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THE PATHOLOGY OF HANDWRITING AS A RESULT OF DRUG ABUSE. A CASE STUDY

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Abstract

The case study highlights the importance of observing the damaged handwriting which occurs in drug abuse. Handwriting of a drug consumer presents certain characteristics which are useful to be known and analyzed by certain specialists (forensic experts, psychiatrists) involved in research in both Criminal and Medical field. Handwriting analysis can become a valuable medical diagnosis tool for monitoring the progress made by drug addicts receiving medication; the conclusions reveal the characteristics of damaged handwriting due to drug abuse, after analyzing several signatures of a 24 year old subject.

Keywords: *pathology, drugs, handwriting, signature, marijuana.*

Introduction

Handwriting, this "fine seismograph", tends to be sensitive to external agents. Drugs and hallucinogens of all kinds, as well as alcohol, leave their mark on the neuromuscular system.

Although their effects may vary, there are certainties about a couple of issues. Factors which can create changes in the individual’s handwriting are: the handwriting’s degree of development, changes caused by writing with the "hand driven ", alcohol, poisoning, drug abuse, drugs, toxic substances, stress; alteration of handwriting as a result of physical agents such as age, fatigue, decrease or loss of vision, amputation of fingers or hand[1].

Heroin, cocaine (and their varieties) addicts, same as alcoholics, feel better initially after taking the drug, as the neuromuscular acuity and their performance is improved; The opposite state is abstinence or withdrawal. Studies have shown that under the influence of drugs like LSD -25 and BOL - 148 the handwriting and signature suffer changes similar to those altered due to alcohol consumption.

Frequent cases occur on handwritten wills or document signatures, shortly before or after the ingestion of an overdose that eventually killed the victim. Checks and receipts are sometimes signed under the influence of drugs, but after recovering to normal, the person it was no longer to remember all that they have signed.

The Use of handwriting analysis studies on drug behavior

Studying the handwriting of drug users is useful for highlighting both health state after ingesting hallucinogenic substances and also the patient’s progress over the treatment

[1] Nicoleta-Elena Buzatu, “Drugs Consumption - a Handwriting Modifier”, *International Journal of Criminal Investigation* vol. 2, Issue 4/2012, p. 274.

administrated by the doctor. We know that toxic ingestion, whether it is inhaled or administrated intravenously induces changes in the central nervous system (CNS), affecting the writing mode - the physiological mechanism of writing is the result of temporary nerve connections and conditioned reflexes, drugs acting as an external factor which corrupts the way letters are made.

Altered writing will depend primarily on age and also other factors (internal and / or external) that may change the individual's handwriting. Internal factors refer to the pre-existing neuropsychiatric diseases - such as Multiple Sclerosis (MS), paralysis of a limb, major depression, schizophrenia, etc. Also, if mixing alcohol with drugs or antidepressant medication, a sample of such writing will provide an increased degree of damage. A similar situation can occur if studying samples of letters from an elderly person, be it only occasionally consuming hallucinogenic substances. In such case, the deterioration factor (drug) overlaps the other factors previously occurred and would enrich the writing's damage degree.

If we refer to the consumers' age, it should be noted that the degree of alteration of the handwriting is proportional to its stability. We know that writing is stabilized around the age of 18-20 years along with achieving maturity of the individual, the writing becomes automatic and movements are simplified.

Also important is the frequency, on which an individual writes - in recent years, due to the increasing role of computers in everyday life, there are fewer and fewer jobs where employees are forced to carry documents in hand. Under such circumstances, we conclude that future graphic expertise and handwriting analysis will be performed on samples of already having a preexistent deterioration. Nowadays, the use of drugs has increased significantly among Romanian young people.

It should be noticed that the process of detoxification is not always successful; studying the patient's handwriting during the detoxification treatment and after its completion will gradually reveal improvements in letters' execution in proportion to the progress made by the individual.

Regarding the external factors, we refer to the conditions in which the handwritten test was conducted: the existence of a proper scriptural instrument, appropriate support, other optimal conditions (staying seated, absence of disturbances such as loud noises, etc.).

In order to complete the assessment of the effects of drugs on the graphic sample it would be needed for each investigated person and each kind of drug substance, to analyze handwriting into four distinct phases: 1. before drug use, 2. during narcotic administration 3. in withdrawal stage 4 in the process of detoxification. Such research should be extended to a large number of subjects, in order to reach conclusive results, to be statistically significant for to be able to use them in future practices.

Regarding the deterioration of the handwriting, there are always cases arguing about the degree of impairment of drug - affected writing or on the time of detoxification or withdrawal phases. Problems arising in the field of handwriting analysis are huge for the following reasons:

a) because of the diversity of the phases in which writing samples were obtained - it's almost impossible to have samples of subjects in the same psychophysical condition; b) for the comparative samples dating from the period prior to administration of the drug, technical obstacles may exist, and the procedure, in particular where the script refers to a long period of time - there may also be other internal unknown factors to alter the sample. c) qualitative differences emerging from fulfilling comparison with the result that it could be mistaken for signs of forgery (considering it wrong to be a fake by imitation of the handwriting) or would be difficult to explain without a careful analysis of the sample of handwriting in question that the deterioration is actually the consequence of substance abuse.

General characteristics of writing psychopathology

The deterioration of any handwriting will depend on the dose and type of the administered drug (-taking into consideration also the internal and external factors mentioned before).

After conducting an experiment by Hirsch, Jarvik and Abramson[2] which required doses of LSD, BOL, alcohol, ergometrine, methamphetamine hydrochloride and scopolamine given to subjects, it was observed that under the influence of LSD, alcohol and BOL 's, 60 % of subjects increased their handwriting, while for the remaining subjects the effect was exactly the opposite.

The largest number of errors, cuts, corrections and erasures was highlighted after scopolamine's administration, while after administration of LSD the following issues like: the largest irregularly reflected on font size, also word spacing, slope, and lack of control in the execution of letters occurred.

Another study made by Legge, Steinberg and Summerfield[3] on the effects of different strength NOH doses administration to patients, substance which is known as strong acting anesthetic central nervous system, relevant results have shown such as increasing the baseline length (horizontal dimension words); this could explain why NOH causes a systematic increase in the size of writing that is correlated with the concentration of administered doses, but it suggests that it acts on the neuromuscular system to such an extent that it can achieve rude movements, so the effects being different from the ones caused by the alcohol.

Following laboratory studies which demonstrated that caffeine consumption improves psychomotor performances, writing and signature become smoother and the speed of execution faster, the same effects were obtained after administration of methamphetamine.[4]

High consumption of marijuana[5] (less than 5 cigarettes) has the effect of increasing the size of the letters, paragraphs deviations and careless execution of proper letters, so moderate consumption of marijuana has less visible effects on writing than alcohol.

Variability of subjective reactions to psychotropic stimuli substances is explained with such skill by Hans Gross: "it seems that psychological stability affects the extent and direction of writing which will change after drug ingestion. We have reason to believe that graphical reactions occurred after drug administrations are proportional to the individual's psychological reactions".

Case study on the signature of a Drug consumer

The case study was performed over a 24 years old male **(S.A.)** – occasional consumer of marijuana which had executed several signatures after ingested the specified amount of drug.

A total number of 8 signatures have been analyzed; we can observe the deterioration of the subject's signature in a total time of 4 days. For better observation the grid method was used, applying a transparent grid ruler over every signature (size of a square 5 mm).

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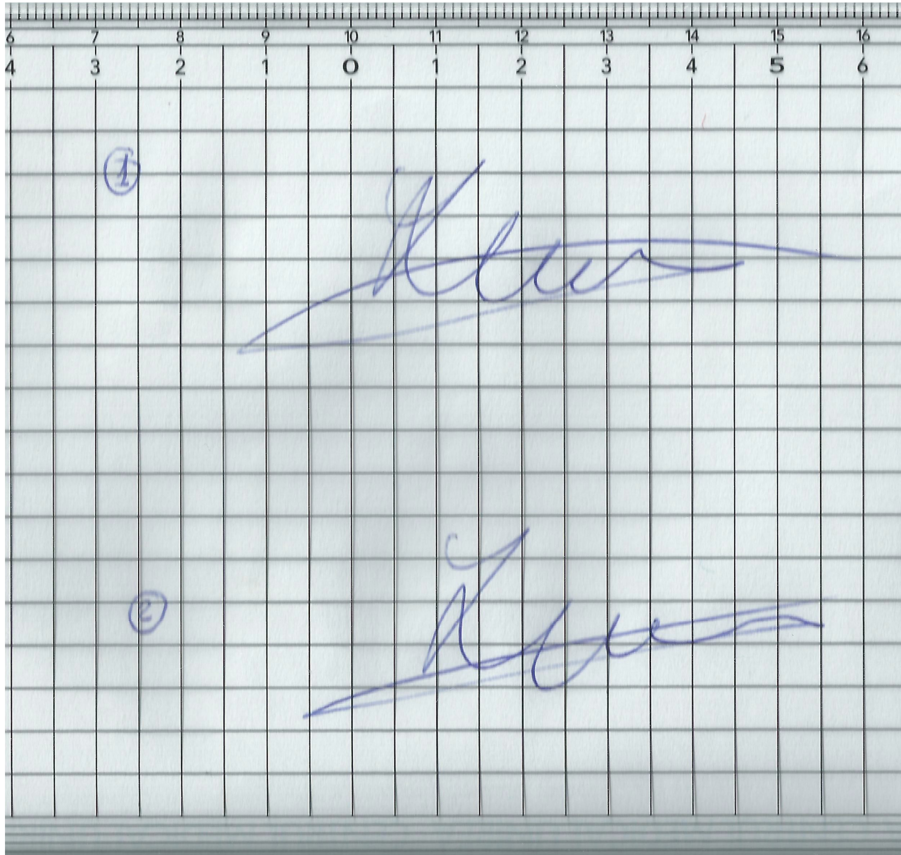
[2] Hirsch, M. W., Jarvik, M. E., and Abramson, H. A., Lysergic Acid Diethylamide (LSD-25): XVIII Effects of LSD-25 and Six Related Drugs upon Handwriting. *Journal of Psychology,*1956; 41: pp 11-22).

[3] Legge, David, Steinberg, Hannah, and Summerfield, Arthur, Simple Measures of Handwriting as Indices of Drug Effects. *Perceptual and Motor Skills,* 1964; 18: pp. 549-558.

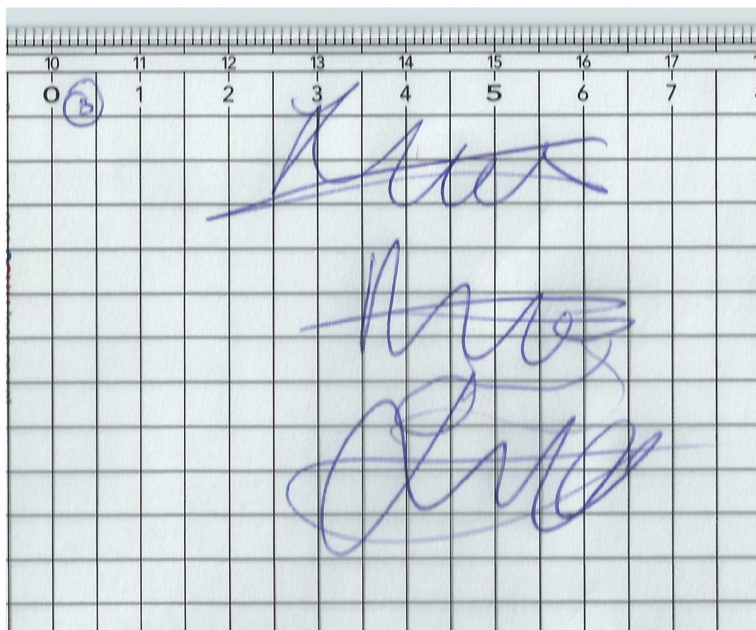
[4] Dhawan, B. N., Bapat, S. K., and Saxena, V. C., Effect of Four Centrally Acting Drugs on Handwriting. *Japanese Journal of Pharmacology,* 1969; 19: pp. 63-67.

[5] Foley, Bobby G., and Miller, A. Lamar, *The Effects of Marijuana and Alcohol Usage on Handwriting.* Presented at the meeting of the International Association of Forensic Sciences (Wichita, KS, 1978).



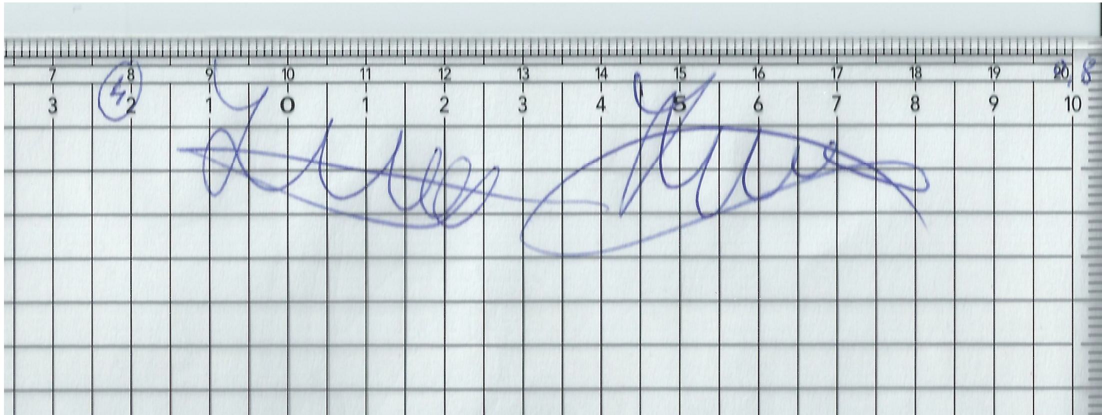
Day 1: Signature made approximately 12 hours after consuming a dose of 0.3 g marijuana;

Day 2: Signature made 7 hours after consuming the same dose;

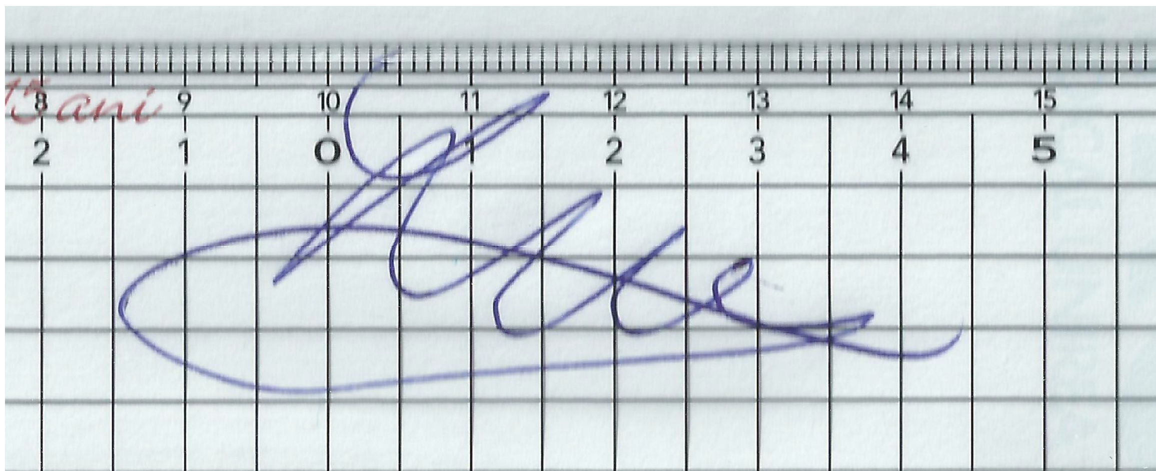


Day 3: Signature made after consuming the same dose; the first signature largely retains its general characteristics, and we observe a slight decrease on the horizontal. When trying to

repeat the signature, the subject fails to properly execute it, his attempt is visible in the next two tries (low speed, lack of coordination, visible tremor). At a superficial forensic examination, the expert may wrongfully consider the 2nd and 3rd attempts as imitations of the first signature.



Day 4: Maintaining the same time schedule as before, but after increasing the dose approximately 3 times than the usual (consuming a total of 0.8 g of marijuana) we observe the signature is performed with great difficulty, requiring two attempts to succeed. The first signature is characterized by downward baseline; by the end of the signature we observe visible failures of execution and a totally low rate of successful achievement.



Signature made by the subject after a period of 2 weeks of abstinence: the baseline maintains a downward baseline and the execution pressure remains high. The execution speed is improved, as well as the coordination movements.

Conclusions

In conclusion, the effects of drugs on the graphic gesture shapes can be briefly classified as: - inconstant pressure; - inconsistency and incoherence in keeping slant left/ right; - performing individual letters with different slants, - sloppiness and mistakes (based on impaired endocrine or muscle spasticity problems); - sudden deviations, irregular amplitudes and vertically - horizontally superficiality and disorder in the general organization of writing in page; - differences in pressure between the upper and the lower zones due to exhaustion and relaxation of muscle tone; - tendency to transform the angular shapes into threaded movements.

Note that general characteristics should always be analyzed after taking into consideration the subject's medical history (previous mental illness or any other diseases that can alter his general health status), the age, the type of drug used (narcotics or even pharmacy medicines).

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THE STUDY REGARDING CORRUPTION CARRIED OUT BY THE WORLD BANK

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Abstract
For a long period of time, corruption was accepted as being an inevitable fact of life. Corruption in the 27 EU member states undermines citizens' fundamental rights, good governance and the rule of law. In 2000, the World Bank carried out a study about corruption at the request of the Romanian Government. The elaboration process and the implementation of an anticorruption strategy depend on the state's politics and priorities.

Keywords: *corruption, World Bank, worldwide, the impact*

Introduction

Corruption – a worldwide affair

For a long period of time, corruption was accepted as being an inevitable fact of life. Recently, despite the fact that there wasn't any opinion which considers corruption a major threat in the way to evolution, a factor which affects the constitutional state, the democracy or the economic perspectives of the society, there has been a dramatic change of attitude worldwide. This thing can be explained by an adjunction of extremely different factors, which allowed corruption to install in the top problems of mankind.

The United States of America, after the follow-up the scandals Watergate and Lockheed, adopted a legislation intended for the prevention on "illicit payments in the international transactions". The American's wish to elaborate a convention project in the U.N. failed in 1979, no state from the Eastern or Western Europe wasn't ready for such an approach against the corruption phenomenon[1].

Starting with the '80s, once the attention towards economic crime organized by the penal politics grew, and once the internal scandals of corruption burst, industrial countries all over the world made the first steps in taking an attitude against this phenomenon.

Relatively recently, a lot of scandals hit different parts of the world. Thus, in Asia, after the fall of the Indonesian president Suharto, his family was attacked several times, existing the proof that the state was prejudiced by the former administration, which declined the implementation of reforms and has extorted billions from the national wealth.

In Pakistan, the prime minister, Benazier Bhutto, and in India, the prime minister, P.V. Maraschima Kao, were both expunged from the government due to corruption incriminations. In South Korea, the former presidents Rah Tae Woo and Chan Doo Hwan were both incarcerated being accused of taking bribe from certain Korean companies. In Japan, a great number of leaders of the government and important businessmen were the targets of the corruption scandals and accusations.

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[1] V. Dobrinoiu, p. 48.

In Latin America, area which is presently struggling with important economic problems, which generate street fights, the accusations of bribery climax with the treachery of the presidents Fernando Collor de Mello of Brazil and Carlos Andrés Perez of Venezuela. The most serious case registered between 2001 and 2002 took place in Argentina, where local corruption joined hands with the international corruption to prejudice the national economy, bringing the people in a state of despair.

In Mexico, the president Carlos Salinas de Gortari was investigated for the enormous sums of money gathered illicit by his brothers. The president Ernesto Tamper of Columbia was accused of accepting money from the Cali drug cartel, fact which had a negative impact on the Columbian poll, which didn't support him in the presidential elections.

The failure of the Spanish prime minister, Felipe Gonzales was due to the corruption scandals inside his cabinet. Also, the president of Zaire, Mobatu Sese Seko, was expelled from the administration because of the people's resentment towards the fact that he took million dollars bribery.

Corruption is a phenomenon spread worldwide, which contracts gigantic dimensions, starting to strike the most important areas of the economic, politic and social life. It is like a disease which spreads rapidly, and for which the antidote hasn't yet been found.

The international commerce registered last year a multiplication of acts of corruption. In this domain, occult commissions extended alarmingly mostly in the countries in transition to the market economy. Experience has demonstrated that the corruption acts are practiced not only on a national scale, but on a continental and global scale as well, proving that the phenomenon knows no frontiers. More analysts came to the conclusion that "the global process of corruption is faster than the globalization of the economy, and, in more than one case, the globalization of some economic sectors implicated serious acts of corruption. Obviously there are countries in which the level of corruption and the frequency of corruption acts are smaller, and some countries where these have alarming dimensions. The interest in obtaining illicit funds has no ethnic or geographic color, and it doesn't characterize a certain country. Corrupters and corrupt people exist in all the countries, that is why a firm action to combat this phenomenon is needed, because corruption dangerously spread in the last decade.[2] An alarming development took the fraud in commercial exchange. Corrupt elements improved their action techniques on the degree of commercial exchange.

They put together techniques and strategies meant to defraud "national fortunes of some nations", bringing them, most of the times, in a state of breakdown. The knowledge of the types and forms of the corruption acts represents an obligation of all the national and international factors involved in the fight against this disaster of the XXI century.[3]

In 2000, the World Bank carried out a study about corruption at the request of the Romanian Government. In this study, an important part was played by the means of reducing and combat corruption.

The elaboration process and the implementation of an anticorruption strategy depend on the state's politics and priorities. There are states in which the reforms had quick results, mainly because of the applied programs, which decomposed the problem of corruption and tried to solve it piece by piece. Such a strategy should contain:

a) Transparency and responsibility in the politic life.

To accomplish this condition it is necessary the existence of clear rules about the conflict of interests, the declaration of the dignitaries' fortunes, the financing of political

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[2] Dumitru Mazilu, "Preventing and relucting corruption" – major undiscriminating of the development of commercial trades based on the fundamental principles and specifications of the international commerce", The Commercial Law no. 1/ 2002, page 108.

[3] Samuel P. Huntington, "Political Order in Changing Societes", Yale University Press, New Haven and London, 1968, page 62.

parties. It is true that these laws do not guarantee the implication of politicians in corrupt businesses, but they can discourage these facts, once there is a higher probability that a corrupt politician can be exposed. This direction is also following the separation of political and economical interests, issue solved by promoting the principle of transparent financing of the political parties and of the electoral campaigns. Thus, there are brought into light the connections between the politicians and the interests that they promote or not. There are states in which the principle of transparency through a very rigid manner: thus, the politicians are forbidden to use the means of the state (funds, cars), in order to earn the confidence of the public opinion and to assure the electorate that the authorities provide for the interests of the society before their personal ones.

b) The improvement of the public administration.

In this direction a few reforms must be enforced, reforms about budgetary management concerning the politic alloy in the responsibilities of the public servants, promoting meritocracy, to appoint some behavior rules for the clerks who must build a pattern concerning their normal behavior.

c) The existence of a solid business environment which can be ease the implementation of a less burdensome legislation for those who want to invest in different domains, to eliminate bureaucracy, which is a permanent source of corruption, to reduce legal obligations which are hard to acquit by different enterprises.

d) Lastly, in order to apply an anticorruption program it is necessary to open towards the society, which presuppose free access of the public and the civil society organizations to any information about the activities of the state's administration. In many states, the freedom of information was enacted, which managed to attract the civil society and the media and to transform them into true allies against corruption. It is important to earn the society's confidence in the Government's actions, but this thing will not happen until a coherent, credible anticorruption strategy will be implied, which ought to be followed by notable progresses in the implementation and supervising.

The attenuation of corruption implies not only strong compulsion, but also the development of the administration of the public sector and social changes. In Slovakia and Lithuania the strategies were based on three key elements:

- To punish corruption according to the law;
- To educate the people about the rights they have when they come in contact with the public sector;
- The combat of corruption through the development of the public sector's administration.

In adopting decisions to combat corruption, must participate, governmental organizations and representatives outside the government (like different non-governmental organizations) which can have as an effect the growing confidence in the measures which were taken.

Concluding thoughts

Corruption in the 27 EU member states undermines citizens' fundamental rights, good governance and the rule of law. Corruption occurs in old and new EU Member States alike. Research shows that the trust of EU citizens in Member States and the EU to fight corruption is very low.

Solution:

The EU must do more to counteract corruption with a comprehensive anti-corruption policy. The prevention of and fight against corruption should remain a priority on the EU's political agenda. Leaders and decision-makers at the EU- and Member State level must take a clear and public stance against corruption, while adequate EU legislation, mechanisms and standards against corruption are needed to tackle the issue at its roots.

The Bank—as is the case with many others working in this area—is at an early stage of building up a body of knowledge on what works and does not work in the fight against corruption. We have much to learn on the design and implementation of effective anti-corruption strategies. The elements sketched out in this brief paper attempt to illustrate a broad and evolving framework, not a blueprint. This framework needs to be filled in with research, country studies, lessons and best practices drawn from country experiences, open dialogue with governments and civil society, and strong interaction and partnerships with other donors and agencies participating in these efforts.

Tackling corruption is neither easy nor quick. The causes are complex and the means to control it are not fully understood. There are no single magical solutions and, as with most problems in development, it must be attacked on many fronts simultaneously.

An anti-corruption strategy must also go beyond first principles, such as adopt market-friendly policies, reduce red tape or provide training, helpful though these actions may be.

Leadership is a key. The sustained reduction of systemic corruption requires committed leadership and support from civil society. Constructive pressure and assistance from abroad can help, but cannot substitute if the political will is missing.

The role of civil society is another key. Where executive political will exists, the role of civil society may be akin to being partners with government in the implementation and monitoring of anti-corruption programs. Where such political will is absent or tepid, civil society's role has a different dimension – it needs to foster the willingness of the political leadership to reform.

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THE RIGHT TO HOUSING IN THE CONTEXT OF NIGERIAN LAW AND HUMAN RIGHTS PRACTICE

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Abstract

Every society needs a set of laws which stipulates the rights and duties of citizens, as well as regulate the conduct of the society. But law is often perceived as repressive and unpopular by majority of the urban poor in many developing countries who feel that the law has done little or nothing to ameliorate their sufferings. For example, new evidence from satellite images has revealed the true extent of forced evictions going on in Badia East-Lagos, one of Nigeria's mega cities. The pictures taken during and after the demolitions carried out by the Lagos State government on 23rd February 2013, clearly shows that a densely populated area containing concrete housing and other structures was razed to the ground. Given the importance of housing to the overall development and existence of mankind, it is necessary to first determine the existence of a legal right to adequate housing to warrant a demand by the citizen to fulfil this right and in order to appreciate the need for government intervention in this area.

Keywords: *Housing, Human Right, Nigerian, Practice, Law*

Introduction

The right to adequate housing, which forms the subject matter of this paper, is one of the economic, social and cultural rights, which has been guaranteed by a number of local and international laws. But their enjoyment in Nigeria falls short of the growing expectations of Nigerians in their desire to have them elevated to the status of fundamental human rights. This desire is a fall out from economic pressures, which have led to the emergence of extremely wealthy people on the one hand, who can afford the best houses, and of poverty-ridden people, who live in shacks in the cities and are in constant fear of being homeless on the other hand. It has therefore been suggested that a great proportion of national wealth should not be enjoyed only be a handful of persons to the exclusion of the less privileged in the society.[1] Surprisingly, there are a number of international human rights conventions, which duly provide for a right to adequate housing. Nigeria is a signatory to these international conventions and has also ratified a number of them.[2] At the national level, the right to housing is recognised in the constitution and other laws enacted at other levels which impact upon housing. The Fundamental Objectives and Directive Principles of State Policy of the 1999 Constitution Provides, inter alia, that the "state shall direct its policy towards ensuring that

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[1] See V. Kartashkin, "Economic, Social and Cultural RIghts" in K. Vasak and P. Alston, eds, *The International Dimension of Human Rights* (Westport, TC: Greenwood Press, 1982), pp. 111 – 134.

