G. Rouhette, I de Lamberterie, D. Tallon, C. Witz, Principes du droit européen du contrat, coll. Droit privé comparé et européen, SLC, Paris, 2003

[4] ARTICLE 12:101: SUBSTITUTION: DISPOSITIONS GÉNÉRALES
(1) Un tiers peut, avec l'accord du débiteur ou du créancier, s'engager à se substituer au débiteur, ce dernier étant délié de ses obligations.
(2) Le créancier peut consentir à l'avance à une substitution future. La substitution ne prend alors effet que lorsque le nouveau débiteur lui notifie l'accord qu'il a conclu avec le débiteur originel.

We observe that within this project too, the possibility for an anticipated consent is allowed, same as in Project Padua, and same as the Romanian Civil Code, compelling the parties, as to the moment the substitution would be perfected, to be the moment at which the creditor is notified regarding the substitution agreement. Yet, unlike the other two mentioned provisions, which allow the notification to be made by the new debtor or by the initial debtor, the notification, according to PECL, must be made, as expressly stated, by the new debtor, eliminating thus the initial debtor.

Article 12:102[5] represents the main legal provision of *effects which the substitution of debtor are applied to defense means and warranties*, stipulating, as a rule, the fact that the new debtor will not be allowed to oppose the creditor no right or defense mean resulted from its reports with the initial debtor. The new debtor, is in its right to oppose the creditor all defense means which the original debtor could have opposed the creditor.

The Romanian Civil Code comprises similar provisions regarding the effects of debt assumption over the defense means, establishing, through article 1603, that, "even if from the contract does not result differently, the new debtor may oppose its creditor all means of defense which the initial debtor could have", yet, "it may not oppose the creditor the means of defense established on the judicial report born between the new debtor and the initial debtor, even if the report has been the determining motif for the assumption". The internal dispositions limit however the sphere of means of defense which may be opposed by the new debtor, eliminating the possibility to oppose the compensation to the creditor or any other personal exception of the initial debtor.

In what regards the warranties, the 2nd paragraph states that the liberation of the initial debtor extends over the warranties that have been consented to the creditor in order to insure the debt, except those perfected for an asset transferred to the new debtor based on a document settled with the initial debtor.

The Romanian Civil Code does not follow this rule, establishing a different one: "Assumption of debt has no effect upon the existence of debt warranties, other than whether they cannot be separated by the party of the debtor" (Article 1602 Civil Code).

Also, the liberation of the original debtor covers the consented warranties to insure the payment of the debt by any other person but the new debtor, except the case in which the person which constituted the warranty consents to maintain it in the benefit of the creditor.

A similar provisioning is found within the internal legislation, article 1602 of the Romanian Civil Code stipulating that "the obligation of the fidejussor or the third party that constituted a warranty in order to accomplish the claim will be annulled if these two parties did not consent to the assumption".

[5] ARTICLE 12:102: EFFETS DE LA SUBSTITUTION SUR LES MOYENS DE DÉFENSE ET LES GARANTIES
(1) Le nouveau débiteur ne peut invoquer à l'encontre du créancier aucun droit ni moyen de défense procédant de ses rapports avec le débiteur originel.
(2) La libération du débiteur originel s'étend aux garanties qu'il avait consenties au créancier pour sûreté de sa créance, à l'exception de celles qui portent sur un bien transféré au nouveau débiteur en vertu d'un acte qu'il a conclu avec le débiteur originel.
(3) La libération du débiteur originel s'étend aux garanties consenties pour sûreté de la créance par toute personne autre que le nouveau débiteur, à moins que cette personne consente à maintenir sa garantie au profit du créancier.
(4) Le nouveau débiteur est en droit d'opposer au créancier tout moyen de défense que le débiteur originel aurait pu opposer au créancier.

3. The Unidroit Principles[6]

Although the role of these principles was to regulate the relations of international commercial law, it also analyzes the three types of assignments (claim, debt and contract), establishing rules and principles applicable, being, although, a source of inspiration for the editors of the contemporary Romanian Civil Code.

Chapter 9 treats the problematic of the three types of assignment in three different sections, the second one provisioning the assignment of debt, being preceded by the assignment of claim (section 1) and followed by the assignment of contract (section 3).

The Unidroit Principles use the term of "*assignment of debt"* and not the "substitution of a new debtor" (PECL) nor the "assumption of debt" (which is the one adopted by the Romanian legislator).

The introduction is sudden, as the mentioned text, with no interest to defining the utilized notion, skips into presenting the methods through which the assignment of debt is possible.

Thus, article 9.2.1 establishes as methods of the assignment of an obligation to pay an amount of money or to execute another benefit from a party called initial debtor to another party (the new debtor): a. *the convention born between the original debtor and the new debtor,* under the reserve of the article 9.2.3 (only possible with consent of creditor) and b. *the convention between the creditor and the new debtor* by which the latter assumes the debt.

This article has been adopted by the Romanian legislator with a literary translation, namely article 1599 Romanian Civil Code.

In both cases, the assignment of debt may occur **only if there is a consent of the assigned creditor**, condition stipulated by article 9.2.3, for the case when a convention is perfected among the initial debtor and the new debtor with the value of an *efficacy condition* or a *validity condition* of the assignment convention, in the case when a contract is perfected between the creditor and the new debtor, by which the latter is compelled to the payment of the debt.

The lack of a provision regarding the party which may notify the creditor regarding the assignment has been completed by the editors of the Civil Code, which in article 1606 state that "anyone of the contractors may communicate to the creditor the assumption contract, demanding for an agreement".

This demand represents an element of differentiation from the assignment of claim, in the case of which it is not required to have consent of the assigned debtor in order to have a valid or efficacy assignment. The reason to impose such a demand is yet a simple one: if, in the case of the assignment of claim, the debtor may not be prejudiced by the change of the creditor party, party to which it has to pay the claim, in the case of assignment of debt, the creditor may be prejudiced by the fact that the new debtor may not present the necessary "warranties' to execute the obligation and therefore not have the trust of the creditor, it being presented, without its will, in the situation to not be able to recover the debt.

Article 9.2.4 introduces the possibility that the creditor should offer its *consent in an anticipatory manner*, case in which the assignment produces effects at the moment at which the assignment *is notified to the creditor or the latter admits it*.

We observe thusly that the Unidroit Principles do not state which of the party has to notify the creditor, allowing thus the initial debtor or the new debtor, unlike the provisions of PECL which state this obligation at the task of the new debtor (art. 12:101).

The notification is not required in the case when the creditor "acknowledges the assignment" which it consented to previously. There is no compulsory form that the

[6] *www.unidroit.org.*

acknowledgement should bear, giving the possibility to be a result from **a statement of express acknowledgement or tacit acknowledgement acts**, from which it should result, without a doubt, the fact that the creditor has knowledge of the perfection of the assignment convention.

The Romanian Civil Code does not comprise such dispositions in the matter of debt assumption, but there are similar provisions to the Unidroit Principles within the matter of contract assignment, article 1317 establishing that "if a party has consented in an anticipatory manner that the other party should be able to substitute a third within contractual reports, the assignment is valid towards that party from the moment the substitution has been notified, or, if the case, from the moment it is accepted".

In what regards the **legal sphere to which it applies**, section 2 of Chapter IV of the Unidroit Principles is applicable only to *the conventional assignments of debt*, and not to assignments of debt that appear by effect of law (IE those which appear from a corporate fusion)[7]. Also, the provisioning of assignment of debt are applicable both in the case when *the assigned debt has as a goal the obligation of payment of an amount of money, but also obligations that have as purpose different forms of benefit,* as different services. The source of the obligations is not limited exclusively to *debts of a contractual nature,* but may also be *of debts born from a new liability or an existing liability based on a legal decision*.

In what regards **the effects of the assignment of debt**, article 9.2.5 allows the creditor to choose whether to liberate the initial debtor. If it chooses not to liberate the initial debtor, it is held as "warrant" for the situation in which the new debtor would not correctly execute its obligation. In this situation, the creditor must first hold liable the new debtor in order to receive the execution of the obligations, being able to hold the initial debtor liable only if the new one did not execute correctly. Therefore, the obligation to which the initial debtor could be held in this hypothesis is *subsidiary*.

The Romanian Civil Code does not comprise such a provision within the matter of debt assumption, but something similar is stipulated in the matter of contract assignment, article 1318 stating a subsidiary obligation of the assignee, the assigned having the possibility to hold it liable only in the case in which the assignor would not execute its obligations.

The creditor has yet another option, even better, the one to hold the initial debtor and also the new debtor in solidary liability, having the possibility to demand execution of the obligation from the both of them. If the obligation will be executed by the initial debtor, as a rule, the latter will have a *regress right against the new debtor*.

Whether the creditor did not state upon the liberation of the initial debtor, or if it wills to hold it as a subsidiary debtor, *the rule to apply establishes that both will be solidary responsible to the execution of the assumed obligation* (3rd paragraph of article 9.2.5).

The Romanian Civil Code, although it somewhat presented in a similar manner provisions of the Unidroit Principles, it didn't follow the rule of debtor solidarity, which would intervene every time the creditor does not state whether it liberates or not the initial debtor. To that sense, article 1600 of the Civil Code states that "by perfection of the contract of debt assumption, the new debtor replaces the old debtor, which, if no other stipulation, and under reserve of dispositions of article 1601, is liberated".

From this rule, article 1601 of the Romanian Civil code introduces the exception that eliminates liberation of the initial debtor whether the new debtor is not solvable, if the creditor had no knowledge of that fact previous to its expressed consent.

[7] To see art. 9.2.2 from the Unidroit Principles.

Article 9.2.6[8] introduces *the hypothesis of execution of the obligation by a third party*, through a conventions perfected only between the debtor and a third party, with no consent from the creditor, or in the case in which the creditor would have already refused to agree to the assignment. Based on this convention, a third party compels to the debtor, to execute the obligation on his behalf. Of course, such a convention cannot be valid if the obligation assumed by the debtor is a personal one, with a pronounced *intuitu personae* character. Such a convention, out of the range of influence of the creditor, may not remove the right of the creditor to demand and obtain an execution of the obligation from its debtor, as the obligational report it has with the debtor is in no manner altered by the convention intervened between the later and the third party. Yet, the creditor, as a principle, cannot refuse payment or execution of the obligation by another party but its debtor, with the limitation of an essentially personal obligation from its debtor.

In what regards the **effects of the assignment**, article 9.2.7 stipulates that "the new debtor may oppose the creditor all means of defense the initial debtor may have used", with no importance if they belong to the material law or the procedural law (certain clauses, exceptions etc.), yet it will not be able to invoke a compensation right which would have been at the disposal of the initial debtor against the creditor, as the demand of reciprocity is not met, requirement which is compulsory in order to have an operational compensation. The compensation could be invoked after the assignment of debt by the initial debtor if the latter had not been liberated.

This provisioning has been also chosen by the Romanian legislator, which presented it in a similar manner within article 1603 of the Civil code. This article is completed by the provisioning which states that the new debtor cannot oppose the creditor the means of defense established on the judicial report born among the new debtor and the previous debtor, even if that report had been the determining reason for the assumption.

In what regards *the rights of the creditor ulterior to the assignment of debt*, article 9.2.8 establishes the possibility of the creditor "to prevail in front of the new debtor of all payment rights or execution of another benefit, comprised within the contract, relative to the assigned debt".

If the assignment of debt is "perfect", having as effect the liberation of the initial debtor, the 2nd paragraph of the same article provisions that "any party, other than the new debtor, which is a warrant of the payment, is liberated, except if the latter would accept to maintain the warranty in favor of the creditor."

Also, with the liberation of the initial debtor, the warranties given by the initial debtor are completed, except those which bear upon an asset transferred within an operation between the original debtor and the new debtor.

Conclusions

To conclude, visibly, the Romanian Civil Code presents provisions similar to those comprised within the projects of standardization in existence at a European level in civil matter, the contemporary legislator trying to include the modernization of the legislature within the circuit of European uniformization.

Acknowledgments.

[8] ARTICLE 9.2.6 *(Exécution par un tiers)*.
1) Sans le consentement du créancier, le débiteur peut convenir avec une autre personne que cette dernière exécutera l'obligation à la place du débiteur, à moins que l'obligation, selon les circonstances, ne revête un caractère essentiellement personnel.
2) Le créancier conserve son recours contre le débiteur.

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References

1. G. Rouhette, I de Lamberterie, D. Tallon, C. Witz, Principes du droit européen du contrat, coll. Droit privé comparé et européen, SLC, Paris, 2003.

2. http://www.accademiagiusprivatistieuropei.it/

3. www.unidroit.org

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GENERAL CHARACTERIZATION OF SECURITY SYSTEMS FOR OBJECTIVES, GOODS, VALUABLES AND PROTECTION OF INDIVIDUALS

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Abstract

The local police operate as a public institution with legal personality for the interest of citizens, which provides services for the security of goods, participates in the defence of public order and peace, of the life and integrity of individuals, and other rights and legitimate interests of the community.

The organization and carrying out of the guarding of the goods and valuables of any kind owned, their transportation and other security services, and participation in the defence of public order and peace are done on the basis of contracts concluded between the local Police and mayors, public or private economic operators, institutions, associations of any kind, natural or legal persons as appropriate.

The security provided by local police officers is carried out according to the security plan drawn up by local police commanders and beneficiaries, approved by the local committee and with the expert's approval from the local police. In their work for performing the service at the objectives entrusted to them, the local police officers have a number of obligations including cooperation with the police bodies and the notification thereof when finding crimes committed which might damage public and private property, acts directed against individuals, fire occurrence, calamities.

Keywords: security systems, security of objectives, protection of individuals, missions, security, national security, local police.

Introduction

The local police and other structures specialized in guarding objectives, goods, valuables and providing imdividulas' protection, have this mission which becomes, as criminals change their methods, an interesting scientific approach focusing on new developments at global and regional level, which result in new dimensions of national security and safety.

People have always tried to ensure their protection against certain eventualities, first by satisfying their vital needs and later by giving rise to bodies empowered to ensure the existence of this national security and/or international security.

1. Security systems for objectives, goods, valuables and individual protection

I have felt the need to order, systematize and group knowledge regarding each topic discussed, because a large number of controversies and theories have emerged from the study

of a vast documentary material, which only make it possible to develop my own conclusions after some preliminary clarifications[1].

Security went from being defined as "a state of facts" that alters its composition with the developments of technique and technology and in parallel with terrorist attacks and organized crime, to representing a security environment. The security issue has preoccupied human communities throughout their existence. In effect, the provision of community security has emerged with the social-political organization of human society. The concept of security on the individual level expresses the feeling of being out of danger, of being protected in order to live in peace in an environment that allows self-assertion on multiple levels. On the collective level, the concept of security means the situation where, following specific measures of protection, a group of people, a state or groups of states have the certainty that their existence, integrity or fundamental interests are protected.

Security ensures the well-being, the protection of the individual, as well as everything related to the human individual: nutrition, economics, education, environment, etc. The fight against terrorism, as a manner of ensuring mankind security, "should take account of compliance with human rights". All modern human communities have come to understand the need to intensify efforts to appease conflicts in their inception phase. Therefore, the attention of decision-makers and analysts in each country are turning more and more to those events, processes and phenomena that might give rise to dangerous contradictions, trying to discover, examine, master them, keeping them constantly under control.

Depending on the importance, specific nature and value of the goods they hold, managers of units, with the specialized support of the police for civil security systems or of the gendarmerie for military security systems, will estalish concrete ways of organizing and performing guarding services, as the case may be, with gendarmerie manpower, with local police officers, own security guards or specialized security companies.

The law clearly establishes the role and duties of the Ministry of Administration and Interior which, in their vast majority, are carried out by police units.

According to Art. 26 point 5 of the Local Police Law no. 155 of 12th July 2010 on the organization and functioning of the local police, this institution regulates and controls, under the law, the setting up of private detective, security, surveillance and bodyguard companies.

Through the public order patrols, the police have sole jurisdiction to adjudicate on the quality and efficiency of any security system, excluding the military guard organized and carried out by gendarmes at the objectives where the latter provide security services.

The concern for improving the work style of the Local Police will certainly acquire a special intensity in the future. Today, managerial science offers a wide range of management tools and models in order to achieve managerial performance. In police work, especially in the context of European integration, managerial performance is inextricably connected to improving the work style of managers.

As for the rest, all those who organize and carry out the other forms of security guard through community police officers, security through specialized companies or bodies, or their own security guards, are required to obtain the specialized technical approval of the police and to comply with the instructions, guidelines and measures ordered by the police.

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

Romanian Police are part of the Ministry of Interior and are the specialized institution of the State which exercises powers regarding the defence of the fundamental

[1] Voicu C, Sandu F, Management Organizaţional în Domeniul Ordinii Publice (Organizational Management in Public Order), vol. II, Editura Ministerului de Interne (Ministry of Interior Publishing House), Bucharest, 2009, p. 37.

rights and freedoms of individuals, of private and public property, the prevention and detection of crimes, respect for public order and peace, under the law.

The activity of the Romanian Police is a specialized public service done in the interest of the individual, the community, as well as in support of State institutions, exclusively on the basis of and in compliance with the law.

In carrying out their missions, the Romanian Police cooperate with State institutions and collaborate with non-governmental associations and organizations, as well as natural and legal persons, within the limits of the law[2].

Security and protection are activities which deal with the main operational management methods used by an effective manager of a local police unit – plan-based management, budget-based management, project-based management, system-based management, management by results, management through product, management by exception, objective-based management, participative management, object-based management, management through cooperation and collaboration, management by delegation, management by motivation, management by innovation, management by information and communication, management by alternative, management by consent[3].

On the basis of this methodology, security and protection structures comprise:

a) specialized security and protection companies;

b) specialized bodies organized by regulations approved by Government Decision;

c) own security guards[4].

All these approaches have allowed revealing some new elements and theoretical and pragmatic personal contributions, this work being aimed at highlighting the weaknesses of the current system in theoretical terms and finding pragmatic solutions in order to minimize them. The research concept kept in mind takes as a starting point the idea that only Local Police tasks can provide solutions to the existing problems in order to achieve performances of the management team. Therefore, I intended this work to deal with some problems that are new to the field, such as:

- highlighting the main managerial aspects of the strategy in conjunction with an effective work style in ensuring public order in the contemporary society;
- managerial concerns for implementing an active, participative work style of managers within the Local Police; a conceptualization of the work style term;
- managerial involvement in the improvement of the work style in the Local Police;
- pragmatization of the work style of the Local Police managers;
- management approach in the activity for combating crime, through conceptual research and concrete practical actions;
- identification and analysis of the essential characteristics of a well-performing management in the police sector;
- dealing with conditions, criteria and processes in their complexity, which is necessary in order to improve the work style and methods of managers in relation to subordinates, etc.
- facilitating the understanding of the purpose of the activity carried out by the police by all natural and legal persons, the understanding of the need to promote and extend modern management methods and techniques in the Local Police, etc.