[2] See e.g. African Charter on Human and People Rights, OAU, DOC, CAB/LEG/67/3/Rev. 4. It entered into force on 21 October, 1996. Nigeria has ratified same as at 1 January, 1996. See, e.g., African Charter on Human and People Rights (Ratification and Enforcement) Acts Cap. 10 LFN 1990. See further, The International Covenant on Economic Social and Cultural (ICESCR) Rights. As of January 1996, 134 countries had ratified the covenant. See 17 HRLJ 66 (1996). Nigeria ratified it in 1993.

suitable and adequate shelter, suitable and adequate food, reasonable national minimum wage, old-age care and pensions, and unemployment and sickness benefits are provided for all citizens".[3] Closely tied to this provision are the various Rent Control and Recovery of Residential Premises Laws and Edicts in different states in Nigeria, which serve to give meaning and significance to the existence of a right to housing. Many of these laws reinforce the position that tenants in residential housing are entitled to adequate housing like their landlords and that tenants should neither be charged arbitrary rents, nor be evicted without due process of law.

Thus, there is a *de jure* acknowledgement of the right to housing in Nigerian domestic law. However, the housing problem has not generally been approached from a human rights perspective. Thus, the laws relating to housing may be with some degrees of exaggeration, be stated to be more honoured in breach than in observance, moreover, there is an emerging trend towards enactment of anti-housing laws in recent years.[4] The socio-economic forces currently at play in the country have cast serious doubts on the ability of the ordinary Nigerian to realize his rights to adequate housing. Rather, from the narrow construction of the fundamental rights provided in the various Nigerian Constitutions, housing rights have been relegated to the background of professional legal discourse.[5] Considering their importance to the majority of the population, particularly the most vulnerable segments of the society, it has become clear that an approach for the judicial enforcement and actualisation of the right to adequate housing needs to be devised.

This paper attempts an analysis of the existing rights on the entitlement of individuals to adequate housing in Nigeria. It further evaluates these rights in terms of internationally accepted norms concerning the rights of the individual to adequate housing in relation to other basic rights, and determines the extent to which these norms are practiced in Nigeria.

Right to Housing: Its Human Right Pedigree

Adequate housing is a right, which has been described as one of the basic needs of man.[6] As such, it is of prime importance for the realisation of the full potential of the human personality. Despite the pessimism expressed in certain quarters[7] about the nature of economic, social and cultural (ESC) rights as rights properly so- called, it has been affirmed that adequate housing is universally viewed as one of the most basic human rights. For human rights generally, there are several definitions, including that proffered by scholars and jurists.[8] At the level of case law, Kayode Eso JSC in *Ransome Kuti vs. Attorney General of the Federation* described human rights thus: "*....it is a right which stands above the ordinary laws of the land and which, in fact, is antecedent to political society itself. It is a primary condition for a civilized existence, and what has been done by our constitution since independence is to have these rights enshrined in the constitution so that the rights could be immutable to the extent of the non- immutability of the constitution itself"*[9].

The Greek and Roman philosophers of the Stoic school, who first formulated the concept of natural law, maintained that natural law is universal because it applies not only to

[3] The constitutional position of non-justiciability has denied the existence of right to adequate housing and other ESC rights which suffer the same fate under Section 6(6)(c). See e.g., *Okojie vs. Attorney General of Lagos State* (1981) 2 NCLR 337, where the Court of Appeal held that by virtue of Section 6(6)(c), no court has jurisdiction to pronounce any decision in conformity or otherwise with chapter two.

[4] See the Land Use Act, which made every Nigerian a tenant of the Federal Government.

[5] Shelter Rights Initiative, Housing Right Protection Strategies for Lower Court Judges (2000).

[6] Food and clothing are also classified as other basic necessities of life.

[7] Supra, see note 3.

[8] *Butchers Union vs. Crescent City Co.* (1883) 28 Led 585; "The rights (i.e. those guaranteed by the bill of rights) are different from the concrete rights which a man may have to a specific chattel or to a piece of land or to the performance by another of a particular contract...they are the capacity, power or privilege of having or enjoying those concrete rights and of maintaining them in courts".

[9] (1985) 2 NWLR (Pt 61) 211 at 230.

citizens of certain states but rather to everybody everywhere in the metropolis. It is superior to every positive law and embodies those elementary principles of justice, which were apparent to the "eye of reason". According to Cicero: "it is of universal application, unchangeable and everlasting ... it is a sin to try to alter this law, nor is it allowable to try to repeal any part of it, and it is impossible to abolish it entirely. *We cannot be free from its obligation by Senate or people ... And there will not be different laws at Rome or at Athens or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times.*[10] *The natural rights, which emanated from it, were "not the particular privileges of citizens of certain state, bill something to which every human being, everywhere, was entitled".*[11]

The general appeal of the idea of natural law continued through the middle ages but the concept suffered a temporary set-back thereafter, due partly to the popularity of the teaching of Machiavelli[12] and partly to the absolutisms of the new and emerging nation-states in the early part of the 16th century. It was, however, revitalized in the 16th and 17lh centuries by two factors. The first was the Reformation, which resulted in bitter religious struggles in Europe. This, in turn, brought about a widespread outcry for the natural rights of freedom of conscience and religious belief.

Human rights are of two broad categories. The first category of civil and political rights is sometimes viewed or otherwise known as liberty-oriented[13] rights or first generation rights. These include the right to life; right to personal security; freedom of thought, conscience and religion; freedom of opinion and expression, peaceful assembly and association; freedom from slavery and servitude, and freedom from torture or cruel, inhuman or degrading treatment or punishment. These are rights asserted against the state for the protection of the liberty of the individual.

The other category of rights consists of the economic, social and cultural rights. They are also known as security-oriented rights or second-generation rights. These include the right to work, to just and favourable condition of work, to form and join trade unions, to social security, to protection of family life, to adequate standard of living, to education, and to take part in the cultural life of one's society. In the 18th and 19th centuries, only civil and political rights featured prominently in political discourse at the national levels and were incorporated in many of the constitutions adopted at the time. Economic, social and cultural rights were at the time considered merely as by-products of civil and political rights. However, from the early 20th century, states started to place emphasis on socio- economic rights. Hence, these became incorporated in the Constitutions of the United State, of Mexico, the Russian Soviet Federated Socialist Republics, the Western Republic of Germany, the Spanish Republic, the former USSR and Ireland in 1917, 1918, 1919, 1931, 1937 and 1938 respectively.[14] Following the establishment of the United Nations at the end of the Second World War and the adoption of the Universal Declaration of Human Rights which recognized both civil and

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[10] The Republic NXXII 33 quoted in *Text for Human Right Teaching in Schools,* a Publication of the Constitutional Right Project, 1999.

[11] Cranston, M., *Human Rights Today* (1962) p. 9.

[12] See *The Prince* (Translated by George Bull) in which Machiavelli (1496 – 1527) taught the princes how to acquire and retain principalities.

[13] David Selby, *Human Rights* (Cambridge, The Cambridge University Press, 1987). There are also third generation rights otherwise known as solidarity rights. They include the right of development, the right to health and balanced environment, the right to communicate, the right to be different, the right to benefit from the common heritage of mankind and the right to humanitarian assistance. This category of rights is still evolving. Not all the rights listed above are supported by everybody. The number may increase or contract in the future. See Karel Vasak "The Third Generation of Human Rights: The Right of Solidarity". Inaugural Lecture at the tenth Session of the International Law of Human Right Conference Strasbourg, 2 – 7 July, 1979, pp. 2 – 27; Keba Mbaye *International Law; Achievements and Prospects* (UNESCO, 1991) p. 1055. Bedjaoui (ed).

[14] See Valdimiri Kartashkin "Economic, Social and Cultural Rights" in *The International Dimensions of Human Rights* (ed) Acronym Vasak, (1992) UNESCO, p. 111.

political rights, as well as the economic, social and cultural rights, the recognition of the latter has become widespread.

The question is: Is the enjoyment of these sets of rights divisible? In other words, should their enjoyment be prioritized so that the enjoyment of economic, social and cultural rights is postponed or accorded less emphasis, while the civil and political rights are enjoyed or vice versa? Or is the enjoyment of the rights indivisible, so that all of them should be insisted upon concurrently.

Content of the Right to Housing

An appreciation of the content of the right to adequate housing will assist in understanding the level of protection encompassed by the right to adequate housing. It has been submitted that: "*At first glance it might seem unusual that a subject such as housing would constitute an issue of human rights. However, a look at national and international laws, as well as the significance of a secure place to live for human dignity, physical and mental health and overall quality of life, it begins to reveal some of the human rights implications of housing...*"[15]

Under General Comment No. 4 of the UN Committee on Economic Social and Cultural Rights, which is relevant to the right to adequate housing, seven functional parameters are enumerated, to wit: legal security of tenure, affordability, availability of materials, services and infrastructure, habitability, accessible location and cultural adequacy:

a. Legal Security of Tenure: tenure takes a variety of forms, including rental (public and private) accommodation, co-operative housing, lease, owner - occupation, emergency housing and informal settlements, including occupation of land and property. Regardless of the type of tenure, all persons should possess a measure of security of tenure, which guarantees legal protection from forced eviction, harassment and other threats. State parties should, consequently, take immediate measure aimed at conferring legal security of tenure upon those persons lacking such protection in consultation with affected persons and groups.

b. Availability of Services, Materials, Facilities and Infrastructure: Adequate housing must contain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and· lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.

c. Affordability: Personal or household financial costs associated with housing should be at such levels that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by State parties to the convention to ensure that the percentage of housing related costs is, in general, commensurate with income levels. State parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance, which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increase. In societies where natural materials constitute the chief resources of building materials for housing, steps should be taken by state parties to ensure the availability of such materials.

d. Habitability: Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protection them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors, the physical safety of occupants must be guaranteed as well. The committee encourages State parties to comprehensively apply the *Health Principles of Housing* prepared by WHO, which view housing as the environmental factors most frequently associated with conditions for disease in

[15] World Campaign for Human Rights: Fact Sheet No. 21 on the Right to Adequate Housing at p. 3.

epidemiological analysis; i.e. Inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates.

e. Accessibility: Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV -positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many State parties, increased access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed, aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement.

f. Location: Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas, where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites or in immediate proximity to pollution sources that threaten the right to health of the inhabitants.

g. Cultural Adequacy: The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not scarified, and that, inter alia, modern technological facilities, as appropriate, are also ensured.

It is clear, from the foregoing, that the right to adequate housing is not limited to any kind of house; neither does the right translate merely into a right to a house built by the state on demand. Adequate housing means more than mere shelter, since it embraces all the social services, utilities and facilities that make a neighbourhood. The law and policy supporting housing rights must assist in the evaluation of the adequacy of housing in every given country. The law can reveal whether the state for instance, encourage the practice of forced eviction or discrimination in housing policies. Thus, considering Nigeria cannot isolate herself from the international community, the goal of her housing policy must reflect the various United Nations agreements which are expressed in conventions. Lastly, since the right to housing is a life-long right, its implications must allow for changing needs. Thus, even when the right to housing is often expressed in terms of possession of houses, the concept of housing is sufficiently all embracing and certainly goes beyond shelter from the elements.

Sources of Right to Adequate Housing:

The right to adequate housing derives its status as a right from a number of national and international law provisions. It is a right, which has been identified as one of the basic needs of man.[16] As such, it is of prime importance for the realisation of the full potential of the human personality. Though housing rights are derived from two backgrounds, namely municipal and international law, the two systems influences and impact on each other. In most jurisdictions, including Nigeria, Constitutional provisions require the incorporation of international law into municipal law before it becomes applicable as the basis for the decisions before the courts.[17] There are various theories on the relationship between national and international laws as reflected in the Monism[18] – dualism[19], Inverted monism[20] and harmonisation schools of thought[21].

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[16] Today, Food and Clothing have been identified also as the other basic needs of man.

[17] See Section 12 of the Constitution.

[18] *Propounded by Hans Kelsen* and his disciples to the effect that international law and municipal law are all aspects of the system of laws.

Constitutional Provisions:

At the national level, there is the constitutional provision found in the Fundamental Objectives and Directive Principles of State Policy, which in Section 16(2)(d) provides that the state shall direct its policy towards ensuring that suitable and adequate shelter is provided for all citizens. However, Section 6(6) (c) of the constitution declared the Fundamental Objectives and Directive Principles non-justiciable.[22] But a court faced with the task of construing a document that impacts on the right to housing may use the Directives as an aid to discover the most appropriate construction that tallies with the Constitution.[23] A learned commentator[24] aptly captured the problems in what he terms the "Source of law misconception" as follows:

"When lawyers classify socio-economic rights as unjusticiable, they confuse in my mind, two important rights – bearing normative orders – the Constitution as a rights founding source on one hand, and legislation as rights empowering source on the other. Although fundamental rights claims are often founded on the authority of the Constitution, there is no requirement that this must be invariably so. Constitutional protection of rights may offer the best guarantees, but sometimes Constitutions themselves can be used to found new legal claims arising from a state's greater capacity and ability to realise human rights..."

Therefore, while the test of justiciability may very well eliminate claims based on socio-economic rights arising via the Constitution, the test may not be relevant for socio-economic rights claims founded on any other legal principle outside the constitutional documents. Section 44(1) of the constitution provides against the compulsory acquisition of property except in a manner and for a purpose prescribed by law that provides among other things:

(a). The prompt payment of compensation thereof, and

(b). To any person claiming such compensation right of access to the courts for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

Section 44(2) provides the exceptions to Section 44.

Section 44(2) of the Constitution provides as follows: nothing in subsection 1 of this section shall be construed as affecting any general law:

(a). For the imposition or enforcement of any tax, rate or duty;

(b). For the imposition of penalties or forfeitures for the breach of any law, whether under civil process or after conviction for an offence;

(c). Relating to leases, tendencies, mortgages, charges, bills of sale or any other rights or obligations arising out of contracts;

(d). Relating to the vesting and administration of the property of persons adjudged or otherwise declared bankrupt or insolvent, of persons of unsound mind or deceased persons, and of corporate and unincorporated bodies in the course of being wound up;

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[19] As postulated by Hegel that international law and municipal law are seen as two different systems of law, coming from two different sources.

[20] Inverted monism postulates that municipal law takes precedence over international law.

[21] The Harmonisation theory rejects the monist and dualist approach to the resolution of conflict between municipal and international law. It canvasses that both laws are concordant bodies of doctrine, each autonomous in the sense that it is directed to a specific and to some extent, exclusive area of human conduct but harmonious in that in their totality the several rules aim at human welfare.

[22] The framers of the Constitution equated the right to housing to a right to housing on demand. As such, the non-justiciability reason was meant to shut out legal demands based on that interpretation of housing rights.

[23] See the decision of the court in *Archbishop Okogie vs. Attorney General of Lagos State* (1981) 2 NCLR 337.

[24] Joseph Otteh. *The Challenges for Socio-Economic Right litigation in Nigeria: Hurdles and Prospects in Economic, Social and Cultural Rights in Developing a Training Agenda for Nigeria.* (Lagos, Legal Research and Resource Development Centre Roundtable Series, 1998).

(e). Relating to the execution of judgements or orders of courts;
(f). Providing for the taking of possession for property that is in a dangerous state or is injurious to the health of human beings, plants or animals;
(g). Relating to enemy property;
(h). Relating to trusts and trustees;
(i). Relation to limitations of actions;
(j). Relating to property vested in bodies corporate directly established by any law in force in Nigeria;
(k). Relating to the temporary taking of possession of property for the purpose of any examination, investigation or enquiry;
(l). Providing for the carrying out of work on land for the purpose of soil conservation.

STATUTORY LAWS

(1). Rent Control and Recovery of Premises Laws

Various recoveries of residential premises laws in different states in Nigeria provide for certain aspects of the right to housing, notably security of tenure. They usually make provisions for the legal procedure to be followed for the recovery of premises, the length of the notice, service, proceedings in court and issues to be considered by the court in arriving at a decision in recovery litigation. Rent control laws are focused on the affordability concept while laws on environmental health are geared to promote habitability. Most times, one enactment controls rent and recovery of premises. For instance, the Lagos State Rent and Recovery of Residential Premises law[25] combines both functions. Arguments abound about the propriety of the state intervening in housing and the use of rent control as a policy instrument in favour of tenants. Investors in property and landlords have questioned the rationale behind regulating rents in a deregulated economy. The argument is that since other sectors of the economy are not regulated, why regulate the housing sector? This school of thought posits that tenants will be the ultimate losers as investors will move away funds from housing to more lucrative sectors of the economy. They conclude by insisting that the law of demand and supply, to wit: market forces, should be allowed to determine rent levels. Alternative arguments are that housing is a basic human right and need and cannot be allowed to be solely regulated by market forces. Allowing market forces to regulate rents will ensure that many individuals will not be able to afford adequate housing. This school of thought recognizes the need to curb the excesses of landlords, who, against all economic indices, charge outrageous rent.[26] Hence, the statement of the European Court affirming a right to housing in the case of *lames and Ors v. the United Kingdom*[27] is instructive:

Modern societies consider housing of the population to be a prime social need, the regulation of which cannot be left entirely to the play of market forces.

For similar development in the Asian States, reference is hereby made to the wise statement of Wilfred Wong, a Legislative Councillor in a speech on the Rent Increases and Domestic Premise Control Bill in Hong Kong, 1970 he stated.

"There is a common tendency to contend that the principle of the free play of the forces of supply and demand should at all times apply to the price of any commodity or accommodation. Suffice it to say that there is a difference between essential commodities such as foodstuff or housing, which are essential to living and luxury items which are not essential to life. We need only to read a little of economic history to note the importance of rent in the

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[25] Made as Edict NO. 6 of 1997 In Imo State, the applicable law is the Landlord and Tenant Edict of 1994: for River States, it is the 1991 Recovery of Premises Law.
[26] See the Lagos State Rent Edict, 1997: A Public Operational Review – of the Human Rights Perspective by Eze Onyekepere. Unpublished paper presented at a workshop organized by the Nigerian Institute of Estate Valuers and Surveyors, March 1998.
[27] Also see the Lagos State Rent Edict 1997.

economic development of any country and, indeed, th political repercussion of uncontrolled spiralling rents".

The provision of the Rent Control and Recovery of Residential Premises laws is made to control the rent of residential premises and the establishment of rent tribunals. They also determination what constitute standard rents and provide for recovery of possession. Thus, it has been stated by Oputa, JSC in *Sule v. Cotton Board,*[28] about a similar legislation as follows: "*The whole scheme and tenor of the Lagos Stare Rent Control and Recovery of Residential Premises Law especially in Sections* 15 *and* 18 *are to provide security of tenure and protection of tenants, including even a statutory tenant, and to restrict the recovery of premises from tenants unless the landlord complies with necessary formalities as to "Notice to Tenant of Owner's Intention to Apply for recovery of possession" as in form E followed by issue of writ or plaint against the tenant or person refusing to deliver up possession".*[29]

Under the Rent Control and Recovery of Residential Premises Law, a tenant includes a substance or any person occupying any premises whether on payment or otherwise, but does not include a person Occupying premises on a bona fide claim to be the owner thereof[30]. This definition, when read in conjunction with Section 14 of the rent control laws, apparently abolishes the right of forcible entry of the landlord of a tenant at sufferance. As has been held in the following decided cases; *African Petroleum v*s. *Owodunni,*[31] *Oduye v. Nigerian Airways Ltd*[32] *and Enigbokan v. Akinosho,* the qualification of a tenant under the law is lawful occupation and if the initial occupation is lawful, the occupier, even if holding over after the determination of the tenancy by a notice to quit, becomes a protected tenant.

The nature of the protection that is offered to tenants by the Rent Control and Recovery of Residential Premises law is appreciated when one compares the powers of the landlord in the recovery of his premises under the common law from his power under the operation of the former. At common law, a landlord may sue to recover possession of his premises immediately upon the expiration of the term of the lease created. And where the term is periodic, he may proceed with his action immediately on the expiration of a valid notice to quit. The recovery of premises law now inserts a protection by providing that the landlord must, at the determination of the tenancy, serve on the tenant a seven day notice of his intention to proceed to recover possession. At the expiration of the seven days grace, the landlord may take out a plaint or writ in the prescribed form and his right to recover possession only takes effect upon a court order. All through the proceedings, the tenant is converted to a statutory tenant, who cannot be ejected by the landlord. As a statutory tenant he has a right to exclusive possession of the premises as against all others, including the landlord. This position is in contrast with the position at common law, where a tenant who refuses to yield up possession is treated as a trespasser vis-a-via the landlord.

(2). The Land Use Act

The Land Use Act[33] is a legislation, whose implementation also affects the enjoyment of the right to adequate housing, particularly the accessibility of land and housing. From its recital, the intendment of the law is stated as follows: *"an Act to vest all land comprised in the territory of each state (except land vested in the Federal Government or its agencies) solely* in *the Governor of the State, who would hold such and in trust for the people and would henceforth be responsible for allocation of land in all urban areas to individuals resident in the State and to organizations for residential, agricultural, commercial and other purposes*

[28] *Sule v. Cotton Board* (1985) 2 NWLR (pt. 5) 17.
[29] See the interpretation of a tenant in Section 36 of the Rent Control Law.
[30] (1991) 8 NWLR (pt 210), 391, at 395.
[31] (1987) 2 NWLR (pt. 55), 126 at 147.
[32] (1957) SCNLR 9 at 11-12.
[33] Cap L.5 Laws of the Federation of Nigeria, 2004.

while similar powers with respect to nail-urban areas have been conferred on Local Governments".[34]

The Act, which was described as intended to facilitate the availability of urban and rural land for development, has been termed a bold step aimed among others at: *"protecting and preserving the rights of all Nigerians as beneficiaries to hold, use, and enjoy land in Nigeria; Reforming and harmonizing various land tenure systems in existence in the country before 1978; Regulating and controlling the use of land; Facilitating the processing of land acquisition by individuals, corporate bodies, institutions and governments, and eliminating land speculation".*[35]

The relevant provisions of the Act, which impacts on the rights to adequate housing, relates to interests on land by communities and individuals, which have been reduced to mere rights of occupancy and which can be revoked by the appropriate authority . In *Nkwocha v. Governor of Anambra State & Ors*[36] the Supreme Court stated of the Act as follows: *"the tenor of the Act as a single piece of legislation is the nationalization of all lands in the country by the vesting of its ownership in the state leaving the private individuals with an interest in land, which is a mere right of occupancy and which is the only right protected in his favour by law after the promulgation of the Act".*

Occupancy rights granted under the Act could be statutory or customary. While statutorily rights of occupancy[37] are granted by the Governor of a state in respect of urban lands[38], customary rights of occupancy are granted by a local government in respect of non-urban lands[39]. The governor, by virtue of Section 5 of the Act, has wide powers to grant statutory right of occupancy for all purposes, to demand rent for any such right which is granted to any person, to revise the said rent and to impose a penal rent. The governor may also revoke a right of occupancy for overriding public interest.

The effect of the continued provision of Section 21 and 22 is to forbid the alienation of both customary and statuary rights of occupancy without the consent of the governor first having been obtained. In view of the literal interpretation of this particular provision, the consent of the governor is required as a condition precedent to the creation of a valid landlord and tenant relationship, since the operative words are alienate or part with possession. The consent requirement has been stated to have a suffocating effect on domestic and commercial requirement for adequate housing.

International Law

A multiplicity of international conventions has made provisions for the right to adequate housing. First the provision of some binding treaties is hereby reproduced.

International Covenant on Economic, Social and Cultural Rights – Article 11(1)

The state parties to the present covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and continuous improvement of living conditions. The state parties will take appropriate steps to ensure to this effect the essential importance of international appreciation based on enforced consent.

International Convention on the Elimination of all Forms of Racial Discrimination, 1965

Adopted and opened for signature and ratification by the General Assembly Resolution 2106 A (xx) of 21 December, 1965; Article 5 (e) (iii) of ICERD. In compliance with the fundamental obligations laid down in article 2 of this convention, states parties

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[34] See National Housing Policy. Chapter 4. Section 44 on the Land Use Act 1978.
[35] (1984) I SCNLR 6 34. Quoted by Shelter Rights Initiative, supra note 5.at p. 26.
[36] See, Section 5(1) of the Act.
[37] See Section 6(1) of the Act.
[38] See Section 5(1)(a) – (h) of the Act.
[39] Prof. S.A. Oretuyi: *Leases/Tenancies and the Consent Provision of the Land Use Act, 1978.*

undertake to prohibit and to eliminate discrimination on ground of race, colour or national or ethnic origin, to guarantee equality before the law in the enjoyment of the following rights.... (e) in particular (iii) *The right to housing*, Article 5 - (e) (iii).

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) Adopted December, 1990: Migrant workers shall enjoy equality of treatment with nationals. Secondly, there are international declarations and recommendations that impact on the right to Housing.

Universal Declaration of Human Rights (1948)

Adopted and proclaimed by the United Nations General Assembly (UNGA) Resolution 217A (iii) on 10 December, 1948. Everyone has the right to a standard of living adequate before the health and well being of himself and his family, including food, clothing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control – Article 25 (1).

Vancouver Declaration on Human Settlement (1976)

Adopted by the UN conference on Human Settlement in 1976, Section III(8). Adequate shelter and service are basic human rights which places an obligation on governments to ensure the attainment by all people, beginning with direct assistance to the least advantaged through guided programmes of self-help and community action. Government should endeavour to remove all impediments hindering attainment of these goals. Of special importance is the elimination of better balanced communities, which blend different social groups, occupations, housing and amenities.

Declaration of United Nations General Assembly on the Right to Development (1986):

Adopted by United Nations General Assembly Resolution 4/128 on 4 December, 1986, Article 8(1) states that "states should undertake, at the national levels, all necessary measures for the realisation of the development of and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health service, food, housing, employment and fair distribution of income". Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

Impact of International Conventions:

Oliver Wendel Holmes stated that law is what the judge says and nothing more[40]. If that were so, then the most important person in the world of human rights, whether civil and political or economic, social and cultural, is the judge. Whatever the judge thinks about the status of enforceability of ESC rights may be more significant than what scholars and the theorists say. However, the assertion of the central role of judges in the protection of human rights does not detract from the fact that scholars do influence the opinion of judges. Be that as it may some decisions of the courts will now be examined to appreciate the position taken by the judiciary in the domestic application of international human rights. In *Attorney General v. British Broadcasting Corporation*[41]*, it was stated...* "There is the presumption, albeit reputable, that our municipal law will be consistent with our international obligations". In *Harris v. Ireland*[42] the European Court of Human Rights found Ireland in violation of the European Convention immediately after the Irish Supreme Court refused to be guided by a previous decision of the European Court having essentially the same fact.[43]

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[40] "The Prophecies of what the courts will do in fact and nothing more pretentious what I mean by law" – *The Common Law* (Boston, Little Brown & Co. 1948).
[41] (1981) Act 303.
[42] (1968) 2 OB 740 at 757.
[43] 142 Fur. Ct. H.R. (ser A) (1988).

In *Akinola v. General Babangida and others*[44] the appellant, a journalist and an officer of the Lagos State Council of the Nigerian Union of Journalists, instituted the action against the Federal Government of Nigeria. Ruling on a preliminary objection filed by the respondents, the High Court held that the court had jurisdiction to hear the case by virtue of Nigeria being a signatory to the African Charter on Human Rights, which preserves the jurisdiction of the courts. Hunponu Wugu J., referring to the decision of Onojala J. (as he then was) in the CRP case, said: *"The learned jurist made copious reference to the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act which is also an Act of the Federal Republic of Nigeria by virtue of cap 10 of the 1990 Laws of the Federation of Nigeria. It is a treaty and it is binding on the Federal Government. Since the Courts have held that the African Charter is like an enactment of the Federal Government, like a decree, it follows that if there is a conflict between an enactment ousting the jurisdiction of the court and another which does not, the courts should lean more on that which preserves the jurisdiction of the court".*[45]

In *Chief Fawehinimi v. General Abach and others,*[46] the appellant, inter alia, sought a declaration that his arrest and detention constituted a gross violation of his fundamental rights, and a mandatory order compelling the respondents to release him. He also sought an injunction restraining the respondents from arresting or detaining him. The appellant based his action not only on Section 31, 32, and 38 of the 1979 constitution but on Article 4, 5 and 12 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act. The respondents raised a preliminary objection to the effect that the appellant was detained pursuant to a detention order made by the Inspector-General of Police, under the provision of the State Security (Detention of Persons) Decree No 2 of 1984, as amended and, consequently, the court had no jurisdiction to hear the action in that its jurisdiction was ousted by the Decree. The appellant's counsel in his argument contended that the Inspector General had no power to issue the detention order in that Decree No 11 of 1984, which sought to vest him with that power was otiose: that the provisions of the said Decree are inferior to and cannot override the provision of the African Charter on Human and Peoples' Rights. The learned trial judge upheld the preliminary objection and struck out the suit of the appellant. On appeal, the Court of Appeal held as follows:

1. The provisions of the African Charter on Human and Peoples Rights are in a class of their own and do not fall within the classification of the hierarchy of local legislation in Nigeria in order of superiority.
2. The African Charter as embodied in cap. 10, Laws of the Federation of Nigeria, 1990 is a law to which the court, the executive and the legislature, that is the Provisional Ruling Council under the present dispensation by virtue of Section 10(2) of Decree No. 107 of 1993, must give due recognition and enforce. The law is in full force and because of its genesis, it has an aura of inviolability unlike most municipal laws and may, as long as it is in the statue book, be clothed with vestment of inviolability. Consequently, the learned trail Judge erred in law in holding that because the provisions of the Charter are the same with the provisions of the Charter 4 of the 1979 constitution, a citizen cannot have recourse to it.
3. By virtue of Article 1 of the African Charter on Human and Peoples' Rights, the member states of the Organisation of African Unity, parties to the Charter, shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect thereto.
4. By virtue of Section 1 of the African Charter on Human Rights (Ratification and Enforcement) Act, Cap. 10 Laws of the Federation of Nigeria, 1990, the provisions or the

[44] Suit No M/462/93; Reported in Eze Onyekpere (ed). *Manual on the Judicial Protection of Economic Social and Cultural Rights.*
[45] Suit No. M/462/93: Reported in Eze Onyekpere (ed). Manual supra.
[46] (1996) 9 NWLR (Pt 475) 710.

African Charter on Human and Peoples Rights shall, subject to as hereinafter provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria. Nigeria incorporated the Charter on Human and Peoples Rights to its statue books because it is a signatory to the convention; by signing same and incorporating it into law seeks to act in accord with the dictates of Section 12(1) of the 1979 Constitution.

On further appeal to the Supreme Court it was held amongst others as follows:

1. The African Charter, as far as Nigeria is concerned, is not purely a matter of public international law (or international customary law, per se) regulating the relationship between member states which are signatories to it, it is an understanding between some African States concerned to protect and improve the human rights and dignity of their citizens and other citizens within the territorial jurisdiction of their countries to the commitment of which that understanding has been translated into a legal obligation by adopting the Charter as a domestic law.[47]

2. The Charter gives to citizens of member states of the Organisation of African United rights and obligations, which rights and obligations contained in the Charter, are not new to Nigeria as most of these rights and obligations are already enshrined in our constitution.[48]

3. The individual rights contained in the articles of the African Charter on Human and People's Right are justiceable in Nigerian courts. Thus, the articles of the Charter show that individuals are assured rights which they can seek to protect from being violated and if violated to seek appropriate remedies; and it is in the national courts such protection and remedies can be sought and if the case is established, enforced.[49]

In *Nigeria National Petroleum Corporation v. Chief Fawehinimi and others*[50], the Court of Appeal held that a party who claims that Article 3 of the African Charter on Human and Peoples Rights has been or is likely to be infringed in regard to him must show (i) that he belongs to that class within which there has been inequality of treatment; (ii) that there is a classification for the purpose of application of the particular law; (iii) that the classification is arbitrary or irrational or otherwise impermissible.

In the case of *Mojekwu and others v. Ejikeme and others*[51], involving Nnewi and "*oli-ekpe*" customs, tobi, JCA, referred to his earlier decision in *Augustine Mojekwu v. Caroline Mojekwu*[52] and said:

"But I can say that the Nnewi custom relied upon by the respondents, which permitted them to inherit the estate of Reuben merely because he had no male child surviving him, is repugnant to natural justice, equity and good conscience. And what is more, such a custom has clearly discriminated against Virginia, the daughter of Reuben and therefore is unconstitutional, in the light of the provisions of section 52 of the Constitution of the Federal Republic of Nigeria, 1999. Article 14 of the European Convention of Human Rights contains generally similar provision. Article 18(3) of the African Charter on Human and People's Right specifically provides for the elimination of discrimination against women, a provision which is consistent with the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)".

The cases made reference to two international conventions: the European Convention on Human Rights; the African Charter on Human and Peoples' Right. There is need to

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[47] Ibid.

[48] Ibid, per Ogundare J.S.C.

[49] Supra.

[50] C.A/E/7/99 delivery on 9 December, (1999); see Eze Onyekpere (ed.) *Manual on Judicial Protection of Economic, Social and Cultural Rights*, a publication of shelter rights initiative 2000, p. 142.

[51] (1997) 7 NWLAR (pt. 512) 283.

[52] (1990) 7 NWLR (pt.163) 489 at 507.

mention that in the Nigerian case of *Oshevire v. British Caledonian Airways Ltd.*[53], the Court of Appeal held that international agreement embodied in a convention or treaty is autonomous, as the parties contracting have submitted themselves to be bound by its provisions, which are therefore above domestic legislation. Thus, any domestic legislation in conflict with the convention is void. The court held that the Warsaw Convention, as amended by the Hague protocol, which was ratified by Nigeria, prevails over the rules of domestic law, when they are incompatible with the latter. It is clear from the above that not much has happened in Nigeria in respect of domestic application of Housing and other ESC rights by her national courts. There are two basic reasons. First, ESC rights are not provided for in chapter four of the constitution but are contained in chapter two which are not justiciable. Secondly, litigants are not fully aware of their ESC rights, - particularly in the context of international conventions like the African Charter on Human and Peoples' Right and this calls for proper education. The point is considered that it will take some time before the public will fully enforce their ESC rights in the same way they enforce their chapter four rights in the constitution. The Nigeriia judiciary is hereby called upon to interpret chapter four rights, in a way that gives life to the provisions of chapter two on fundamental objections and directive principles of state policy.

For instance, in *Tellis v. Bombay Municipal Corporation*[54] slum dwellers brought an action to prevent eviction from their shelter without provision for adequate alternative accommodation. They contended that their eviction would deprive them of their economic livelihood and hence their rights to life under article 21 of the Indian constitution, because their shelters were the only place where they could reside in close proximity to their employment. The Indian Supreme Court agreed and stated thus:

"The sweep of the right to life conferred by article 12 is wide and far reaching. It does not mean merely that life cannot be extinguished... and, for example, by imposition and execution of the death sentence, except in *accordance with a procedure established by law. All equally important facet to that life is the right to livelihood, because no person can live without the means of living, that is, the means of livelihood... Deprive a person of his right to livelihood and you shall have deprived him of his life".*

Thought this may appear ambitious on the face of it in this country, yet case law from other jurisdictions confirms the possibility of such application.[55]

Conclusions

In this paper, I argue a case for a right to housing as a fundamental human right. My analysis was confined to the effect of the use of regulatory schemes as a source of protection and, particularly, I am concerned with a consideration of examples of these schemes viz: the Rent Control and Recovery of Residential Premises laws and the Land Use Act. It is observed that the intrusion of regulatory schemes offer less elaborate protection for the right to housing than the citizens themselves getting directly involved from the level of human rights adjudication. It is also observed that the right to adequate housing is a right of every citizen of Nigeria to live somewhere in security, peace, liberty and dignity. In this regard, the role of the government may not translate directly into building houses for every needy member of the society; rather, it extends to providing the enabling socio-economic and political climate necessary for the fulfilment of this right through legislation, and readiness of the state to ratify and comply with the provisions of international human rights instruments on the right to housing. It follows, therefore, that the challenges of the issue of adequate housing require commitment and changes in behavioural approach to the distribution of national resources in favour of the under-privileged in the society.

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[53] (1990) 7 NWLR (pt. 163) 507.

[54] (1986)(AIR (SP. Ct) 180.

[55] See *Bromor v. Ekiyor* (1985) HCNLR 987 at 989. See also Manual on Housing Rights. Supra at p. 28.

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INFLUENCE OF GLOBALIZATION ON THE LAW SYSTEMS

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Abstract

The legal issues compared by litigants to the phenomenon of globalization include the penetration of global juridical values into the national law systems to which they do not traditionally belong and thus, we may speak of the globalization of law. Globalization, a phenomenon that practically extends the communication bridges among states also results in the fact that the internal legal order expands towards a new legal order, namely a global legal order. In this context, the modernization and compatibility of the legal systems through the transfer of law is inevitable, a fact that might mean the total or partial replacement of a law system which proves to be out of date or obsolete by a system or parts of it assumed to be somehow superior and healthier and aiming at enriching or treating such system so as to ensure the compatibility of an internal legal system to the regional and inevitably the international one. In these conditions, the science of law exceeds the borders and the internal organization rules of a certain state may be useful in other state and vice-versa.

Keywords: *globalization, science of law, global legal values, transfer of law, legal system*

Introduction

Globalization[1] *and the transfer of law have become daily realities that establish connections and interdependences between them so that the globalization of law is seen as an ordered and quite rigorous architectural system of legal norms and the transplant of law represents both the influences between the legal systems and those between the national, regional and international legal cultures. In these conditions, such a continuous evolution of the globalization of law has become a permanent challenge aiming at developing a global reasoning of the institutions entitled to interpret the law on the application of the legal norms from one state to another, from particular to general and vice-versa to find the most adequate and convincing solutions for the clarification of the concrete cases and to provide legal order and social peace at national, regional and global levels.*

The word globalization has been used very frequently with very many significations referring to the development of global financial markets,[2] a potential increase of transnational companies and corporations and an increasing domination of these on the national economies and, as a consequence of such phenomena, citizens compare many legal issues to globalization also including the penetration of global legal values into the national law

[1] A.Jones, *Globalizarea. Teoreticieni fundamentali*, coord. Corneliu Nicolescu, CA Publishing House, Cluj-Napoca, 2011, pp. 7-10.
[2] V.Balaure, C.Vegheş, M.Roşca, S.Toma, *Marketingul în procesul dezvoltării economice şi sociale*, 1972-200: *30 de ani de marketing în România*, vol. I, *Marketingul în era globalizării*, ASE Publishing House, Bucharest, 2002.

systems that do not traditionally belong to them discussing at the same time about the globalization of law.[3]

Another definition[4] of the phenomenon of globalization places it in a set of social, technological, political, juridical and cultural structures and processes resulting from the ever-changing character of goods production, consumption and trade. Massive changes have taken place and are taking place in the world economy[5] so that we may consider that globalization is the result of creation of a world market which must be controlled by strict and yet sufficiently flexible legal rules to guarantee a good existence and functioning of the commercial relations among the subjects of law, individuals or states. The phenomenon of globalization also has some disadvantages meaning that it may decrease the security of al indicators, the local and regional chronic phenomena become global, the organized crime becomes worldwide, the ethnic and religious fanaticisms radicalize and the threat of terrorism increases[6].

And the negative aspects are multiple since globalization is an uncontrolled, unguided and ungoverned process and, if got out of hand, economic globalization may lead, for example, to economic chaos and ecologic devastation in many parts of the world. Globalization may influence democracy[7] as well meaning that it may replace the dictatorship of national elites with the dictatorship of international finances. For instance, the phenomena of fragmentation and weakening of social cohesion and localism in wide areas of the globe are alarming. Practically, by globalization there is a deterioration of income distribution, financial and economic crises multiply with huge effects on the social and political life, including the danger of state disintegration with major influences on social order and implicitly on legal order[8]. The marking of borders no longer has the role of an intangible space of the territory since the state inevitably becomes part of a whole, from the globalized world and its territory is oriented after the logic of lows from all domains[9]: capitals, goods, information, culture and individuals. All these flows represent both power vectors, for those who know how to generate them, to master them and to give them a meaning, and destabilization factors only if they are seen as a fatality. Thus, in recent years, the mobility of law has increased because the enforcement of law no longer supposes the settlement of certain divergences between neighbors but this organization of circulation of capitals, goods, information and individuals among countries and implicitly among continents. The concept of globalization of law[10] appears following the need of existence of some procedures focused on the safety of changes of these flows and implicitly the prevention of potential risks resulted from such processes.

In the specialized opinions[11] it has been affirmed that the political organization of a new international society, the transposition at international level of the organization of states as federations and the prefiguration of a potential world state or government lay at the bottom of appearance and development of some international organizations; thus, supranational entities that have become stronger and stronger and are autonomous towards the states they finance or have acquired over time a supranational character have come into existence,

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[3] G.Soros, *Despre globalizare,* Polirom Publishing House, Iaşi, 2002, p. 23.

[4] I.Bari, *Globalizarea şi problemele globale*, Bucharest, Economică Publishing House, 2001, pp. 17-19.

[5] Ph.Kotler, *Managementul marketingului, analiză, planificare, implementare, control*, Bucharest, Teora Publishing House, 1997, pp. 54-56.

[6] Gh.Văduva, *Terorismul contemporan-factor de risc la adresa securităţii şi apărării naţionale, în condiţiile statutului României de membru NATO*, "Universitatea Naţionala de Apărare" Publishing House, Bucharest, 2005, p. 11.

[7] J.Stiglitz, *Globalizarea. Speranţe şi deziluzii*, Economică Publishing House, Bucharest, 2005, p. 53.

[8] E.Gh.Moroianu, *Consideraţii privind ordinea naturală şi ordinea socială în vechea filosofie greacă*, in "Revista de filosofie", no. 1/1990.

[9] Z.Bauman, *Globalizarea şi efectele ei sociale*, "Antet" Publishing House, Bucharest, 1999, p. 85.

[10] I.Craiovan, *Filosofia dreptului sau dreptul ca filosofie*, "Universul Juridic" Publishing House, Bucharest, 2010, pp. 281-282.

[11] Raluca Miga Beşteliu, *Organizaţii internaţionale interguvernamentale*, All Beck Publishing House, Bucharest, 2000, pp. 1-5.

entities that do not have their own colours, such as the International Monetary Fund or the World Bank, have exercised an important influence on the birth and formation of national laws, mainly in the post-communist states.[12]

Of all subjects, the science of law is the most affected one by this process of continuous unification of the world[13] because the science of law must be updated continuously so that it may cover as many new aspects of the contemporary social life as possible since new spaces and domains of the law, new methods and enforcement strategies or regulation techniques appear permanently that we may come to the situation where many of the things that represented fictions in the past may become an *aquis* at present.

At global level, the existence of preoccupations related to the independence of legal power and the statute of those entitled to make the law has at least two significant explanations.

First of all they refer to the phenomenon of globalization which also determines, among others, a certain convergence of the legal systems by creating some common legal spaces and instruments at continental and regional level, leads to the intensification of institutional cooperation, a fact that necessarily involves a certain adjacency of concepts regarding the independence of justice and implicitly the immovability of judges and their role in a democratic state.

Secondly, we may see that in all states there is the trend of political factor and mainly of the executive organs to try, in direct or less direct diverse ways, to influence the judicial power[14], especially by means of the mechanisms of appointment and promotion of magistrates thus negatively influencing the general law principles and, moreover, bringing prejudice to the rule of law. In this context, the political power is structured into three dimensions[15]: the dimension of the national law, the dimension of the international law and the dimension of global policies, this type of power bearing the name of *soft power*.

By its specific object, the science of law[16] currently acquires a special importance which is determined by the need to analyse the law and state from the perspective of globalization. The regional organization is considered as the intermediate stage leading to globalization and relies on the deliberate and voluntary transfer of sovereignty to supranational institutions. In this context, in the world there is at present tens of associations of regional states, associations that differ among them by the intensity of cooperation or the degree of institutionalization.

The transfer of law is in general understood as a transfer of power and institutional structures beyond the geopolitical or cultural frontiers and which may be decided imperatively or voluntarily, it comprises whole legal systems or unique legal principles and intends to get integrated into similar or different legal cultures[17]. In the receiving countries, the transfers of law may penetrate the notion of rule of law or non-state social institutions or, in case of many developing countries, they are implemented in the supreme state law superposing over indigenous legal structures. This is more and more internationally connected to the harmonization legislative projects sponsored by the great commercial partners and the donating international agencies.

The transfer of law involves a legal system which includes a legal norm, institution or doctrine adopted from another legal system. It may also refer to the reception of an entire

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[12] M.G.Losano, *Drept comparat*, C.H. Beck Publishing House, Bucharest, 2005, p. 72.

[13] L.J.Constantinesco, *Tratat de drept comparat,* vol. I, *Introducere în dreptul comparat.* Bucharest, All Publishing House, 1997, p. 18.

[14] Sofia Popescu, *Statul de drept în dezbaterile contemporane,* "Academia Română" Publishing House, Bucharest, pp. 146-149.

[15] J.Allard, A.Garapon, *Judecătorii şi globalizarea. Noua revoluţie a dreptului*, edition reviewed by Mona-Maria Pivniceru, Rosetti educational Publishing House, Bucharest, 2010, p. 70.

[16] N.Popa, *Teoria generală a dreptului*, C.H. Beck Publishing House, Bucharest, 2008, pp. 10-11.

[17] J.Allard, A.Garapon, *op. cit.*, p. 54.

legal system that may appear in a centralized way. To understand the transplantation phenomenon of a foreign law system it is necessary to examine the historical premises existing round the introduction of the foreign law in a particular case, for example, if this is the result of a conquest, colonial expansion or political influence of the state whose law system is being adopted. A territorial expansion by military conquest does not always involve the imposition of legal norms by the winsome peoples to the conquest populations and this type of imposed power bears the name of *hard power*.

The concept of transplant of law is not new[18] since the legal systems all over the world have developed for millennia by transfers of law and some of the best transfer of law that may be documented took place during the military expansion of the Roman Empire. The roman lawyers used to assimilate *ius gentium*, which applied to the colonized persons to *ius naturale* – the law that had to be observed by everybody[19]. They considered that the *universal laws of nature* are capable of linguistic culture by means of the universal legal codes. Their conviction was that the differences between the legal systems denied the universal attributes of the human being and the codes of natural laws based on the roman morality superposed over the indigenous beliefs and cultural practices.

The example is given by history, namely in the countries under Roman domination, the Germanic and Islamic populations which represented the subjects of the legal norms of the rule of law continued to be governed by their own systems of law within the so-called *principle of the legal personality*. In some cases, a direct imposition occurred in fact as happened, for instance, with the introduction of legal norms of Spanish law in South America[20]. In other cases, the law of the winsome nation was introduced partially or in an indirect manner, an example being when during the British and French colonial expansion there was the tendency to introduce elements of the legal systems[21] of the colonial powers to develop law systems adapted to the local conditions but reflecting to a great extent the character of metropolitan systems. Moreover, they had to accept that the process of transplant of law might have been interrupted by a revolutionary change knowing that a revolution may be defined as a historical event that may change the identity of a social-political system through the modification of the ideological bases of its legitimacy and, consequently, of the orientation. A legitimate revolutionary change is the most radical change to which a social-political system may be subjected because the transformation of the legal system of a country determined by such a change may make the legal system move forward or backward from other law systems, an extent to which ideological differences and similarities related to the social-political and economic structure of different countries is expressed in legal norms[22]. The newly-born legal institutions may not easily cross diverse contexts since they need a careful inoculation in the social and juridical consciousness that is going to adopt them, somehow contrary to what the idea of a transplant erroneously suggests, namely the institution moved will remain the same, will have the same function, except that all these will happen in the new legal system wherefrom the existence of an extremely limited area of options that makes us enunciate two possible solutions: rejection or integration.

The principle of *complementarity* of the legal norms functions as a quite efficacious mechanism in the evaluation of capacity of the legal systems at global level to find the best possible solutions to solve legal order issues[23] that may occur at a global level – the trial of crimes against humanity, the traffic in human beings, the drug traffic, piracy - as Mircea

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[18] Ellen Goodman, *The Origins of the Western Legal Tradition*, Federation Press, Sydney, 1995, pp. 131–36.

[19] N.Barry, *An Introduction to Roman Law*, Clarendon Press, Oxford, 1962, pp. 54–59.

[20] M.G.Losano, *Marile sisteme juridice*, *Introducere în dreptul european şi extraeuropean*, coord. M.-C. Eremia, All Beck Publishing House, Bucharest, 2005, pp. 198-201.

[21] *Idem*, pp. 291-297.

[22] R.Rodière, *Introduction au droit comparé*, Dalloz, Paris, 1979, pp. 21-23.

[23] Ch.Debbasch, J.-M.Pontier, *Introduction à la politique*, Paris, Dalloz, 2000, p. 6.

Maliţa said: "Globality does not ensure the internal order and the enforcement of justice. The states are called to cope with new dares: weapon traffic, money laundering, corruption, terrorism, and drugs".[24]

The appeal for the transplantation of jurisprudence of the legal systems of other states in view of argumentation based on the efficacy of the applied and applicable legal norms leads to the creation of a common and inedited juridical space through the creation of some unified legal procedures, and we may exemplify the *European arrest warrant* in this respect, an institution aiming at the elimination of possibility for offenders to exploit the differences between the legal system of the states. For this purpose, it is necessary that the sentences be acknowledged and executed abroad without the formalities provided for the classical conventions regarding the international legal assistance[25].

The law systems created or updated by the method of transfer of law must not compete but lead to a mutual and permanent evaluation and maintenance having as a goal the diminution of the risk of rejection of the transplanted norm. The legal norms may be taken out of context and be used as a model for juridical development in a very different society. The absence of some substantial differences in the manner of drafting a legal norm between a donor and a host country does not imply the fact that the legal reality or the daily legal and social practice in the two countries should be identical or similar. The legal reality in the host country may be very different in terms of the manner in which people (including lawyers and civil servants) read, interpret and justify the relevant legislation and sentences rely on these. More than that, the role of law in the receiving country may be weaker than in the donating country and, in particular, it may become a predominant factor. Thus, in practice, social norms might be hindered by people since the initiation of a legal right or even by a decision given by a court to sustain such a request. This suggests that it is not honest to use the perspective and framework of one's own legal culture when they examine a legal norm or institution borrowed by a legal system in the context of another culture[26]. Such an approach involves the risk of existence of many more de facto similarities[27].

Another goal of the legal transplant is to ensure the adequate functioning of the global society and requires the existence of a single legal order since two distinct and independent legal orders may not be simultaneously valid for the same individuals in the same territory. This way, *legal order* provides the orientation, carrying out and control of social actions and behaviours based on a ranked system of legal norms. Legal rules represent the foundation of legal order and, just like social norms, protect the main social values and relations by imposing, allowing or forbidding certain actions or behaviors. The opening of an international legal space through the assimilation of certain specific legal norms allows the acceleration of the course of international justice and the placement of weaker states under the domination of stronger states as well.

Conclusions

As a conclusion, the legal transplant represents a phenomenon in a continuous development that may lead to the globalization of law by extension to any legal norm that may be useful for a given global topic. At the same time the globalization of law and justice opens a new horizon for the sovereign states called to evaluate the value and place in grouping nations in terms of influence and independence. The efficiency, efficacy and validity of law and the application thereof in a reasonable and convincing manner are the principles that come before independence and dignity of any national law. The globalization of law is

[24] M.Maliţa, *Zece mii de culturi, o singură civilizaţie,* Nemira Publishing House, Bucharest, 1998, p. 128.
[25] J.Allard, A.Garapon, *op. cit.*, pp. 27-29.
[26] O.Kahn-Freund, *On Uses and Misuses of Comparative Law*, in *Modern Law Review*, 1974, p. 37.
[27] W.Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants* in *American Journal of Comparative Law*, 1995, p. 43.

constituted at present in a wide movement area where national strategies are in their environment and have as a finality the provision of legal order and, by the method of legal transplant, leads to the birth of a global procedural law which is imposed, on one hand, by the need for the instauration and maintenance of social peace and world level and, on the other hand, by a certain attraction between the legal cultures and the attempt to meliorate the differences between the legal systems. The main motivation of the latter aspect is that the global and common principles of justice lie at the bottom of different national law systems. The existence of legal transplants in diverse cultural, socio-economic and political contexts is important in order to examine and establish the opportunity and applicability of transplants and legislative and legal practice that may ensure the adequate functioning of a globalized society with an efficient and efficacious legal order.

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REGARDING TO THE ACTIVE ROLE OF THE NATIONAL AGENCY OF FISCAL ADMINISTRATION

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Abstract

The National Agency for Fiscal Administration was incorporated on 1 October 2003 subordinated to the Ministry of Public Finances, by Government Ordinance no. 86/2003, as a specialized body of the central public administration. Starting with January 2004 it became operational, acquiring the capacity of institution with its own legal personality, by splitting the directorates in charge of the state income administration within the Ministry of Public Finances.

Keywords: *National Agency for Fiscal Administration, politics of fiscal administration*, *transparency*

Introduction:

To guarantee the good functioning of Romanian society the role of A.N.A.F is to collect efficiently the budgetary incomes.

In the context of perpetuation of the effects of the economical crisis attracting public incomes is a major challenge for A.N.A.F, because collecting these becomes more and more difficult in the condition of restriction of economical activities, of a fragile voluntary compliance and in the condition of a growing fiscal evasion.

The efficiency of attracting resources cannot be realized without the voluntary compliance of the tax-payer and without *modern and quality assistance services* offered by the Agency. During the assistance activities offered for the tax-payers, A.N.A.F. and implicitly the public officers of fiscal administration are going to respect the following principles: the principle of equality before the law and before public authorities, the principle of no discrimination, of access to information of public interest, of free fiscal assistance offered for the tax-payer, of transparency, of adjustment of fiscal administration according to the request of the tax-payer, of respect and consideration towards the tax-payer and of confidentiality.

The budgetary incomes collecting procedures promoted by A.N.A.F. must be simplified, coherent, in order to serve the interests of a healthy, equitable and competitive business environment. The simplification and/or modernization of fiscal procedure is realized through the continuous extension of use of informatics (this way the modern applications have facilitated the fulfilment of fiscal obligations in term, diminishing "losing time" by the offices of the competent fiscal administrations). The accentuation of the simplifying politics of the procedures assessed the re-examination and reformulation of declarations and forms and also the elimination of some declarations.

In sustaining these objectives, along the time, A.N.A.F. has implemented different politics of fiscal administration which have contributed also to the prevention of fiscal evasion

– infractions generating negative effects in the structure of budgetary incomes, in the business environment, etc.

In order to fight against fiscal fraud the actions of A.N.A.F. are aiming to *verify* as a priority those tax-payers who can represent important potential of fiscal evasion, selected based on some risk analyses, but also on some prudential supervision of the higher risk domains of fiscal evasion like the domain of intra-communitarian acquisitions[1], of the excise taxable products, of the import-export operations etc.

In the same time, for the following period, the actions of A.N.A.F. must aim also combating cross-border fiscal evasion, multinational fraud and to assure the necessary basis to implement the Schengen Agreement.

Even more, to prevent and fight against not declaring or under declaration of social contributions and to fight against the phenomenon of illegal work there are organized periodically some cooperation programs (common control operations) with the Labour Inspectorate. The controlling act is permanently developed through the professional training of the employees, during the whole time of fiscal control, the inspectors of fiscal control having the obligation to work professionally, proving rectitude and objectivity in relation to tax-payers and to other persons with whom they meet during fulfilling their service activity.

Also to prevent and to fight against nonconformity of the tax-payers towards fiscal obligations (declarations and payments), A.N.A.F. will monitor the newly founded tax-payers (registered for VAT), will try to improve the efficiency of administrative sanctions and to improve the cooperation with the units of research and penal prosecution.