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

[3] Team of authors, coordinators Frunzeti Teodor, Zodian Vladimir, Lumea 2010, Enciclopedie politică şi militară, studii strategice şi de securitate (Political and Military Encyclopedia, Strategic and Security Studies), Editura Centrului Tehnic-Editorial al Armatei (Technical Editorial Army Centre Publishing House), Bucharest, 2011, p. 129.

[4] Romanian Police General Inspectorate (RPGI/IGPR) Order no. 422/25th September 2006 on the regulation of the work performed by police structures in the field of security of objectives, goods, valuables and protection of individuals, Art. 1, para. 2.

- managerial involvement in the improvement of the work style within the Local Police.

The responsibility for coordinating and guiding the activity carried out by the security and protection structures mentioned, for the prevention and fight against crimes, against other violations of the law in this area, lies with the Public Order Police Directorate of the Romanian Police General Inspectorate and with the Public Order Police Services of the County Police Inspectorates, respectively the General Police Directorate of Bucharest Municipality, according to jurisdiction.

For objectives or activities organized in the field of rail, marine and air transport, the jurisdiction belongs to the Transport Police Directorate, Regional Transport Police Departments, County Services and Transport Police Stations.

At the level of the Public Order Police Directorate and Transport Police Directorate, a specialized service operates, organized by departments and lines of work. Within the Public Order Police Services of the County Police Inspectorates, operates the Security System Department consisting of officers, of which at least one is an electronics specialist who isin charge of the control, support and guidance of the work carried out by the security and protection structures, the beneficiaries of these services, as well as the monitoring of the activities of the subordinate police structures.

At the General Police Directorate of Bucharest Municipality, in the Public Order Police Service, a Security System Office operates. Within the public order structures, one or more police officers will be appointed, depending on the volume of activity by field, who should be in charge of the issue of security, assessed according to specific indicators.

In rural areas, guard security activities are carried out by officers and agents within Communal Police Offices or Stations, in the assessment of which specific indicators shall be taken into account[5].

In order to combat crimes aimed at the property of institutions or economic entities, police officers in the Security System Departments carry out informative-operational activities to identify those who violate legislation in the field of security and protection of objectives, goods, valuables and individuals, by ordering legal measures[6].

The most dangerous crisis situations likely to cause serious disturbances of public order would be the following: separatist actions; diversionary-terrorist actions; sabotages; blocking of civilian or military objectives, of land, water, rail transport and communication of strategic importance, of the national energy system; actions meant to destabilize the rule of law. The internal forces that may undertake hostile and aggressive actions touching upon national security are: ethnic groups, infiltrated groups or groups formed on the Romanian territory, research and diversion elements, groups formed on religious grounds; terrorist, terrorist-diversionary groups or elements; paramilitary units made up of runaways, exiles, immigrants and mercenaries specially trained on the national territory or abroad, groups of foreigners having come as tourists, meant to prepare, train and possibly lead the structures of separatist forces; internal dissident elements, making up legal organizations and controlled from the exterior; internal elements in conflict with the law and without occupation, hired with wages, political parties and legal organizations engaged in setting up a non-constitutional regime. Alos, risk situations have emerged, with the potential to disturb public order, which could degenerate into serious disturbances of public order, touching upon state security[7].

Lately, new concepts have emerged in the specialized literature, such as management of crisis situations, indicating a constant concern for uniting efforts in order to eliminate

[5] Cearapin Tudor, Managementul resurselor umane în domeniul ordinii publice (Human Resources Management in Public Order), Editura Universitas (Publishing House), Bucharest, 2006, p. 153.

[6] Appendix to the Romanian Police General Inspectorate (RPGI/IGPR) Order no. 7/7th February 2008 on the concept of organization and action of public order police structures, Art. 21.

[7] Law no. 333/8th July 2003 on the security of objectives, goods, valuables and individuals, Art. 5.

conflicts regardless of their type, a complex and documentary approach of the situations that generate them, with particular emphasis on concrete ways to solve a crisis[8].

Regarding the ways of making decisions in crisis situations, a few highlights are necessary:

- a crisis is characterized, among other things, by the way in which a State initiates it and the way in which another State responds to it and takes decisions;

- the number of decision-makers is an interesting landmark. In a serious crisis entailing a risk of war, the responsibility to pursue the situation and propose measures to be taken to the supreme commander lies with a very small group of people, of a high hierarchical rank;

- rigorously selected members of such a group easily communicate with each other. A quick and consensual choice of actions to be undertaken is therefore possible, in principle. The problem posed by extremely tight deadlines is thus better surpassed than by adopting a more complex structure;

- conversely, during prolonged crises of low intensity, entailing fewer serious risks and more time to deal with them, the implementation of decisions becomes increasingly administrative in nature. The more people are involved and the greater the flow of information processed, the harder it is to achieve consensus;

- unitary crisis assessment by states is a recent phenomenon. Of course, before 1945, in the absence of modern means of information, communication and rapid processing of data, there were no *ad-hoc* structures able to help the heads of state in crisis management. It was only as late as the year 1962 that institutionalized structures enabling decision-making were set up as attached to the great powers. To mitigate risks arising from very short deadlines, from very strong pressure, from excessive fatigue, countless "crisis cells" gradually appeared, increasingly better equipped, both within states and within the large national or multinational enterprises.

The diagnostic analysis revealed essential aspects that we present below.

The main positive aspects signaled are:

a) general:

- the functional structures' ability to adapt to the changes and requirements of the socio-economic environment and to the national objectives imposed by the European integration and by membership to the North-Atlantic Treaty Organization – NATO;

- the development and promotion of regulatory acts in accordance with European Union standards and the Acquis Communautaire;

b) in the field of Public Order and Safety

- organized and disciplined working environment;

- numerous opportunities for professional training and improvement.

The main weaknesses are:

a) general:

- internal communication difficulties which generate a certain resistance to change;

- insufficient coherence in adopting sub-sectoral policies and strategies;

b) in the field of Public Order and Safety

- a shortage of staff within the operational structures, which decreases the capacity for action of public order structures;

- the delay in implementing some of the reform measures set out;

[8] Law no. 333/8th July 2003 on the security of objectives, goods, valuables and protection of individuals also provides, in Art. 3 para. (4), that: "the protection of Romanian and foreign dignitaries during their stay in Romania, of their families, the security of their work offices and residences shall be ensured by the Protection and Guard Service according to its duties set out by the special law on its organization and operation."

- the delay in adopting and using as equipment modern methods and means for real-time crisis management;

- the lack of criminal risk assessments in local communities;

- malfunctions in providing material and financial resources.

As part of the specific activities they carry out within their competence area, local police officers will identify the objectives that require the setting up of physical guarding, the implementation of mechanical and electronic security systems[9] or the upgrade and supplementing thereof, as well as their connection to local monitoring control rooms, notifying about this, on the basis of a grid, the Security System Departments of municipal and city police units. Police officers in these departments will check and order legal measures to secure the objectives signaled.

Owners' associations will be advised by local police officers to take measures for the implementation of appropriate electronic and mechanical systems at the entrances of block staircases. Also, recommendations will be made, in areas where this is required (parking lots, isolated walkways, places where public order is frequently violated or neighbourhood gangs are active, etc.), in order to have security and protection systems organized by licensed companies as patrol systems[10].

3. Specific documents required for the implementation and records of the security service

These documents and records must be present in all units equipped with any of the forms of security provided by the law becuase they are indispensable to the conduct of the security activity, as they keep track of all the activities and operations carried out by the security personnel and of the control activities the object of which are such activities.

The managerial decisions that operationalize the personnel recruitment strategies and policies should consider the following issues:

- identifying and attracting a number of candidates as large as possible in order to obtain the necessary number and quality of employees;

- the extent to which vacant places are filled up from within the organization, from among its own employees, from outside the Ministry of Administration and the Ministry of Interior, or by combining these two possibilities;

- ensuring consistency between the recruitment activities of the Ministry of Interior and the values and strategies thereof;

- the extent to which the Ministry of Administration and the Ministry of Interior prefer to attract satisfactorily-qualified candidates who are looking for a job and are interested in quickly occupying vacant jobs, or try to attract competitive candidates who have a real interest in vacant jobs, who are prone to a long-term career and can ensure an efficient management in the field of human resources;

- the concern of the Ministry of Administration and the Ministry of Interior with identifying and attracting a variety of categories of candidates;

- taking account of the objectives envisaged after hiring the personnel, including post- recruitment effects;

- personnel recruitment efforts should lead to the expected effects, including the improvement of the overall image of the Ministry of Administration and Interior, so that even rejected candidates might develop positive images or attitudes towards the organization, that they might further communicate;

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[9] Armstrong M, Baron A, (2014),Managing Performance. Performance management in action Hargie, O. & Tourish, D. (2009) Auditing Organizational Communication. New York: Taylor&Francis.

[10] Romanian Police General Inspectorate (RPGI/IGPR) Order no. 422/25th September 2006 on the regulation of the work performed by police structures in the field of security of objectives, goods, valuables and protection of individuals, Art. 81.

- carrying out personnel recruitment within a period of time as short as possible and with the lowest possible costs;
- appointment of special working groups in order to broaden professional skills;
- participation in training activities: symposia, seminars, distance learning, etc.[11].

Conclusion

The control of security activity is not only about how the security personnel fulfill their duties, it concerns the entire way in which those units comply with the legal provisions regarding the security of objectives, goods or valuables[12].

The primary goal is to prevent and detect thefts from the objective under security guarding, performing for that purpose checks at access points, stalks and operational surveillances.

The findings made on the occasion of the inspections shall be recorded in the single control register of the unit, measures and tasks being put into place in order to eliminate the shortcomings discovered, the deadlines being achieved by the unit chief.

According to Law 333/2003, the security personnel is assimilated, during the performance of the guarding, to the official who performs a duty involving the exercise of state authority, thus being achieved the legal protection of security personnel, which, at the same time, can be held accountable in relation to offences they commit while in office.

Bibliography

1. Local Police Law no. 155 of 12th July 2010;
2. Government Decision no. 1332/2010;
Order no. 92 of 5th May 2011 approving the Methodology for approving the plan of public order and safety of the Local Police;
3. Jackson M. Peter, Palmer (2003) "Public Service Performance Evaluation: A Strategic Perspective";
4. Coşcodaru Ion (coordinator), Doctrina Armatei României (Romanian Army Doctrine) (project), Bucharest, 2014;
Androniceanu, A, (2004), Noutăţi în managementul public (New Public Management), Editura Universitara (University Publishing House), Bucharest;
5. Cearapin Tudor, Managementul resurselor umane în domeniul ordinii publice (Human Resources Management in Public Order), Editura Universitas (Publishing House), Bucharest, 2006;
6. Voicu C., Sandu F (2009), Management Organizaţional în Domeniul Ordinii Publice (Organizational Management in Public Order), vol. II, Editura Ministerului de Interne (Publishing House of the Ministry of Interior), Bucharest;
7. Armstrong M, Baron A, (2004), Managing Performance. Performance management in action Hargie, O. & Tourish, D. (2009) Auditing Organizational Communication. New York: Taylor&Francis
8. Patrick von Maravic (2007), Reforma managementului public şi corupţia – conceptualizarea consecinţelor neintenţionate (Public Management Reform and Corruption -

[11] Government Decision no. 1010/10th August 2004 approving the rules laid down in Art. 69 of Law no. 333/2003 on the security of objectives, goods, valuables and protection of individuals, Appendix 4, Art. 1.

[12] Iordan Nicola (2008), Managementul serviciilor publice locale (The Management of Local Public Services), Editura All Beck (Publishing House), J. Maciariello – The Daily Drucker, Elsevier, Butterworth Heinemann, UK, 2009 Jablin, F & Putnam L, (2001) The New Handbook of Organizational Communication, available on-line at www.books.google.com

Conceptualization of Unintended Consequences), journal Administraţie şi Management Public (Public Administration and Management), issue no. 8;
9. Iordan Nicola (2008), Managementul serviciilor publice locale (Management of Local Public Services), Editura All Beck (Publishing House) J. Maciariello – The Daily Drucker, Elsevier, Butterworth Heinemann, UK, 2009 Jablin, F & Putnam L., (2011) The New Handbook of Organizational Communication, available on-line at www.books.google.com
10. Team of authors, coordinators Frunzeti Teodor, Zodian Vladimir, Lumea 2010, Enciclopedie politică şi militară, studii strategice şi de securitate (Political and Military Encyclopedia, Strategic and Security Studies), Editura Centrului Tehnic-Editorial al Armatei (Technical Editorial Army Centre Publishing House), Bucharest, 2011;
11. Armstrong M, Baron A, (2014), Managing Performance. Performance management in action Hargie, O. & Tourish, D. (2009) Auditing Organizational Communication. New York: Taylor&Francis.

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DISCIPLINARY AND CRIMINAL LIABILITY OF THE EMPLOYEE - FORM OF LEGAL LIABILITY.

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Abstract

The duration and nature of the employment contract does not have an influence on the existence of any misbehavior. Any employee with employment contract, either fixed or indefinite period, even if they are on probation, is likely to respond to disciplinary action. Also, the person who performs work under a contract of employment which proves to be invalid is obliged to obey the order and discipline of work, being unable to defend himself against disciplinary action by invoking vices in the employment contract.

Keywords: disciplinary, features disciplinary liability, labour code, criminal liability, objective side aspect, the aspect mode of sanctioning

Introduction

Labor discipline coexist in close correlation with the rights and duties of employees, and is a complex obligation of any employee, regrding all their duties as a person employed under a legal labor contract that was completed and registered at the Territorial Labor Inspectorate. Only the legal duties arising from the legal relationship of employment, based on the employment contract, are part of labor discipline.

1. Labor discipline - concept and features:

By virtue of relations of subordination, the employee must comply not only to the general job duties laid down in the legislative measures, individual employment contract, internal regulations[1], but also to the decisions made by the employer by provisions, verbal or written orders regarding to his duties. Compliance of the orders given by the employer makes the employee not liable for damage caused to the employer by executing the provision or the order recieved, provided that the order is not obviously illegal, and, therefore the damage is not the result of inadequate performance of the given order. Legal literature classifies the paths of the labour discipline in two categories:

1. Paths of organizational nature, preventive and stimulating: participation of the employees in organizing, directing and controlling the business units, ensuring this way the educational and preventive measures, likely to lead to respect for labor discipline; moral and also material incentives. These are the main ways of making labor discipline.

2. Paths of sanction nature (penalties) Sanctions are embedded in the very legal institution of disciplinary liability. On the other hand, their regulation is an effective way of preventing violation concerning the labor discipline, and on the other hand, the sanctions only apply if illegal acts were committed. They restore, in this case, the disciplinary order. The sanctioning

[1] Regarding international documents that govern employment of children and young people, see Boghicevici C, Botiş N. I, Meianu B, Creţ D. C, Nedelcu M, Şipoş F, *Politici de ocupare a forţei de muncă*, Editura Vasile Goldiş University Press, 2010, p. 10.

side of labor discipline occupies a secondary step in terms of importance and frequency. Labor discipline is the obligation of all employees to subordinate to a set of rules of conduct established under the Labor Code, other regulations at the unit level, including unit's internal rules. Inside the unit, the discipline is ensured by the employer through creating a economic, social, legal and organizational work conditions necessary for the provision of a high productivity, also by forming a conscious attitude towards labor, and by applying of rewards for diligent work aswel as penalties for committing disciplinary offenses.

According to the Labour Code [2](art 40, al. 1, lit: C,D,E) the employer is entitled to the following rights :

c). employer has the right to give binding provisions for employee subject to their legality,

d). to exercise control over the performance of duties;

e). to assess the disciplinary offenses committed and apply the appropriate sanction, under the law applicable, according to collective agreement and internal regulations.

The Labour Code does not legislate specifically the work discipline principle, but only set, art 39, paragraph 2, letter b) the employee's obligation to obey labor discipline. Disciplinary intervention occurs only when a person employed in an institution commits culpable deviation from service obligations, including the rules of conduct. Disciplinary liability arises as a subsidiary means of strengthening labor discipline by punishing individuals employed who do not realize their obligations under labor legal relations and that at some point violate workplace discipline.

Defining elements of disciplinary responsibility, without which there would be no cumulative existence this form of legal liability, are as follows:

a). quality of the persons employed in the unit under a contract of employment;

b). existence of illegal acts;

c). committing the offence with guilt;

d). the occurrence of a harmful result;

e) the causal link between the act committed and the result.

A person who commits an offense must be party to a contract of employment. In the absence of an employment contract - or any legal relations existing - there can be no disciplinary liability. In accordance with Law no. 52/2011 on activities carried out by daily labourers by derogation of Law No. [3]53/2003 of republished Labour Code with subsequent additions and amendments, the daily labourers may conduct ocassional unqualified form of employment.The employment of the daily laborer and the beneficiary shall be determined by agreement of the parties, without making, in writing, an individual employment contract. - art.3 of law. The legislature allows the recipient the right to exercise control over the performance of labour (art. 5 para 1 letter b of the law) but the daily worker is not disciplinary liable to the beneficiary, despite the existance of an employment relationship between them, as there is no written contract of employment registered at the Territorial Labor Inspectorate. We appreciate that the recipient can hold accountable its laborers for the damage and recover damages amicably, by resorting to a mediator or by civil action in a competent court.

Higher education graduates performing internship for 6 months can be disciplinary sanctioned. Law. 335 of 10.12.2013 published in Official Gazette no. 776 of March 12, 2014 on the internship for graduates of higher education governing period of 6 months in professional debut in accordance with Art. 31 paragraph 5 of Law 53/2003, republished on code modifications and subsequent additions except for professions for which special regulations are enforced.The intern, is bound during his internship to perform labour for and under the authority of an employer, person or entity, in exchange for a remuneration referred

[2] In accordance with Labor Code commented the V edition revised and enlarged by Alexandru Țiclea, Universul Juridic Bucharest 2014.

[3] In accordance with Law No. 53/2003 - Labour Code, republished in the Monitorul Oficial al Romaniei, Part I, No. 345 of 18 May 2011, as amended and supplemented.

to as salary, based on an individual labor contract and an intership contract. Internship contract end with the conclusion of the individual labor contract. The duration of the internship is 6 months, unless the law specifically mentions another period of internship. Internship contract is made, mandatory, in written form in Romanian. Obligation to conclude a written internship contract belongs to the employer. The rights and obligations of the parties concerning the conduct of the internship period shall be determined by the internship contract, under the law, and shall be supplemented, as appropriate, to the provisions of the applicable collective labor contract wording and the internal rules. In accordance with Art. 25 letter c of the law; to meet the tasks given by the mentor and superiors within the organizational structure where he performs the internship. And the employer has the right under Article 25 letter c; to exercise control over the fulfillment of the duties and apply appropriate sanctions misbehavior; letter d of the same article of the law.

The duration and nature of the employment contract does not have an influence on the existence of any misbehavior. Any employee with employment contract, either fixed or indefinite period, even if they are on probation, is likely to respond to disciplinary action. Also, the person who performs work under a contract of employment which proves to be invalid is obliged to obey the order and discipline of work, being unable to defend himself against disciplinary action by invoking vices in the employment contract. Persons performing domestic work, so outside the units where their employment contract mention, are not subject to the internal order of the facility, or rules that relate to workplace discipline, only when the person is within the facility premises. They do have the duty to obey to the other obligations regarding compliance with labor standards, labor quality prescriptions and labor protection. Only in case of breach of such obligations the person may be liable disciplinary.

For example, contracts of carriage, services, mandate, enterprise, although their object is, as the employment contract, the provision of an activity but not having an essential element, the person's subordination toward labor discipline in the unit operating, they do not show the characters of the employment contract and therefore holders of such contracts are not subject to disciplinary liability.

Civil servants, military personnel can not be held responsable to disciplinary liability based on the Labour Code, but only according to their sector specific regulations.

2. Accumulation of disciplinary liability with criminal liability

2.1. Disciplinary liability

The term "discipline" come from the latin word "disciplīna" meaning system, rule, moral and also training principles, school, education, training. The notion of discipline can be considered as the three main aspects:

1. discipline - all the rules and regulations established for the human community, organized in a certain structure, to carry out efficently the conditions of a specific activity (financial discipline, sports, work, military, etc.)

2. discipline - the obligation to follow the rules or predetermined previsions.

3. discipline - a state of order achieved through an activity acordingly with a set of standards and rules of human behavior.

The obligation to obey work discipline is complex process, incorporating both service duties of the employees[4] and those duties aimed at compliance behavior in the working environment, or in some exceptional cases, even outside the working environment.

Labor discipline is autonomous, differing from other types of discipline (financial, contractual, etc.).

[4] The personnel of public authorities and institutions Editura Universitatii Aurel Vlaicu Arad, 2009 by prof. univ. dr. Micle Ioan.

In labor law there is no definition of disciplinary liability in cases where a person commits culpable disciplinary misconduct. In art. 247 of the Labour Code is stated that the employer has disciplinary powers, with the right to apply, according to the law, disciplinary sanctions to his employees upon finding that they have committed a disciplinary violation..In its Second paragraph the legislature defines *"disciplinary offense as an offense in relation to work and consisting of an act or omission, committed with guilt by the employee that he violated the law, bylaw individual employment contract or applicable collective labor contract, orders and statutory provisions of hierarchical leaders* [5]*"*. This deviation leads to disciplinary responsability and, therefore, disciplinary sanctions, in order to constrain and reeducate the guilty one to adopt the correct attitude towards work, preventing also the other members of the staff of the consequences of negative behavior at the working place. In cases where ignoring labor discipline is causing damage or is a violation of administrative law relations or even a worse social danger, to the appropriate disciplinary responsability is added a material liability, administrative or even criminal, to ensure labor discipline, it is also recognized as one of the forms of legal liability.

Employee disciplinary basis is found in art. 10 of the Labour Code, the employee shall work under the authority of the employer, a legal relationship of subordination being born as an individual employment contract between the parties. The individual labor contract is an unilateral act, a will agreement between two people, under which the legal relationship of employment is created. Expressing consent to the conclusion of the contract the employee undertakes to fulfill, in time and precisely, all obligations under the law, regarding labor performance. The contract is in fact the base of disciplinary liability of the employee, establishing the nature of contractual liability. Subordination in the legal relationship of employment, are, essentially, legal basis for disciplinary liability of the employee.

A person who commits an offense must be a party in an employment contract. In lack of an employment contract - some sort of legal relations as background - there can be no disciplinary liability.

Another necessary condition for the existence of disciplinary liability is the existence of illegal acts.

Features of Disciplinary Liability

Disciplinary liability is characterized by the following features:

1). If[6] disciplinary violation was committed, ascertaining its existence, disciplinary liability is based on sanctioning, and it is preventive and educational. The guilty person recieves moral or material punishment according to the seriousness of the offense committed. This penalty is reflected in terms of conscience and attitude of the sanctioned as a moral constraint or as a material deprivation, likely in the future to keep him from committing other irregularities. By this, disciplinary or criminal liability resembles, and differs from material liability.

2). Disciplinary liability is contractual because only by signing the employment contract grants the ensurance of fulfillment by the employee of the obligation to comply with all the rules that shape labor discipline. Direct link between employment contract and disciplinary liability determines and limits its application. A person who commits an offense must be a party to a contract of employment. In the absence of an employment contract - or some legal relations existing - there can not be a disciplinary liability.

[5] The work "Tratat Teoretic si practic de dreptul muncii" is the most important work of the prestigious author prof. Dr. dr. Ion Traian Stefanescu. Editura Universul Juridic Bucharest 2014.

[6] In accordance with Labor Code commented the V edition revised and enlarged by Alexandru Ţiclea Universul Juridic Bucharest 2014, The personnel of public authorities and institutions Editura Universitatii Aurel Vlaicu Arad, 2009 by prof. univ. dr. Micle Ioan.

Another necessary condition for the existence of disciplinary liability is the existence of an illegal act. The act leading to the production of a result likely to jeopardize the smooth running of the business in a certain unit. Also harmful result must be the consequence of the misconduct, that will be disciplinary sanctioned, and not of other facts.

3). Is purely personal; the *"intuitum personae"* character of the individual labor contract makes the disciplinary liability impossible vicarious or transmission to the heirs wage.

Disciplinary liability is a form of liability independent of all other forms of legal liability.

The sole basis for disciplinary liability, necessary and sufficient condition to trigger it, is a disciplinary violation.

For violation of labor discipline, the employer has the right to apply to the employee in accordance with art. 248 of the Labor Code, the following disciplinary sanctions:

a). written warning

b). demotion, for a period not exceeding 60 days;

c). reduction in base salary for a period of 1-3 months by 5-10%;

d). reduction in base salary and / or, where appropriate, reduction in management allowance for a period of 1-3 months by 5-10%;

e). disciplinary termination of the individual labor contract.

If by professional statutes approved by a special law, there are subsequent sanctions, those will be applied to it.

The legislature determines that the disciplinary sanction of law shall be canceled within 12 months of the application, if the employee is not bound for another disciplinary action within that period. Cancellation of disciplinary sanctions shall be determined by the employer's decision issued in writing. According to art. 249 of the Labor Code fines are prohibited and for the same misconduct it can only be applied one penalty.

The employer shall establish a disciplinary sanction applicable to the severity of the misbehavior committed by the employee, taking into account:

a) the circumstances in which the act was committed;

b) the degree of fault of the employee[7];

c) the consequences of misbehavior;

d) the general conduct of the employee;

e) any subsequent disciplinary sanctions suffered by him. When applying disciplinary sanctions, the employer must take into account the seriousness of the misconduct and other objective circumstances. Consideration of previous disciplinary sanctions suffered by the employee as a criterion of individuation of sanction, is not contrary to the principle of the inadmissibility of double punishment, expressly devoted to art. 249, paragraph 2. Under penalty of nullity, no action except written warning can be ordered before conducting a preliminary disciplinary research. (1) The employer dispose the sanction issued in writing within 30 days from the date of knowledge about disciplinary irregularity, but no later than six months from the date of the deed.

Under penalty of nullity, the decision necessarily must include:

a) description of the act constituting misconduct;

b) must specify the provisions in personal status, bylaw individual employment contract or collective agreement applicable, infringed by the employee;

c) the reasons why defenses stated by the employee during the disciplinary investigation or prior to the investigation were removed, or reasons why, as provided in art. 251 para. (3), research was not carried out;

[7] The personnel of public authorities and institutions Editura Universitatii Aurel Vlaicu Arad, 2009 by prof. univ. dr. Micle Ioan. "Tratat Teoretic si practic de dreptul muncii" is the most important work of the prestigious author prof. Dr. dr. Ion Traian Stefanescu, Editura Universul Juridic, Bucharest, 2014.

d) legal grounds under which disciplinary sanction apply;

e) the period within which the penalty can be appealed;

f) the competent court where the sanction may be appealed.

Sanctioning decision shall be communicated to the employee within 5 days from the date of issue and shall take effect from the date of notification.

The document must be handed personally to the employee, wih recieving signature, or, in case of refusal of receipt, at the registered residence given by the employee. Sanction decision may be appealed by the employee to the competent courts within 30 days of notification.

2.2. Criminal Liability

The Law no.[8] 187/2012 for implementation of Law no. 286/2009 the Criminal Code art.. 127 Article 261-263 of the Labour Code is repealed. Law. 53/2003 - Labour Code, republished in the Official Gazette of Romania, Part I, no. 345 of 18 May 2011, as amended, provides that the following acts as criminal acts- art 264 states as follows;

1. constitutes a crime and it is punishable by imprisonment from one month to one year or a fine, the criminal act of a person, who repeatedly, establishes for employees employed under individual employment contract wages below the gross minimum wage guaranteed, provided by law.

2. The same penalty stated in para. (1) punishes consisting of unjustified refusal of a person to submit to the competent bodies of legal documents in order to prevent checks on the implementation of general and special regulations in labor relations, safety and health in later than 15 days of receipt of the second request.

(3) The penalty stated in para. (1) is punishable the offense consisting in preventing under any form of competent bodies to enter, as provided by law, the offices, premises, land and means of transport that the employer uses in his professional activity to perform checks on the implementation of general and special regulations in labor relations, safety and health.

(4) an offense and shall be punished with imprisonment from three months to two years or with fine, receiving more than 5 persons to work, whatever their nationality, without concluding an individual employment contract.

- art.265 states: Employment of a minor in violation of the legal age or the use of the minor for the provision of activities in violation of legal provisions relating to the employment of minors is a crime punishable by imprisonment from three months to two years or a fine.

(2) The penalty provided for in art. 264 para. (4) is punishable the receipt of a person working in illegally in Romania, knowing that it is a victim of human trafficking.

(3) If the work performed by persons referred to in para. (2) or in art. 264

(4) if it is likely to endanger thir life, integrity or health, the punishment shall be imprisonment from six months to three years.

(4) In case of committing any of the offenses referred to in para. (2) and (3) and Art. 264 para. (4), the court may order the application of one or more of the following additional penalties:

a) total or partial loss of the employer's right to receive benefits, aids or subsidies, including EU funding managed by the Romanian authorities for a period of up to five years;

b) prohibiting the employer's right to participate in the award of a public contract for a period of up to five years;

c) full or partial benefits recovery, aids or subsidies, including EU funding managed by the Romanian authorities granted to the employer for a period of up to 12 months before the offense;

[8] Law 187/2012 for the implementation of Law No. 286/2009 regarding the Romanian Criminal Code, Noul Cod Penal.

d) temporary or permanent closure of the work centers where the offense took place, or temporary or permanent withdrawal of the license to conduct the activity in question, if this is justified by the gravity of the infringement.

(5) In case of committing any of the offenses referred[9] to in para. (2) and (3) and Art. 264 para. (4) the employer will be required to pay a fee representing:

a) any outstanding remuneration payable to persons employed illegally. The amount of remuneration is assumed to be equal to the average gross wage in the economy, unless either the employer or the employee can prove otherwise;

b) the amount of all taxes and social security contributions that the employer would have paid if the person were legally employed, including default interest and relevant administrative fines;

c) the costs determined by the transfer of the due payments to the person illegally employed, in the country he returned to wilful or by law.

(6) In case of committing any of the offenses referred to in para. (2) and (3) and Art. 264 para. (4) by a subcontractor, both the main contractor and any intermediate subcontractor, where they knew that the employing subcontractor employed foreigners who are staying illegally, may be required by the court, jointly with the employer or in place of contractor or subcontractor employer whose employer is a direct subcontractor to pay the sums of money mentioned in par. (5) a and c.

Art.261-263 of the Labour Code repealed by Law 187/2012 for the implementation of Law no. 286/2009 on Penal Code. These texts were taken, by the Art. 287 of Penal Code Non-recognition of judicial decisions. Legislator incriminates the failure to comply to a court order by:

d) failure to reinstate an employee following a court order given;

e) non-enforcement regarding payment of wages within 15 days from the date of application for execution by the claimant to the employer;

f) failure of judicial decisions determining the payment, updating and recalculation of pensions; shall be punished with imprisonment from three months to two years or with fine. If the facts set out in point d) to g), criminal proceedings shall be initiated upon prior complaint from the injured person.

3. Differences and similarities between disciplinary and criminal liability.

Between disciplinary and criminal responsibility is an essential distinction, due to their *different source*. Criminal liability finds its source in the law, it is therefore *legal*, while disciplinary liability has its source in the contract between the parties, it is therefore *contractual*.

Between crime and misbehavior there are some similarities:

- both are forbidden acts, with anti-social consequences
- both are committed with guilt and are injuring some definite order in the society. But there are differences.

In terms of *subject*, a disciplinary offense does not only directly harm the legitimate interests of the unit, but also the interests of the entire staff of employees of which the author is a part of.

Disciplinary liability is defending a determined social order, of labor relations and unit production level, meanwhile the criminal liability defending values and relationships considered as paramount to the entire society: sovereignity, public property, the individual and his rights, independence and unity of the state, as well as the entire order.

[9] Noul Cod Penal, In accordance with Labor Code commented the V edition revised and enlarged by Alexandru Ţiclea Universul Juridic Bucharest 2014, The personnel of public authorities and institutions Editura Universitatii Aurel Vlaicu Arad, 2009, by prof. univ. dr. Micle Ioan.

In terms of the object, there is a *similarity* in its generic nature - defending a premade social order in a particular sphere of activity - but there is a collective *difference* consisting in the precise nature, type and relative importance of relationships protected and regarding the extent of the scope of liability.

In terms of the objective side,[10] both the criminal and disciplinary liability are assumed as committing an illegal act, contrary to predetermined rules, but the facts are different regarding disciplinary and criminal liability in terms of severity, the harmfulness of its consequences, as well as the level of disturbance of the relationships within its reach. Acts of the same nature may be, depending on amount of "elements", either misconduct or crime. These "elements" are: The importance of the object to be protected in a given time, circumstances (ex: number of people, time and place of the deed), type and intensity of guilt, crime consequences, whether actually produced as well as those that would have occurred, the possibility of preventing etc. These "elements" compete to determine the different social risk, resulting in the final form of liability it engages and also the sanction dosage. Severity and social danger of the track scene is the element that best express the differences in degree of intensity and is the element that places a certain deed above or below the threshold separating the two responsibilities.

In terms of the action taken, there is a similarity in character consisting of coercive sanctions and deprivation, but also a distinction, a difference in the nature and degree of constraint and deprivation, and the purpose followed, the ways to follow and approved bodies to do the following, methods and enforcement bodies.

Overlapping criminal liability with disciplinary liability is possible if the same act committed by an employee in the workplace, affects both internal order and discipline of the unit, as well as the values of general interest to society, defended by criminal law.

Criminal liability, once triggered, causes a cessation of disciplinary and makes cumulative liability not to be achieved by parity and simultaneously, but in a subsequent report of conditioning and derivation.

The employer,[11] after taking note of committing an act that meets the elements of an offense by an employee, is obliged to immediately notify the criminal investigation bodies. With the introduction of the complaint, or if the employee, without a complaint from the unit, was indicted for a criminal act that makes him incompatible with his job position, forces the management to suspend him from office. In this case the suspension of the labor contract can be done unilateral by the unit. During the suspension, the employee can not exercise his powers granted by his position in the unit and will not get paid. Depending on the final solution given by the court in the criminal case it will require, as appropriate:

- either resumption of labor relations, with full payment during the suspension, or further administrative investigation;
- or termination by the unilateral act of the unit on the day the employee is convicted of an offense in connection with his work, if sentencing makes the job that he held inadequate.

The employer can not proceed to trigger disciplinary investigation and disciplinary sanction, parallel and separate from the ongoing criminal trial. Therefore, when a person is accused of committing criminal acts in connection with his work, it creates an incompatibility between the offense committed and maintaining the function of the person in that unit and, accordingly, both the execution of the employment contract as well as the exercise of

[10] In accordance with Labor Code commented the V edition revised and enlarged by Alexandru Țiclea Universul Juridic Bucharest 2014, The personnel of public authorities and institutions Editura Universitatii Aurel Vlaicu Arad, 2009 by prof. univ. dr. Micle Ioan. The work "Tratat Teoretic si practic de dreptul muncii" is the most important work of the prestigious author prof. Dr. dr. Ion Traian Stefanescu. Editura Universul Juridic, Bucharest, 2014.

[11] The personnel of public authorities and institutions Editura Universitatii Aurel Vlaicu Arad, 2009 by prof. univ. dr. Micle Ioan, Boghicevici C, Botiş N. I, Meianu B, D. C. Creţ, Nedelcu M, Şipoş F, Politici de ocupare a forţei de muncă, Editura „Vasile Goldiş" University Press, 2010.

disciplinary proceedings shall be suspended pending the final solution in the criminal trial. So the penal spectrum is helding the disciplinary spectrum down and also the civil spectrum. The final sentence handed down by the criminal offense of the existence of the offense, its author and guilt, are considered as primary in the process of applying disciplinary sanctions.

Where it is found that the act meets the elements of an offense in connection with the work, committed with guilt by the employee concerned, him being convicted by a final judgment, the management unit is entitled to apply later concurrently, disciplinary dissolution of the contract. But even when it commits such an act sanctioned by a final criminal conviction, the governing body of the unit is not required to terminate the employment; But is able to assess whether or not to take disciplinary action. Accumulation of the criminal sanction with the disciplinary sanction occurs in a subsequent report meaning that disciplinary liability applies only after establishing criminal liability and its consequences. If criminal proceedings ceases or is acquitted - unless the act does not exist or was not committed by the defendant, such as when the act committed by the employee is not a crime, amnesty or prescription criminalization involved - only than the competent body of the unit may start the research to determine whether or not the act constitutes misconduct. The employer can adopt one of the disciplinary sanctions provided by art. 248 of the Labour Code. When, however, the act is a serious disturbance of order within the unit, termination of contract may be enforced.