A.N.A.F. will have to prevent fraud from the collecting phase of fiscal debts, analyzing permanently the solvency indicators of the tax-payers in order to prevent the accumulation of more debts compared with the patrimonial situation. This way the appearance of the impossibility of enforcement procedure will be avoided.

In order to accomplish efficient analyses and for a better foundation of the measures disposed through a controlling action, the inspectorate of fiscal control will promote the principles of integrity in exercising its function, of objectivity in making establishments and establishing the applied measures, of legality of the control procedure, of confidentiality and of competency.

The National Agency of Fiscal Administration has the following main objectives[2]:

- realizing the incomes of the general budget consolidated from taxes, fees, social contributions and any other amounts which have to be paid to the budget of the state, through the continuous improvement of the voluntary conformity level of the tax-payers;
- the unitary application of the foresights of fiscal legislation;
- service of information and assistance delivery for the tax-payers for the understanding and correct application of fiscal legislation;
- the constant improvement of efficiency in collecting budgetary incomes;
- guaranteeing reliability for the tax-payer in the integrity and impartiality of fiscal administration;

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[1] In order to prevent and fight against intra-communitarian fiscal evasion and fiscal fraud, A.N.A.F. must take into consideration the intensification of cooperation with other member states through special measures of administrative cooperation activities, respectively:
- the initiation of multilateral controls and the continuous participation by the controls initiated by other states;
- participation through the intra-communitarian exchange network of information Eurofisc, dedicated for operative exchange of data regarding to suspicious intra-communitarian transactions;
- the increasing of efficiency in valuing data transmitted by Eurofisc, through the intensification af the verifying actions developed by the territorial structures.

[2] Art. 4 paragraph 1 of G.D. No. 109 from 18.02.2009 regarding to the organization and functioning of the National Agency of Fiscal Administration published in the Official Monitor No. 126/02.03.2009, with the ulterior modifications and completions by G.D. No. 566 from 01.06.2011 published in the Official Monitor No. 405/09.06.2011.

- preventing and fighting against evasion and fiscal fraud;
- training of competent and motivated human resources;
- protecting the fiscal and financial interests of the European Union, etc.

In realizing the above mentioned objectives, A.N.A.F. has mainly the following attributions[3]:

1. ellaborates and applies procedures regarding to voluntary payment and the establishment of payment means, together with the special directions of the Ministry of Public Finances;
2. ellaborates and applies, through competent units, procedures regarding to other methods of compensations of budgetary obligations administrated by it;
3. participates by the estimation of budgetary incomes which are administrated by it and makes proposals regarding to the income level which can be collected from the tax-payers, based on registered dates, on macro-economical indicators, fiscal politics and on the actual legislation regarding to taxes, fees, social contributions and other budgetary incomes;
4. delivers for the Ministry of Public Finances the necessary information for the foundation of estimation of incomes which can be collected from the tax-payers;
5. delivers for the special structures of the Ministry of Public Finances the necessary information for the foundation of calculation of the contribution of Romania to the budget of the European Union;
6. assures the unitary, correct and not discriminating application of the legal foresights regarding to taxes, fees, social contributions and other budgetary incomes, the collection of budgetary incomes, the application of the prerogatives established by law, through the equitable treatment for all the tax-payers, the use of new technologies in sustaining the management of the National Agency of Fiscal Administration and the improvement of the relation with the tax-payers;
7. participates, together with the special directives from the Ministry of Public Finances by the elaboration of the projects of normative documents regarding to the establishment of budgetary incomes;
8. sustains the encouragement of voluntary conformation of the tax-payers through the development of the services offered for them, aiming to facilitate the fulfilment of fiscal obligations;
9. offers guidance for the tax-payers in the application of fiscal legislation and of the foresights of the agreements to avoid double taxation with the help of the territorial fiscal units;
10. represents the state in front of the court and of the units of penal prosecution, as subject with rights and obligations regarding to judicial fiscal relations and other activities of the agency, directly or represented by the general directions of the territorial public finances and of the capital Bucharest, based on the transmitted warrant; the resignation of means of appeal, in the litigations which are connected to judicial fiscal reports, will be made according to the procedure established by the orders of the president of the National Agency of Fiscal Administration.

A.N.A.F. continues to develop its activity based on the efficiency principles of the activity of fiscal administration, on the principle of unitary treatment, of respect and transparency towards the tax-payers.

The primary axes of the politics of fiscal administration focus on three important action directions[4]:

- fighting against fiscal evasion and against any other form of avoiding the declaration and payment of fiscal obligations;

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[3] *Ibidem*, art. 4 paragraph 2.

[4] www.anaf.ro – National Agency of Fiscal Administration, datum 4 March 2013, 15.00 o'clock.

- the improvement of the efficiency and dynamics of collecting and in the same time reducing the costs of collection;
- the encouragement of voluntary conformation in order to assure a quick collection with reduced costs.

The active role of A.N.A.F. in the procedure of fiscal administration will be developed also through the future implementation of control of electronic commerce. These kinds of control procedures (respectively, the necessary informatics application to analyze internet transactions) will be developed mostly with the help of European funds.

Through its politics A.N.A.F aims to develop partnership with the tax-payers, according special attention also to create some consulting mechanisms with the representatives of the subjects of taxation. Through the increasing of efficiency of communication there will be a complex process of transparency of the activity and of development of trust in the quality of the services offered by fiscal administrations. A.N.A.F. must remain the promoter of organizing communication sessions, thematic meetings in order to know and unitarily apply fiscal legislation, editing flyers, brochures to transmit information to the tax-payers.

We must mention that A.N.A.F., in the actual economic context continues to face some important challenges in order to modernize its activity. They tried to identify some weak points of the agency, where they are operating in the future in order to eliminate malfunctions, to strengthen the fiscal system and in order to use the given resources at maximal capacity and in efficient conditions. These problems are concerning:

- continuously, the **reduced level of voluntary conformation** and for this reason, the keenly felt need of action in order to fight against fiscal evasion, against any kind of measures of avoiding declarations and payments and in order to improve the services offered to tax-payers and to diminish the conformation costs;

Fiscal administration must develop every kind of fiscal administrative tasks, including the services offered to tax-payers, elaborate inspections and investigations – through which it is offered the possibility to plan, coordinate and evaluate in an efficient manner all those activities which are able to influence the conformation of the tax-payers.

- **the actual organizational structure**, especially that of the territorial agency which imply high administrative costs, caused the foundation of the high number of fiscal organs, all the counties being similarly treated without taking into consideration the dimensions and importance of each of them under the aspect of their economical share, or of the number of tax-payers etc.
- **the inefficient distribution of employees** among the different activities of fiscal administration, as well as among the different units of territorial level, without respecting from one county to the other the same proportion between the number of employees and the number of the administered tax-payers or the realized incomes;

We must underline the fact that the efficiency of the fiscal system is burdened also by the great number and gravity which are occupied by non-fiscal activities or by those which are not subordinated to the aim of collecting budgetary incomes. Furthermore, the number of employees assigned to different structures of territorial level, are not well-proportioned with some indicators like the number of tax-payers or the realized incomes.

To consolidate the necessary legal frame in order to fight fiscal evasion and because of the engagements assumed by Romania in relation to the International Monetary Fund, the Government adopted the Urgent Ordinance No. 74/2013[5].

With this normative document it is aimed to regulate the following aspects:

[5] O.U.G. No. 74/2013 regarding to some measures to improve and reorganize the activity of the National Agency of Fiscal Administration, and for the modification and completion of some normative documents published in the Official Monitor No. 389/29.06.2013.

- *the creation of regional level* in order to reduce the number of reports to the main office of A.N.A.F., to improve plans and controls, to reduce the cost of collection and to create some more balanced units in the perspective of economic share and of share in collecting incomes;
- *the creation of anti-fraud structure* through *the reorganization of operative control* among the own system of A.N.A.F.. Taking into consideration the necessity of recovering with celerity the damages caused at the budget of the state through criminal activity of fiscal evasion, and also the necessity of the training of employees who are dedicated to fight against this phenomenon, the anti-fraud structure will take over also activities of penal investigations. This measure is justified by the necessity of coordination by a single unit of the whole activity, in order to concentrate information and to use them efficiently, through reducing administrative barriers and to obtain immediate results. It is taken into consideration the example of some developed European countries, where this kind of structure which combine penal investigation with administration/fiscal research and obtain great results in fighting against the phenomenon of fiscal evasion.

In a concrete manner, by the Agency there is founded the general Direction of fiscal anti-fraud, structure without judicial personality, with attributions in preventing and fighting against documents and actions of fiscal evasion, fiscal fraud and customs fraud. The direction id coordinated by a vice-president with rank of under-secretary of state, named by the decision of the prime minister and lead by a general inspector of anti-fraud, helped by a general deputy inspector of anti-fraud.

Among the central structure of the general Direction of fiscal anti-fraud, near the structures of prevention and control, there is the Direction of combating fraud, which offers specialized technical support to the prosecutor in the development of penal pursuit in the cases with object of economic-financial infraction. In order to this the anti-fraud inspectors of this direction are sent to the prosecuting magistracy, according to law, as specialists.

In exercising their duties, the anti-fraud inspectors of the Direction of combating fraud are making, according to the disposals of the prosecutor: technical-scientific establishments, containing proving materials, according to law; financial investigations in order to block goods; any other controls in fiscal matters ordered by the prosecutor[6].
- *assuring the autonomy of the General Direction of Customs*, as part of A.N.A.F., in exercising the special functions of customs: the security of the external border of the European Union, doing the customs operations, fighting against drug trading and against trading of counterfeit goods etc.;
- *the implementation of a new strategy of human resources and the simplification of the decisional process.* This measure can be realized through the redistribution of the employees towards the critical domains (anti-fraud, fiscal inspection, IT, judicial) or towards fiscal organs with the highest load of work, and at the other hand by dismiss of those who are not corresponding from professional point of view and from the point of view of integrity. In the same time through reducing with up to 30% the management functions the decisional process will be quicker and there will be savings in order to use the budgetary funds for the costs with the employees.

Conclusions

The fiscal administration must continuously deliver quality services for the users, because they are expecting quick, correct and objective solutions for their documents. The decision-making must be quick, steady and transparent. The principle of transparency is referring not only to the modalities but also to the factors which stand on the bases of the decisions.

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[6] Art. 3 paragraph 4 of O.U.G. No. 74/2013.

Last, but not at least, A.N.A.F. also fulfills an acting role in international relations, the adherence of Romania to the European Union obliging the agency to participate in an active way by the European decisional process through the promotion of some of their own ideas and interests. The representatives of A.N.A.F. have participated and are continuously implied in a various range of activities regarding to international cooperation: reunions of work-groups organized at the level of European institutions (visits and workshops developed through the program FISCALIS, events organized by the Intra-European Organization of the Fiscal Administration, and also activities of the projects developed on bilateral bases together with other fiscal administrations.

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PROPOSALS FOR THE AMENDMENT OF THE NEW CIVIL CODE ARISING OUT OF THE FAILURE TO MEET THE REQUIREMENTS OF ENVIRONMENTAL PROTECTION

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Abstract

Appeared with the declared intention to ”meet the requirements of a dynamic present”, by: “the newly promoted solutions, the revision of some classical institutions or emphasis on certain internationally recognized principles, not implemented in the Romanian space yet”, the new Civil Code does not seem to integrate the environmental and related issues in the dynamics of the present. Moreover, except for some modest norms – such as art. 539 par. 2 which includes in the category of movables “the electromagnetic waves or those assimilated to them, as well as the energy of any kind” and art. 603 which provides the obligation of the owner to “observe the tasks concerning the protection of the environment and the action of ensuring good neighbourhood” – nothing entitles us to assert that the new Civil Code “makes valuable use of provisions of European law instruments”. It is known that the basic treaties of the European Union – the Treaty on European Union and the Treaty on the Functioning of the European Union – in numerous articles, establish the sustainable development of Europe and of the planet, the promotion of solidarity between generations and a high level of protection and enhancement of the quality of the environment as primary objectives of the European Union. This is the reason why art. 11 TFEU imposes that “environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities”.

Keywords: *basic treaties of the European Union, protection of the environment, sustainable development of Europe and of the planet.*

Introduction

Section 1. The Civil Code and the protection of the environment

Subsection 1.1 Art. 539 of the Civil Code (Movables)

(1) “The things which are not immovable by law are movable. (2) Electromagnetic waves or whatever is assimilated to them, as well as any kind of energy, lawfully generated, captured and transmitted by any person and for his own benefit, regardless of the movable or immovable nature of their source, are also movables”. The text raises some comments. First, one should notice the negative form of the sentence defining movables, which is not the most appropriate one for a legal norm[1]. Instead of providing that movables are not immovables, it would have been more accurate to indicate what characterizes this category of property[2]; the

[1] Neculaescu S, *Răspunderea civilă delictuală în Noul Cod Civil – Privire critică* -, “Dreptul” Review, no. 4/2010, p. 55.

[2] Popa C., *Teoria definiţiei,* “Academiei” Publishing House, Bucharest, 1972. So that a definition will be functional, it must meet the following requirements: to be characteristic; not to be circular, a word is not defined by itself; to be clear and precise; to be logically affirmative; not to contain contradictions.

very definition of movables, by excluding the things "which are immovable by law" from the category of property, is not a good choice. Secondly, although there is no definition of movables, par. 2 provides that "... are also movables" and, consequently, we do not know what movables are in general, but we find out that, undoubtedly, this category "also" contains the items of property expressly enumerated in par. 2, "electromagnetic waves or whatever is assimilated to them, as well as any kind of energy, lawfully generated, captured and transmitted by any person and for his own benefit...". As for the enumeration "generated, captured and transmitted", referring to "any kind" of energy, we may notice that it does not comply with the stages provided by Law no. 13/2007 on electricity[3]. "Establishing the legal framework for the electricity sector activities … for the effective use of primary energy resources in terms of accessibility, availability, affordability and compliance with the safety, quality and environmental protection norms"[4], Law no. 13/2007 provides in art. 13 par. (2) that "The generation, transmission, system service, distribution and supply of electricity, as well as the activities of the electricity market operator and supply of system technology services take place on the basis of licenses granted under this law". And in art. 27 it is specified that: (1) "The participants in the electricity market and associated operational structures are: producer[5], transmission system operator[6], market operator[7], distribution operator[8], supplier[9], eligible and captive consumer[10]". By systematically interpreting the texts

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[3] Official Gazette no. 51, 23/01/2007. Of the amendments and completions to the law, we mention: G.E.O. no.33 of 4 May 2007; G.E.O. no. 172/2008 for the amendment and completion of the Law on electricity no.13/2007. Law no.123/2012 on electricity and gas establishes now the legal framework for the electricity sector activities... for the effective use of primary energy resources in terms of accessibility, availability and affordability and compliance with the safety, quality and environmental protection norms. Law no.123/2012 provides in art. 8(2) that "The generation, transmission, system service, distribution and supply of electricity, as well as the activities involved by the administration of centralized electricity markets take place on the basis of licenses granted under this law". In art. 21(2) it is specified: (1) "The participants in the electricity market and associated operational structures are: producer, transmission system operator, market operator, distribution operator, supplier and client". (Official Gazette no. 485, 16/7/2012).

[4] Art.1 The scope of regulation.

[5] Art.3 (46) *The meaning of some terms and expressions: electricity producer,* natural or legal person, license holders, whose specific activity is to generate electricity, including cogeneration.

[6] Art.3 (35) *transmission system operator,* natural or legal person which detains, with any title, an electrical power transmission network and holds a transmission license, entrusted with operations, maintenance and, if necessary, development of the transmission network within a certain area and, where applicable, interconnection with other electro-energetic systems, as well as the assurance of long-term capacity of the system to cover reasonable requests for the transmission of electricity.

[7] Art.3 (33) *operator of the centralized electricity market* the economic operator holding a license and ensuring the organisation and administration of a centralized electricity market.

[8] Art.3 (34) *distribution operator* natural or legal person which detains, with any title, a distribution network and holds a distribution license by which it is entrusted with operations, maintenance and, if necessary, development of the distribution network within a certain area and, where applicable, interconnection with other systems, as well as the assurance of long-term capacity of the system to cover reasonable requests for the distribution of electricity.

[9] Art.3 (23) *electricity supply,* the activity of electricity trading towards clients; (24) *supplier,* legal person holding a supply license; (25) *supplier of last resort,* supplier appointed by the competent authority to provide supply services under specifically regulated conditions; (26) *default supplier,* supplier appointed by the competent authority, which also detains the distribution license, as well as a concession contract for the exclusive supply of distribution services within a certain area or the successor of the legal entity carrying out both its distribution activity and supply activity at the time of the entry into force of this law.

[10] Art.3 (8) *client,* natural or legal person that is buying electricity; (9) *wholesale client,* any authorised natural or legal person buying electricity for the purpose of reselling it on the internal or external electricity market; (10) *eligible client*, any natural or legal person free to buy electricity from the supplier, in accordance with their own choice; (11) *final client,* any natural or legal person buying electricity for their own use; (12) *non-domestic client,* any natural or legal person buying electricity which is not for their own domestic use, this category also including producers and wholesale clients; (14) *captive consumer,* electricity consumer which, for technical, economic or regulation reasons, cannot choose the supplier, as well as the eligible consumer which does not

under discussion, we cannot but guess the legislature's intention to limit to "the generation, caption and transmission" of electricity and the reason underlying the choice of the expression "any person", as long as we can see that not any person, but well individualized persons from the standpoint of name, powers, duties..., deal with electricity issues. It is possible that the reason behind the expression "any person" may be to emphasize the fact that the person who "generated, captured, transmitted", "any kind of energy" is not important as long as it was "for his own benefit"; and since there is a gain - out of this "benefit"- for the person involved, it results not only that the specificity of the property mentioned in art. 539(2) is given by this gain, but also that this rule actually addresses a particular category of persons, those participating in the electricity market. Since this is the logical conclusion, we wonder why art. 539 occurs in a section entitled "On the distinction of property", at the beginning of a chapter called "On property in general"[11].

The merit of this paper, under environmental law, resides in the inclusion of "*electromagnetic waves or whatever is assimilated to them"* in the category of movables. Independently, art. 539 of the Civil Code is just a segment of an incomplete legal framework leading to uncertain judgments, full of unavoidable errors caused by the fact that in such a sensitive domain, i.e. the environment, there are still solutions which do not comply with the spirit of the law. A first reason in this sense is that electromagnetic pollution does not benefit from coherent regulations. Thus, the framework law, G.E.O. no. 195/2005 on the protection of the environment, with regard to electromagnetic radiation, adopts a different position, not offering a special chapter as happens with other pollutants (e.g. dangerous substances and preparations, Chapter II, waste, Chapter IV, fertilizers and plant protection products, Chapter V, genetically modified organisms, Chapter VI, ionizing radiation, Chapter VII, etc). It nevertheless mentions electromagnetic radiation as a polluter in art. 2(50), providing that a *pollutant* is "any substance, in solid, liquid, gaseous form, or in the form of vapour or energy, *electromagnetic*, ionizing, thermal, phonic radiation or vibrations, which, introduced in the environment, modifies the balance of its components and of the living bodies and causes damage to material goods". Since G.E.O. no. 195/2005 recognizes electromagnetic radiation as a pollutant and, consequently, its ability to cause damage to people, it results that a series of texts, including some in the framework law, should be modified. Thus, ***de lege ferenda:*** a) art. 2(38) referring to *information on the environment* which must be made available to the public, must concern, in par. (b), *factors*: besides substances, energy, noise and electromagnetic radiation[12] and together with art. 2(38), it is necessary to modify the relevant legislation in the field, namely the legislation on environmental information; b) *"action plans", integrated environmental authorisation"...* must also concern electromagnetic radiation; c) the central public authority for health should monitor *the health of the population* in relation to this risk factor and should develop research in this field; d) the central public authority for *education and research* (individually or in cooperation with the central public authority for health) should increase research in order to *eliminate any uncertainty regarding the harmful effects* of electromagnetic radiation and to take appropriate measures; e) the authorities within *local public administration* which also have the power to supervise

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exercise the right to choose its supplier; (15) *domestic consumer,* consumer which buys electricity for his own use of the household, excluding electricity consumption for commercial or professional activities; (16) *electricity consumer,* final client, natural or legal person, buying electricity for their own use; (17) *eligible electricity consumer,* electricity consumer which may choose its supplier and contract the necessary energy directly with it, having access to transmission and/or distribution networks.

[11] Section 1. On the distinction of property, Chapter I. On property in general, Title I. Property and real rights in general, Book III On goods.

[12] At present, the text appears as follows: "*information on the environment,* any information in written, visual, audio, electronic form or in any other material form on: a)...; b) factors such as substances, energy, noise, radiations or waste, including radioactive waste, emissions, discharges and other releases into the environment which affect or may affect the environmental elements referred to in a)".

subordinate *economic operators* for the prevention of accidental release of *pollutants...*[13] must take into account those whose activity generates *electromagnetic radiation*; f) the *National Authority for Consumer Protection* should have powers in this matter as well (not only in the field of genetically modified organisms[14]), and on the basis of data provided by the Authorities for health and research, they should take measures for consumer information with regard to mobile phones, video-terminals, GSM etc. A second reason for which electromagnetic radiation remains a problem is the absence of special environmental courts which should adjudicate only environmental issues. An environmental court would imply, in particular, the existence of: specialized police officers; motivated magistrates specialized in environmental issues; the will of judicial institutions, especially of the public ministry, to integrate the fight against environmental crimes among the high priority objectives; some experts not only specialized, but also possessing the equipment for various measurements. For the above-mentioned reasons, we propose ***de lege ferenda,*** the amendment of the Code of Civil Procedure, in the sense of establishing environmental courts.

Art. 539 of the Civil Code do not reveal its importance individually, but by relating to art. 1349 of the Civil Code which provides: *(1) Everyone has the duty to observe conduct rules imposed by the local law or custom and not prejudice, by his acts or failure to act, the legitimate rights or interests of others. (2) The mentally competent person who fails to perform this duty shall be liable for all the damage caused, having the duty to fully remedy it. (3) In cases expressly provided by law, a person has the duty to remedy the damage caused by another person's action, by the things or animals in his custody, as well as the ruin of a building. (4) The liability for the damage caused by defective products shall be established by a special law.*

Getting over the flagrant violation of the norm according to which: "in the normative language the same notions shall be expressed only by the same terms"[15], and we can see that for the same notion of property, there are several terms, even in art. 1349 of the Civil Code, par. (3) mentions …the damage caused…by the things … in his custody, and par. (4) provides that: "*The liability for the damage caused by defective products shall be established by a special law",* and getting over the fact that we do not understand the distinction between "goods", "things" and "products", art. 539 of the Civil Code is important by these two articles whose systematic interpretation results in the fact that one must be liable for *"the damage caused"…"by electromagnetic waves or whatever is assimilated to them, as well as any kind of energy",* and liability may be imposed on *"any person"* who used it "*for his own benefit",* by *"generating, capturing and transmitting",* this kind of *"things", "regardless of the movable or immovable nature of their source".*

***Subsection* 2. Art. 630 of the Civil Code (Overcoming normal neighbourhood inconveniences)**

[13] Art.90 (h), G.E.O. no.195/2005.

[14] Art.92 (a, b, c) G.E.O. no.195/2005.

[15] Art.37 of Law no. 24/2000 on the legislative technique norms for the elaboration of normative acts, republished on the grounds of art. II of Law no. 60/2010 for the adoption of G.E.O. no. 61/2009 for the amendment and completion of Law no. 24/2000 (Official Gazette no. 215, 6/04/2010). Law no. 24/2000 on the legislative technique norms for the elaboration of normative acts (republished in the Official Gazette no. 777, 25/082004); Law no. 49/2007 for the amendment and completion of Law no. 24/2000 on the legislative technique norms for the elaboration of normative acts (Official Gazette no.194, 21/03/2007); Law no. 173/2007 for completing art. 53 of Law no. 24/2000 on the legislative technique norms for the elaboration of normative acts (Official Gazette no.406, 18/06/2007); Law no. 194/2007 for the amendment and completion of Law no. 24/2000 on the legislative technique norms for the elaboration of normative acts (Official Gazette no.453, 4/07/2007); G.E.O. no.61/2009 for the amendment and completion of Law no. /2000 on the legislative technique norms for the elaboration of normative acts (Official Gazette no. 390, 9/06/2009). Republished in the Official Gazette no. 260, 21/04/2010.

(1) "If the owner causes, by exercising his right, inconveniences which exceed the limits of normal neighbourhood relations, the court may, on equity grounds, order him to pay compensatory damages to the injured person, as well as reinstatement whenever possible.

(2) Should the injury be minor in relation to the necessity or utility of carrying out the harmful activity by the owner, the court may approve the performance of that activity. The injured person shall be entitled to compensation. (3) If the injury is imminent or very likely to occur, the court may approve, by a court order, the necessary measures for preventing the damage". Obviously, this article is a continuation of the previous one; therefore in case *he fails to observe the duties regarding environmental protection and good vicinity,* the owner is subject to art. 630 of the Civil Code. By systematically interpreting art. 630 and art. 1353 of the Civil Code, which provides: *"The person who causes an injury by the very exercise of his rights shall not have the duty to remedy it, except where the right is exercised abusively"* and art. 1381 of the Civil Code which provides: (1) *"Any injury shall entitle to remedy",* it results that art. 630 of the Civil Code does not set a judicial limit[16], if we take into account the fact that art. 630 of the Civil Code is the single article of Section 3 *Judicial limits,* in Chapter II *The juridical limits of the right to private property* (Title II. Private property, Book III. On goods), but a special case of liability. Consecrating the moral imperative *Neminem laedere qui suo iure utitur,* attributed to Ulpian, art. 1353 of the Civil Code materializes the principle of the abuse of right regulated in art. 15 of the Civil Code. *"No other right shall be exercised for the purpose of injuring or prejudicing another or in an excessive and unreasonable manner, contrary to good faith"*[17]. With no intention to bring details, we can only notice the negative form of the sentence which defines the abuse of right[18], which is not the most appropriate for normative expressions; thus, instead of disposing how *a right shall not be exercised,* it would be better to read about how rights shall be exercised and what characterizes the abuse of right. There might be an objection in the sense that art. 15 of the Civil Code is the natural consequence of art. 14 of the Civil Code (Good faith) (1) *Every natural or legal person must exercise their rights and perform their civil obligations in good faith, in accordance with public order and mores* and is closely related to art. 1349 of the Civil Code (Liability in tort) (1) *Everyone has the duty to observe conduct rules imposed by the local law or custom and not prejudice, by his acts or failure to act, the legitimate rights or interests of others,* and therefore it results that rights must be exercised *in good faith, in accordance with public order and mores,* so that by his *acts or failure to act, any person shall not prejudice the legitimate rights or interests of others.* Likewise, it results that the specific feature of the abuse of right consists in the exercise of any right, *contrary to good-faith, for the purpose of injuring or prejudicing another or in an excessive and unreasonable manner.* Since this possible objection does not substitute coherent norms, we consider that all these should be taken into account in a necessary prospective revision of the texts we made comments upon. On the other hand, we do not understand the difference between *"to injure"* and *"to prejudice"* as long as injury involves prejudice. Consequently, art. 630 of the Civil Code outlines a case of abuse of right, which entails the liability of the owner who *"failing to observe the duties regarding environmental protection and good vicinity"* (art. 603 of the Civil Code), *"causes, by exercising his right, inconveniences which exceed the limits of normal neighbourhood relations"* (art. 630 of the Civil Code). This is the reason for which *"the court may... order him to pay damages to the injured person, as well as reinstatement whenever possible"* (art. 630 of the Civil Code).

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[16] Or just a judicial limit.

[17] Neculaescu S, *Răspunderea civilă delictuală în Noul Cod Civil – Privire critică* -, "Dreptul" Review, no. 4/2010, p. 56.

[18] Neculaescu S, *Răspunderea civilă delictuală în Noul Cod Civil – Privire critică* -, "Dreptul" Review, no. 4/2010.