Development and publication of this have been caused by changes to the Labour Code by Law 187/2012 for implementation of Law[12] no. 286/2009 the Criminal Code and Law puneraea 255/2013 the application of Law no. 135/2010 the Code of Criminal Procedure.

Conclusion

The disciplinary penalties are means to constraint required by law, aimed at defending the disciplinary order, responsible for developing the spirit of conscientious fulfillment of duties and compliance behavior and preventing acts of indiscipline. They are specific measures, labor law in connection with the execution of the labor contract without affecting personal rights and property celelallte of employees.

Regarding criminal responsibility art. 261-263 were repealed as from Act No. 187/2012 bags for implementing the Law no. 286/2009 on the Criminal Code Article 127 paragraph 1. These texts were taken, but by Article 287 of the Criminal Code, entitled "Failure of judgments".

References:

1. Alexandru Ţiclea - Codul Muncii comentat ediţia a V-a, Univers Juridic Publishing House, Bucharest 2014.

2. Ion Traian Ştefănescu - Tratat teoretic şi practic de dreptul muncii, Universul Juridic Publishing House, Bucharest, 2014.

3. Ioan Micle -Salarizarea personalului din autoritâţile şi instituţile publice, Universitatea Aurel Vlaicu Publishing House, Arad, 2009.

4. Boghicevici C., Botiş N. I., Meianu B., D. C. Creţ, Nedelcu M., Şipoş F., *Politici de ocupare a forţei de muncă*, Vasile Goldiş University Publishing House, Arad, 2010.

[12] Law. 53/2003 - Labour Code, republished in the Official Gazette of Romania, Part I, no. 345 of 18 May 2011, as amended and supplemented.
Law 187/2012 for the implementation of Law no. 286/2009 concerning the Criminal Code.
New Criminal Code.

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ACCESS AND BENEFIT SHARING UNDER NAGOYA PROTOCOL AND SUSTAINABLE DEVELOPMENT: A CRITICAL ANALYSIS

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Abstract

The debate over control and ownership of natural and bio genetic resources has a chequered history in International environmental law. Historically genetic resources were considered and acknowledged as part of common heritage of mankind. But with the development of technologies and the heightened north south divide over the issue of sovereign right over natural resources the developing nations became extremely concerned with the exploitation of biological and Genetic resources. Access to benefit sharing (ABS) was considered as an answer to balance the interests of developed and developing nations and to conserve and protect bio diversity. Adopted on October 2010 in Nagoya, Japan by the Parties to the Convention on Biological Diversity (CBD) of 1992, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (NP) has come into force after its 50th ratification on 2013. Nagoya protocol details on procedure for access and benefit sharing, disclosure mechanism, principles of transparency and democracy. The paper analyses the protection of access and benefit sharing envisaged under Nagoya protocol and its possible role in promoting sustainable development in the develoing nations.

Key Words: Sustainable Development, Nagoya Protcol, Biological Resources, Bio Diversity.

Introduction

On October 2010, international community saw the successful adoption of the 'Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits by the parties to CBD.[1] It has been hailed as one of the momentous and unprecedented legal development and is expected to promote intra and intergenerational equity between developed and developing nations.[2] Such a sharing mechanism became imperative as the biological diversities are mostly located in developing nations and the technological developments to utilise and tap the potential of these biological diversities are the monopoly of developed north.[3] To complicate the matter until the end of the last century, genetic resources and biological resources were managed as public domain goods on the basis of the "common heritage"(CHM) concept.[4] Absence of private appropriation, sharing of

[1] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Oct. 29, 2010, UNEP/CBD/COP/DEC/X/1 of 29. *COP 10 Decision X1: X/1.Access to genetic resources and the fair and equitable sharing of benefits arising from their utilization, (*http://www.cbd.int/decision/cop/?id=12267(Accessed on 3-07-2015)
[2] E, Louka, International Environmental law, Fairness Effectiveness and World Order, Cambridge, p 310, 2006.
[3] *ibid.*
[4] B, Kemal, *The Concept of the Common Heritage of Mankind in International Law*, Hague, Martinus Nijhoff, p xxi, 7, 1988.

benefit mechanism, peaceful use and transmission to future generations forms the characteristic feature of this concept.[5] The developing countries realised the commercial implications from biological resources and saw the protection of genetic resources as a mechanism for economic development and demanded sovereign rights over natural resources.[6] They argued for specifying national ownership over genetic resources and use of contracts in the movement of resources between countries.[7] When the negotiations were progressing under the CBD the biodiversity-rich developing nations had high expectations under the premise that biological resources, being the raw material for the biotechnology, seeds and pharmaceutical industries, are the key to potential development.[8] The South vehemently clamored for national sovereign rights over biological resources and rejected the attempts by the north to extend the common heritage strategy.[9] Negotiations leading to CBD attempted to reach a consensus by declaring bio-diversity as a common concern of mankind much to the delight of developing nations.[10] The preamble of the convention declares bio diversity to be the common concern of mankind.[11] What are the contours of this concept there are diverging opinions? Boyle suggest that the concept denote that under this approach states can no longer exclusively misuse genetic resources against the interests and concerns of the rest of the world.[12] Access to Benefit was considered as an apt mechanism through common concern interest of nations can be balanced and was incorporaated as part of conventions objective.

Access to Benefit Sharing and Bio Diversity Protection

The CBD is the legal foundation of biodiveristy protection and the ABS mechanism.[13] The convention has primarily three objectives in the form of (a) conservation of biological diversity, (b) the sustainable use of its components (c) and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[14] Regarding ABS commented Tvedt and Young, "nationally, countries committed to enabling access to genetic resources and in exchange for developing countries' agreement to this commitment, developed countries agreed to a second commitment – to develop a mechanism for sharing the benefits of the utilization of genetic resources with the country of origin. In essence, both groups received a desired objective, in exchange for committing to one for which they have less desire."[15]

CBD has operationalised ABS mechanism through Article 15. It recognizes the sovereign rights of States over their natural resources, At the same time states are required to create conditions to facilitate access to genetic resources for environmentally sound uses by

[5] *ibid*

[6] A, Zinatul, L.A, Zainol, Bio Piracy and States Sovereignty over their Biological Resources, *African Journal of Bio Technology*, Vol. 10, No (58), pp, 12395-12408, 2011.

[7] R,Pistorius, *Scientists, Plants, and Politics: A History of the Plant Genetic Resources Movement*, United States, Diane Publishing Company,1997.

[8] S, F, H Gurdrun, The Regime Building on the Convention on Biological Diversity on the Road to Nairobi, Max Plank *UNYB* (3), pp 315-361, 1999.

[9] G.K, Rosendal, Interacting international Institutions: Convention on Biological Diversity and TRIPS-Regulating Access to genetic resources, Interactions Between International Institutions Synergies and Conflicts,2003,http://www.ecologic.de/download/projekte/850-899/890/isa/isa_convention_on_biodiversity.pdf accessed on 3-07-2015).

[10] https://www.cbd.int/gbo1/chap-02.shtml. accessed on 3-07-2015

[11] U.N. Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, U.N. Doc. UNEP/Bio. Div/N7-INC.S/4, *reprinted in* 31 I.L.M. 818 [hereinafter CBD].

[12] A. E, Boyle, M. R, Anderson, *Human Rights Approaches to Environmental Protection*, Clarenden Press, 1988

[13] Supra note 11, see CBD.

[14] *ibid*

[15] M. Tvedt, T, Young, Beyond Access: Exploring the Implementation of the Fair and Equitable Sharing Commitment in the CBD, IUCN Environmental Policy and Law Paper No. 67/2, Bonn Germany, IUCN Environmental Law Centre, 2007, http://www.fni.no/doc&pdf/beyond_access.pdf, accessed on 23-06-2015.

other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.[16] Access, where granted, shall be on mutually agreed terms and on the basis of prior informed consent.[17] When the fair and equitable benefit-sharing was first adopted as part of CBD, many developing countries saw this as an opportunity of promoting intragenrational equity and hoped that it will put an end to bio piracy and will assist them pursue a path of development. Several countries have developed legal regimes and implementing mechanisms to regulate access to genetic resources[18] but, unfortunately due to lack of exhaustive provisions of the modalities and mechanisms of benefit sharing jurisdictions came out with their own strategies. The case of Philippines can be cited here. The legal structure envisaged by Philippines was so much protective and restrictive in nature that it almost led to extinction of any possibility of benefit sharing. It was realised that a formal mechanism is the need of the hour. After long years of concerted negotiations which witnessed conflicting arguments and positions the Nagoya Protocol, was adopted at the 10th Conference of the Parties (CoP) to the CBD at Aichi-Nagoya, Japan in October 2010.[19]

Nagoya Protocol and Sustainable Development

The Nagoya Protocol implements the third objective of the CBD, concerning fair and equitable sharing of the benefits arising out of the utilization of genetic resources. The scope of the protocol applies to genetic resources, traditional knowledge (TK) associated with genetic resources and the benefits arising from its utilization.[20] The question which forms the core of the discussion relates to how far Nagoya protocol promotes sustainable development. The international law of sustainable development is contained in a catena of declarations, conventions and other documents. In 1972 International environmental law is believed to have taken its first major step with the convening of first Conference on the Human Environment ("UNCHE").[21] The concerns of developing countries were addressed and the conference formally linked the issue of environment protection with development.[22] This was carried forward further when in 1983 General Assembly resolution established the World Commission on Environment and Development ("WCED).[23] The outcome document popularly known as, "Our Common Future" gave the world a new paradigm of sustainable development.[24] It defines "sustainable development as a development which seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future."[25]

The idea of sustainable development got a boost and concrete foundation in 1992 with the United Nations Conference on Environment and Development(RIO).[26] The linkage of environmental conservation measures, economic and social goals got completely entrenched

[16] Supra note 11 see CBD, Art 15 (1).
[17] *ibid* Art 15(4).
[18] Grajal, A, Bio-Diversity and the Nation State, Regulating Access to Genetic Resources Limits to Biodiversity Research in Developing Countries, *Conservation Biology* Vol 13, No 1, pp 6-10,1999.
[19] Supra note 1 See Nagoya
[20] *ibid* Art 3.
[21] Conference on the Human Environment, *Declaration of the United Nations,* U.N. Doc. /CONF.48/14/Rev. **I** (Jun. 5-16, 1972).
[22] K. Alexandra, S. Dinah, *A Guide to International Environmental law*, Martinus Nijoff, p 38, 2007.
[23] *Ibid,* p 39.
[24] *ibid*
[25] *ibid*
[26] Report of the United Nations Conference on Environment and Development Annex I AICONF.151/26 (Vol. I) Aug. 12 1992.

into the sphere of international law with the signing of RIO declaration.[27] The exact meaning and definition of sustainable development eluded RIO and its implementation was marred by its lack of clarity. Patricia Birnie and Alan Boyle,[28] identifies following components

- the environmental needs of future generations;
- environmental protection to be an integral part of development;
- common but differentiated responsibilities; reduction of unsustainable patterns of production and consumption;
- enactment of effective environmental laws;
- recognition of the precautionary principle;
- internalization of environmental costs and the use of economic instruments.

The above characteristic features suggest the existence of certain substantive and procedural aspects to the principle of Sustainable development. The substantive elements are the sustainable utilization of natural resources; the integration of environmental protection and economic development; the right to development; and striving for equity in the allocation of natural resources between future and present generations.[29] The procedural principles deal with public participation in environmental decision-making and environment al impact assessment.[30] For International Union for Conservation of Nature (IUCN) sustained development refers to processes, principles and objectives as well as to a large body of international agreements on environmental, economic, civil and political rights.[31] In *Gabcikovo-Nagymaros,* the International Court of Justice deliberated on the concept of sustainable development as a concept reconciling economic development with protection of the environment.[32] Through successive conventions and declaration, juristic opinions certain substantive and procedural components of sustainable development has been identified including right to development, intra and intergenerational equity, precautionary principles and procedural requirements in the form of Public participation, access and information sharing, and principle of transparency and accountability etc.

An analysis of the protocol reveals that attainment of sustainable development figures prominently in the protocol. Protocol broadly incorporates environment, economic and social dimension of the principle of sustainable development. Preamble and objective of the protocol recognises that the fair and equitable sharing of the economic value of biodiveristy with the custodians of biodiversity forms a key part of the the conservation of biological diversity and the sustainable use of its components.[33] The protocol mandates that benfit shring mechanism envisaged here contributes to the conservation of biodiversity and the sustainable use of its the components. The key components of the Nagoya Protocol are the provisions on access, benefit sharing and compliance. The substantive and procedural components of law of sustainable development are generally incorporated in the attainment of these components.

Access to Genetic Reosurces. Protocol prescribes that access to genetic resources shall be subject to the prior informed consent of the Party (PIC) and on mutually agreed terms

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[27] P. Pramod, *Learning from Ecological Ethnicities: Toward a Plural Political Ecology of Knowledge, in (*John A. Grim Ed.) *Indigenous Traditions and Ecology: The Inter-being of Cosmology and Community*, p 559-574, 2001.
[28] P. Birnie, A. Boyle, *International law and the Environment,* Oxford University Press, 2009.
[29] M. Fitsmaurize, *Contemporary Issues in International Environmental Law*, Edgar Elgar, 2009.
[30] *ibid.*
[31] *Report* of a *Consultation on Sustainable Development: The Challenge to International Law*", *Reciel* 2(4) (1993).
[32] Gabčíkovo-Nagymaros Project (Hungary/Slovakia),*1997* I.C.J. 7, reprinted in 37 I.L.M. 162
[33] *Supra* note1 see Nagoya preamble &objective.

(MAT)[34] The access should be based on legal certainty, clarity and transparency.[35] Protocol ensures obligations between provider as well as user countries to put in place a mechanism of access based on fairness. Countries should ensure that their obligation to grant access are properly matched with the corresponding obligation on the part of developed countries to ensure compliance and contribute to technological diffusion, as well as funding.[36] Protocol takes into account social dimension while dealing with access requirements. Protocol urges the states to create conditions of access, which will promote and encourage research contributing to the conservation and sustainable use of biological diversity particularly in developing countries.[37] It gives due regard to the importance of genetic resources for food and agriculture and their special role for food security.[38] Protocol provides special attention to the condition of traditional and indegenous communities. Protocol directs that with regard to these community access in terms of genetic resources, State should through legal and administrative measures make sure that for access is obtained from such communities.[39]

Benefit Sharing: One of the foundational principles of sustainable development is the principle of fairness, equity and justice. Protocol throughout its breadth and length elaborates procedures for achieving a fair and equitable benefits sharing mechanism from the utilization of genetic resources as well as on the subsequent applications and commercialization.[40] Protocol dicates that benefit sharing includes monetary and non monetary benefits.[41] This provision if put to implementation properly can provide communities much needed assistance in the form of establishment of hospitals, schools etc leading to sustainable development. Principle of fairness and justice demands that those who conserve the biological resources should benefit from its utilization.[42] What constitutes a fair and equitable benfit sharing has to be detrmine dby the criteria developed.[43] Some of the points sugggested include:

- The South-North imbalance in resource allocation and exploitation;
- Protecting the cultural identity of traditional communities;
- A shared interest in food security;
- The need to conserve biodiversity.[44]

Protocol prescribe that benefits derived from the utilisation of genetic resources or traditional knowledge held by communities must be shared in a fair and equitable way with such communities.[45] From the procedural aspect participation of the relevant stakeholdres is significant. Protocol recognizes the role of indigenous communities in providing, caring and nurturing bio diversity and the necessity to protect biodiversity for the sustainable livelihoods of these communities.[46] Indigenous people need to be consulted in developing community protocols, minimum requirements for MAT, and model contractual clauses.[47] Capacity building has been given lot of attention under the

[34] *ibid*, Art 6 (1)
[35] *ibid*, Art 6 (3)
[36] An Explanatory Guide to the Nagoya protocol on Access and Benefit Sharing, IUCN, p 28,2012.https://books.google.co.in/books?id=HXW95Za0wk0C&printsec=frontcover#v=onepage&q&f=false accessed on 10-06-2015.
[37] Supra note 1 See Nagoya, Art 8.
[38] *ibid*, Art 8 (c).
[39] *ibid*, Art 7.
[40] *ibid,* Art 5 (1).
[41] i*bid*, Art 5 (4)
[42] B. De Jonge, What is Fair and Equitable Benefit-sharing, *J Agric Environ Ethics* Vol. 24, pp 127–146, 2011.
[43] *ibid*
[44] *ibid*
[45] *supra* note 1 Art 5 (2)
[46] *ibid*, Art 12 (2)
[47] *ibid* Art 12 (3) (a)

protocol.[48] Protocol emphasizes the need to increase capacities of women and Indigenous communities so that they can effectively participate in the implementation of the protocol.[49]

The provisions protecting and safeguarding the interests of indigenous communities has given a fresh leave of hope into the life of these communities in making sustainable use of bio diversity and thereby contributes to the sustainable development of the society. As Braulio Ferreira de Souza Dias, Executive Secretary of the Convention on Biological Diversity pointed out: "*The Nagoya Protocol is central to biodiversity for sustainable development. Its entry into force will create incentives for preserving genetic diversity, biodiversity in general, and associated traditional knowledge. It will provide the conditions for continuous research and development on genetic resources. But most importantly, the Protocol will give us the opportunity to develop an economy that is more sustainable and where the value of natural resources will be truly acknowledged.*[50]

Compliance: Protocol elaborates on compliance measures and dispute resolution meausres to be initiated by the parties to see that genetic resources utilized within their jurisdiction have been accessed in accordance with prior informed consent and on mutually agreed terms.[51] Protocol clearly gives emphasis to the procedural requirement of access to justice.[52] Protocol mandates an efficient mechanism to seek recourse under their legal systems when disputes arise from mutually agreed terms.[53]

One of the corner stone of sustainable development relates to the right to development and it needs no emphasis that there can be no development without compacting poverty. The capacity of Nagoya protocol to promote sustainable development is directly proportional to its ability to fight and remove poverty. Bio diversity – sustainable development poverty nexus has attracted wide scale of research and discussions across competent academics.[54] The highest biodiversity hotspots are found in developing countries. Biodiversity hotspots are also characterised by regions of acute poverty.[55] The complementarily and harmonious existence of the goal of sustainability and poverty reduction is well emphasised in the 2011 Human Development Report which argues argue strongly for the need to consider sustainability and equity jointly.[56] But if we analyses how far poverty reduction finds its place in Nagoya protocol, the objective of poverty reduction does not find any express mention.[57] Definitely three are provisions which have a bearing on poverty reduction are scattered in various part of protocols. But the clear-cut absence of a poverty target provisions certainly puts a question mark on the ability of the protocol to achieve sustainable development. There are studies showing the impact of ABS mechanism and poverty reduction. In 1985 US National Cancer

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[48] *ibid* Art 22

[49] UN Secretary-General Report on Legal Empowerment and Poverty Eradication (A/64/133) and UN General Assembly Resolution on Legal Empowerment of the poor emphasise on the rights of indigenous people as a mechanism to tackle poverty and achieve sustainable development. R. Katharina & K. Koutouki, The Nagoya Protocol: Status of Indigenous and Local Communities, *Vermont Journal of international law* Vol 13, p513-535, 2011.

[50] The Nagoya Protocol Heralds a New Era for Sustainable Development, http://blogs.kent.ac.uk/klslllm/2014/12/03/the-nagoya-protocol-heralds-a-new-era-for-sustainable-development-2/ accessed on 5-07-2015

[51] *Supra* note 1 See Nagoya Art 15 (1) & 16 (1)

[52] *ibid* Art 18

[53] *ibid* 15 (2) & 16 (2)

[54] W. M, Adams, D, Aveling, B. Brockington, J, Dickson, J, Elliot, D. Hutton, B. Roe, B. Vira, and W. Woolmer, Biodiversity Conservation and the Eradication of Poverty. *Science* Vol 306, pp 1146-1149, 2004.

[55] B. Fisher, T. Christopher, Poverty and Biodiversity: Measuring the Overlap of Human Poverty and the Biodiversity Hotspots. *Ecological Economics* Vol 62: pp 93-101. 2007.

[56] Human Development Report (2011) Sustainability and Equity: A Better Future for All, New York, UNDP.

[57] *Supra* note. See Nagoya 1 preamble *Recognizes* the interdependence of all countries with regard to genetic resources for food and agriculture as well as their special nature and importance for achieving food security worldwide and for sustainable development of agriculture in the context of poverty alleviation.

Institute (NCI) while researching drugs for HIV did investigation on mamala Tree which the villagers traditionally uses to cure hepatitis.[58] The NCI research was able to isolate an ingredient known as Prostratin and got a patent for the same. The NCI agreed to give 30% of the royalties to the village in Samoa. The recent studies prove that it has helped to reduce poverty in the region.[59]

Common but Differentiated responsibility principle has been accepted as a component of sustainable development. The access and benefit mechanism under Nagoya is premised on the belief that developing nations holds most of the biological resources. By imposing an obligation on the user countries (mostly developed) to share the benefits derived out of the utilization of biological resources Nagoya protocol operationalize the CBDR principle. In most of the cases this situation may hold true. However, we cannot ignore the fact that there are biologically less diverse developing countries. The underlying point is that merely being a developing country does not make such countries significant beneficiaries of ABS, unless they happen to be also significant holders of genetic diversity. Further contractual relations form the back rope of ABS. Developing nations often does not possess equal bargaining powers compared to the most developed nations negatively impacting CBDR.

Successful implementation of ABS requires a deep level of understanding among the various stakeholders. Most of the developing nations awareness of ABS in government and non-government sectors is extremely low. Programmes and rules needs to be in place to increase awareness and capacity building of government, non-government organizations, civil society, and local communities. Effective implementation of any convention requires the participation of stakeholders and in terms of Nagoya protocol it is the role of common public, which assumes significance. In order to promote meaningful participation of them it is imperative that democratic institutions especially at the local level should be strengthened. Unless and until this happens the real impact of Nagoya protocol in achieving sustainable development will not be materialized.

Suggestions and conclusions

The notion of sustainable development is a dynamic concept and its right implementation can go a long way in promoting real development among disadvantaged regions and communities.[60] Without any doubt, the Nagoya Protocol epitomizes an ideal agreement based on the fundamental deep-rooted association between biodiversity and sustainable development. Protocol incorporate many of the substantive and procedural ingredients of sustainable development in the form of access on mutually agreed terms, benefit sharing, participation of indigenous communities and capacity building of women etc. Right to development has been recognised as a prominent goal under the protcol. The protocol on the flipside gives scant regard to poverty reduction. The relation between biodiversity protection, sustainable development and poverty reduction has travelled a long way from just being an environmental issue to encompass social and human right paradigms.[61] This assumes double significance as many of the hotspots of bio diversity also corresponds with the poorest regions and communities of the world. Poverty reduction and involvement of the disadvantages communities' involvement and a real benefit sharing mechanism is needed if Nagoya Protocol has to have any measurable impact of achieving sustainable development. Nevertheless, given the clash of interests

[58] Towards Access and Benefit-Sharing Best Practice, Pacific Case Studies, Australian Government and Aus Aid, http://www.abs-initiative.info/uploads/media/ABS_Best_Practice_Pacific_Case_Studies_Final_01.pdf accessed on 4-06-2015.
[59] *ibid*
[60] *supra* note 28 see Birnie
[61] India Country Strategy Paper, Government of India, 2007.

among CBD parties, any kind of agreement is a major step forward.[62] For nations and communities, protocol offers a unique prospect to protect and conserve biodiversity while initiating a path of development, which is truly sustainable. The Nagoya Protocol therefore merits the support, acknowledgment strict implementation.

References

1. Alexandra, K, Dinah. S, (2007), *A Guide to International Environmental law*, Martinus Nijoff.
2. Fisher, B., and Christopher T., (2007). Poverty and Biodiversity: Measuring the overlap of human poverty and the biodiversity hotspots. Ecological Economics 62: pp 93-101.
3. Fitsmaurize, M. (2009) *Contemporary Issues in International Environmental Law*, Edgar Elgar.
4. Grajal, A. (1999), Bio-Diversity and the Nation State, Regulating Access to Genetic Resources Limits to Biodiversity Research in Developing Countries, *Conservation Biology* 6-10.
5. Katharina R. Von B & Konstantia Koutouki, (2011) The Nagoya Protocol: Status of Indigenous and Local Communities, *Vermont Journal of international law* Vol 13, mp 513-535. Kemal B, (1988), *The Concept of the Common Heritage of Mankind in International Law*, Hague, Martinus Nijhoff.
6. Louka, E (2006) International Environmental law, Fairness Effectiveness and World Order, Cambridge.
7. M. Tvedt., Young T, (2007) Beyond Access: Exploring the Implementation of the Fair and Equitable Sharing Commitment in the CBD, IUCN Environmental Policy and Law Paper No. 67/2, Bonn Germany, IUCN Environmental Law Centre.
8. Michael R, (2003), Poverty Reduction, Equity and Climate Change: Global Governance Synergies or Contradictions? In Globalisation and poverty reduction Programme, London. Overseas Development Institute.
9. Nijar, G.S, (2010), Nagoya Protocol on Access and Benefit Sharing of Genetic resources: An Analysis, (CebLaw), Center of Excellence for Bio Diversity Law.
10. Patria, Birnie, Alan, B, (2009), *International law and the Environment,* Oxford.
11. Pistorius, R. (1997). Scientists, Plants, and Politics: A History of the Plant Genetic Resources movement, United States, Diane Publishing Company.
12. Pramod P, (2001) *Learning from Ecological Ethnicities: Toward a Plural Political Ecology of Knowledge, in (*John A. Grim Ed.) Indigenous Traditions and Ecology: The Inter-being of Cosmology and Community, (p *559-574),*
13. Zinatul, A, Zainol, L.A, (2011), Bio Piracy and States Sovereignty over their Biological resources, *African Journal of Bio Technology*, 12395-12408.

[62] Nijar, G. S, Nagoya Protocol on Access and Benefit Sharing of Genetic Resources Analysis and Implementation Options for Developing Countries, South Centre, 2011. http://www.southcentre.int/wp-content/uploads/2013/05/RP36_The-Nogoya-Protocol_EN.pdf accessed on 21-06-2015.

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LEGAL FRAMEWORK FOR THE PROTECTION OF CHILD RIGHTS IN NIGERIA[1]

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Abstract[2]

As far as human rights law is concerned, children constitute a minority group. They are by their nature very vulnerable and thus merit special laws to cater for their needs as the well-being of generations to come depend on how well children are raised today. The writer takes a look at the Nigerian legal system as it relates to children. It examines the UN CRC and the Nigerian CRA 2003.

Keywords: child, children, law, Nigeria, rights

Introduction - who is a child?

The United Nations Convention on the Rights of the Child defines a child as "a human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier"[3]. The various Children and Young Persons enactments in Nigeria on the other hand define 'child' as a person who has not attained the age of 14 years and 'young person' as one who has attained the age of 14 years but has not attained the age of 17 years. http://en.wikipedia.org/wiki/Child - cite_note-un-3 *Children generally have fewer rights than adults and are classed as not able to make serious decisions, and legally must always be under the care of a responsible adult. In some cases, the age at which a person ceases to be a child varies even under different laws in the same country. However, for the purposes of this write-up, the word child covers both children and young persons.*

Why children?

Children are the assurance of the continuity of the human society. Without children today there will be no society of humans' tomorrow. Yet they are the most vulnerable members of the society. They lack the physical, emotional and mental maturity required to face life. They, therefore, require special safeguards, care and protection. In addition, children are unique by their nature and their needs and as such the normal rights guaranteed adults are not adequate to cater for the special needs of children.[4]

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[3] *"Convention on the Rights of the Child"* The Policy Press, Office of the United Nations High Commissioner for Human Rights, http://www.hakani.org/en/convention/convention_rights_child.pdf

[4] http://dailyindependentnig.com/2013/10/the-child-rights-act-2003-the-rights-the-benefits/. Accessed on 11/03/15

Again, the kind of leaders we will have tomorrow depends on the kind of children we have today. Abused, maltreated and neglected children become stunted emotionally and physically, and lack the confidence to face life. They are therefore deprived of the opportunity to develop their full potentials.[5]

Since the independence of Nigeria, rivalries between groups of the population have regularly turned into violent conflicts. Many children died, or lost their parents, or were left disabled or were internally displaced. Children have also been severely affected by the economic crises faced by the country in 1999 which has led to an increase in the number children living in poverty or extreme poverty. Among other dangerous consequences, poverty made more children to live and/or work in the street and has increased their vulnerability to trafficking.

Some diseases have reached tragic dimensions and harmful traditional practices, such as forced marriage, female genital mutilation, widowhood practices and boy preference continue to have negative effects on the life and welfare of the girl-child. But discrimination also affects other groups of children, such as orphans, street children, disabled children or children born out of wedlock. A large number of children also continue to be subjected to domestic violence or corporal punishment at school or in detention facilities. Thus millions of Nigerian children face special problems of disadvantage, discrimination, abuse and exploitation, sometimes in appalling circumstances. These problems not only compound the risks of survival and create formidable obstacles for the development of children, but are major challenges in their own right; requiring special protective measures if they are to be addressed effectively.

The legal system and the Laws applicable to children

The general framework within which human rights are protected in Nigeria is enshrined in the 1999 Constitution of the Federal Republic of Nigeria. Chapter IV contains an elaborate Bill of Rights. The rights guaranteed include the right to life (Sec. 33); the right to personal liberty (Sec. 35); the right to fair hearing (Sec. 36) and the right to freedom of movement (Sec. 41). Section 42 prohibits unjustifiable discrimination on the basis of "ethnic group, place of origin, sex, religion or political opinion".

The 1999 Nigerian Constitution provides in its Chapter Two some fundamental objectives and directive principles of the Nigerian State which are geared towards the promotion and protection of children's interests in Nigeria. The Constitution requires the government to provide free compulsory and universal primary education, free secondary education, free university education, and free adult literacy programs when practicable.[6] Section 13 imposes a Constitutional obligation on all arms and tiers of government to observe the fundamental objectives relating to socio-political, economic, educational and cultural matters. Section 14 provides that the security and welfare of the people shall be the primary purpose of government. Section 16 provides for the control of the economy to secure maximum welfare, freedom and happiness of every citizen on the basis of social justice, equality of status and opportunity, harnessing and distribution of material resources of the community to serve the common good, provision of suitable and adequate shelter, suitable and adequate food for all Nigerians by the State.

Under section 17, the State social order is to be founded on freedom, equality and justice and the State shall direct its policy towards ensuring that:

> *(a) all citizens without discrimination on any ground whatsoever have opportunity for securing adequate means of employment;*

[5] http://dailyindependentnig.com/2013/10/the-child-rights-act-2003-the-rights-the-benefits/. Accessed on 11/03/15

[6] See Section 18 of the 1999 Constitution.

(b) conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life;
(c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused;
(d) there are adequate medical health facilities for all persons;
(e) there is equal pay for all work without discrimination on account of sex, or any other ground whatsoever;
(f) Children and young persons and the aged are protected against any exploitation whatsoever, and against moral and material neglect.

However, these provisions are only directive principles of State Policy and no action can be brought against the government for enforcement of the provisions as they are not justiciable.

Nigeria's legal system is characterized by three different traditions of law: The English Common Law, Islamic or Shari'ah Law and Customary Law. The 1999 Constitution provides, in section 6, for an independent judiciary for the determination of any question as to civil rights and obligations. The Constitution equally allows for the Customary and Shari'ah courts to cover various issues and jurisdictions. The Shari'ah courts according to section 277 (1) (2) of the 1999 Constitution have jurisdiction in civil proceedings involving questions of Islamic personal law regarding marriage concluded in accordance to that law and relating to family relationship or the guardianship of an infant; where all the parties to the proceedings are Muslims. The Customary courts' jurisdiction as provided for in section 282 (1) (2) relates to civil proceedings involving questions of Customary Law and succession as may be prescribed by the House of Assembly of the State.

Nigeria ratified the Convention on the Rights of the Child (hereafter the CRC) on April 16th 1991 and has ratified subsequently other international instruments such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the Convention on the Elimination of All Forms of Racial Discrimination. It is also a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In addition, Nigeria has ratified the African Charter on Human and People's Rights. Further, it signed but did not ratify the Optional Protocol on Children in Armed Conflict and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and the African Charter on the Rights and Welfare of the Child.

As for penal infraction, Nigeria has two separate codes, one applicable to Southern Nigeria (Criminal Code) and another applicable to Northern Nigeria (Penal Code). These provide for offences against persons and the State, including homicide, assaults and different kinds of sexual and gender- specific violations such as rape.

Since the ratification of the CRC, the AU Charter on the Rights and Welfare of the Child and other relevant international instruments, Nigeria has instituted various legislative and institutional measures aimed at addressing various forms of violence against children. These enacted legislations include The Child's Rights Act (CRA) 2003 and Trafficking in Persons (Prohibition) Law, Enforcement and Administration Act 2003.

The Government of Nigeria has also evolved some institutions charged with child protection issues and protection against violence. These include: National and State Child Right Implementation Committees; Child Development Departments in the Federal and State Ministries of Women Affairs; National Council of Child Rights Advocates of Nigeria (NACCRAN) as the umbrella NGO involved in Child Rights advocacy; Nigerian Children's Parliament and the National Agency for the Prohibition of Trafficking in Persons.

In Nigeria, there are laws which expressly prohibit child labour. For instance, the Labour Act[7] in section 59 sets the minimum age for employment at 15 years except for light agricultural, horticultural, or domestic work performed for the family. The minimum age provided for apprenticeships under Section 49 of the Act is 13 years. It means that any person below the age of 13 is not supposed to work as an apprentice. Children are prohibited from being employed to lift or carry any load likely to negatively affect their physical development. The Labour Act generally provides for the prohibition of hazardous works by children.

The Convention on the Rights of the Child (CRC)

The United Nations CRC is a human rights treaty which sets out the civil, political, economic, social, health and cultural rights of children. Two optional protocols to the convention were adopted on 25th May 2000. The first restricts the involvement of children in military conflicts while the second prohibits the sale of children, child prostitution and child pornography.

The convention deals with child-specific needs and rights. Under it, States are required to act in the best interests of the child. This approach is different from that previously existing in many societies where children are treated as possessions or chattels.

Nigeria has ratified the CRCand as such is obligated under Article 4 of the CRC to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present convention. As with any international treaty, State parties need to consider whether becoming a party to these human rights treaties will require changes to be made to their national laws or policies, to enable them meet all of their obligations under the treaties. For example, some legislative measures may need to be taken with regard to child rights and the system of juvenile justice in line with the provisions of the above treaties to which Nigeria is a signatory.

The concept of participation is part of the culture of democracy. The rights of children to participation are grounded in the idea that, like any other human beings, they have the right to share in the making of decisions which affect their lives and the life of the community of which they are part. In the CRC, Articles 12-15 capture what have collectivity been regarded as the participatory rights of children. Article 12 provides that the child has the right to express his or her opinion freely and to have that opinion taken into account in any matter of procedure affecting the child. Article 14 binds state parties to respect the child's rights to freedom of thought, conscience and religion, subject to appropriate parental guidance.

In a bid to more effectively implement the CRC, among other reasons, the Nigerian Government enacted the Child Rights Law 2003.

The Child Rights Act (CRA) 2003

This Act seeks to set out the rights and responsibilities of the child in Nigeria and provides for a system of child Justice Administration and the care and supervision of children, amongst other things.

Within the context of such a mandate, therefore, the Act has been divided into twenty-four parts and eleven schedules. The various parts address broadly rights and responsibilities, protection and welfare of children, duties and responsibilities of government, institutions for children, as well as other miscellaneous matters. In terms of contents, the Nigerian Child Rights Act borrowed a leaf from the UN CRC and the OAU Charter in respect of the guiding principles for the promotion and protection of the rights of children.

Under sections 1-2 (Part I), the Act provides that the best interest of the child shall be of primary or paramount consideration in all actions to be undertaken whether by an individual, public or private body, institutions or service, court of law or administrative or

[7] Cap L1, LFN 2004.

legislative authority. Further, the Act provides that necessary protection and care shall be given to the child for his/her well-being, taking into account the rights and duties of the child's parents, legal guardians and other bodies legally responsible for the child.