Par. (2) under art. 630 of the Civil Code provides: *"Should the injury be minor in relation to the necessity or utility of carrying out the harmful activity by the owner, the court may approve the performance of that activity. The injured person shall be entitled to compensation".* The situation is paradoxical, in the sense that the owner, compelled by the Constitution and the Civil Code *to observe the duties regarding environmental protection and good vicinity* and not *exceed the limits of normal neighbourhood relations,* is exempted from performing these obligations if he pays compensatory damages and puts the prejudiced person back to his original position, as happens in the classical case of liability in tort[19]. The paradox also consists in the fact that by corroborating art. 602 of the Civil Code (which provides: *(1) The law may limit the exercise of the right of property either for public or private interest. (2) The legal limits for private interest may be modified or temporality terminated by the mutual agreement of the parties. For enforceability against third parties it is necessary to fulfil publicity formalities as provided by law."*) with art. 603 of the Civil Code (which provides: *"The right of property compels to the observance of the duties regarding environmental protection and good vicinity, as well as the observance of other duties which, in accordance with the law or custom, lie with the owner"*) it results that legal limits for public interest, as happens with *the duties regarding environmental protection and good vicinity,* cannot be modified or temporarily terminated by the mutual agreement of the parties. We understand that the court may *modify or temporarily terminate the legal limits for public interest* so that the one who will have to suffer the *exceeding of normal neighbourhood inconveniences* throughout *the performance of the harmful activity* is the innocent owner because the court will hold, according to unknown criteria, that *the injury would be minor in relation to the necessity or utility of carrying out the harmful activity* and therefore it *may approve the performance of that activity.* Maybe the explanation for such an anomaly is the economic interest which prevails, especially when we deal with "the vicinity of a plant, railway, a pig or chicken farm, dairy, slaughterhouse, a transport company, a mall, a touristic complex, a quarry, a site, a mine, a sawmill, high voltage power lines, GSM antennas, billboards..."[20], numerous workers benefiting from these activities – therefore part of the prejudice which can consist in the diminution of the building value[21] as a consequence of abnormal neighbourhood disturbance, will be covered by the owner as a victim.

On the other hand, although we know the adage *ubi lex non distinguit, nec nos distinguere debemus,* we consider that it would have been interesting for the legislature to distinguish between the situation of the owner as a natural person and the owner as a legal person. The distinction is important if we take into account the exceeding of normal neighbourhood relations by different activities generating noise, visual, olfactive pollution. If in the former case, the court might consider the repeated use of a grill (for instance)[22], by the owner, in the yard of his house, as an action generating a minor prejudice, it is totally different when a person lives near a pig or chicken farm, dairy, slaughterhouse, a transport

[19] *Section 6 Remedy for the prejudice in the case of liability in tort* Art. 1381 – (1) Any prejudice entitles to remedy. (The object of the remedy), Art. 1385 – (1) The prejudice shall be remedied in full, unless otherwise provided by law. (3) The compensation shall cover the loss suffered by the prejudiced person, the gain that he could have obtained under normal circumstances and of which he has been deprived, as well as the expenses that he covered in order to avoid or limit the prejudice. (The scope of the remedy), Art. 1386 – (1) The remedy of the prejudice shall be in kind, by reinstatement, and if it is not possible or if the victim is not interested in a remedy in kind, by compensatory damages, established by mutual agreement of the parties or, in the absence of it, by judgment of the court. (The forms of the remedy).

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

[21] *Idem.*

[22] Which was perceived by a vegetarian neighbour as embarrassing.

company, a quarry, a site, a mine, a sawmill[23] …In such cases we do not know by what kind of algorithm of thought one might reach the conclusion that the prejudice is minor. Whether the prejudice is minor or major, when it is the result of pollution, it compels the polluter to pay damages, not *on equity grounds,* but because G.E.O. no.195/2005 establishes objective liability.

Thus, art. 95 of the Government Emergency Ordinance no. 195/2005 provides: (1) "the liability for damage to the environment has an objective character, independently of guilt. In case of several authors, liability is joint responsibility; (2) Exceptionally, liability is subjective for the prejudice caused to protected species and to natural habitats, in accordance with express regulations; (3) The prevention and remedy of environmental damage are carried out in accordance with the provisions of the present emergency ordinance and express regulations. From this text, it results that the rule in environmental law is represented by objective liability, independently of guilt (and the exception is subjective liability) and joint liability (in case of plurality of authors). Objective liability and joint liability are the expression of the fundamental "polluter pays" principle[24] actually meeting the needs of the victim who, on the one hand does not have to prove the guilt of the doer and, on the other hand, in case of plurality of authors, has the possibility to claim full remedy of damage from any of them. As far as environmental law is concerned, the acts generating liability include both wrongful acts, causing damage to the environment and, at the same time, standing for violations of the legal norms, and legal acts which can constitute causes of damage to the environment. If in the case of wrongful acts the ground for liability is the guilt, in the case of legal acts, the ground for liability is the risk.

Considering these inadvertencies between art. 630 of the Civil Code and environmental law we think it would be useful to present some solutions of the foreign jurisprudence. Noises seem the most often invoked disturbance in litigations. Thus, in France, in 1844 the court held the liability of a factory owner who did not declare that the noise the factory would make would be permanent; the jurisprudence retains several ideas: a) the property right is limited by the legal and natural obligation of not causing any damage to the neighbouring property (an idea which might rely on the very definition of the right of property, a definition reminding the limits established by law); b) the abnormal character of neighbourhood disturbance also resides in the fact that "it exceeds the ordinary level and neighbourhood obligations"; c) the "excessive" character of the damage arises out of the fact that the normal neighbourhood inconveniences are exceeded. These issues are to be found as well in a decision from October 2007 which disposed the remedy of the prejudice caused to the victims by a municipal polyvalent hall where noisy manifestations took place, even after midnight, and which, by the acoustic level, exceeded the normal neighbourhood disturbance[25], it was held that the local administration was liable without any guilt, liability arising out of the damage caused to third parties by the functioning or mere existence of a public service. Disturbance[26] generated by noises also led to the annulment, by an administrative tribunal, of a construction authorisation for erecting such a building where various activities were to be

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

[24] As provided by art. 3(e) of Government Emergency Ordinance no.195/2005.

[25] The decision is also important because it mentions the "valuable loss of this property" due to the noise which might be considered an apparent defect of the construction. Février.I.M, *Responsabilité administrative. Nouvelles condamnations de communes a raison des nuisances sonores provoquées par des manifestations culturelles*, in Environnement – Revue Mensuelle Lexisnexis Jurisclasseur – 1/ janvier, 2008, pp. 18-20.

[26] Gillig.D, *Une salle multi-activités est une occupation du sol susceptible de causer des effets genant pour le voisinage*, in Environnement Revue Mensuelle Lexisnexis Jurisclasseur no. 1 janvier, 2008, p. 35. With regard to the possible solutions in the case of administratively authorized *harmful* activities, see: Ph.Malaurie, L.Aynès, Ph.Stoffel-Munck, *Drept civil. Obligaţiile*, translated by Diana Dănişor, Wolters Kluwer, 2010, p. 66.

carried out – as a result, a future probable risk lay at the basis of a request for the annulment of the construction authorisation or, more precisely, the precautionary principle.

***Subsection* 3. Art. 2518 of the Civil Code (The prescription period of 10 years. Cases)**

"The right of action shall be subject to a prescription limit of 10 years in the following cases: 1. Real rights which are not declared imprescriptible by law or are not subject to another limitation period; ... 3. the remedy of the damage to the surrounding environment". We are interested in the last point under art. 2518 of the Civil Code which establishes for the remedy of the damage to the environment a prescription period of 10 years. It is clear that the expression 'the surrounding environment' is a pleonasm which could have been easily avoided[27] as long as the legislation on the environment uses the term 'environment'[28]. Yet, it is not clear why the legislature preferred such a long prescription period for the remedy of the damage to the environment. In order to support this idea, i.e. that it would have been better to establish a shorter period, we have in view not only the much repeated educational function, mobilizing extinctive prescription, meant to stimulate the holders of subjective civil rights and to make valuable use of them, thus stimulating the dynamics of the civil circuit as well[29], but also aspects of environmental law. Thus, the Emergency Ordinance on environmental liability with regard to the prevention and remedy of damage to the environment, no. 68/200730 which establishes the regulatory framework for environmental liability, based on "the polluter pays" principle, for the purpose of preventing and remedying damage to the environment[31], is full of norms compelling to immediate action. For instance, art. 10 provides; (1) In case of imminent threat of damage to the environment, the operator[32] shall have the duty to immediately take the necessary preventive measures and, within 2 hours of becoming aware of the threat occurrence, notify the county agency for the protection of the environment and the county commission of the National Environmental Guard.... (3) The preventive measures referred to in par. (1) must be proportional with the imminent threat and lead to the avoidance of the damage, considering the precautionary principle in decision-making.... (4) Within 1 hour of the completion of preventive measures the operator shall inform the authorities provided in par. (1) on the measures taken to prevent damage and their efficiency. (5) If the imminent threat persists despite the preventive measures taken, the operator shall, within 6 hours after he noticed the inefficiency of the measures taken, inform the county agency for the protection of the environment and the county commission of the National Environmental Guard on: a) the measures taken to prevent damage; b) the evolution of the situation after taking the preventive measures; c) additional measures, if any, to be taken to prevent the worsening of the situation". Art. 13 is similar (disposing: "in the event of environmental damage, the operator shall, within 2 hours after the damage occurred, inform the county agency for the protection of the environment and the county commission of the National Environment Guard on: a) the identification data of the operator; b) the time and place of the damage to the

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[27] Hristea.T, *Un pleonasm evitabil: "mediul înconjurător"*, "Revista Română de Dreptul Muncii" Review, no. 1/2003.

[28] G.E.O. no.195/2005 on environmental protection defines, in art. 2 (41) the environment as the totality of natural conditions and elements of Terra: air, water, soil, subsoil, characteristics of the landscape, all atmospheric strata, all organic and inorganic matter, as well as living beings, interacting natural systems, containing the previously mentioned elements, including certain material and spiritual values, life quality and conditions which may influence the welfare and health of humans.

[29] Chelaru E, *Drept civil. Partea generală*, "All Beck" Publishing House, Bucharest, p. 185.

[30] Official Gazette no. 446, 29/06/2007.

[31] Art. 1.

[32] Art. 2 (11) *operator*, any natural or legal person under public or private law which performs or controls a professional activity or, if the national legislation provides it, which was invested with decisive economic power on the technical functioning of such an activity, including the holder of a regulatory act for such an activity or the person which registers or notifies such an activity.

environment; c) the characteristics of the environmental damage; d) the causes generating the damage; e) the affected environmental elements; f) the measures implemented to prevent the expansion or worsening of the environmental damage; g) other information considered relevant by the operator") or art. 14 (which provides: The operator is required to: a) take immediate action to control, isolate, remove, or otherwise to manage the pollutants and/or any other contaminating factors in order to limit or prevent the expansion of the environmental damage and the adverse effects on human health or the worsening of service damage; b) take appropriate remedy measures in accordance with art. 17-19").

We may note, from the above-mentioned articles, that G.E.O. no.68/2007 provides extremely short time intervals, of hours or days, for taking necessary measures, either in case of imminent threat of environmental damage, or in case of actual environmental damage. But G.E.O. no. 68/2007 does not entitle natural or legal persons under private law to compensation as a consequence of environmental damage or imminent threat of such damage; the provisions under common law are applicable in such cases[33]. The explanation is that G.E.O. no. 68/2007 is applicable to: a) environmental damage caused by any type of professional activity referred to in Annex 3 and to any imminent threat of such damage caused by any of these activities; b) damage to protected species and natural habitats and to any imminent threat of such damage caused by any professional activity other than those referred to in Annex 3 whenever the operator acts intentionally or recklessly; environmental damage or an imminent threat of such damage caused by pollution of a diffuse character only when one can establish a causal link between the damage and the activities of individual operators"[34]. As a result, taking into account art. 2518(3) of the Civil Code and the articles previously discussed of G.E.O. no. 68/2007 we cannot understand what may explain this difference between the 10-year prescription limit for the remedy of environmental damage and the extremely short time intervals provided by G.E.O. no.68/2007 when the operator polluter has to take necessary measures, time limits which are more appropriate for environmental problems. It is also painful to find that under environmental law the odyssey of compensation lasts for years even in the case of well-known disasters such as the sinking of the Amoco Cadiz[35] or Erika[36] tankers. We consider that we have brought arguments to support the idea that the 10-year prescription term is not justifiable in case of damage caused by pollution of a diffuse character[37] and, so much the less, in case of instantaneous pollution.

Conclusions

The new Civil Code, a normative reality as a consequence of its adoption by Law no. 287/2009, implements a deep reform of the Romanian legal system. A modern instrument for

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[33] Art. 3.

[34] Art. 3.

[35] Whose sinking caused 220, 000 tons of oil to spill near Brittany, destroying sea fauna, as well as sea-related industries. The accident occurred on17 March 1978, but due to bureaucratic games, the court decided only on 11 January 1988 that the Amoco company should pay 85.2 million $ in damages for this catastrophe". See: Țurlea S., *S.O.S! natura în pericol,* "Politică" Publishing, Bucharest, 1989, p. 62.

[36] The sinking of the tanker Erika, which took place on12 December1999, spilling part of its cargo and content of the tanks, caused the pollution of the French Atlantic seaside, and the judgment of CJEC (Great Chamber) – in case C-188/07, a reference for a preliminary ruling from the Cour de cassation (France) on the basis of art. 234 EC, received by the Court on 3 April 2007, in Commune de Mesquer v. Total France SA, Total International Ltd – was delivered on 24 June 2008.

[37] G.E.O. no.195/2005, Art.2 (50) *pollutant* - any substance, in solid, liquid, gaseous form, or in the form of vapour or energy, electromagnetic, ionizing, thermal, phonic radiation or vibrations, which, introduced in the environment, modifies the balance of its components and of the living bodies and causes damage to material goods; par. 51 *pollution* - direct or indirect introduction of a polluter which can prejudice human health and/or environment quality, cause damage to material goods or cause degradation or prevention from environment use for recreational purposes or other legitimate purposes.

regulating the fundamentals of the individual and social existence, the new Civil Code makes valuable use of the experience of recent reforms in the field of civil law accomplished by other states, as well as the provisions of European and international law instruments. This is what is asserted in the motivation of Law 71/2011 for the enforcement of Law no. 287/2009 on the Civil Code, where it is also shown that: in order to meet the requirements of a dynamic present, of living and ever-changing realities, new solutions are being promoted, classical institutions are being revised, internationally recognized principles are being emphasized, principles which have not been implemented in the Romanian space yet. Although the declared intention is to "meet the requirements of a dynamic present", the new Civil Code does not seem to place the environment and related problems within the dynamics of the present. Therefore, except for modest norms - art. 539 par. 2 and art. 603 - nothing entitles us to state that the new Civil Code "makes valuable use of provisions of European law instruments", a reason for which this paper aims at highlighting aspects which must be regulated or which may be better regulated.

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THE RESPONSIBILITY OF PERSONS CAUSING DEBTOR'S INSOLVENCY IN THE BILL ON PRE-INSOLVENCY AND INSOLVENCY PROCEEDINGS

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Abstract
Insolvency is the state of the debtor's patrimony characterized by insufficient monetary funds available for the payment of exigible debts. It may be the consequence of unfavourable economic circumstances, but also the result of managerial deficiencies of even fraud.

If insolvency is caused by the gross incompetence or the fraud of the debtor's board of directors, then the syndic judge, by means of the special mechanism created in the insolvency proceedings, i.e. the joint responsibility action, may include the responsibility of the debtor's managers (if the debtor is a legal person) in covering the debtor's liabilities. From a psychological point of view, such a menacing perspective may bring about a certain control of the managerial activity, a certain caution of a *bonus pater familias* in managing the debtor's affairs[1].

Keywords: Insolvency, imposition of responsibility, managing board, Bill on Pre-insolvency and Insolvency Proceedings

1. Regulations of the responsibility of the managing authorities

The core of the matter is to be found in Chapter IV of Law no. 85/2006 art.138- 142. The bill on the pre-insolvency and insolvency proceedings refers to this matter in Title II, Section VIII, articles 169 – 173. The future law does not essentially alter the lawmaker's conception on this institution, but it does amend certain issues occurring in practice. The present paper does not aim at an exhaustive analysis of the institution of the responsibility pertaining to the managing board of the debtor as legal person, but at underlining the differences between the present regulations and the future law.

First, the position of the dispositions regulating the responsibility suit is worth mentioning. Both in the text of Law no. 64/1995, and the text of Law no. 85/2006, the chapter devoted to the responsibility of the debtor's managing board is situated immediately after the section regulating the termination of the proceedings. This arrangement has given rise to a diversity of precedents. Certain judges identified a legal reason to tackle this issue after closing the proceedings[2], others gave a decision before closing the proceedings, and some other magistrates who, although notified before the closing proceedings, decided to separately record and decide on the case, suspending proceedings until the final solution[3].

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[1] Piperea, Ghe., *Insolvenţa: legea, regulile, realitatea, Wolters Kluwer*, Bucharest, 2008, p. 727.
[2] Sentence no. 61 of 9 January 2005 of the Sibiu Court, quoted by Turcu, I., *Legea procedurii insolvenţei, comentariu pe articol*e, 4th edition, C.H.Beck Publishing House, Bucharest, 2012, p. 654.
[3] Sent. No. 410 of 23 April 2005 of the Botoşani Court, quoted by Turcu, I., *Legea* ... op. cit., p. 654.

The doctrine has rightly pointed out[4] that the closure of the insolvency proceedings settles the responsibility suit, even if it was registered and left unsolved, as the debtor ceased to exist as a legal person, being radiated, the syndic judge and the liquidator are disinvested, and the creditors' committee is dissolved.

In order to provide a unitary view of legal practice, the Bill on Pre-Insolvency and Insolvency Proceedings places the dispositions referring to the imposition of legal responsibility on the managing board before those referring to the closure of the insolvency proceedings.

2. Legal nature

Another issue, which the Bill on Pre-Insolvency and Insolvency Proceedings unfortunately leaves unsolved, is the legal nature of the responsibility suit. Regarding this aspect, there have been many doctrinarian debates ending in placing the judicial nature of this suit either in the sphere of tort law[5], or contractual liability[6], or, as the case may be, tort or contractual law, according to the source of the legal breach[7].

Similarly, specialised literature[8] also supports the organic theory, according to which the members of the supervision/managing board are not subjects of law distinct from society, and their power does not derive from the constitutive act, but the Law, as it regulates their prerogatives and duties, and their liability can only be subject to tort law.

The analysis of the legal nature regulated by the Law no. 85/2006 on insolvency proceedings, resumed by the Bill, reveals that it is a special tort liability, with all the consequences arising from this qualification, which contains elements seen as derogatory to the common law of tort liability. As this is tort liability, the requirements of imposing responsibility pertain to common law.

3. Individuals entitled to submit the legal request of imposing patrimonial liability

The initiators of liability suits may be: the legal trustee/ liquidator, the President of the creditors' committee as a result of the decision of the Creditors Assembly, or, in case this committee has not been assembled, the creditor nominated by the creditors' assembly. Similarly, legal action may be taken in the same conditions by the creditor who owns more than 50% of the arrears in the total debt.

Exerting his attributions, the liquidator performs a detailed analysis of the debtor's assets and liabilities, as well as the associated documentation, in order to find the causes and circumstances leading to the state of insolvency, mentioning the individuals who may be held liable for this state, and the existence of the premises for imposing their responsibility, according to art. 138 in the Law. He is entitled to decide if the management was at fault and if there are persons whose activity contributed to the company becoming insolvent, in the sense of art. 138.

The different content of alin.1 of art.138 in the Law as compared to alin.1 of art. 169 in the Bill leads to the conclusion that the insolvency expert is no longer constrained by indicating the liable persons in reporting the causes of the liability suit. This reformulation of

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[4] Piperea, Ghe., op. cit., p.741.

[5] Piperea, Ghe., op. cit., p. 737, I. Adam, C. N. Savu, *Legea procedurii insolvenţei. Comentarii şi explicaţii*, C.H.Beck Publishing House, Bucharest, 2006, p. 776, decision no. 1317/2003 of the Bucharest Court of Appeal, in Curtea de Apel Bucureşti, *Practică judiciară comercială pe anii 2003 – 2004*, p. 328.

[6] Şcheaua, M., *Răspunderea civilă a membrilor organelor de conducere ale societăţilor comerciale reglementată de Legea no. 85/2006*, in Pandectele Române, no. 2/2006, p. 144, Bufan, R., *Aspecte ale răspunderii juridice conţinute în Legea no. 64/1995 privind reorganizarea judiciară și lichidare*, in the Annals of the University of Timişoara, 1998, p. 405.

[7] Turcu, I., Law … op. cit., p. 664.

[8] See: Baias, F., David, S., *Răspunderea civilă a administratorilor societăţilor comerciale*, in "Dreptul" no. 8/1992, p. 21; Pătulea, V., *Răspunderea juridică a organelor de conducere administrare şi control ale societăţilor comerciale cu capital de stat*, in "Dreptul" no. 1/1996, p. 15.

the text is therefore useful, in our opinion, as it aimed at eliminating the existing constraints, since in practice certain liable aspects of the activity of the former management is apparent after the expiry of the report submission date, the delay being sometimes due to the difficult access to financial information and accounting reports.

A peculiar aspect of the insolvency proceedings, introduced by Law no. 169/2010 is the possibility of the disposition in art. 138 alin. 6, according to which, "in the case of a decision to dismiss the case introduced on the basis of alin. 1 or, if it is the case, alin. 3, the legal trustee/liquidator not intending to appeal will notify the creditors about his intent. If the general assembly or the creditor who owns more than half the value of all the outstanding debts decides that an appeal is in order, the legal trustee should resort to it, according to the law".

The first issue evinced in the doctrine is the legal liquidator's apparent suppression of the possibility to appeal, the law referring only to the legal trustee. We agree to the opinion that this is a mere inconsistency in the text of the law, as both the liquidator and the legal trustee may appeal, taking into account the destination of the amounts received from the decision to impose the responsibility, as well as the inadmissibility of the ongoing suit quality in the appeal according to the stage of the insolvency suit.

Additional issues stemming from the adoption of this legislation refer to forcing the insolvency expert to appeal against his will and respectively taking over the proceedings when the appeal was introduced by the president of the creditors' assembly, another entitled creditor or the main creditor. In regard to the fact that filing an action on the grounds of art. 138 alin. 1 forbids the creditors from instituting legal proceedings according to alin. 3 in the same article of the law, it is our opinion that obliging the legal expert to appeal when the liability suit was brought by him is a beneficial legal innovation, aimed at subjecting his activity to the creditors' control.

Nevertheless, obliging the insolvency expert to appeal against the lack of relief in imposing patrimonial responsibility when he has considered that the suit is not advisable and considering that the main party will be entitled to appeal is an objectionable legislative solution whose adoption will not protect the creditors' interests, which would be better defended if they brought the case to court themselves.

This issue also finds a solution in the Bill which, in art.169 alin.6 states that, in case the creditors' assembly or the creditor owning more than half the financial claims decide that an appeal is in order, the case will be appealed by the president of the creditors' committee or the main creditor, as the case may be.

4. Conditions of responsibility

4.1. Persons responsible for driving the company into insolvency

In order to coerce these persons into accepting the patrimonial responsibility of a part of the debtor's liabilities, it is necessary to prove the main requirement, i.e. that the person in question was a member of the supervision or management board in the company, followed by the probation of one of the commissive or omissive acts mentioned in the special law on the matter.

The persons who may be held liable for driving the company into insolvency may be:

a. The debtor's trustees, acting individually or as part of an administrative board, according to the attributions of representation and operation, according to art. 70 and 71 in Law no. 31/1990, republished.
b. The debtor's CEOs by virtue of their attributions of operating the company, according to art. 152 in the Law no. 31/1990, republished, although a contrary convention may exist and their term derives from an employment contract.
c. The debtor's censors who, although not part of the management proper, are entitled to supervise the administration, to check the company books, and to unannouncedly control the management of the company liquidities, according to art. 163 in the Law no. 31/1990, republished.

d. Any other person who has contributed by committing the acts sanctioned by the law to the debtor's cessation of payments – for example the actual manager who is involved in activities specific to the offices of management and control, but without abiding by the formal requirements stipulated by statute for this particular position.

The doctrine[9] states that the rightful trustee is the individual who has been officially vested, like social administrators, the president – general manager, their deputies, the managers of the groups of economic interest, the presidents, vice-presidents and members of committees or managing boards of associations.

On the contrary, specialized literature[10] states that the rightful trustee[11] is considered to be the trustee whose office has been revoked, with or without recording it in the register of companies, if he continued performing acts specific to this position, such as signing contracts or payment instruments etc.[12]. Similarly, it is our opinion that the rightful trustee is also the social administrator who, although not legally vested — for instance, his appointment was not recorded in the register of companies[13] – but he has exerted attributions specific to the company management, and who is included by his acts in what is expressly and limitatively stated in art. 138 alin. 1 lit. a - g in the Law has caused the state of insolvency of the debtor legal person[14].

The Bill introduces an element of novelty, sanctioning the liable person who, as a result of the responsibility suit, may not be appointed as trustee or, if he is the trustee of other societies, he will be retrograded for a period of 10 years since the date of the final ruling. The novelty is radical, as it is applicable not only to the members of the statutory management committee, but also to other persons, including the rightful trustee.

Art. 169 alin.8 in the Bill states that the decision that the syndic judge gave in order to impose the patrimonial responsibility of the statutory trustee will be automatically communicated to the National Office of the Register of Companies (ONRC). It is our opinion that in view of a fair application of the dispositions of art. 169 alin.7, this notification has to be effected not only for statutory trustees, but also for any party involved in patrimonial responsibility.

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[9] See Turcu, I., *Falimentul. Actuala procedură. Tratat*, 5th edition, completed and upgraded, Lumina Lex Publishing House, Bucharest, 2005, p. 471.

[10] Paşca, V., *Falimentul fraudulos. Răspundere şi sancţiuni,* Lumina Lex Publishing House, Bucharest, 2005, p. 101.

[11] He is assimilated to the rightful trustee and the main associate who, by their resolutions, decisively influenced the company activity, performing certain operations included in the acts expressly and limitatively stated by art. 138 alin. 1 lit. a - g in the Law (ibidem, pp. 101 - 102).

[12] In this respect, legal practice states that it is impossible to exclude the responsibility of the actual trustee, the son of the sole associate who continued the company operations after his father's death, but it goes without saying that his responsibility is conditioned by the probation of the acts expressly and limitatively stated in the law in regard to creating such a responsibility (the Timiş Court, resolution no. 9713 of 18 September 2003, ibidem, p. 102). Is our opinion that this solution remains up to date in the light of the new insolvency law, the text of art. 138 being not very different from the former art. 137 in Law no. 64/1995.

[13] In legal practice, it was accurately stated that it is illegal to decide the dismissal of a case because it was brought against a person without passive quality, as long as the office of the register of companies contained no mention of the conveyance of debts and the cessation of the quality of trustee, since according to art. 5 in Law no. 26/1990 (republished) mentions are opposable to third parties since the date of their inclusion in the register of companies or their publication in the Official Monitor of Romania or another publication (according to statutory provisions). Taking into account these issues, the appellate court decided to quench the decision and send the case back to the syndic judge as he had given a solution without studying the root of the matter (the Bucharest Court of Appeal, common sitting 6, Decision no. 301/R/2005, in I. I. Dolache, C. H. Mihăianu, op. cit., pp. 283 - 284).

[14] See also the Decision no. 5104/2004 of the Cluj Court of Appeal, S. com., in Turcu, I., *Falimentul. Actuala procedură...,* cit. supra, p. 474.

4.2. Damage

The patrimonial responsibility under discussion presupposes the existence of a tort in the patrimony of the insolvent debtor's creditors. The tort inflicted on the creditors is represented by their impossibility to recover the outstanding debts because the members of the supervision/managing boards or any other party has caused the state of insolvency, so that the debtor could no longer settle his debts by means of the funds available. We consider that the responsible persons are to be compelled to compensate for a part of the company liabilities, not because they have caused the damage to the creditors, but because their acts brought the debtor into an insolvency state. Therefore, it has been stated[15] that in the special case of tort liability, regulated by art. 138 in the Law, the damage consists of the liabilities of the insolvent debtor.

Specialized literature[16] considers that the fact that the lawmaker uses the formulation "... a part of the debtor's liabilities ..." does not automatically mean that the syndic judge has to oblige the responsible persons to pay only a part of the company liabilities, as they may be forced to pay for the liabilities in their entirety. All the more, another view expressed in specialized literature[17] soundly considers that the statute under analysis should not be interpreted in the sense that the persons having committed the illegal acts who have driven the debtor into insolvency could not repay the outstanding debts in their entirety, but in the sense that each of these liable persons may be individually obliged to do so when their contribution is different and may be accurately determined.

The Bill sanctions these opinions by unequivocally stating in art. 169 alin.1 that the liable individuals may be obliged to recover "the outstanding financial prejudice of the debtor legal person, who is in an insolvency state, without exceeding the prejudice in direct connection to the tortious act".

4.3. The tortious act

In connection to the tortious act, both the doctrine[18] and legal practice[19] consider that the enumeration in art. 138 alin. (1) has a limitative character, expressly and exclusively stating the categories of tortious acts resulting in creating liability for the members of the management of the insolvent legal person and/or other individuals contributing to driving the legal person into insolvency.

Thus, claims were dismissed if based on factual grounds like: lack of due diligence in bringing certain goods back to the debtor's patrimony[20], lack of recording the debts to the state budget in the company books[21], faulty management[22], not following through with recovering the company's own debts[23], the cession of shares, etc.

Art. 169 alin.1 in the Bill nevertheless adds to the torts already sanctioned by the regulations in force "any other intentional act contributing to the debtor's present state of insolvency, as established according to the present law".

In this respect, it is to be remarked that the enumerative and limitative character of the statute is modified, but the responsibility of the members of the management boards is better evinced as a special type of tort liability.

It is to be noted that the members of the managing boards are not responsible for their mere managerial inability, but for the commission of illegal acts whose purpose usually is the misapplication of company funds and the study of personal or third parties' interests, so that

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[15] Adam, I., Savu, C. N., op. cit, pag. 26.
[16] Paşca, V., op. cit., p. 104.
[17] Turcu, I., *Falimentul. Actuala procedură..., cit. supra*, p. 475.
[18] Turcu, I., Law… op. cit., p.664, Piperea, Ghe., op. cit., p. 742.
[19] Decision no. 4547 of 28 September 2004 of the Cluj Court of Appeal.
[20] Decision no. 13 of 13 January 2005 of the Suceava Court of Appeal.
[21] Decision no. 100 of 9 February 2005 of the Timişoara Court of Appeal.
[22] Decision no. 19 of 20 January 2005 of the Suceava Court of Appeal.
[23] Sentence no. 18 of 24 January 2005 of the Galaţi Court.

in practice this form of responsibility tends to be seen as tortious in all circumstances. Also, if the illegal act caused damages which are too small as compared to the debtor's turnover, and the time elapsed since that moment is long enough to allow the assessment that it bore no influence on the initiation of the insolvency proceedings, there is no question of the members of the managing board to be held responsible from a patrimonial point of view.

Alternately, one may resort to the form of general tort liability, according to Law no. 31/1990. The legal trustee/liquidator will also examine the causality relation between the alleged act committed by the member of the debtor's managing board and the state of insolvency that the debtor is presently in. The responsibility is created not only when the commission of the act constituted a determining condition for the insolvency state of the debtor, but also when it was only an enabling condition.

4.4. The causality connection

The patrimonial responsibility of the members of the managing board and/or other individuals having contributed to the insolvency of the legal person may not be engaged unless there is a causality relation between the tort committed by the persons under investigation and the damage caused, i.e. driving the company into insolvency.

As a result, all the acts performed/committed by the members of the managing boards and/ or any other person whereby they "contributed" to the legal person's reaching the state of insolvency, without regard to their being a direct cause of the damage or just enabling the commission of the illegal act, are susceptible to result in the punishment stipulated in art. 138 alin. (1), all the more that the term in the statute is "to contribute" and not "to cause" [insolvency].

In case the responsibility claim is admitted, the decision given by the syndic judge must mention the persons who may be held liable for the legal person's insolvency, the facts determining/ concurring and/or contributing to the state of insolvency, as well as the degree (percentile) to which the liable persons will be obliged to recover the damage caused and partially or totally repay the outstanding debts.

5. Conclusions

The analysis of the statutes on imposing the responsibility of the debtor's managing board reveals that the future regulation mainly resumes the legal dispositions in force, preserving the legal aspect of this institution and benefiting from the previous experience in point of doctrine and case law.

The amendments pertaining to the substance of the matter only refer to the loss of the constraining character of the acts constituting the grounds for the involvement of responsibility and the 10-year interdiction to be appointed as trustee applied to the individuals found liable.

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ABUSIVE CLAUSES IN INSURANCES DOMAIN

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Abstract

The occurrence and development of some specialised domains in selling off products and in providing services have generated also new forms of contracts, like adhesion contracts and typical contracts. Through their specificity, they lead to the occurrence of an imbalance between the services provided by the contracting parties, not in favour of the consumer or of the client, allowing the occurrence of abusive contractual clauses. Such clauses can occur also in the contracts concluded in the insurances domain, contracts that have their character of adhesion as a specificity element, the professional insurer being the one who establishes the clauses, and the insured client adheres or not to them, not being able to negotiate.

In this paper there are presented some clauses from the contracts concluded in insurances area that can be considered abusive.

Keywords: *abusive clauses, clients, insured, insurers*

Introduction

Law no.193/2000 regarding abusive clauses from the contracts concluded between professionals and consumers, republished, defines as abusive that clause not directly negotiated with the consumer if, through it or along other provisions from the contract, generates a significant imbalance between the rights and obligations of the parties, on contrary to the consumer's good faith and interest.

The same text of the law evidences three elements characteristic to an abusive clause, namely:

1. The clause was not directly negotiated with the consumer. It is supposed that it is not negotiated that clause that does not allow the consumer to influence its nature, to change or remove it, as there are pre-created contracts. In the doctrine, it was highlighted that accepting a clause does not mean its negotiation;

2. The rule of good faith is not complied with, rule that implies removing any action or omission that might harm the co-contractor. Law no. 193/2000 refers to good faith in general, reason for which the professional must have acted with the intent to prejudice the consumer, in bad faith. It is considered that it is in unconformity with the good faith the inclusion of a clause that produces an important imbalance not in favour of the consumer;

3. To exist an important, significant imbalance between the rights and responsibilities of the parties. The criterion of assessing this imbalance is a real one, analysed in report to the circumstances corresponding to every contract concluded.

Also from Law no. 193/2000 we conclude that the provisions regarding the abusive clauses are applicable to those juridical reports that take place between consumers and traders. Art.1, paragraph 1 of this law, provides that any contract concluded between traders and consumers for the sale of goods or for providing services will include clear contractual

clauses, in no uncertain terms, for their understanding not being necessary specialty knowledge, and in paragraph 3 of art.1 of the law it is forbidden for traders to include abusive clauses in the contracts which they conclude with the consumers. This law comprises also an annex where there are exemplified contractual clauses considered abusive, the legislator not limiting the area of these clauses to only the ones exemplified.

From the provisions of law no. 193/2000, we find that all contracts concluded between traders and consumers can be the object of the above, all the more adhesion or pre-formulated contracts. A type of adhesion contract is the insurance contract, that is a contract where the clauses are established by one of the parties, without any possibility for the other party to discuss them, but only to accept them by concluding them, or not accepting them by refusing their conclusion, no matter if is has as object the goods, civil liability or persons. In the case of these contracts, the insurer, as professional, establishes the clauses of the contracts that are going to be concluded with the potential insured clients. These contractual clauses issued by the insurer have the general purpose to shield the insurance company from paying indemnifications, following to being produced some events that cannot be controlled. From this point of view, many exclusion clauses are absolutely natural, but others are unclear, excessive or deceitful and due to this reason they should be investigated and analysed. There is a series of exclusion from insurances that already breach the legal norms and they can be considered as being abusive clauses, not being able to be directly negotiated with the insured client and not being in his/her favour, as well as being contrary to good faith.

Out of the clauses exemplified in the annex of Law no. 193/2000 as being abusive, we consider that the following could be also encountered in the insurance contracts:

a) Provisions that give the exclusive right to the professional to interpret the contractual clauses. Regarding these provisions, we could give as example the medical malpraxis insurance contract where there are met contractual clauses through which the insurer's obligation to give indemnifications is removed (excluded). In practice, one of the obligations expressly included in the contract that devolves upon the insured (doctor in this case) is the one to refrain from any admission towards third parties – inclusively towards the prejudiced person – regarding his/her responsibility in producing the prejudice / event that could lead to granting the indemnity. In case he/she would breach this obligation, that is he/she would practically admit his/her error or fault in producing the undesired event, the insured doctor would not receive any indemnity from the insurer, even if he/she would comply with all other contractual obligations and first of all, with the basic obligation to pay up to date the insurance premiums. We consider that this condition expressly imposed by the insurer is an abnormal condition in the least, due to the fact that this insurance is concluded so that the insured person to be protected for the eventual case where by his/her error or fault, he/she committed a malpraxis act. Due to this reason we believe that this contractual clause is abusive and illegal;

b) Provisions that limit or cancel the consumer's right to demand indemnifications in case the professional does not comply with his/her contractual obligations.

In our opinion, being an adhesion contract, unfortunately, the professionals – respectively the insurers – do not always explain to the insured client all his/her rights and revert to such practices with intent, just for protecting his/her own interests, this not being in favour of the insured person who maybe would not conclude such contracts with the respective insurance companies, being totally informed.

For example, it cannot be accepted the insurer's demand of cancelling the contract, on the grounds of own fault at concluding the insurance contract.[1]

[1] This fact was provided also by the judiciary practice in the domain; see also Alba-Iulia Court of Appeal, Commercial Division, Decision no. 242 as of 1st October 2004, Manuela Tărăbaş, Mădălina Constantin, *Insurances. Judiciary practice compilation,* C.H. Beck Publishing House, Bucharest 2009, pp. 100-102.

c) Provisions that restrict or cancel the client's right to denounce or to unilaterally cancel the contract, in cases when the professional either unilaterally changed the contractual clauses, or he/she did not fulfil his/her obligations or he/she imposed to the client clauses regarding payment of a fixed amount (in case of unilateral denunciation);

d) Clauses that exclude or limit the legal responsibility of the professional in case of consumer's injury or death, as the result of an action or omission of the trader regarding the usage of the products or services.

Such an abusive clause can be met at the insurance policies for houses sold by certain insurance companies from our country that infringe upon the provisions from the Civil Code. We refer to those contracts concluded by the authorized insurers where, under "exclusions" chapter, there are included also the claims of indemnifications from the husband, wife or relatives of the insured, even if the beneficiaries are not specified in the contract. This fact is not natural if we have in view that fact that the insurance policies for houses cover also serious risks like earthquakes or landslide, events that increase the risk of occurrence of the death of the insured person during their occurrence. In such cases, by applying the clause stipulated in the contract, the insurance company will not pay indemnifications to the family of the insured which deceased, even if the insured paid and the insurance company received the respective insurance premiums.

If we consider the provisions of art.2230 Civil Code regarding the insurances for persons, that provide that "in case of the insured death, in case no beneficiary was designated, the insurance indemnity is part of the deceased's estate, returning to the inheritors of the insured", then we can conclude that this clause is abusive, since it limits the right to inherit.

In our opinion, abusive clause is also the clause from some insurance contracts for medical malpraxis which removes the obligation of the insurer vis-à-vis indemnification claims formulated by third parties, other then the patients, claims whose coverage is excluded by the insurers.

We do not consider rightful this clause mentioned above, due to the fact that the patient's family or next of kin have the right to claim the indemnifications in the regrettable case of patient's decease. Due to this reason, we believe that the health care professionals should not accept insurer's liability as clause of exclusion, not being rightful or valid at all.

e) Clauses that give the professional the right to transfer the contractual obligations into the responsibility of a third party (agent, proxy), without client's agreement, if this transfer helps at reducing the guarantees or other liabilities towards the clients.

In practice, in the case when the insurance contract is concluded with the help of an insurance agent who cashes also the insurance premiums, having the obligation to handover them, along with the documents of the insurance company, within a certain period of time, in case he/she does not comply with the due dates established and the risk insured is produced in the mean time, the insurer will have to comply with the obligation of paying the indemnification towards the client insured, being able to revert to recourse action against the agent. The insurer will not be able to refuse to pay the indemnification towards the insured client due to the fact that it did not receive the rightful insurance premiums.[2]

f) The clauses that provide that the price of the products is established at the moment of delivery or that allow to the sellers of products or to the suppliers of services the right to increase the prices, without giving the right to cancel the contract to the clients, in case the final price is too high as compared to the price convened at the moment of concluding the contract, in both cases.

We consider that these provisions could be associated in the insurances domain with the situation when the insurer, although it concluded a contract of insurance of goods through

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[2] Bacău Court of Appeal, Commercial decision no. 69 as of 11th October 2005, Manuela Tărăbaş, Mădălina Constantin, *Insurances. Judiciary practice compilation,* C.H. Beck Publishing House, Bucharest 2009, pp. 78-79.

which it was established a certain value to the insurance premium and to the amount insured, after being produced the insured risk, it decides to decrease the value of the indemnification which was committed through the contract, considering that the goods present a degree of usage which is higher than the one provided in the policy. This was considered although the insurance premiums were paid according to the degree of usage provided in the contract, thus being accepted by it. In our opinion, this action of the insurer can be appreciated as being abusive and thus the insured client is entitled to refer the case to the competent court for rejecting these reasons and for forcing the insurer to comply with his/her responsibilities as committed through the contract which was validly concluded.[3]

According to the civil provisions, nobody can exercise any right with the purpose of being detrimental to or to prejudice another person excessively, unreasonably and contrary to good faith, without being penalised for reasons of abusive exercise of rights (art.15 Civil Code). In the juridical literature, it is considered that the penalty applied to the abusive clauses is the nullity of the contract included by it. Actually, the penalty of nullity is also based on the legal provisions comprised in art.1 paragraph 1 of Law no. 193/2000, according to which any contract must include clauses which are clear, in no uncertain terms and easy to understand for all parties. Actually, the nullity has as basis also incompliance with the basic condition for the validity of a contract regarding its cause which must be licit and moral, due to the fact that an abusive clause has as grounds bad faith at concluding the contract.

Having in view the fact that through inserting an abusive clause, only a part of the professional's will is corrupted by the bad faith at concluding the contract, breaching the legal condition regarding the cause affects only a part of the contract, respectively the abusive clause. This partial nullity will demolish only one part of the contract concluded, respectively the clause considered as being abusive and the contract remains partially valid. In case the abusive clauses do not produce effects against the consumer client, then, with his/her agreement, the contract will continue to produce effects, if the contract can be continued following to eliminating the clauses under discussion. In case the contract cannot produce effects following to eliminating the abusive clauses, then the consumer has the right to pretend its cancellation, according to art. 7 of Law no. 193/2000, case when he/she is entitled to obtain indemnifications also, the professional's responsibility being a liability in tort.

Both in practice and in the doctrine there are numerous discussions based on the penalty of the abusive clauses motivated by the reality that the law regarding these clauses does not refer to a juridical procedure through which to be removed the effects of the abusive clauses, as it is provided by other legislations, like the French or Quebec region legislations.

The existence of the abusive clauses must be proved by the one who invokes it, respectively by the consumer / client, according to the civil provisions in force, through evidences provided by the Civil Procedure Code; Law no. 193/2000 does not comprise special provisions in the domain. The object of the evidence can be represented by any of the three conditions necessary to the existence of such a clause: lack of negotiation, lack of good faith, the presence of a significant imbalance.

In case of adhesion contracts – like the insurance contract – that comprise abusive clauses, the law authorizes certain control authorities to notify the court from the professional's domicile or headquarters and to request his/her obligation to change the contracts under developments, by removing the abusive clauses, as it is provided by art.12 of Law no.193/2000. These authorities are represented, according to art.8 of the law, by the National Authority for Consumers' Protection representatives, as well as by the authorized specialists of other public administration authorities, according to their competencies. Besides them, the consumers prejudiced through the respective contracts have the right to address to the court.

[3] See High Court of Cassation and Justice, Commercial Division, Decision no. 2408 as of 18th April 2003, www.scj.ro.

The court cannot change itself the clauses considered abusive from the contract, but it will be able to force the professional to change all adhesion contracts in development, when there is observed such a clause exists in the contract, as well as to eliminate the abusive clauses from the pre-formulated contracts which are meant for use in the professional activity, as it is provided by art.13 paragraph (1) of the law to which we refer to.

In case the court observes that there are no abusive clauses in the contract, it will cancel the report issued by the official examiner according to the law.

Conclusions

In the insurance contract there is a series of exclusion from insurances that already breach the legal norms and they can be considered as being abusive clauses, not being able to be directly negotiated with the insured client and not being in his/her favour, as well as being contrary to good faith.

It would be desired to be brought modifications to the actual Romanian law regarding the abusive clauses for clarifying these aspects that refer to the above mentioned juridical mechanism to remove the effects of these clauses.

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PROHIBITION OF GENDER DISCRIMINATION IN SOME INTERNATIONAL REGULATIONS

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Abstract

Non-discrimination it is considered a basic and general principle relating to the protection of human rights. International human rights system aims to protect against gender discrimination in two ways: through the principles of non-discrimination and equality in treaties that do not focus specifically on the enjoyment of women rights and through a women-specific human rights treaty.

Keywords: *equality fundamental rights, gender, international law*

Introduction

Non-discrimination it is considered a basic and general principle relating to the protection of human rights. International human rights system aims to protect against gender discrimination in two ways: through the principles of non-discrimination and equality in treaties that do not focus specifically on the enjoyment of women rights and through a women-specific human rights treaty.

This article aims to present the main international provisions on prohibition of discrimination, especially gender discrimination.In acest articol nu se vor prezenta prevederile de la nivelul UE. This article will not present EU provisions.

1. The definition of discrimination

The Human Rights Committee consider that “non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”[1]

Neither the Universal Declaration of Human Rights nor the International Covenants define “discrimination”. A definition of this term can only be found in conventions and declarations dealing with specific types or forms of discrimination. Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying

[1] Human Rights Committee, *General Comment No. 18*, para. 1.

or impairing the recognition, enjoyment or exercise, on the equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

The Human Rights Committee stated "that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[2] But "the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance". [3]

The European Court of Human Rights consider article 14 is violated "when States treat differently persons in analogous situations without providing an objective and reasonable justification", it now also considers "that this is not the only facet of the prohibition of discrimination in Article 14" and that "the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without objective and reasonable justification fail to treat differently persons whose situations are significantly different."[4]

2. Legal provisions

2.1 Universal Declaration of Human Rights (1948), (UDHR)

The Universal Declaration of Human Rights was adopted and proclaimed by UN General Assembly Resolution 217 A (III) of 10 December 1948.

Although intended as a non-binding declaration, it is often cited in cases before both national and international tribunals. [5] Some autors [6]consider the Universal Declaration of Human Rights has acquired the status of universally recognized norms of customary international law that bind all Member States of the United Nations.

The preamble to the Universal Declaration of Human Rights states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

Provisions relevant to equality and non-discrimination are those of articles 1, 2 and 7.

Article 1 of the Universal Declaration proclaims that "all human beings are born free and equal in dignity and rights", while, according to article 2: "everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin,property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

So according to article 2 of the Declaration "distinctions of any kind" are prohibited. This could be read as meaning that no differences can be legally tolerated.

With regard to the right to equality, article 7 of the Universal Declaration stipulates that: "all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

[2] Human Rights Committee, General Comment No. 18, para. 7.
[3] Ibid., para. 8.
[4] European Court of Human Rights*, Case of Thlimmenos v. Greece, judgment of 6 April 2000,* para. 44.
[5] Kitching, K. (ed.), *Non-Discrimination in International Law. A handbook for practitioners*, Interights Publishing House, London, 2005, p. 28.
[6] Alston, P., Steiner, H. (eds.), *International Human Rights in Context*, Clarendon Press Publishing House, Oxford, 1996, p. 143.

Article 2 and 7 applies only to the rights and freedoms set forth in Declaration. These are considered a dependent provision as it guarantees non-discrimination with respect only to the rights guaranteed by the ICCPR.[7]

2.2 European Convention on Human Rights (1950), (ECHR)

The European Convention on Human Rights was adopted by the Council of Europe in 1950 and entered into force in 1953.

Article 14 states: "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 1 is the central provision of the ECHR concerning equality. It can be interpreted as an open-ended prohibition of discrimination because of the use of the words "other status".

The protection it gives is dependent in that it only covers " the rights and freedoms set forth in Convention". In the case of Rasmussen v. Denmark, the European Court of Human Rights [8] states that "Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not necessarily presuppose a breach of those provisions - and to this extent it has autonomous meaning - there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter. "

According to European Court of Human Rights jurisprudence[9], discrimination for the purposes of Article 14 occurs where: there is different treatment of persons in analogous or relevantly similar situations; and that difference in treatment has no "objective and reasonable justification." An objective and reasonable justification is established if the measure in question has a legitimate aim and there is "a reasonable relationship of proportionality between the means employed and the aim sought to be realized".

In Hugh Jordan v. the United Kingdom the court acknowledged that "where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group". [10] In D.H. and Others v. the Czech Republic the Court expressly named a discriminatory act as indirect discrimination. Therefore, the European Convention on Human Rights provides protection to bort direct adn indirect discrimination.

In 4 November 2000 was adopted Protocol No. 12 to the European Convention, which expands the scope of the prohibition of discrimination. The Protocol contains a general prohibition of discrimination. Article 1(1) provides that "the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Article 1(2) states that "no one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1". The Protocol is into force but not all member states ratified it.

Some autors goes even further in stating that, "the equality right arises even if the right has not been specially granted, but inferred from a duty imposed upon a public authority. For

[7] Kitching, K. (ed.), *Non-Discrimination in International Law. A handbook for practitioners*, Interights Publishing House, London, 2005, p. 31.

[8] European Court of Human Rights, *Case of Rasmussen v. Denmark, judgment of 28 November1994, p*ara. 29.

[9] European Court of Human Rights, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium, judgment of 23 July 1968,* para. 10.

[10] European Court of Human Rights, *Case of Hugh Jordan v. the United Kingdom, final judgment of 4 August 2001,* para. 154.

example, the statutory duty to provide education for school-age children, or to house unintentional homeless, while not necessary creating rights in individuals, would attract the duty not to discriminate." [11]

It is clear from the wording of this article that it is an independent provision prohibiting discrimination in the enjoyment of any right or benefit under national law.

2.3 International Covenant on Civil and Political Rights (1966), (ICCPR)

The UN General Assembly adopted the ICCPR in 1966, which entered into force in 1976.

The right to equality and freedom from discrimination is protected by various provisions of the International Covenant on Civil and Political Rights.

In article 2(1) each State party: "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 26 states that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 26 it is considered the cornerstone of protection against discrimination under this Covenant.

These articles does not enumerate all of the grounds of discrimination and include a general provision "or other status". [12]

Article 2(1) provides protection only in connection with the rights recognized in the Covenant. This is considered a dependent provision as it guarantees non-discrimination with respect only to the rights guaranteed by the ICCPR.[13] Contrary to article 2(1), article 26 in an autonomous right of equality and "prohibits discrimination in law or in fact in any field regulated and protected by public authorities". So the rights granted by legislation must be provided without discrimination.

Gender equality is emphasized in article 3, according to which States parties "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant".

Article 14 provides that "all persons shall be equal before the courts and tribunals".

Human Rights Committee states that "purpose and effect" [14] of any measure must comply with the Covenant. [15]This suggests that direct and indirect discrimination are prohibided. Human Rights Committee emphasis and "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant".[16]

2.4 International Covenant on Economic, Social and Cultural Rights (1966), (ICESCR)

The International Covenant on Economic, Social and Cultural Rights was adopted the in 1966 and entered into force in 1976.

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[11] Sandra Fredman, *Discrimination Law*, Oxford University Press Publishing House, Oxford, 2001, p. 52.

[12] Is an "open ended" provision.

[13] Kitching, K.(ed.), *Non-Discrimination in International Law. A handbook for practitioners*, Interights Publishing House, London, 2005, p. 31.

[14] This could be interpreted as prohibiting direct discrimination ("purpose") and indirect discrimination ("effect")

[15] Human Rights Committee, *General Comment No. 18*, para. 7.

[16] Ibid., para. 10.

Under article 2(2) the States parties undertake “to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. The States also undertake under article 3 “to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant”.

The provisions of the ICESCR (Articles 2(2) and 3) are similar to Articles 2(1) and 3 of the ICCPR and were intended in the relevant parts to have the same meaning. There is no equivalent of Article 26 in the ICESCR.

Article 2(2) it is considered a dependent provision as it guarantees “the rights enunciated in the present Covenant”. This article contains a nonexhaustive list of grounds protected, so it is an “open ended” provision. CESCR states that Article 2(2) prohibits direct and indirect discrimination.[17] The states are required to ensure formal and substantive equality, which means that they are permitted to take positive action and may be required to do so in order to prevent discrimination. [18]

Gender equality is contained in article 7(a) (i), which guarantees “fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work”.

Lastly, article 7(c) of the Covenant secures the right to “equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence”.

2.5 Convention on the Elimination of All Forms of Discrimination against Women (1979), (CEDAW)

The Convention on the Elimination of All Forms of Discrimination against Women was adopted in 1979 and entered into force in 1981.

Article 1 of the Convention defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

Protection against discrimination in CEDAW is limited to discrimination against women. Article 1(1) refers to only one ground of discrimination, namely sex discrimination.

Article 1(1) autonomous right of equality and prohibits “any distinction, exclusion or restriction made on the basis of sex”.This article does not enumerate all of the grounds of discrimination and include a general provision “or other field”. Article 1(1) is similar to Articles 2(1) of the ICCPR and Article 2(2) of the ICESCR, thus this article could be interpreting in the same way as the other two articles in that prohibit both direct and indirect discrimination.

The achievement of equality not only de jure but also de facto demands sometimes that an affirmative action be taken by States to diminish or eliminate conditions which cause discrimination of individuals or groups of the population. Article 4(1) states that the adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered as discriminatory.

Eleanor Roosevelt pointed out specialisation of certain issues or rights may lead to marginalisation and stigmatisation of women. But proponents of the this approach argue that

[17] Committe on Economic, Social and Cultural Rights, *General comment no. 20*, para. 10.

[18] Kitching, K.(ed.), *Non-Discrimination in International Law. A handbook for practitioners*, Interights Publishing House, London, 2011, p. 29.

the risk of addressing women's rights only in a mainstream human rights framework may result in these matters being completely ignored or overlooked. [19]

The adoption of the CEDAW meant that women's rights were expressly placed in the ambit of international human rights, but the rights of women were still ignored by the mainstream human rights mechanisms. One problem after CEDAW is that the monitoring bodies of the other human rights treaties do not solve violations of women's rights and leave these issues up to the specialised CEDAW Committee to deal with and the adoption of the CEDAW has therefore led to the marginalisation of human rights of women. So the criticism is that the mainstream human rights instruments do not pay attention to women's rights. [20]

Conclusions

Much has been achieved in the past six decades to prohibit and eliminate gender discrimination.

Discrimination is a dependent provision and the prohibition is linked to the enjoyment of another rights. In discrimination cases no claim can be made only in conjunction with one of the specified rights. This limitation is softened by the fact that there is not necessary to show a breach of one of the substantive rights. In other words, claims brought to justice must relate to discrimination in the enjoyment of another right, and discrimination cannot be invoked on its own, only "in conjunction with" substantive rights and there does not need to be a violation of the substantive right itself for discrimination rules to be applicable. This provision differs from the other human right.