Part II (Sections 3-20) of the Act provides for the rights and responsibilities of a child in Nigeria. Accordingly, it entrenches the following fundamental rights of the child, namely, the rights to survival and development, to a name, to freedom of association and peaceful assembly, to freedom of thought, conscience and religion, to private and family life, to freedom of movement, to freedom from discrimination, to dignity of the child, to leisure, recreation and cultural activities, to health and health care services, to parental care, protection and maintenance, to free, compulsory and universal primary education, as well as encouragement of the child to attend and complete secondary education.[8] The Act also guarantees the right to special protection measures for a child in need of such protection as is appropriate to his/her physical, social, economic, emotional and mental needs and under conditions which ensure his/her dignity, promote the child's self-reliance and active participation in the affairs of the community, as well as the provision to a child with such assistance and facilities necessary for the child's education, training, employment, rehabilitation and recreational opportunities in a manner conducive to the child's overall development. Further, the right of an unborn to protection against any harm or injury caused willfully, recklessly, negligently or through neglect before, during or after the birth of that child; and to benefit from the estate of the deceased parents if any one of them dies intestate, having survived any one of them. Furthermore, the Act provides for the contractual right of a child only for necessaries, and any contract entered into by a child below the age of legal majority, that is, 18 years, for repayment of money lent or for payment of goods supplied, shall be void. Section 19 provides that subject to age, ability and other legal limitations, every child in Nigeria shall work towards the cohesion of his/her family and community; respect his/her parents and elders at all times and assist them in case of need; serve the Federal Republic of Nigeria by placing physical and intellectual abilities at service; contribute to the moral well- being of the society; preserve and strengthen social and national solidarity, the independence and integrity of Nigeria, the solidarity and achievement of Nigerian, African and World unity, peace, security, freedom, equality and justice for all persons; and to relate with other members of the society, with different cultural values in the spirit of tolerance, dialogue and consultation.

The duty to provide the necessary guidance, discipline, education and training for the child in one's care in order to secure the necessary assimilation, appreciation and observance of the Child's responsibilities (mentioned above) lies on every parent, guardian, institution, persons and authority responsible for the care, maintenance, upbringing, education, training, socialization, employment and rehabilitation of the child.[9]

Part Ill (sections 21-40) of the CRA provides for the protection of the rights of the child through the prohibition of: child marriage, child betrothal, infliction of tattoos and skin marks, exposure to use, production, trafficking, etc. of drugs and psychotropic substances, use of children in any criminal activity, abduction and unlawful removal and transfer of a child from lawful custody, forced, exploitative or hazardous child labour, including outlawry of employment of children as domestic helps outside their own home or family environment, buying, selling, hiring or otherwise dealing in children for the purpose of hawking, begging for alms, prostitution, unlawful sexual intercourse, other forms of sexual abuse and exploitation prejudicial to the welfare of the child.

Further, the Act prohibits recruitment of children into the Armed Forces of Nigeria, and importation of harmful publication which portray information such as the commission of crimes, acts of violence, obscene, immoral and indecent representations which tends to

[8] This is consistent with Chapter Two of the 1999 Nigerian Constitution.
[9] Ibid. section 20.

corrupt or deprave a child; whilst the Act further preserves the continued application of all criminal law provisions securing the protection of the born or unborn child.

Part IV (sections 41-49) Act provides for additional protection through civil and welfare proceedings. Thus, it makes provisions for securing assessment orders in relation to the ascertainment of state of health or development of, or the way in which the child has been treated, with a view to enabling a determination as to whether the child is suffering or is likely to suffer significant harm, and to this end, the appropriate authority may secure an order from the family court for emergency protection of children where and when necessary. The Act additionally imposes duties on a State government to safeguard or promote the welfare of any child in danger or suspected to be in danger of suffering significant harm within its jurisdiction.

Part V (Sections 50-52) empowers a Child Development or Police Officer or any other authorized person to bring a child in need of care and protection before a court for a corrective order, if he has reasonable grounds for believing that the child is an orphan or is deserted by his relatives, neglected, ill-treated or battered by his parent or guardian or custodian, or found destitute, wandering, homeless, or surviving parent undergoing imprisonment, mentally disordered, or otherwise severally handicapped; or found begging for alms, in company of a reputed/common thief or prostitute, or otherwise beyond parental control or exposed to moral or physical danger.

Part VI (Sections 53-62) provides for the making of care and supervision orders which are designed to place children in need of care and protection in the care of a designated person, appropriate authority or state government for the purpose of safeguarding or promoting the welfare of the child. The Supervision Orders may include Education Supervision Orders.

Part VII (Sections 63-67) empowers the Court to give direction or order for the use of scientific tests, including blood tests, to ascertain whether the tests show that a party to any civil proceedings is or is not the father or mother of that person; and for the taking of blood or other samples from that person, the mother or father or any party alleged to be the father or mother of that person or from any two of those persons,

The person responsible for carrying out blood tests taken for the purpose of determining the maternity or paternity of the person in the proceedings, shall make a report to the court stating the result of the tests, and indicating whether the party to whom the report relates is or is not the father or mother of the person whose paternity or maternity, as the case may be, is to be determined, and the value, if any, of such a result. The report shall be received by the court as evidence in the proceedings of the matters stated in the report.

Consent is required to be obtained from any person responsible for the child or the legal guardian if the child is under sixteen years, or is mentally retarded, or is incapable of understanding the nature and purpose of the scientific tests before such a scientific sample is taken from him or her. The appropriate minister is empowered by the Act to regulate the taking, identification and transporting of the scientific samples.

Part VIII (Sections 68-81) deals with possession and custody of children, within the context of the acquisition of parental or quasi-parental authority over children. Where the father and mother of a child were not married to each other at the time of the birth of the child, the family court established under section 153 of this Act may on the application of the father or mother, order that he or she shall have parental responsibility for the child, or the father and mother may by agreement have joint parental responsibility for the child.

The fact that a person has, or does not have, parental responsibility for a child shall not affect any obligation which he may have in relation to the child, including a statutory duty to maintain the child.

The court may make an order as it may deem fit to ensure that the child is brought up in the religion in which the parent requires the child to be brought up, on the application by the parent for the production or custody of a child if it is of the opinion, that the parent ought

not to have the custody of the child, and that the child is being brought up in a different religion other than that in which the parent has brought up the child.

The appropriate Minister may, by order, notwithstanding any customary law to the contrary, prohibit the giving or acquiring of the custody, possession, control or guardianship of a child or the removal of a child from any part of a state. It shall be a defence to prove that the child concerned was acquired or given in accordance with customary law, provided that the customary law is not repugnant to natural justice, morality or humanity or inconsistent with any written law.

Part IX (Sections 82-92) provides for guardianship of children, which is also another way of acquiring parental responsibility for the child. The parents of a child shall have guardianship of the child and, in the event of the death of a parent; the surviving parent shall be the guardian of the child. Where the parents of a child are not fit to be guardians of a child jointly or severally, the court shall, on application of a member of the family or an appropriate authority, appoint a person to be a joint guardian with the parent (s) of the child.

Part X (Sections 93-99) deals with ward-ship, which is a device by which a child is made a ward of court, notwithstanding that the child continues to remain with his parents or under the supervision of a child development officer or some other authority.

Part Xl (Sections 100 -124) provides for fostering of children who are abandoned by their parents, or where an orphaned child is deserted by his relatives, or voluntarily presented by his relatives for fostering, or where neglected or ill-treated by the person having care and custody of him; or has a parent or guardian who does not or cannot exercise proper guidance over him; or is found destitute or is found wandering, has no home or settled place of abode, is on the streets or other public place, or has no visible means of subsistence. The court may dispense with any consent required if it is satisfied that the person whose consent would have been required has abandoned, neglected or persistently ill-treated the child; or cannot be found or is incapable of giving his consent or is unreasonably withholding his consent. Furthermore, the Act prohibits the following acts: receiving money or reward as inducement to foster a child; the taking or sending of a fostered child out of jurisdiction or Nigeria; withdrawal of a child from the care of the applicant without the leave of the court.

Part XII (Sections 125-148) provides for adoption, with the establishment of adoption service nationally and clear specifications for the mechanisms and procedure for adoption, including a well-articulated in built monitoring mechanism, which has led to restrictions on inter-state adoptions. A child may be adopted if the parent(s) or guardian consents to the adoption; or the child is abandoned, neglected or persistently abused or ill-treated, and there are compelling reasons in the interest of the child why he should be adopted. A court order allowing the adoption of a child may be granted to: a married couple where each of them has attained the age of twenty-five years, and they are jointly authorised by order to adopt a child; or a married person who has obtained the consent of his spouse; or a single person of thirty-five years old provided that the child to be adopted is of the same sex as the person adopting; and that in all the above cases, the adopter (s) shall be persons found to be suitable to adopt the child in question by the appropriate investigating officers.

The CRA provides for the establishment of the Family Court, Child Minding or Day Care Centres and Allied Homes under Parts XIII to XIX (Sections 149-203). Under part XIII of the Act, the Family Court, which will operate at the High Court and Magisterial levels, has been vested with the jurisdiction to hear all cases in which the existence of a legal right, power, duty, liability, privilege, interest, obligation or claim in respect of a child is in issue, and any criminal proceeding relating to any offence committed by a child. The court is constrained in all proceedings to be guided by the "principle of conciliation of the parties" involved or likely to be affected by the results of the proceedings including the parents or guardians of the child.

Part XV (Sections 171-185) provides for State Government support for children and families, including the provision of a range of services appropriate of the welfare and

upbringing needs of children including further accommodation and maintenance for children looked after by it, as well as provision of advice and assistance for certain categories of children.

Much along the principle of creation of institutions for servicing the needs and welfare of the child, the Act, under Part XVI (Sections 186-190), provides for the establishment, registration, regulation and monitoring of Community Homes; Part XVII (Sections 191-194) similarly provides for Voluntary homes and Voluntary Organisations; Part XVIII (Sections 195-197) of the Act provide for Registered Children's Homes, while Part XIX (Sections 198 to 203) provides for the supervisory functions and responsibilities of the minister having responsibility for children in relation to the various children's Homes, which includes monitoring, provision of financial support, research and returns of information on the activities of these homes.

Part XX (Sections 204-238) of the Act provides for Child Justice Administration, which will now replace the Juvenile Justice Administration, which has been in existence for several decades in Nigeria. The provisions in this part prohibit the subjection of any child to the criminal justice process, and guarantees the due process to any child subjected to the Child Justice system under the Act at all stages of investigation, adjudication, and disposition of the child. In this regard, the Act has sought to apply (the principles contained in the UN Standard Minimum Rules for the Administration of Juvenile Justice (otherwise known as the Beijing Rules) in Child Justice Administration in Nigeria.

The functions of the Committee, among others, are to initiate actions that shall ensure the observance and popularisation of the rights and welfare of the child as provided for in the Act, the UN Convention on the Rights of the Child, the OAU Charter on the Rights and Welfare of the Child, the Dakar Consensus and National Programme of Action, the Declaration of the World Summit for Children, and such other international instruments relating to children to which Nigeria is a signatory; continually keep under review, the state of implementation of the rights of the child; prepare and submit periodic reports on the state of implementation of the rights of the child to the Federal Government, African Union, ECOWAS and the United Nations.

Finally, Part XXIV (Sections 272-279) of the Act variously provides for service of documents, supremacy of the provisions of the Act over those of all other laws relating to children in cases of inconsistency, interpretation and citation of the Act. The Act has eleven Schedules which contain rules for regulating the functioning and management of the various mechanisms and institutions created under the Act.

The Child Rights Act provides for a ten-year sentence for the trafficking of children for the purposes of hawking, begging, prostitution, pornography, labour, under slave like conditions and activities related to illicit drugs.

Conclusion

In this paper the writer has examined the legal framework for the protection of child rights in Nigeria. The Nigerian Child Rights Act was also considered in detail. It is evident from the above overview of the rationale, structure and contents of the Child Rights Act 2003, coupled with the analysis of state obligations to promote and protect children's rights, that in its rights/responsibilities approach, the Act is constitutionally and culturally sensitive, progressive, compatible, relevant, problem solving and above all, in the best interest and welfare of the Nigerian Child.

Selected Bibliography

1. *Convention on the Rights of the Child.*
http://www.hakani.org/en/convention/convention_rights_child.pdf
2. *Nigerian Child Rights Act, 2003.*

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HISTORICAL EVOLUTION OF THE LAW

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Abstract

*The entire community acted according to these rules because their disobedience had an influence on the survival of the entire community, as they had a powerful mystical and religious character. Sanction measures evolved along with the evolution of communities and they were applied to individuals who disobeyed and broke these rules. Thus, the first forms of human community used the death penalty (blood revenge[1]) as means of punishment for serious violation of the rules of coexistence. Later on, death penalty was replaced by the individual`s expulsion from the community and as communities evolved, material redemption was used instead of expulsion. The first judicial norms (the germs of law) developed among these social cohabitation, organization and behaviour rules. Judicial norms differed from other rules due to their compulsory character and by appeal to the coercive force of the community when they were broken by certain individuals. The change of social, customized norms into judicial norms and the emergence of law as independent entity take place along with the occurrence of state and public power rooted in the Greek – Roman Antiquity. It has been set that law is a social phenomenon incidental to human society; thus, Romans have expressed this statement through the phrase: "**ubi societas, ibi jus",** namely law occurs along with the society. Law, like society is not a static, immutable entity issued once and for all; they are under constant development and social-historical evolution. As social phenomenon, social law experiences a constant historical evolution, bearing the mark of historical periods and cultural, spiritual and religious features of nations.*

Keywords: **custom, social norm, juridical norm, regulation**.

Introduction

Man is a social and sociable creature whose place in within a community. Thus emerge the needs for organization, order, discipline, all leading to the occurrence of behaviour rules, to sets of norms that would harmonize the individuals` interests to the interests of the community as part of the collective interest. Along with the evolution of human society and its organization in families, races and tribes, we witness the emergence of first behaviour rules embedded in skills, habits, customs, etc. The entire community acted according to these rules because their disobedience had an influence on the survival of the entire community, as they had a powerful mystical and religious character.

1. The law classification

Behaviour rules have developed and evolved along with the evolution of human communities, changing into social norms of cohabitation, organization and behaviour. The

[11] see I. Craiovan, *Teoria generala a dreptului,* Ed. Sibila, Craiova, 2009, pp. 11-15.

evolution of the community brought about the evolution of penalties applied to individuals who disobeyed or broke those rules. Thus, the first forms of human community used the death penalty (blood revenge[2]) as means of punishment for serious violation of the rules of coexistence. Later on, death penalty was replaced by the individual`s expulsion from the community and as communities evolved, material redemption was used instead of expulsion.

The first judicial norms (the germs of law) developed among these social cohabitation, organization and behaviour rules. Judicial norms differed from other rules due to their compulsory character and by appeal to the coercive force of the community when they were broken by certain individuals. The change of social, customized norms into judicial norms and the emergence of law as independent entity take place along with the occurrence of state and public power rooted in the Greek – Roman Antiquity. It has been set that law is a social phenomenon incidental to human society; thus, Romans have expressed this statement through the phrase: *"ubi societas, ubi jus",* namely law occurs along with the society. Law, like society is not a static, immutable entity issued once and for all; they are under constant development and social-historical evolution. As social phenomenon, social law experiences a constant historical evolution, bearing the mark of historical periods and cultural, spiritual and religious features of nations. Over time there have been several theories on the classification and ordering of the law. Some of them are listed below:

– a theory centred on the basic characteristics of form and content of the law classifies it into law systems or law families. For instance, the Roman-Germanic law system founded on the Roman Law and blended with German, Spanish, French, etc. doctrine; the common-law system founded on the English Law, etc.

– another theory founded on the chronological and historical criterion of the emergence of judicial norms groups the law in types of law. Thus, the Marxist Theory mentions four types of law: slave-owning, feudal, burgher and proletarian (socialist). The following classification of types of law can be taken into consideration:

- incipient law (early law) typical for the primitive society;
- Medieval law typical for the Middle Ages;
- modern law typical for the beginning of Capitalism;
- contemporary law which tends to share common features due to international public and private law but can still be grouped into:
  - the law of democratic societies;
  - socialist law;
  - the law of developing countries;
  - community law, etc.

1.1. The factors which influence the law and its judicial norms

The analysis of factors which influence the judicial norms of the law involves the identification of causes and metrical forces that generate it and determine a judicial regulation or another. Various concepts and philosophical theories have sought to identify these factors, referring to politics, morality, ideology, economy, etc. Thus, there are the following factors:

a) *geographical, demographic, biological factors where human existence develops*

These factors influence judicial norms to a certain extent.

See the differences between judicial norms of overpopulated countries and those of underpopulated ones, between states placed in arid and dry areas and those placed in wet, green areas.

b) historical, ethnical, national factors

These factors take into account historical conditions and the ethnical-national peculiarities of population. See the differences between states with homogenous ethnical structure and those with multi-ethnical population or consisting of several minorities.

[2] see I. Craiovan, *Teoria generala a dreptului,* Ed. Sibila, Craiova, 2009, pp. 11-15.

c) social-economic factors

These factors are determined by the level of economic development, the nature of property forms, the structure of social layers, professional categories of the society, etc. See the effort made by Romania to create the legal framework for economic reformation after the shift to a market economy. We can notice that there is interdependence and mutual influence between economy and law and the role of law in regulating social relations increases along with the historical development of a society.

d) political factors

These factors play a determining role in the development of judicial norms in a certain society. Changes in the political regime in former socialist states after the fall of totalitarian regimes had an overwhelming consequence on all branches of law, especially on constitutional law.

e) cultural – ideological factors

These factors sum up the artistic, cultural, spiritual creation, ideology and religion which will occur in judicial norms of all branches of law in a society at a certain point. (called the reference point).

f) international factors

These factors refer to the international situation, the relationship with the neighbouring countries, the state`s relationship to international institutions, etc., factors with a powerful influence on the judicial norms (international public and private law, diplomatic law, etc.).

The sum of these factors influences to a larger or smaller extent the elaboration and evolution of judicial norms of a society at a certain reference point. But specialists in judicial norms consider that the fundament of law in a society is the human factor in his complexity and dynamics of his features and relationships. Thus, the needs, interests, aspirations and actions in various situations (citizen, owner, public servant) have to be taken into account. This factor along with other factors will bring about the elaboration, transformation and replacement of judicial norms with newer ones and thus determine the evolution of law in a society.

2. The functions and finalities of law

2.1. Law as independent institution

The core of law can be expressed in terms of will and interests of a society at a certain reference point. In law, the role of will has a double significance. It is the general will of social classes or even the society`s, governed by general interests and made official by the state as a guarantor for law obedience. On the other hand, it is the individual`s, the citizen`s will visible in the process of law application.

Law can be presented in various ways. It is the product of social deeds and the man`s will, a historical phenomenon and normative order, an aggregate of will acts and authority, of freedom and constraint.[3]

The problem with defining law is not of mere theoretical importance but it has also practical implications. As an author noticed, the legal advisor has to seek solutions and not aspects related to the definition of law and its sources of knowledge. But how the legal advisor uses the technique, his horizon and the quality of approached solutions depend on the answer to these issues. Kant, in his work "Metaphysical Elements of Justice" drew attention upon the fact that solution in law, according to the text of positive law, issues the question: what is justice, what is the law itself?

Those who study law have to accept the pluralism of answers, that several definitions of law are available, their variety and relativity but also their tendency to present the core of law. Their perennial character is marked by a series of objective and subjective factors such

[3] See Sofia Popescu, *Conceptii contemporane despre drept,* Ed. Academiei, Bucharest, 2010, pp. 74-75.

as: historical time, philosophy of the period, various judicial movements and law schools as well as the author`s personality.

In this perspective, law as it has been seen throughout the years is not mere historical illustration but a necessary endeavour for the understanding of its complex significances.

In judicial writings, authors have tried to group the definitions of law and therefore in 1985, J.F. Bergel`s work "Theorie general du droit" classifies them as follows:

1. Definitions of formal – normative type, which present law as an aggregate of behaviour rules which regulate social reports in a more or less organized society; their obedience is ensured by public constraint, if necessary".

2. Definitions of substantial type – they aim the reason of being, the origin, justification and conclusiveness of law.

Definitions given by different authors are undoubtedly very significant for the judicial beliefs of the author, thus the famous philosopher Immanuel Kant defines law as "the sum of conditions when an individual`s free will can coexist with everyone`s free will according to an universal law of freedom."

A remarkable contribution to the development of general theory of law was made by Mircea Djuvara (1886-1945). He considered that "law is a product of human reason no matter how rudimentary it was in primitive societies and the manner law functions is the result of this product".

Professor Djuvara classifies law in: rational law and positive law. Rational law involves abstract judgements and results in appreciations on what is just or unjust, legal or illegal.

Positive law is represented by the law practiced in society and is contained by bills, customs, jurisprudence and other sources. The Romanian recent judicial doctrine through the voice of professor I. Ceterchi defined law as "the system of behaviour norms, written or acknowledged by the state, which guide human behaviour according to the social values of a society, setting rights and judicial obligations whose obedience is enforced by public power, if necessary (represented by the state and its institutions).

2.2. The finalities of law

Professor Nicolae Popa defines law as "an aggregate of state-guaranteed rules whose purpose is to organize and discipline human behaviour in the main relationships of a society, in a freedom-governed climate that protects human rights and social justice". After analysing various definitions of law issued throughout the years, we can list its main characteristics. Thus, law has a:

a. social character because it places the human being in relation and interactivity with another human being.

b. anti-entropic character, namely its ability to oppose to disaggregation, disorder and social conflicts. Law has always been a regulating and ordination factor in the society because it confers certainty, peace, safety and protection to the people who obey it.

c. normative character because it represents what is and what should be in a society in the form of specific, general and impersonal rules.

d. imperative character, characterized by the provision of judicial norm; the provision must be obeyed by all people and its disobedience will be punished by the coercive force of the state (through its institutions).

e. value character which is generated, structured and directed in relationship with other values of the society, according to historical time it has been issued.

f. educational character which involves its ability to develop a collective but also compelling relationship to those who break the law

g. architect of social life characterized by its ability to accustom to good discipline and educate the society`s behaviour so as to respect and defend social values.

h. historical character which is represented by the influence of spatial-temporal coordinates upon judicial norms and law in general. Thus, law is subjected to historical

evolution, judicial norms are specific configurations of one country or another; it is influenced by the historical period it was issued in because of the influence of natural, social, economic, cultural, political and international factors.

The functions and finalities of law are complex, dynamic and contradicting. They sum up several ways, manners and moral, cultural and normative mechanisms through which society imposes the individual (all members of a society) a series of constraint and interdictions. Thus, the individual has to obey norms and basic values promoted and defended by the society.

This process takes place under social control which identifies the main mechanisms and levers by means of which society ensures the social cohesion of its members, the stability and functionality of its institutions.

The term "social control" was introduced into the vocabulary of judicial sociology by the American school of "sociological jurisprudence". It stipulates that law has an important role and it is considered the most perfectible and complex manner of social control. The sociological theory of law considers it highly dependent on the global social system of a society. The functions of law have been defined as fundamental directions or orientations of the judicial mechanism. The whole system (norms, institutions of law) along with institutions authorized by the society[4] are involved in achieving these directions.

The Italian professor V. Ferrari[5] considers that law as three may functions:

1) social regulation
2) conflict solving
3) legitimation of power

Professor N. Popa believes that law fulfils the following four main functions:

1) institutionalization and judicial formalization of social-political organization
2) preservation, defence and guarantee for the fundamental values of a society
3) rule over society
4) normative function

Law as part of the social system is perfective. It is subjected to constant changes and its positive effects on the social life and economic, administrative and political activities of a society are visible.

There are also cases when the relationship between the law and the social system is subjected to severe disturbing phenomena. They can generate real legal dysfunctions[6] represented by the law`s impossibility to express itself efficiently or by distorting the law. The situations can be the following:

1. when law misses from social relations or from fields where it should be used. The phenomenon was analysed by the French Professor J. Carbonnier and called "non-law" phenomenon. It can have the following characteristics: self-limitation of law in time and space, namely judicial activity is not enforced on certain days, holidays or at night. For example: trials are not held on legal holidays, houses are not searched during the night, etc.
2. lack of validity and efficiency. These causes can be determined by internal or external causes, in situations when laws do not take into consideration the technical legal conditions or certain judicial principles. Here count also laws that face public resistance or have lost their object, thus becoming obsolete.
3. the existence of judicial norms that affect seriously the social values and even the notion of social justice (unjust law).

[4] see N Popa, *Teoria generala a dreptului,* Ed. Actomi, Bucharest, 1996, p. 80.
[5] see V. Ferrari, *Funzioni del Diritto*, bari, 1987, p. 25.
[6] see I. Craiovan, *Teoria generala a dreptului,* Ed. Sibila, Craiova, 2009.

4. repressive (oppressive) law when the harmful effects of unjust judicial norms are experienced by certain social classes or categories, thus violating the human fundamental rights and freedom[7].

We need to have a closer look on the finalities of the law in order to be able to establish its role, importance and place in the society. The understanding and analysis of law finalities means presenting its reason of being, goal and ideals as well as its development tendencies.

Conclusions

With the evolution of human society and its organization in families, races and tribes, we witness the emergence of first behaviour rules embedded in skills, habits, customs, etc. The entire community acted according to these rules because their disobedience had an influence on the survival of the entire community, as they had a powerful mystical and religious character. Sanction measures evolved along with the evolution of communities and they were applied to individuals who disobeyed and broke these rules. Thus, the first forms of human community used the death penalty (blood revenge[8]) as means of punishment for serious violation of the rules of coexistence. Later on, death penalty was replaced by the individual`s expulsion from the community and as communities evolved, material redemption was used instead of expulsion. The first judicial norms (the germs of law) developed among these social cohabitation, organization and behaviour rules. Judicial norms differed from other rules due to their compulsory character and by appeal to the coercive force of the community when they were broken by certain individuals. The change of social, customized norms into judicial norms and the emergence of law as independent entity take place along with the occurrence of state and public power rooted in the Greek – Roman Antiquity. It has been set that law is a social phenomenon incidental to human society; thus, Romans have expressed this statement through the phrase: *"ubi societas, ibi jus",* namely law occurs along with the society. Law, like society is not a static, immutable entity issued once and for all; they are under constant development and social-historical evolution. As social phenomenon, social law experiences a constant historical evolution, bearing the mark of historical periods and cultural, spiritual and religious features of nations.

Bibliography

1. Banciu, D., *Control social si sanctiuni sociale,* Ed. Hyperion, Bucuresti, 2012, p. 10
2. Craiovan, I., *Teoria generala a dreptului,* Ed. Sibila, Craiova, 2009.
3. Djuvara, M., *Teoria generala a dreptului,* Bucuresti, 1930.
4. Popa, N., *Teoria generala a dreptului,* Ed. Actomi, Bucuresti, 1996, p. 80.
5. Popescu, S., *Conceptii contemporane despre drept,* Ed. Academiei, Bucuresti, 2010, p. 74-75.

[7] See D. Banciu, *Control social si sanctiuni sociale,* Ed. Hyperion, Bucharest, 2012, p. 10

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THE CRIME INVESTIGATION ACTIVITY OF THE BORDER POLICE

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Abstract

Following analysis, it has been concluded that in order for the criminal prosecution activity to become more effective, legislative amendments are required that would allow the activity of border police officers to be carried out under the exclusive control of the prosecutors.

Ministry representatives claim that the effectiveness of the judicial police is diminished because of their double subordination and that the proposed legislative amendments allow for a clear delineation between judicial and administrative functions and guarantee the status of the police officers in the border police, whose professional career will depend exclusively on how their activity is evaluated by the magistrate overseeing the prosecution.

Keywords: **investigation, crime, judicial police, police officer, criminal prosecution, information.**

Introduction

Taking as a starting point the perception of the phenomenon's development in its essence, of course, all rules and relationships that govern this complex activity have room for improvement in order to adapt themselves to the current criminal trends in the field.

This research paper is primarily intended as an accumulation of knowledge on European realities in the field, and secondly as an identification of international and national rules, being aimed at identifying the gaps and issuing concrete proposals for the improvement of the efficiency of the border police activity, proposals for the improvement of the legal, institutional and procedural and action-taking framework, all of these on an international and European level.

The border police, whose existence is necessary in all countries, cannot, however, ignore or neglect democracy. Indeed, the organization and operation of the police bodies has been and still is one of the capital issues on which the democratic or totalitarian nature of a State depends.

However ideally organized the border police, their activity depends to a large extent on the professional training and honesty of officers. It is a truth rooted in the development of law and the administration science that public services are not worth anything if the officials are not skilled, well-trained and loyal to their office.

In connection with the border police, which are the main internal order authority within a State, there has always been confusion and a hateful mentality. Even today there is the opinion that the police are meant to protect the political supporters of the government and to persecute their adversaries, which is an outdated concept. The border police must ensure the satisfaction of all citizens and normal progress towards democracy in Romania, at present, and even with greater force in the future.

Freed from pressures or political influence, the border police must only obey the law and truth, while enjoying greater dignity.

It is the status of the Romanian police officer (rights, obligations and responsibilities) which determines whether we live or will live in a state of disorder or tranquillity. In other

words, by the way in which the police are organized and operate, one can determine whether our society is full of virtue or loaded with vices or bad habits.

In the increasingly dynamic pace of life today, more and more dominated by the agitation of national, social, political and economic unrest, and on the other hand, the resurgence of crimes of all kinds, police tasks are augmented and become increasingly difficult. In all their undertakings for the exercise of their profession or in social life, police officers should know that there is no other judge for them but the law and the community they serve.

According to the widely accepted international norms, the police must provide a guarantee of the rights and freedoms of individuals, their property, public order and the institutions established by the Constitution.

In exercising their duties, the police are to carry out their missions in compliance with the Universal Declaration of the Rights of Man and the Citizen. Therefore, they are available to any natural or legal person under the conditions prescribed by law.

Border Police are organized hierarchically and are under the political authority of the Minister of Internal Affairs and the administrative authority of the chief of the General Inspectorate of Romanian Border Police.

Placed in the public service, police officers must have an exemplary conduct, show absolute respect for the individual, regardless of their nationality or origin, social condition or political, religious or philosophical convictions.

The police officer is obliged, even outside office hours, to intervene on his/her own initiative in order to help any person in danger, to prevent or stop any act likely to disturb public order, to protect the individual, the community and property.

Given the network of professional relationships, the Public Ministry has proposed several variants for taking over the judicial police, such as administrative control, the relocation of police officers within the Prosecutors' Offices or passing over the duties regarding the police officers' professional career to the competence of this institution.

Following analysis, it has been concluded that in order for the criminal prosecution activity to become more effective, legislative amendments are required that would allow the activity of border police officers to be carried out under the exclusive control of the prosecutors.

Ministry representatives claim that the effectiveness of the judicial police is diminished because of their double subordination and that the proposed legislative amendments allow for a clear delineation between judicial and administrative functions and guarantee the status of the police officers in the border police, whose professional career will depend exclusively on how their activity is evaluated by the magistrate overseeing the prosecution.

Mainly, the observations of the Prosecutor's Office attached to the High Court of Cassation and Justice are based on the fact that it is essential to differentiate between the police structures with administrative duties and the judicial police, the latter structure having the task to find and track any criminal offence, in compliance with the rules of criminal procedure, and to enforce the measures ordered by prosecutors[1].

One solution would be to relocate police officers to the prosecutor's offices within the Public Ministry. The solution is similar to that currently regulated at the National Anticorruption Directorate, which has proven effective, on condition that coordinating prosecutors annually fill in assessment sheets concerning the judicial police officers, sheets that should be taken into consideration in the final assessment carried out by the professional chiefs.

Another solution could be that these workers of the judicial police should keep their position in the specialized structures of the Ministry of Administration and Interior, but the

[1] Mateaş Florian - *Poliţia de Frontieră Română – Evoluţie şi perspective" (Romanian Border Police - Evolution and Perspectives)*, Editura (Publishing House) Pro Universitaria, Bucureşti, 2007, pp.67

professional assessment of workers in the judicial police should ONLY be within the competence of prosecutors, who exercise the coordination, control and conduct of criminal investigation activities.

All the issues mentioned above must also be considered in light of the new European context, so that judicial cooperation in criminal matters has become, since the entry into force of the Treaty of Maastricht, in November 1993, a matter of high priority for all Member States of the European Union and the Council itself. Cooperation between Member States in the field of justice and internal affairs is conducted in the so-called third pillar of the European Union. The idea of creating an area of freedom, security and justice in Europe becomes more of a reality every day in the European Union and the Council has adopted in recent years a significant number of legal instruments, which either have already been implemented in the Member States or their implementation in national legislation is in progress. Many new projects are also under preparation in the various working groups of the Council. The entry into force of the Amsterdam Treaty on 1st May 1999 has strengthened this development. In 1997 the European Council adopted an action plan in order to combat organized crime, which was prepared by a high-level group of experts from the Member States. Several of the recommendations of this expert group formed the basis of the action plan to improve the standards of cooperation between judicial authorities in criminal matters. On the basis of this action plan, the Council adopted on 29th June 1998 a Joint Action to create a European Judicial Network. This network was officially inaugurated on 25th September 1998 by the Austrian Minister of Justice, who held the European Union Council Presidency. They have regular working meetings and take an active role as intermediaries, their precise task being to facilitate judicial cooperation between Member States and provide legal and practical information on mutual legal assistance to those interested in this field and the general improvement of judicial cooperation coordination between Member States.

The scientific novelty and originality of the thesis consists in the formulation of certain theoretical and practical conclusions and the submittance of proposals with a view to the future law (de lege ferenda), logically resulting from the investigations carried out, contributing to the completion of the doctrine in the matters concerned, the improvement of the legislation in force, logically harmonized with already existing national and international regulations.

The theoretical importance and applicative value of the work is determined by the possibility of using the proposals. For Romania, which is currently still in a process of reform, all the issues in the study presented are extremely useful in substantiating and directing general and sectoral strategies designed to lead to a legal regulation of the judicial police compatible with those of the European Union countries.

1. Management of criminal investigation activities within the judicial police

Working Methods and Means

Information Gathering

Information is the material of any description, including those derived from observation, stakeout, reports, rumors and other sources. The information itself may be true or false, accurate or inaccurate, confirmed or unconfirmed, relevant or irrelevant. Although the information process requires that information should be stored, organized and reaccessed, the production of valuable information involves much more.

Valuable information is the product resulting from the collection, evaluation and interpretation of data. Thus, valuable information can be seen as information to which something was added. This something added is the result of analysis – an explanation of what the information means.

Valuable information can be general or specialized. Information of general value focuses on a wide range of criminal activities, typical for small police units or areas of

competence. The information of special value focuses on a particular type of criminal activity, such as drug trafficking, industrial espionage or organized crime.

Value-added information has both operational and strategic applicability. The information of tactical value is directed at the objectives of the law enforcement institution in the short term, with immediate impact, consisting of arrest, sequestration or capture. The information of strategic value is related to larger issues and targets, in the longer term, such as the identification of major criminals or criminal groups, projections of the development of certain types of criminal activity and prioritization in the law enforcement activity[2].

For a better enforcement in the field of the police, it is necessary to find out what information and its analysis mean in practical and theoretical terms. They may seem simple activities, and even today there are disputes as to what these terms in the field in which we operate mean.

The concept of gathering and using information to support decision-making, in a structured form, is not new. In order to obtain advantage over an opponent, it is necessary to process the newest and most representative pieces of information, *inter alia*, regarding his/her intentions and capabilities. This rule applies in all fields, be it politics, business, military strategies or information of a criminal nature.

It is a process that has been, is and will be in constant development and evolution, in response to changing socio-cultural, technological factors, organizational needs and new/increased analytical skills.

Analysis of information of a criminal nature

For most people, including investigators, the term evokes images of collation systems used in order to store and reaccess information that we collect about crimes and criminals. As the volume and variety of the information that we have been collecting has increased, we have gradually introduced more complex systems to assist us in storing and revisiting it. In this limited context, the introduction of information technology has been a notable success. The use of computers to store and revisit criminal information is now almost a second nature for operational investigators and there is no doubt that, without this tool, as a unit, we would simply not be able to handle the task of recording and collation criminal information.

SWOT Analysis

In the modern age, anti-crime strategies also resort to forms of analysis-synthesis of the results used in areas other than public order. Studying the entities involved in the fight against crime, we highlight their polarization into two categories: some that gain considerable successes and others that are struggling hard to achieve the desired results or have modest achievements.

Task-force in the current context

TASK-FORCE is a working group created in order to work for the achievement of the same stated goal, consisting of representatives of several entities, which do not necessarily belong to the same area of activity.

Originally introduced by the Royal Navy, the term has now become of "general use" and is part of the NATO-type work standards.

The concept initially came into widespread use in the Royal Navy around year 1941, as a way to increase operational flexibility.