International regulation are applicable men and women without discrimination, but the exclusions specific to are neither recognised nor protected by mainstream human rights instruments.

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FOUNDATION OF STATES

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Abstract

The organisation of international society in state entities, appearing as subjects of international law, represented an essential element in the overall evolution and development of it, the state-policy making leading to the incorporation, maintenance and development of international community. The state may be considered the main creator, beneficiary and defender of public international law.

Key words: *foundation of state, South Sudan, subject of public international law.*

Introduction

The states have been the first subjects of public international law and for a long time the only one. They are typical, fundamental subjects of international law, forming the political and legal entities which meet to the largest extent the capacity of having legal reports governed by international law and benefit from the unlimited right to participate to the elaboration of the norms of international law.

They are also subjects of universal international law, the only ones entitled to undertake all rights and obligations with international character.

In the international relations, the states participate as suzerainty holder. Suzerainty is an essential and necessary characteristic of every state, an intrinsic, inherent attribute of it, being the political and legal basis of the capacity of state as subject of international law.

I. Definition of the incorporating elements of the state

As for the definition of the state, based on the general theory of law, "the state is the political organisation which, holding the monopole of coercion force, of elaboration and application of law, exercises over a human community on a certain territory the suzerain power from the given society".

Based on public international law, the state is a community of individuals independently organised, settled on a determined territory, permanently, enjoying the right to decide in a suzerain manner, if not over all its interests, at least partly.

The state is a direct and immediate subject of international law, with full capacity of undertaking all rights and obligations with international character. The states have been the first subjects of public international law and for a long time the only subjects.

The states have international legal personality, regardless their territorial length, the size of population, the economic and military force or the degree of development, since they do not have the capacity of international law subjects in terms of such characteristics, but it results from their suzerainty.

For an entity to have international legal personality as state, it has to meet certain conditions. According to the convention related to the rights and obligations of state[1] in the

[1] For the Convention text, see: http://avalon.law.yale.edu/20thcentury/intam03.asp.

year 1933, in order to be acknowledged as international individual, the state shall meet the following characteristics:

- to have a permanent population;
- to have a delimited territory;
- to have a government;
- to have the capacity of entertaining relations with other states (to conclude treaties).

The population consists in the totality of natural individuals living on the territory of a state and submitted to its jurisdiction. The population of a state includes several categories of individuals, each of them having a different status: its own citizens, foreigners (citizens of other state), as well as stateless and dual nationals living (having the domicile or residence) on the territory of this state. Regardless the category of such individuals and the state specific to each of them, the basic characteristic is that they are living and submitted to the territorial jurisdiction of this state.

The state territory is the geographical space formed of terrestrial, aquatic and marine areas, of soil, subsoil and air space over which the state exercises the full and exclusive suzerainty.

The governmental authority is the condition that provides expression to the political organisation of the group. It represents only the public authority by which the population is organised inside and by which it relates with other entities with international personality. Regarded as limited law power (public authority), the government provides international identity to the entity it represents, provided there is no other authority on the same population and the same territory (exclusivity and effectiveness of power).

The last condition, *the capacity of entertaining relations with other states,* is valid to the extent that the states, in virtue of their international personality, must have the possibility to participate directly to the international legal reports, the activity of inter-governmental international organisations, to have access to the jurisdictional procedures and, last but not least, to have the capacity to determine diplomatic relations with other states.

II. Foundation of state

In the history, the manner of foundation of states has varied. In the slave and feudal order, the new states usually appeared as result of conquering territories, by successional partition or unification between the members of monarchic families.

During the breakdown of feudal order, with the incorporation and consolidation of some new social classes - bourgeoisie - new states appeared pursuant to the fight for national independence. Thus, during the process of incorporation of nations and fight for national independence in the XIX and XX century, unified states appeared, such as Italy, Germany and other independent states resulted from the breaking down of some empires (ottoman or Hapsburg). This is added the separation of some metropolis colonies and turning them in independent states, mainly pursuant to the Second World War, during the decolonization process.

As legal forms of incorporation of new international law subjects the following are known:

- merger of two or more states within a sole state, such as Tanzania, incorporated by the merger of Zanzibar and Tanganika states in 1964 or in case of Germany, when Federal Republic of Germany (RFG) was united with the Democratic Republic of Germany (RDG);
- dismemberment (division) of a state in two or more suzerain states. For instance, Czech, replaced by two independent states, Czech and Slovakia; dismemberment of URSS and disappearance of it as state, replaced with several independent states etc.;
- separation of one or several parts of a state and incorporating them as suzerain states. For instance, Croatia, Bosnia-Herzegovina, Macedonia and Slovenia, detached from Yugoslavia; subsequently, Yugoslavia disappeared, pursuant to the occurrence of new European states: Serbia and Montenegro in 2006. More recently, we have states such as Kosovo, detached from Serbia, or South Sudan, detached from Sudan.

As noticed, a new state, as subject of international law, involves the existence of a governmental, independent authority, holding the prerogatives of power within a certain territory and over a stable population. The institution of such authority has to be done by exercising the right to self-determination of people.

II.1. Acknowledgement of states

Concerning the appearance of new states, different problems appear, among which the problem of acknowledging them by the existent states, with which shall entertain relations.

Acknowledgement is a unilateral act by which a state observes the existence of some facts, acts or situations with consequences over its rights, obligations and interests.

The acknowledgement of a state is the act by which a state admits that a political entity meets the conditions specific to a state (considers the occurrence of this new subject) and expresses it will to consider it member of international community.

Pursuant to the analysis of the definition of acknowledgment of states, the following characteristics may be considered:

- acknowledgement is the unilateral act of state, resulting from its suzerainty. The states have consequently the right, but not the obligation, to acknowledge other states;
- the act of acknowledgement may have either the form of diplomatic notes or of a direct notification addressed to the state acknowledged or the form of some messages, congratulation telegrams or official declarations. Seldom, the acknowledgement may be done by multilateral international treaties or bilateral treaties, being however appreciated the volume and nature of the relations established between the parties;
- the acknowledgement may be performed only by a state (individual acknowledgement) or a group of states (collective acknowledgement);
- the acknowledgement is a state determining the occurrence of a new state, subject of international law. It does not provide such quality to the states, which they acquire as of their incorporation. The refusal of some states to acknowledge a new state does not affect its existence which maintains the quality of subject of international law, with all juridical and political consequences of such existence;
- acknowledgement has a declarative nature, it does not create the rights of the state, which it exercises based on its suzerainty, independently of its acknowledgement.

The acknowledgement has as practical effect establishing normal relations between states, representing, in fact, the leaving point of the manifestation of personality of the state acknowledged, in relation to other states. As of such moment, the state acknowledged may establish diplomatic relations with the state or with the states that acknowledged it, he is acknowledged the right to the immunity of jurisdiction and execution before the state courts acknowledging it, affecting its rights of using the assets held on the territory of other state, it may demarche judicial actions in the states acknowledging it, it may conclude bilateral treaties with it etc.

Depending the volume and length of the effects produced by acknowledgement, there is a distinction between *de jure* and *de facto* acknowledgement.

By *de jure* acknowledgement, one understands the full and final acknowledgement of a state. Such acknowledgement is irrevocable; the effects disappear only upon the termination of the capacity of law subject of the state acknowledged.

The *de facto* acknowledgement has a limited and provisional character, being possible to recall it anytime. Pursuant to *de facto* acknowledgement, relations are established between states with a narrower field than in case of *de jure* acknowledgement.

Between the *de jure* and *de facto* acknowledgement, there is no essence difference, and the limits between them are difficult to determine, the *de facto* acknowledgement representing, usually, a preparing phase *of de jure* acknowledgement.

In terms of the forms of expression and acknowledgement, this may be express or tacit.

The express acknowledgement is performed by a special act of the competent state body (a formal declaration or notification), addressed to the new state and which expresses, clearly, the intention to acknowledge it.

Tacit acknowledgement appears when, in the absence of a formal and express declaration, it may be deducted from concluding facts of the state, such as determiningdiplomatic relations, concluding a bilateral treaty ruling general issues, without reserves in terms of acknowledgement.

We outline that the participation to international conferences or the admission to an international organisation is not equivalent to a tacit acknowledgement by the states participating to the conference or members of the organisation if they didn't acknowledged otherwise the new state.

Besides the acknowledgement of new states, in the international relations it is raised the issue of acknowledgement of governments, movements of national liberation or insurgents within a civil war

II.2. South Sudan - the last state appeared on international scene

On July 9th 2011, the South Sudan became the newest country of the world by separating it from Sudan. Incorporated after over fifty years from the declaration of the own independence of Sudan that took place on January 1st 1956, the incorporation of South Sudan as nation concluded a period of painful transformation: from being a region contested in the country (South Sudan) to an independent state (South Sudan Republic). The south people contested the unity of Sudan during two civil wars, that extended, to the largest extent, in the second half of 20* century. The first civil war, that took place in the eve of independence - 1955 - until 1972, was restricted mostly to the South area. This first fight generated around 500.000 victims, 180.000 refugees and up to one million civil citizens travelling internally. The first war, having as scope the independence, ended only with a quasi-autonomy for South Sudan, upon the execution of the Agreement from Addis Abeba, incorporated in the Constitution of Sudan.

In 1983 the second Civil War burst between the Government of Sudan and the Army of People Liberation from Sudan, led by John Garang de Mabior. The war started upon the breach of the Agreement from Addis Abeba by the President Gaafar Nimeiry, who declared the entire Sudan as being an Islamic state, ceasing thus the existence of the Autonomous Region of South Sudan. The second war, with over 2 million victims, continued until 2005, when a new peace agreement was signed, on January *9X,* in Nairobi, with the following terms:

- the South will be autonomous for six year, then a referendum for independence will be organised;
- both parties in conflict will unite their armed forces in one formed of 39.000 soldiers, after six years, if the referendum is not favourable for succession;
- the income resulted from oil will be shared equally between the Government and the Army of People Liberation from Sudan, during the autonomy period of six years;
- the jobs will be shared in different proportions, so as the autonomous Sudan holds a certain percentage, although the majority will be held by Government;
- the Sharia Islamic law will be applied in North, and in South one will apply only to the extent decided by the Meeting selected.

Therefore, observing the Agreement from Nairobi, between January 9th-15th 2011, after six years of autonomy, one has organised the referendum for the independence of South Sudan. 98.8% of population supported the secession, which entailed formal independence on July 9th 2011, the capital of the new state being established at Juba.

The Egypt, Sudan, Germany and Kenya have been the first countries that acknowledged the independence of South Sudan. More than that, only few days after obtaining the independence, on July 14* 2011, the South Sudan became the 193r state member of the Organisation of United Nations and on July 28th it has been received in the African Unit becoming the 54th member state.

The independence largely claimed of South Sudan as a great victory for its population, affected by internal fights for almost half a century, however the North and South still depend one of the other: most of the oil reserves are in South, and the transportation pipes, the ports and refineries are in North. In addition, the area of Abyia, very rich in oil, has to decide by a referendum if it joins South Sudan currently being under the control of North Government and there is the risk that a new conflict bursts in the future between the two countries.

Conclusions

In conclusion, the state represents the frame of exercising the law of every people to decide its own fate, and its appearance is related to the evolution of human communities which, in order to operate, need a political organisation given by state.

Regardless the manner of their creation, the new states enjoy the quality of subject of international law as of its occurrence, with all state rights and obligations, the other states having the obligation to observe both their suzerainty and territorial integrity, and all right held by a state in the international relations.

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SUBSIDIARITY IN THE UNION LAW: A SUCCESS OR A FAILURE?

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Abstract

The principle of subsidiarity has been introduced in the Union law, as a constitutional principle, by the Treaty on the European Union in order to protect the competences and the authonomy of the member States from the interferences of the Union (the European Community at that moment) in the areas of shared competence. It is not sure today that it has succeeded to fulfil this role. Due to their functional nature, the competences of the Union has gradually expanded until now.

Key words: subsidiarity, Union, competences, jurisprudence, doctrinal comments

Introduction

In a previous article[1] *we have treated those principles of the European Union law which constitute means of protection of the human rights; more precisely we have approached the most important of them. In the present study we are going to approach the principle of subsidiarity, which is destined – at least at first sight – to protect the competences of the States against the possible interferences of the actions of the European Union, as far as the States and the Union are competent in a field. We shall show the legal definition of this principle and the specifications brought to it by Protocols joined to the treaties, the comments – favourable or not – made on it by the doctrine and the jurisprudence of the Union related to it. We shall not treat procedural aspects related to it, because we did this in a previous article*[2].

Definition and comments

The principle of subsidiarity has been for the first time introduced in the Treaty establishing the European Economic Community (become later Treaty establishing the European Community – TEC) by the Single European Act of 1986 (SEA)[3], but it was applicable at that moment only in the field of the environment. Here is the formula from the art.130R par. 4 of the TEC as introduced by the SEA: "The Community shall take action relating to environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States…." Later, the Treaty on the European Union (TEU, called then the Treaty of Maastricht) of 1992[4]

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[1] See Carmen-Nora Lazăr, *Principiile generale ale dreptului Uniunii Europene – mijloace de protecţie a drepturilor omului*, in *Contemporary legal institutions in the context of the integration in the EU*, Universul Juridic Publishing, Bucharest, 2012, pp. 101-112.
[2] See Carmen-Nora Lazăr, *Rolul parlamentelor naţiionale în tratatele anterioare ale Uniunii Europene şi ale Comunităţilor Europene şi în Tratatul de la Lisabona*, in *Dreptul* no. 6/2010, pp. 203-209.
[3] Entered into force in 1987.
[4] Entered into force in 1993.

has generalized it, making it a principle which governs the exercise of the Community competences; so, the art. 3B al. 2 from the TEC as modified by the TEU provided: “in areas which do not fall under its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore (emphasis added by us), by reason of the scale or effects of the proposed action, be better achieved by the Community”[5]; this is correlated with the idea affirmed in the art. A (common provisions) from TEU that the decisions in the Union are taken as closely as possible to the citizen[6]. We can remark a difference in comparison with the definition from the SEA: while this last required only that the Community action be able to achieve the objectives pursued, thus it being not necessary that the action of the Community be more satisfactory than that of the States, the TEU requires two cumulative conditions; also, while in the SEA only the action of each Member State is taken into acount in order to see if it is satisfactory, the definition of the TEU does not anymore specify anything in this respect, which will raise a problem (see below). The definition given by the actual art. 5 par. 3 from TEU (common provisions) as modified by the Treaty of Lisbon of 2007[7] is maintained in essence: "Under the principle of subsidiarity, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather (emphasis added by us), by reason of the scale or effects of the proposed action, be better achieved at Union level". The word "therefore" is suppressed[8]; concerning the level of the States, the treaty specifies that it may be the central, the regional or the local level, taking into account the territorial structure of the States and the distribution of the competences within them; curiously, the word "rather" is not present in other linguistical variants of the treaties (those whose language is accessible to us, i.e. those in Spanish, in Portuguese, in Romanian, in Italian, in French and in German) and moreover it does not make sense. Obviously, the idea mentioned above – that the decisions are taken as closely as possible to the citizen – is maintained (in art.1 of the TEU – common provisions).

We observe that the subsidiarity is a principle which governs the use of the Union conpetences and not their delimitation from those of the States, as the principle of conferral does (whose logical consequence it is considered by some authors[9]). It is applicable all the times that it is about non-exclusive competences, which means that, theorically, these competences may be shared, of coordination of the economic and employment policies of the States, of defining and implementing a common foreign and security policy (which is, in essence, also a shared competence) or of coordination/supporting/supplementing of the actions of the States in purely national areas[10]. Previously to the Treaty of Lisbon, though,

[5] We observe that by using the word “therefore” the treaty wanted to underline a consequence which results automatically, necessarily, from the previous idea; or, this is not exact, because if the actions of the States are not satisfactory this does not mean that the action of the Community (now the Union) will be automatically satisfactory.

[6] See also S. Sieberson, *Dividing lines between the European Union and its Member States*, "T.M.C. Asser Press" Publishing House, Hague, 2008, p. 139.

[7] Entered into force in 2009.

[8] Other authors too consider that this suppression is a progress (see A. von Bogdandy, J. Bast, *The federal order of competences,* in A. Von Bogdandy, J. Bast, *Principles of European constitutional law*, “Hart” Publishing, Oxford-USA-Canada, “C.H.Beck” Publishing House, München, 2009, p. 302).

[9] S. Sieberson, op. cit., pp. 142-143; T. van den Brink, *The substance of subsidiarity: the interpretation and meaning of the principle after Lisbon*, in M. Trybus, L. Rubini, *The Treaty of Lisbon and the future of European law and policy*, “Edward Elgar” Publishing House, Great Britain-USA, 2012, pp. 160-161).

[10] We consider, though, that practically the subsidiarity is not applicable to the other types of competences than those shared and that of defining and implementing a common foreign and security policy because it, by definition, permits only the intervention at a single level, either of the Union or of the States. Or, in the cases of coordination/supporting/supplementing, the intervention takes place at both levels, although it is of a different type: the States take a measure (either a policy or an action) and the Union coordinates it for all or supports it or

when a classification of the Community competences did not exist in the treaties and was the "creation" of the jurisprudence through the interpretation of the treaties, the principle of subsidiarity was difficult to apply[11]. With regard to the nature of the acts, the question is if the subsidiarity mentioned in the art.5 TEU refers only to the legislative acts, thus to the legislative competence, or also to the implementing acts, to the implementing competence. In our opinion the subsidiarity provided there is applicable only to the legislative competences[12], because the implementing competences are referred to separately, respectively the delegated implementing competences in art. 291 par. 1 and 2 of Treaty on the functionning of the European Union (TFEU) and the own implementing competences in various provisions of the same treaty (see below). Art. 291 TFEU contains the subsidiarity without affirming it expressely: "1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts. 2. Where uniform conditions for implementing legally binding Union acts are needed (emphasis added by us), those acts shall confer implementing power on the Commission or, in duly justified specific cases and in the cases provided for in art. 24 and 26 TEU, on the Council". Concerning the own implementing competences of the Union (more precisely of the Commission), i.e. those provided directly by the treaties, they are: the adoption of directives or decisions addressed to the States concerning the public enterprises or the enterprises with special regime which provide services of general interest (art. 106 par. 3 TFEU); the adoption of regulations concerning the right of permanent residence of the employees nationals of another State (as a component of the freedom of movement; art. 45 par. 3 d TFEU); the adoption of regulations concerning the competition (art. 105 par. 3 TFEU); the execution of the Union budget (art.317-319 TFEU). With regard to the first the subsidiarity cannot apply because it would not make sense that the States address to themselves directives or decisions! With regard to the last the subsidiarity cannot apply because it is an exclusive competence of the Union. With regard to the right of residence and to the competition[13], they contain cross-border elements, the first by its nature, the second by hypothesis; it results, thus, that the subsidiarity is not applicable also here, the two provisions containing an absolute presumption in favour of the Union level. Moreover, the two Protocols on the application of the principles of subsidiarity and proportionality, annexed to the Treaty of Amsterdam and, respectively, to the Treaty of Lisbon, mentioned below, make reference to the legislative acts. The difference between the art. 5 and the art. 291 TFEU is that in the case of the implementing competences the non-respect of the subsidiarity may not be imputable to the implementing act itself, because it is adopted on empowerment by the legislative act, but to this last also, as in the hypothesis provided by the art. 5.

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supplements it. On the other hand, in the case of the last type of competences the intervention of the Union may not be imposed to the States, even if it is necessary; moreover, the treaty itself provides in this case that the Union may not supersede the competences of the States. Also, it does not apply to the competences of control or of delivering opinions (see the decision of the European Court of Justice – ECJ - "Commission/Germany" 539/09 of 15.11.2011, *http://curia.europa.eu/*). The subsidiarity remains thus to apply only to the shared competences (including, as we said, the common foreign and security policy).

[11] Josephine Steiner, Lorna Woods, *EU Law*, "Oxford University Press" Publishing House, New-York, 2009, p.61; N. Foster, *Foster on EU Law*, "Oxford University Press" Publishing House, Oxford, 2009, p. 94.

[12] Despite the defectuous, redundant wording of the art. 2 TFEU: "Only the Union and the states may legislate and adopt legally binding acts..." (emphasis added by us), respectively "The Union and the States may legislate and adopt legally binding acts..." (emphasis added by us), the notion of legally binding acts covering also the implementing acts (be they normative or individual).

[13] We specify that it is about the competition which overcomes the borders of a single State, otherwise the competence belongs to the State concerned (according to the art. 3, par. 1 b of the TFEU).

In case of doubt with regard to the satisfactory character of the action of the States, the provision of the TEU contains a presumption in favour of the inferior level; this result from the cumulative character of the conditions required (see below)[14].

Because, according to the opinion of some authors, the mentioned provisions do not contain a definition of the principle but of its way of use[15] and according to the opinion of others the definition is vague, unclear, unprecise[16], the Protocol on the application of the principles of subsidiarity and proportionality joined to the Treaty of Amsterdam of 1997[17] has brought some specifications in the matter and has formulated for the institutions requirements with regard to this principle. Thus, in order to verify the fulfilment of the two conditions mentioned in the treaty, three criteria must be taken into account: the existence of cross-border aspects, which cannot be satisfactorily regulated by the States; the action of the States or the absence of the action or the Community would conflict with the requirements of the treaty (for example the necessity to correct the distorsions of competition, to avoid the disguised restrictions brought to the changes or to strenghten the economic-social cohesion) or would damage seriously in another way the interests of the States; an action at Community level would have obvious benefits in comparison with an action of the States, by reason of its scale or effects. In fact a test of comparative efficiency is made[18]. Although it is sustained that it is not clear if the three criteria are cumulative or alternative, in our opinion they may not be but alternative, this resulting logically from the manner in which they are fomulated[19]. Some authors consider though that it is not possible to establish *a priori* clear and abstract criteria for the evaluation of the subsidiarity, because all the areas are closely connected between them and all have a connection with the common market (the main objective of the treaties, n.n.), so that an intervention of the Union shall always be necessary, even if in a reduced degree[20]. Then, in accordance with the Protocol, the form of the Community action must be the simplest possible permitted by the adequate attainment of the objectives of the measure and by the necessity of an effective execution. It is recommended to give priority to the directives over the regulations, respectively to the frame-directives over the detailed directives; one can add the recommendations, the guides, the codes of conduct[21], all non-binding instruments for those to whom they are addressed, forming what some call the “soft law”; also, the idea contained in the Protocol would impose to have recourse to minimal harmonizations, respectively to the mutual recognition instead of harmonization[22]. Regarding the nature and the scale of the Community action, it is specified that the measure must leave to the States a margin of action as great as possible but compatible with the requirements of the treaties and with the necessity of the attainment of the objectives of the measure; the well established national practices and the national legal systems must be respected; the States

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[14] Alina Kaczorowska, *EU Law*, “Routledge-Cavendish” Publishing House, Great Britain-USA-Canada, 2009, p. 102; T. Konstandinides, *Division of powers in EU Law*, "Wolters Kluwer" Publishing House, Hague, 2009, p. 123

[15] T. Konstandinides, op. cit., p. 124

[16] T. van den Brink, op. cit., p. 160-161; N. Foster, op. cit., p. 94; S. Sieberson, op. cit., p. 123; in T. Konstandinides, op. cit., p. 121.

[17] Entered into force in 1999.

[18] Josephine Steiner, Lorna Woods, op. cit., p.62; D. Chalmers, G. Davies, G. Monti, *European Union law: cases and materials*, "Cambridge University Press" Publishing House, Cambridge, 2010, p. 364.

[19] In the same sense see J.-P. Jacqué, *Droit institutionnel de l'Union Européenne*, “Dalloz” Publishing House, Paris, 2009, p. 166.

[20] P. Craig, Grainne de Burca, *EC Law. Texts, Cases & Materials*, “Oxford University Press” Publishing House, Great Britain, 2008, p.95; according to the functionalist theory, on which the Communities are founded, the necessity to attain an objective in an area imposes the institution of competences in another areas too, because of the close connection between them, as the “rule of snowball” works; thus, the competences are based on objectives, not on areas.

[21] P. Craig, Grainne de Burca, op. cit., pp. 95-97; Alina Kaczorowska, op. cit., pp. 99-100.

[22] P. Craig, Grainne de Burca, ibidem; Alina Kaczorowska, ibidem.

must be offered different solutions for the attainment of the objectives of the measure, subject to the ensurance of an adequate execution. The institutions must reason each legislative act with regard to the respect of the subsidiarity principle, in the *exposé* of reasons which accompanies it; they must take into account the necessity that each kind of burden (administrative, financial, etc.) imposed on the Community, on the States, on the local authorities or on the individuals (economic operators or private persons) be as low as possible. The Commission, moreover, must proceed to social consultations as large as possible before proposing a legislative act. According to the Protocol, the subsidiarity is a dynamic concept, which permits both an extension of the Community actions, when the circumstances require it and within the limits of its competences, and a limitation or a cessation of these actions, if they are not anymore justified[23].

The Protocol having the same object joined to the Treaty of Lisbon maintains the requirements previously instituted with regard to the obligation of social consultation, specifying moreover that the regional or local scale of the proposed action must be taken into account, to the obligation of reasoning of the legislative acts with regard to the subsidiarity (but, instead the *exposé* of reasons, the act must be accompanied by a slip which contains elements based on qualitative and, if possible, quantitative indicators which permit the evaluation of the proposed measure), to the obligation to take into account that any imposed burden be the lowest. We do not mention anymore here the procedure of parliamentarian control instituted by the Protocol because, as we have specified in the Introduction, we have done it in a previous article.

Having in view that the principle of subsidiarity is correlated with the idea that the decisions must be taken as closely as possible to the citizens – the principle proceeding just from this necessity -, it can be sustained that only at a first impression, more precisely that its role is only apparently to protect the competences of the States, ultimately the citizens being those it concerns. This because the State is not a goal in itself and its competences are tasks given in order to satisfy social needs; on the other hand, the democracy supposes that the citizens participate to or influence the decision-making; or, the more distant is the level of the decision-making, the weaker is the participation or the influence of the citizens (if it exists; let us remember that until a given moment the European Parliament, which represents the citizens of the Member States, had not a proper power of decision but only an influence, at the beginning weak and later stronger, on the decision factors). So that, in our opinion, it cannot be sustained, as some authors do, that the principle of subsidiarity is not of a nature to interest the citizens because it is indifferent for them at what level the decisions are taken[24].

The principle of subsidiarity has appeared, as it is shown, in a context in which the Community competences had very much expanded (either by revisions of the founding treaties, or by the use of the flexibility clause – the actual art. 352 TFEU[25]) and some States and the individuals had the impression that they (the competences) can expand undefinitely, due to their functional nature; other States, with a federal structure or only regionalized, feared that the expansion of the Community competences would affect the balance and the distribution of their internal competences; the individuals saw that their life was more and more regulated at a more distant level from them; more generally, the States feared that in the areas of shared competence their freedom of action would diminish, especially that more and more decisions were going to be taken with qualified majority[26]. Thus, the principle was going

[23] In this sense an author showed that the subsidiarity is not equivalent to the decetralization, just because it allows power either at the superior level or at the inferior one, depending on the necessities (T. Konstandinides, op. cit., p. 124; Alina Kaczorowska, op. cit., p. 197).
[24] N. Foster, op. cit., p. 96.
[25] This provision is applicable in the case in which the treaties assign to the Union an objective but they do not give it also the corresponding means (the legal acts), the Council being allowed to establish them by unanimity
[26] J.-P. Jacqué, op. cit., pp. 162-164.

to refocus the process of exercise of governmental functions from the centre to the periphery[27], to put an end to the tendencies considered to be federalist of the Community[28], although it was accepted also by the supporters of the federalism and by those who were hostile to such an evolution[29]. The explanation of its general acceptance is, probably, that it is of a nature to lead both to the expansion and to the limitation of the intervention of the Union, depending on the necessities, (as the Protocol mentioned above remarks), being both an integrationist and an anti-integrationist principle, having thus both a positive and a negative aspect[30].