At that time the need for ships of different divisions and squadrons from different countries to collaborate without being united under a single command imposed cooperation in the form of a working group composed of the commanders of various military units, in pursuit of the same purpose.

[2] Mateaş Florian**,** Popescu Cristian, Matei Cristian - *„Investigarea criminalităţii transfrontaliere" (Investigation border crime)* – Editura (Publishing House) M.I.R.A., Bucureşti, 2007, pp. 72.

Many non-military organizations establish at present "working groups" or working groups for temporary activities which, in the past, were carried out by the so-called ad hoc committees.

The undercover investigator

The institution of the undercover investigator was first introduced in Romanian legislation by *Article 21 of Law*[3] *no. 143 of 26th July 2000* on combating the trafficking and use of illegal drugs and *Government Emergency Ordinance*[4] *no. 43 of 4th April 2002* on the National Anticorruption Prosecutor's Office.

Covert actions

A covert action consists in influencing conditions and conduct in forms that cannot be ascribed to the entity under whose auspices it is carried out. Convert actions and the counterintelligence service seek to manipulate and control opponents. One of the main differences between them is that a covert action is usually conducted by players outside the intelligence sphere, whereas counterintelligence concerns staff of the intelligence services of opponents and political leaders. Covert action seeks to influence open values, institutions and instruments or is aimed at state and non-state players.

Body search, house search

In order to ascertain the existence of the facts and factual circumstances which form the subject of criminal cases, as well as the guilt of the perpetrators, judicial bodies carry out a complex evidentiary activity.

Judicial search is part of the investigation procedures used in the management of evidence and material means of evidence by judicial bodies. As an evidentiary procedure, the search is frequently performed in judicial practice, in order to search and seize objects that contain or bear the traces of the crimes committed, material evidence or documents known or unknown by the judicial bodies and which may serve to finding the truth.

In most criminal cases, judicial bodies resort to this evidentiary procedure in order to discover objects, goods, documents and other valuables related to the cases investigated, by means of which they can prove the criminal activity and, therefore, the defendant's guilt.

The effectiveness of the search largely depends on how this activity is planned, prepared and carried out by the judicial bodies, as well as finding the right moment to perform it.

The search must be conducted in strict accordance with the legal provisions, the judicial bodies having the obligation to respect the constitutional rights of the persons investigated and not to obstruct or restrict these rights except to the extent that is absolutely necessary for solving the criminal case.

From the time of perpetration of a criminal offence until the carrying out of the judicial search, generally, a variable period of time passes, which often leads to missing the best operational moment for carrying out this activity. Moreover, within that time period, the evidence sought by the judicial bodies may disappear or be hidden. There is also the possibility that the perpetrator might be informed through other individuals involved in the criminal proceedings (witnesses, accomplices, aggrieved party, etc.) about the activities of the judiciary, which might lead him to concealing, disposing of or destroying the means of evidence necessary in order to solve the case.

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[3] Published in the OFFICIAL JOURNAL no. 362 of 3rd August 2000, as amended and supplemented by: LAW no. 169 of 10th April 2002; LAW no. 39 of 21st January 2003; LAW no. 522 of 24th November 2004.

[4] Published in the OFFICIAL JOURNAL no. 244 of 11th April 2002, as amended and supplemented by: LAW no. 503 of 11th July 2002; LAW no. 161 of 19th April 2003; EMERGENCY ORDINANCE no. 102 of 24th October 2003; LAW no. 26 of 5th March 2004; EMERGENCY ORDINANCE no. 24 of 21st April 2004; EMERGENCY ORDINANCE no. 103 of 16th November 2004; LAW no. 601 of 16th December 2004; LAW no. 247 of 19th July 2005; EMERGENCY ORDINANCE no.120 of 1st September 2005; EMERGENCY ORDINANCE no. 134 of 29th September 2005; LAW no. 383 of 16th December 2005; LAW no. 35 of 1st March 2006; LAW no. 54 of 9th March 2006; EMERGENCY ORDINANCE no. 27 of 29th March 2006.

The concept of judicial search

The search can help solve criminal cases through the objects and documents it may uncover and which may have relevance in elucidating some aspects of these cases. The importance of judicial search as an investigative procedure was underlined in the specialty literature which mentions that this activity provides indispensable evidence, sometimes the only pieces of evidence, necessary in order to solve criminal cases.

Some authors considered that no other activity implies involvement in the most intimate aspects of an individual's life, their rights over real estate property and land, as does the search.

The word "search" (Rom.: *percheziție*) comes from the Latin word "perquiro", which means "to seek", "to look carefully everywhere", designating a particularly important activity within the preliminary criminal investigation. According to Professor V. Manzini, "searches are material researches, that may be conducted through coercion, allowed as exceptions from the normal safeguards of individual liberty, in order to ensure in the process items which might serve as evidence or to arrest the defendant or another person suspected of the crime or fugitive".

According to the definition contained in the Explanatory Dictionary of the Romanian Language, the search is a research done by the prosecution bodies or by the prosecutor against a person (suspected of a crime) or in that person's dwelling, in order to find and collect material evidence of the crime or identify the perpetrator[5].

According to another opinion, house search consists in the inspection and the research of the dwellings of the detainee, his accomplices, his hosts and any other individuals who may hold evidence of guilt.

The legal regulation of the judicial search procedure

The legal regulation of search has undergone significant alterations since year 1990, materialized through the adoption of new regulatory acts in this field: Decree -Law no. 12/1990, Law no. 32/1990, Law no. 104/1992, Law no.141/1996, Law no. 281/2003, Law no. 356/2006 and Government Emergency Ordinance no. 60/2006. These changes were intended to harmonize the provisions of the Criminal Procedure Code with the principles, recommendations and regulations contained in the international criminal justice documents and to transpose into national legislation the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and the jurisprudence of the European Court of Human Rights. The change of substance occurred as a result of these changes consisted in the fact that the judge received exclusive jurisdiction to authorize house search, both in the criminal investigation stage and the trial stage.

According to the previous regulation, the search could also be ordered by the prosecutor during the criminal prosecution stage, and in the case of a flagrant offence or if the person searched consented in writing to the search, no authorization was necessary.

2. Institutions with an indirect role in criminal prosecution

The Romanian Intelligence Service[6]

The Romanian Intelligence Service (SRI) is the national authority in preventing and combating terrorism, as well as in the field of armed attendants aboard aircrafts. It is a complex responsibility that requires concerted actions and measures: information gathering, multisource analysis, monitoring, anti/counter-terrorist intervention, as well as internal cooperation – with public authorities and institutions belonging to the National System for Preventing and Combating Terrorism (SNPCT) – and international cooperation.

[5] Constantin Aioniţoaie, Ion-Eugen Sandu (coordinators) *et al.* - Tratat de tactică criminalistică (Treatise of Forensic Tactics) (2nd edition revised and amended), Editura Carpaţi (Publishing House), Craiova, 1992, p. 207.
[6] www.sn.ro

The Foreign Intelligence Service[7]

The Foreign Intelligence Service (SIE) is the state institution specialized in foreign intelligence regarding national security, Romania's defence and its interests.

The Department of Intelligence and Internal Protection[8]

The Department of Intelligence and Internal Protection is the specialized structure of the Ministry of Internal Affairs which conducts intelligence and internal protection, in order to ensure public order, to prevent and combat threats to national security regarding the missions, the personnel and classified information within the ministry.

The General Anticorruption Directorate[9]

The General Anticorruption Directorate was established under Law no.161/2005 and is the structure of the Ministry of Internal Affairs specialized in preventing and fighting staff corruption within the ministry.

The National Anticorruption Directorate[10]

The National Anticorruption Directorate (DNA) is a prosecuting structure specialized in combating high and medium-level corruption. It was created as a necessary tool in detecting, investigating and bringing to court medium and high-level corruption cases. Through its work, it contributes to reducing corruption, in support of a democratic society that is closer to European values. The DNA, as a structure with clearly defined powers to combat high and medium-level corruption, was created after a model adopted by several European countries – Spain, Norway, Belgium, Croatia. Why was it necessary to create a specialized prosecuting structure for the sole purpose of fighting high and medium-level corruption, as long as petty corruption, or rather, everyday corruption, "counter corruption" is a phenomenon with a stronger impact on the citizens? The answer is the following: corruption at all levels is fueled when corrupt people who have certain levers of power have the feeling that they are above the law, that they are intangible and that society does not have sufficient effective means to prove their criminal activities and hold them accountable. In order to efficiently combat such type of criminality, which is part of the "white collar criminality", it is necessary to have a specialized, independent institution, endowed with the appropriate resources. The concrete results achieved by the specialized institution in combating high-level corruption are meant to discourage corruption at all levels. DNA is an independent entity in its relations with the courts, with the prosecutor's offices attached to these courts, as well as in its relations with the other public authorities.

The Directorate for Investigating Organized Crime and Terrorism[11]

By Law no. 508/2004, the Directorate for Investigating Organized Crime and Terrorism (DIICOT) was established, as a structure specialized in the fight against organized crime and terrorism of the Prosecutor's Office attached to the High Court of Cassation and Justice, through the reorganization of the Department for Combating Organized Crime and Drugs and its territorial structure. The reason for setting up this structure was the formation of an elite corps of prosecutors specializing in investigating crimes of extreme gravity.

The Special Operations Directorate[12]

The Special Operations Directorate is a unit of information, tactical-operational and technical-operational specialized support serving the structures of the Ministry of Internal Affairs, the Romanian Police General Inspectorate and the Public Ministry which seek professional support in handling complex matters in operational situations requiring urgent action or presenting a high degree of risk.

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[7] www.sie.ro
[8] www.dgipi.ro
[9] www.mai-dga.ro
[10] www.pna.ro
[11] www.diicot.ro
[12] www.politiaromana.ro/operaţiuni-speciale

At territorial level, the directorate comprises 14 regional services, distributed according to the Courts of Appeal principle, and 26 territorial departments in the remaining counties of the country.

The Defence Intelligence General Directorate

The Defence Intelligence General Directorate ensures the procurement, processing, checking, storage and recovery of information and data on risk factors and internal and external, military and non-military, threats, that may affect national security in the military field, it coordinates the implementation of counter-intelligence measures and cooperation with national and intelligence services/departmental structures, as well as with those of the Member States, of international alliances, coalitions and organizations to which Romania is part and it ensures the security of national, NATO and the European Union classified information at the level of the Ministry of Defence.

The National Office for Witness Protection[13]

The National Office for Witness Protection is an operational unit of the Ministry of Internal Affairs, it reports directly to the Romanian Police General Inspectorate, having general territorial jurisdiction.

The Interpol National Bureau[14]

The International Criminal Police Organization (O.I.P.C./ICPO) is an intergovernmental institution which provides mutual assistance between the police forces of member states in order to prevent and suppress common law crime; it does not intervene in political, military, religious or racial matters; it respects the sovereignty and independence of each country; it ensures the exchange of police-related information at international level; it identifies wanted criminals with international warrants to their names; it coordinates theactivities of surveillance and catching of international criminals; it informs units specialized in matters related to the theft or loss of foreign identity documents, international drug trafficking, money forgery, auto theft and art theft, etc., in order for them to take operational measures.

Conclusion

Upon request, it requests the information necessary in order to solve certain criminal cases. Interpol National Central Bureaus make up the national fulcrum for international police cooperation. Created in each Member State of the ICPO – INTERPOL, National Central Bureaus are made up of national officials who always act within the legal framework provided by the legislation of their country. Their role is to overcome the obstacles that international cooperation faces because of the difference in structure between national police, language barriers and differences in the legal systems of member countries.

Bibliography:

1. Bălan George – Combaterea traficului şi consumului de droguri prin noile măsuri prevăzute în Legea nr. 143/2000 (Combating Drug Trafficking and Consumption through the New Measures Provided by Law no. 143/2000), in Revista de criminologie, criminalistică şi de penalogie (The Journal of Criminology, Forensic Science and Penology), issue no. 7/2000;
2. Bălan George – Rolul Ministerului Public în luarea de măsuri administrative faţă de străinii care desfăşoară activităţi de natură să pună în pericol siguranţa naţională (The Role of the Public Ministry in Taking Administrative Measures against Aliens Who Carry Out Activities Which May Jeopardize National Security), in Pro Lege, issue no. 2/2005;

[13] www.politiaromana.ro/oficiul-national-pentru -protectia-martotilor.htl
[14] www.mira.gov.ro/biroul-national -INTERPOL.htl

3. Bălan George – Noile tendinţe mondiale în acţiunea politicilor de apărare a securităţii statelor şi de combatere a terorismului (New World Trends in the Action of the State Security and Combating Terrorism Policies), in Doctrină şi Jurisprudenţă (Doctrine and Jurisprudence), issue no. 3/2005;
4. Botoş Ilie – Mecanismele informative de control şi documentare a activităţii circumscrise terorismului (Informative Mechanisms of Control and Documentation of Activities Related to Terrorism), in Pro Lege, issue no. 4/2004;
5. Călinoiu Constantin – Implicaţii politice şi constituţionale ale extinderii Uniunii Europene (Political and Constitutional Implications of EU Enlargement), in Pro Patria Lex, Academia de Poliţie „Alexandru Ioan Cuza" (Police Academy "Alexandru Ioan Cuza"), issue no. 5/2004;
6. Cristescu Doru Ioan – Tehnici de obţinere a materialelor de comparaţie necesare unor constatări şi expertize dispuse cu prilejul investigării infracţiunilor contra securităţii naţionale şi de terorism (Techniques for Obtaining the Comparison Materials Necessary for Findings and Expertise Ordered During the Investigation of Crimes Against National Security and Terrorism), in Revista de criminologie, de criminalistică şi penalogie (The Journal of Criminology, Forensic Science and Penology), issue no. 4/2004;
7. Herghelescu Liviu – Despre posibilitatea instanţei de judecată de a cunoaşte identitatea reală a investigatorului sub acoperire (On the Possibility of the Law Court to Know the Real Identity of the Undercover Investigator), in Dreptul (Law), issue no. 5/2005;
8. Hărăştanu Angela, Predescu Ovidiu – Investigatorul sub acoperire. Rolul instanţelor de judecată privind activitatea acestuia (The Undercover Investigator. The Role of the Law Court with Regard to His Work, in Dreptul (Law), issue no. 5/2004;
9. Gorgăneanu I. Gheorghe – Noi reglementări privind perfecţionarea legislaţiei procesuale penale (New Regulations on the Improvement of Criminal Procedural Legislation), in Revista de drept penal (Criminal Law Journal), issue no. 2/1996, p. 34;
10. Gâdea Cornel – Criminalitatea informatică greu de combătut (Difficult-to-Fight Cybercrime), in Revistă de Criminalistică (Forensic Science Journal), issue no. 5/2000;
11. Kovesi Laura Codruţa – Accesul şi supravegherea sistemelor de telecomunicaţii sau informatice (Access and Surveillance of Telecommunications or Computer Systems), in Pro Lege, issue no. 2/2003;
12. Lascu Laurenţiu – Investigatorul acoperit (The Undercover Investigator), in Revista de drept penal (Criminal Law Journal), issue no. 3/2002;
13. Mateaş Florian - Poliţia de Frontieră Română – Evoluţie şi perspective", (Romanian Border Police - Evolution and Perspectives) Editura (Publishing House) Pro Universitaria, Bucureşti, 2007
14. Mateaş Florian, Popescu Cristian, Matei Cristian - „Investigarea criminalităţii transfrontaliere" (Investigation border crime) – Editura (Publishing House) M.I.R.A., Bucureşti, 2007.
15. Mateuţ Gheorghe – În legătură cu noua reglementare privind înregistrările audio sau video în probaţiunea penală (On the New Regulation regarding Audio or Video Recordings in Criminal Evidence Production), in Dreptul (Law), issue no. 8/1997; 14. Manda Cristina Măria – Globalizarea şi statul naţional (Globalization and the National State), in Revista...
16. Andreescu Anghel, Toma Gheorghe – Conflictele sfârşitului de mileniu (Conflicts at the End of the Millennium), Editura Timpolis (Publishing House), Timişoara, 1998;
17. Antoniu George – Noul cod penal. Codul penal anterior. Studiu comparativ (New Criminal Code. Previous Criminal Code. A Comparative Study), Editura AII Beck (Publishing House), Bucharest, 2004;
18. Banciu Dan, Rădulescu M. Sorin – Corupţia şi crima organizată în România (Corruption and Organized Crime in Romania), Editura Continent XXI (Publishing House), 1994;
19. Bannelier Karine, Christakis Theodoree, Carten Oliver, Delcourt Barbara - Le droit international face au terrorisme (International Law against Terrorism), Cedin, Paris, Cahier internationaux nr. 17, Pedone Publishing House, 2002;

20. Bădescu Mihai – Drept constituţional şi instituţii politice (Constitutional Law and Political Institutions), Editura Lumina Lex (Publishing House), Bucharest, 2001;
21. Bârsan Gheorghe – Securitatea Publică (Public Security), Editura M.A.I. (Ministry of Internal Affairs Publishing House), Bucharest, 2005;
22. Berger Vincent – Jurisprudenţa Curţii Europene a Drepturilor Omului (Jurisprudence of the European Court of Human Rights), 4th edition (transl. Ionel Olteanu, Comei Atanasiu), Institutul Român pentru Drepturile Omului (Romanian Institute for Human Rights), Bucharest, 1988;
23. Bobocescu Vasile – Istoria Poliţiei Române (History of the Romanian Police), Editura Ministerului de Interne (Ministry of Interior Publishing House), Bucharest, 2000;
24. Bulai Constantin - Drept penal. Parte generală (Criminal Law. The General Part), vol. III – Răspunderea penală. Sancţiunile în dreptul penal (Criminal Liability. The Penalties under Criminal Law), Bucharest, 1982;
25. Carp Gheorghe – Terorismul internaţional (International Terrorism), Editura M.A.I. (Ministry of Internal Affairs Publishing House), Bucharest, 2005;
26. Câmpeanu Paul – Legea şi legalitatea în România (Law and Legality in Romania), Editura Antet (Publishing House), Bucharest, 2005;
27. Cochinescu Nicolae – Totul despre Ministerul Public (All about the Public Ministry), Editura Lumina Lex (Publishing House), Bucharest, 2000;
28. Diaconescu Gheorghe, Duvac Constantin - Drept penal. Parte specială (Criminal Law. The Special Part)
29. Noul Cod penal (New Criminal Code), vol. I, Spiru Haret University, Editura Fundaţiei (Publishing House).