As it was remarked, before being consecrated as such the subsidiarity was (and continue to be) implicitely contained in more provisions of the treaties: in the flexibility clause provision (see previously), in that related to the implementing competences (see previously), in that related to the margin of appreciation of the States when they implement a directive (art. 288 par. 3 TFEU), in those related to the mutual recognition between the States of the standards, diplomas, certificates etc., in the rule of reason[31] with regard to the freedom of movement[32]; in a larger sense, it is considered that also the conferral of competences on the Community/Union, both initially and later – by revisions of the treaties -, contains implicitely the principle of subsidiarity, this being inherent to any system with more levels of governance[33].

Despite of the fact that the principle of subsidiarity is necessary, in our opinion, if the preservation of the national authonomy is wanted, it is far to make unanimity in the literature. Some authors have considered that it is mistaken, appeared in an improper moment and irrelevant for the Union law because it is born in another sphere, that of the relationships individual-society-State (for this reason it is also irrelevant for the federal States)[34]; being unclear and unprecisely defined and, for this reason, being difficult to be controlled by judicial way, having moreover a defensive nature, it is not able to establish a balance between the Union and the States[35], it cannot represent an adequate guarantee against the unjustified expansion of the Union competences[36], it does not meet the concerns for the preservation of the competences of the States and it did not succeed to contain the centralizing trend of the power[37]. For these reasons some consider that the proportionality[38], respectively the sovereignty[39] are more important than the subsidiarity; anyway, the subsidiarity is not

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[27] T. Konstandinides, op. cit., p. 118.
[28] P. Craig, Grainne de Burca, op. cit., p. 94.
[29] J.-P. Jacqué, op. cit., p. 161.
[30] Idem, p. 165; P. J. G. Kapteyn e.a., *The law of the European Union and the European Communities,* Ed. Wolters Kluwer, USA-The Netherlands, 2008, p. 171; T. Konstandinides, op. cit., p. 120; other authors define inversely the positive and the negative aspect, the first meaning the limitation of the Union competences and the second the prevention of the action of the States (and, thus, the permission of the Union action) (see T. Konstandinides, op. cit., pp. 124-125).
[31] This concept, (deliberately) incompletely provided in the treaties, was completed by he ECJ through interpretation; it refers to the derogations – non-provided by the treaties - which the Member States may bring to the freedom of movement under the control of the ECJ, this last having the role to appreciate the reasonable character, the rightness of these derogations.
[32] N. Foster, op. cit., p. 93; Alina Kaczorowska, op. cit., p. 97; J.-P. Jacqué, op. cit., p. 160.
[33] J.-P. Jacqué, ibidem.
[34] P.J.G. Kapteyn e.a., op. cit., pp. 139-140.
[35] T. van den Brink, op. cit., pp. 160-161; P. Craig, Grainne de Burca, op. cit., p. 100.
[36] P.J.G. Kapteyn e.a., op. cit., pp. 139-140.
[37] Ibidem; T. Konstandinides, op. cit., p. 120.
[38] T. van den Brink, op. cit., p. 160; P. Craig, Grainne de Burca, ibidem.
[39] P.J.G. Kapteyn e.a., op. cit., pp. 139-140; this because the Union is however an international organization, so that in its relationship with the Member States the problem would be that of the respect of the sovereignty and not that of the subsidiarity.

sufficient to involve the citizens in the decision-making[40], idea to which we cannot but to subscribe.

It is to be mentioned also the fact that neither the procedure instituted by the Treaty of Lisbon with the view to monitor previously the respect of the principle of subsidiarity has been exempted from criticism. Indeed, this procedure encumbers and slows the decision-making process - despite of the fact that its simplification has been wanted all the time -, without the national parliaments being able to block the adoption of an act which is deemed to violate the subsidiarity[41]. If we agree with the criticism concerning this last aspect, we do not share it also for the rest. Any democratic process, by the fact that it involves more actors[42], is *par excellence* complex and complicated; only the dictatorship is simple! Without the ordinary legislative procedure – the former co-decision -, the European Parliament would have neither today a decisive word to say in the decision-making process (which has given birth to the criticism concerning the "democratic deficit" of the Union). Certainly, even here some questions may be raised, for example referring to the obligation of the governments of the Member States to represent before the jurisdiction the parliaments of their own States in an action based on the non-respect of the principle of subsidiarity, if they do not agree with the action[43]. The Protocol joined to the Treaty of Lisbon provides that the obligation mentioned is exercised "in accordance with the legal order of the States". Does this mean that the existence itself of the obligation or only the conditions of its exercise depend on the provisions of the legal order of the States? In our opinion the answer is the second variant, otherwise the provisions of the Protocol would be void of content and the national parliaments which want to bring judicial proceedings, if they did not succeed to prevent the adoption of an act "accused" to violate the subsidiarity, would be at the mercy of their own governments, which would not be normal[44]. Anyway, it is important that the monitoring of the respect of the subsidiarity be made also prior to the adoption of a legislative act, even in the absence of a veto from the national parliaments or from another factors, this influencing too the effectiveness of the principle[45].

Relatively to the subsidiarity more questions have been raised[46]. First, the action of the States should be appreciated with reference to the actual, present situation, or to the future, potential one? We agree with the opinion that, having in view the terms of the treaty, one must take into acount what the States could do in the future[47]. Second, one must take into account the action at the level of each State (thus isolately, individually) or, to the extent that an agreement is concluded between all the States, the collective action resulted? In other words, is the intervention of the Union justified if the objective can be attained by a collective action of all the States, given that the action of each State would not be able to attain it? We saw that the SEA has referred only to the individual States, so the answer would be clear here. The opinions are shared, some sustaining that, although in accordance with the letter of the treaties, an agreement between all the Member States violates their spirit, pursuing to attain an objective out of the frame of the Union and through an instrument which is not an act of Union law but one of international law, thus taken away from the judicial control of the ECJ[48];

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[40] J.-P. Jacqué, op. cit., p. 161; this author considers that the problem does not reside in the fact that the Union has too many competences, but in their way of use (idem, p. 164).
[41] T. Konstandinides, op. cit., p. 151; S. Sieberson, ibidem; the first author considers even that the procedure instituted is destined more to solve the problem of the Union legitimacy than the problem of its competences.
[42] Thing that, moreover, even some critics appreciate as being, though, an advantage (T. Konstandinides, ibidem; A. von Bogdandy, J. Bast, op. cit., p. 304).
[43] T. Konstandinides, op. cit., p. 150.
[44] In an opposite sense see A. von Bogdandy, J. Bast, op. cit., p. 303.
[45] T. Konstandinides, op. cit., p. 121.
[46] For all these questions see J.-P. Jacqué, op. cit., pp. 166-168.
[47] Ibidem, pp. 166-167.
[48] In J.-P. Jacqué, op. cit., p. 167 (the author agrees with this opinion).

others, as well the ECJ itself, consider though that, in so far as the States are (also) competent in an area, they may exercise their competence as they want, inclusively by an agreement to which all of them are parties, the treaties not instituting restrictions in this respect[49]. Third, the action of the private partners (natural and legal persons) can be taken into account where we speak about the action of the States? Theorically, having in view the terms of the treaties, which refer to the States, this is not possible[50]; the individuals may not be assimilated to the States, however we force the interpretations. Practically, though, the Commission takes into account the measures that the individuals take with the view to attain objectives of the Union (for example through agreements between trade associations and employers organizations) and gives up to propose legislative acts in that matter[51].

On the other hand, if it is considered that legally speaking the principle has and will have only an insignificant impact – i.e. it has not led and will not lead to the reduction of the intervention of the Union -, from a political point of view it represents an engagement toward democracy and toward decentralization, conferring legitimacy to the Union, in opposition with the nationalist trend, which focuses on the legitimacy of the States[52].

Jurisprudence and comments

Even from the beginning the problem has been raised if the principle of subsidiarity is of a nature to be invoked before the jurisdictions, more precisely before the Union jurisdictions. Some authors, arguing its partially political nature[53] and the vague character of its definition, have sustained that it may not be invoked judicially[54], but others have shown that the vagueness and the lack of clarity have not made other concepts unable of judicial review[55]; also, the fact that the jurisdiction must appreciate the opportunity and the necessity is not an obstacle against the judicial review, which has been and is exercised in other similar situations too[56], even if it is limited to establish if the institution has not committed a manifest error of appreciation. Neither the jurisprudence of the ECJ has followed the first point of view, accepting even early[57] to review the legislative Community acts (also) with regard to the respect of the subsidiarity, although, really, its control has been limited to verify if the acts were dully reasoned in this respect[58], with the specification that in the point of view of the ECJ at that moment the reasoning did not need to be detailed and neither to make an express reference to the principle of subsidiarity; the Union jurisdiction has not applied itself, thus, the test of comparative efficiency based on the criteria from the Protocol previously mentioned[59].

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[49] In J.-P. Jacqué, ibidem; opinion of he ECJ 1/94 of 15.11.1994, *http://curia.europa.eu/*; decision ECJ "Parliament/Council" 316/91 of 2.03.1994, *http://curia.europa.eu/*; decision ECJ "Commission/Council" 22/70 of 31.03.1971, *http://curia.europa.eu/*; decision ECJ "Parliament/Council and Commission" 181/91 of 30.06.1993, *http://curia.europa.eu/*; the author cited shows, though, that, because in two of these cases it was about competences of coordination and not of shared competences, the reasoning of the Court could not be extended to these last; we are not of this opinion, the Court having used general terms ("non-exclusive competences", which means all the other types).

[50] J.-P. Jacqué, op. cit., pp. 167-168; in an opposite sense see Alina Kaczorowska, op. cit., p. 151.

[51] J.-P. Jacqué, ibidem.

[52] S. Sieberson, op. cit., p. 143

[53] Because it implies the appreciation of the opportunity and the necessity of a measure

[54] Josephine Steiner, Lorna Woods, op. cit., p.62

[55] In T. van de Brink, op. cit., p. 160

[56] For example in the case of the principle of proportionality

[57] Decision of the ECJ "Great Britain/Council" 84/94 of 12.11.1996, *http://curia.europa.eu/;* decision of he ECJ "Germany/Parliament and Council" 233/94 of 13.05.1997, *http://curia.europa.eu/*; we mention that in the first case the subsidiarity has not been invoked separately but in connection with the legal basis of the act

[58] The obligation of reasoning is a general one, having to be respected for each act, irrespective of its nature and rank; also, we mention that the non-respect of the subsidiarity may be invoked in the frame of the existing procedures, i.e. in an action in annulment, in a preliminary ruling in validity and through the plea of illegality in any type of direct action (see in the same sense Josephine Steiner, Lorna Woods, op. cit., p.62; T. van den Brink, op. cit., p. 163)

[59] T. van den Brink, op. cit., p. 163.

Subsequently to that Protocol, the jurisprudence has evolved in the sense of the deepening of the review, the jurisdiction verifying itself if the requirements of the Community action are satisfied with reference to the criteria from the Protocol[60]. Having in view the provisions of the Protocol, it would have been impossible for the ECJ to not take it into account and to not evolve from a purely formal review to a substantial one[61]; all the more after the entry into force of the Treaty of Lisbon with the afferent Protocol – thus with the new procedure of *a priori* control and with the possibility of the introduction of an action in annulment by the national parliaments and by the Comitee of Regions – the ECJ could not maintain its former position[62]. However, as the doctrine remarks, having in view the great power of appreciation from which benefit in principle the institutions, even a substantial review is not and cannot be, inevitably, but a marginal one, limited to the ascertainment of the existence of a manifest error of appreciation; otherwise the jurisdiction should make complex social-economic assessments and calculations, which would mean that it substitutes itself for the competent institutions[63]. Moreover, since a measure has been proposed by the Commission and adopted by the Council and, in principle, by the Parliament too, its invalidation by the Union jurisdiction by reason of the non-respect of the subsidiarity would be equivalent to say to the respective institutions that all have been wrong, that all have mistaken about[64]. We would add that, if a measure is taken with unanimity, the jurisdiction must show even more restraint, because it is supposed that the subsidiarity protects just the authonomy of the States; or, these have give up to its benefit by voting in favour of the measure. Also, the jurisdictions of the Union do not benefit from electoral legitimacy and a larger review would curb the development of the competences of the Union, i.e. the European integration; if in other respects the ECJ has shown militancy, being accused for the "government of judges", this has happened just in cases in which an impulse to the integration, endangered by the inaction of the political decisional factors and by the non-respect by the States of the requirements of the treaties, had to be given[65].

What could be inferred from the jurisprudence so far of the ECJ? From a statistical point of view the subsidiarity has been invoked as a ground of nullity[66] in few cases from the total number of acts adopted by the Union[67] and it is to be specified that it was invoked rarely alone (probably because the claimants appreciated that otherwise they had few chances of

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[60] Decision of the ECJ "The Netherlands/Parliament and Council" 377/98 of 9.10.2001, *http://curia.europa.eu/*; decision of ECJ "Alliance for Natural Health and Nutri-Link Ltd e.a." 154-155/04 of 12.07.2005, *http://curia.europa.eu/*; decision ECJ "B.A.T. e.a." 491/01 of 10.12.2002, *http://curia.europa.eu/*; decision ECJ "Commission/Germany" 103/01 of 22.05.2003, *http://curia.europa.eu/*; decision ECJ "Vodafone" 58/08 of 8.06.2010, *http://curia.europa.eu/* (even in this period, though, there are decisions in which the reasoning on subsidiarity is lacunar or which are limited to the analysis of the reasoning of the act; see decision of the former Court of First Instance, actual General Court, "GSK Services Unlimited/Commission" 168/01 of 27.09.2006, *http://curia.europa.eu/*; decision of the ECJ "Commission/Germany" 518/07 of 9.03.2010, *http://curia.europa.eu/*).

[61] T. Konstandinides, op. cit., pp. 136-137.

[62] T. van den Brink, op. cit., p. 164; Alina Kaczorowska, op. cit., p. 65; J.-P. Jacqué, op. cit., p. 168; however, it is sustained that in the action in annulment brought by the national parliaments – through their governments – the jurisdiction may not review but the respect of the *a priori* procedure, not other aspects too (see T. Konstandinides, op. cit., p. 150); we confess that we do not see on what such an affirmation is based!

[63] P. Craig, Grainne de Burca, op. cit., p.99; J.-P. Jacqué, op. cit., p. 168; P.J.G. Kapteyn e.a., op. cit., p. 143; T. Konstandinides, op. cit., pp. 131-136; this last author considers that the treaty itself is ambiguous with regard to the scale of the judicial review, it does not result from it if the review must be a purely formal, procedural one (i.e. limited to the reasoning of the act and to the respect of the *a priori* procedure) or also a substantial one (idem, p. 152); in our opinion, since it is not specified in the treaty, the review must be complete, i.e. focus on all the aspects, even if it is limited with regard to its intensity.

[64] D. Chalmers, G. Davies, G. Monti, op. cit., p.364 and pp. 365-366.

[65] T. Konstandinides, ibidem.

[66] In this respect it is included in the larger ground, i.e. the infringement of the treaties and of the acts adopted for their application.

[67] P. Craig, Grainne de Burca, op. cit., p. 100.

success); often it was invoked as an accessory ground of the legal basis. Also, an uniformity of attitudes between the Member States does not exist. For example, the most times the claimants were natural/legal persons, not States, although it is supposed that the subsidiarity protects the competences of those! One reason for which the individuals have invoked the subsidiarity is that mentioned previously, i.e. the fact that it is not indifferent for them at what level the power is exercised. Then, many times some States have intervened in the defense of the act (which is not surprisingly if they have voted in its favour), while rarely one State has intervened in the defense of the individual claimant[68]. Finally, the most important observation would be that never the jurisdiction has annulled an act exclusively on the ground of the non-respect of the subsidiarity[69]. Some authors are of opinion that, even if the review was more intense, it would not be sure that the result would be other, i.e. the act would be annulled on this ground[70]. The explanation for the restraint of the Union jurisdiction consists in those shown previously; before the Treaty of Lisbon, the fact that the classification of the Union competences was just the creation of the jurisprudence was another argument[71].

These results, not just glad, gives the right to some to sustain that a substantial review of the respect of the subsidiarity does not make sense, having to limit itself to formal, procedural aspects[72]. We do not agree with such an affirmation, even we observe that, really, so far the jurisprudence is disappointing. Anyway, it is probably that the subsidiarity will influence the interpretation of the Union law – with regard to its content and scope -, if it is not a ground of invalidity/nullity[73].

Conclusions

How the result of a few years of application of the principle of subsidiarity can be appreciated? In fact it is difficult to say clearly, without no doubt, that the result is positive or negative. It is likely, though, that the result is under the expectations. If the jurisprudence is really disappointing, we must wait to see how the *a priori* procedure of the monitoring the respect of the subsidiarity by the national parliaments works; it is too early to say something in this respect. If the national parliaments, which so far had not any role in the Union decision-making process, take seriously their role attributed by the Protocole joined to the Treaty of Lisbon, it is sure that the initiators of a legislative act – firstly the Commission – be more cautious, more prudent to propose something which does not respect the subsidiarity; also, the legislator – the Council or/and the Parliament – will pay more attention to this aspect. As a result, it is likely that the jurisprudence will change too and not only with regard to the procedural aspects, but also with regard to the substantial aspects.

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GOVERNMENT AND OPPOSITION - THE BINOMIAL DEMOCRATIC GOVERNANCE

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Abstract:

An essential aspect of the political relations is represented by the relation between power and opposition, the power being in the meaning of this relationship the legitimate capacity to impose its own will or to exert the authority, which reveals a relation of domination. The two socio-political entities, government and opposition, acts by its specific means and in a democratic system these ease the confrontation of ideas, solutions, open competition between political forces generating the alternation in power, as a result of the electorate's will and political orientation.

Generally, the power is assimilated to the force or capacity of constraint, which suggests that, from a certain perspective, the imposition of the political will.

In the socio-political area, J.J. Rousseau in his "Social Contract" stated that the most powerful is not strong enough to always be the "master", if he does not transform the force into law and subjection into duty, so that the normative power shall emerge from a social morality stated by the law. As the pair term of the "power", the opposition is the ensemble of the political groups, parties or alliances, which, taken separately or as an ensemble, are opposing the political regime in force or the actual government's policy.

Keywords: *democracy, government, power, opposition, authority*

Introduction

The purpose of this research is the investigation of the content and socio-political dimensions of the relation power-opposition in order to establish a state of facts and to draft proposals on effective the interactions.

The conceptual analysis of the relation between power and opposition is made through its components, based on the complexity and diversity of the notions of "power" and "opposition". Are being analyzed both the methodological approaches focused on the study of the relations of power, as well as the main ideas in this area. A special attention is paid for the investigation of the specificity of the relations between the political power and opposition in the context of the democratic transformations, as well as in the context of the consolidated democracies.

Both the policy and the politics can be defined only by the relations configured for the achievement of their goals and purposes. The politics, according to D. Fisichella, can be built

after the clarification of the "issue regarding the definition of the political relations". The political activity has always manifested only by relations "by which persons and groups exert the power or the authority in order to maintain the order in a territorial framework". During the evolution of the "zoon politikon" also changed the framework and entourage for the manifestation of the political relationships, their internal and external orientation, the leading actors, but the essence remained the same, the political relationships being relations for the organization of the society, for management and exertion of the governance, process that involves the political actors representing a dichotomy of the politics: political power and opposition.

The concept of political power is important and determinant for the identification of the specificity of the relation power-opposition. According to L. P. Zăpârtan "without any doubt, the concept of political power has a central position in every politic construction". The object of the research does not regard the general concept of power, but especially its relational feature, assuming besides the existence of the carrier of the power and the agent who is influenced by it. And he is not just influenced, but he opposes the influence and domination, the governing being achieved by the carrier of the political power. This is why in the present paper the effort of the author shall be focused on the theoretical reflection, and not on the content of the concept of "political power", but on its finality, on the teleological perspective. Essentially, the political activity is the activity to conquest, maintain, monitor, exert and communicate the political power. Most political specialists in their attempts to define policy have mentioned the important role played by the political power.

Starting with the studies of the ancient philosophers and ending with the theories of the contemporary political scientists, most authors have analyzed the political phenomenon in terms of the political power - Plato, Aristotle, Cicero, Thomas Aquinas, Machiavelli, Th. Hobbes, de Tocqueville, Montesquieu, M. Weber, R. Dahl etc.

The particular analysis of the concept of political power, from the perspective of the relation power-opposition, it is necessary because there are multiple methodological approaches of this subject, hence the diversity of meanings. By the way in which the concept of power is treated it definitely depend the conceptual content of the relation power-opposition.

For instance, if we analyze the political power only in relation to the state powers, then there is a risk to miss scientific issues such as the elections, public opinion and civil society's attitude etc. On the other hand, if we analyze the political power only from the light of its relational feature, then the concept of political opposition fits within the concept of power and yet again we are limited in our scientific exploration of the concept.

Studying the literature assumed the identification of four main principled scientific approaches of the political power, as a component of the political relation power-opposition: anthropological, sociological, legal-institutional, and behaviorist. The anthropological approach is synthetized by the studies of G. Balandier, P. Clastres, J. W. Lapierre. Therefore, G. Balandier starting from the anthropological approach of the phenomenon considers that: "resorting to the synthetic formula, the power shall be defined as emerging, for every society, from the need to fight against the entropy which threatens with disorder". The author draws attention on the organizational and integrant feature of the political power, which in different historical moments, by different forms of manifestation ensured the coagulated and organized feature of the human society.

An important role in the arsenal of instruments of the state has always been played by the coercion, which according to anthropologists is the element which determined the passage from kinship relations to political relations in the organization of society. The subject of using the force, the coercion, in the process of exerting the power is a subject as important as that of the relations of power. The coercion is not necessary only for the power, as well as for the whole society. P. Clastres moves further in correlating the terms power-opposition stating that the "power in in its essence coercion".

Another author, the anthropologist M. Smith synthetizes the idea according to which the power is only "the capacity to effectively act on people, using a variety of means from persuasion to coercion". The awareness on the role of coercion derives from the teleological aspect of the power to ensure social order and organization. We must be totally aware of the fact that there is "no other society in which the rules are automatically accepted". Especially rules imposed in the virtue of the behavior code enlightened based on the opinion of majority. And where is majority, there is minority, which can disagree the provision of the prescriptive code imposed by the majority.

In this regard, there are not, at least at this moment, societies without contradictions and opposition, hence there are not homogenous societies and even the totalitarianism has pointed out the existence of the opposition.

In the area of interest of the anthropologists we do not find the political opposition in its feature as an alternative to power. The opposition for anthropologists has a social shade and it refers to the resistance of the social structures to modernization. From the institutional perspective, the political power is the ensemble of the institutions and mechanisms connected to the state's activity in the exercise of its constitutive attributes.

The legal approach treats the political power in an impersonal manner; it is not interested in actors, but in institutions. According to the legal opinion, the relation political power - political opposition is an institutional one, as regards the relations between institutions representing the power (usually executive ones) and those representing the opposition (the legislative, by its factions of opposition).

The sociological approach of the political power scientifically initiated and grounded by M. Weber, represents a special point of view different from the theoretical visions previously analyzed.

The specificity is ensured by the fact that the scientist is not focused on the analysis of the institutions or functions of the political power, but of its social component - the actors trained in the performance of the political power. The relation between political actors representing the political institutions and citizens as social support of their authority represents a particularity of Weber's scientific point of view.

Treating the subject of the political power from the sociological perspective involves, even imposes, the consideration of certain terms necessary for the comprehensive awareness of the object studied as: authority and legitimacy. These concepts represent the justification of the actions of the parties involved in the relations of power, for the carrier of the power, to act, for the object of the action of power, the justification of the action in relation to his indications. In a democratic regime the authority and legitimacy refer both to the carrier of the power as well as to the political opposition.

The power assumes hierarchy, authority, a certain dynamics of the action and social organization, according to some strategies recognized and accepted in the democratic system. In fact, over the time, political analysis prove that the power is a specific mean of expression of the human relationships, resulted in the fact that certain people can determine, more or less socially comprehensive, the behavior of other people. This continuous and complex phenomenon is owed to the particularity that the society is constantly adjusting, producing its own social and cultural effect, transforming the mechanisms of power.

In fact, the power has the feature of authority, exerted by influence, persuasion, generically signifying the power to persuade. The politics usually refers to the meaning of capacity of a person, structure or political institution to be respected and to inspire subordination, the authority simultaneously representing the power to issue mandatory provisions or to impose obedience in the virtue of a mandate.

Both parties have the mandate given by the electorate. Usually the difference refers to the quantitative aspect. The authority and legitimacy of those who have the political power is explained by the majority of the votes received from the electorate, in comparison with the political forces representing the opposition. Political authority, seen especially from the legal

perspective, has an abstract and impersonal feature. In the same time "belonging either to institutions, or reflected by laws, rules or customs with which the individuals temporarily identify themselves, the political authority cannot be separated from its individual carriers". Therefore, from the perspective of the political sciences, the personalization of the power is a natural process.

It is understood that the political authority must be approached in the context of the analysis of the relations of political domination, and as pointed out especially by political sociologists, the historic forms of authority meet certain features. These have been analytically described by Petre Andrei under the influence of certain French and German thinkers, thus the authority acts as an objective power, being in the same time a conscious product of the value judgments, is normative under the relation of the human actions and behaviors, assumes hierarchy and organized dependence otherwise it shall reach the anarchy, and last but not least the authority must be legitimate and necessary.

The relation power-opposition has different forms; the democratic experience revealing that, placed on opposite positions, the political forces in opposition can play both functional and dysfunctional roles. From this perspective, approaching the issue of the representative governance, characterized by three essential instances of the participation to the political life, *to represent, to debate* and *to decide,* a series of authors emphasize the natural logic of the opposition. This fact is expressed by weakening the opponent in order to enlighten, by contrast, his own capacities and projects, in the permanent fight between the opposition and governors acting in time and space, playing a decisive role in imposing the perceptions or favorable or detrimental images for one or other of the parties.

In this context, it returns to a political analysis, in identifying the shades and anticipate the consequences of that certain positions, by identifying the opponents, namely those with a governmental vocation and the peripheral ones, namely the protesters. Hence, it must be considered that if the opposition is manifested in a legal framework, institutional or outside the established political system then, from different reasons, real or artificial, it refuses the rules of the political game, resorting to unconstitutional means.

Thus, there is a parliamentary opposition, party or group of parties acting in the Parliament, criticizing the governmental policies and voting without a rational reason against them, in the virtue of the custom "to be against". In the same time, there is an extra-parliamentarian opposition, whose form of fight is represented by the challenging of the power by demonstrations, repeated strikes and unusual forms of holding the institutions or public squares for the creation of a state of political and economic instability. Usually those who practice these forms convict any attempt to restore the public order, classifying it as a "violation" of the democratic principle and limitation of the human rights. In its extreme form, this type of opposition is transformed into violent movements of attacking the public institutions, with the purpose of forcing the taking of power.

The rights and duties of the opposition are manifested in ways different from a regime to another, according to the socio-historical conditions, certain formal regulations such in the case of some states where a certain political statute is recognized for the opposition, who have the right to offer answer to the government's statements or to be consulted in certain major issues, especially related to foreign policy. A common example is that of Great Britain, whose opposition forms "the shadow cabinet".

Generalizing the theoretic-methodological information analyzed, regarding the nature of the political power, from the perspective of the relation power-opposition, some conclusions are emphasized. Thus, the analyzed methodologies can be grouped in two categories. The first group is formed by the scientific-anthropological and legal-rational approaches which have an "impersonal" perspective over the political power in the light of its functions and institutions. The second group is formed based on the sociological and behaviorist approaches aiming more the "social" and personalized feature of the political power.

Analyzing these two structured views, D. Fisichella considered that we can talk about a double valence of the notion of power. The political scientist considers that there is a relational and an institutional concept of the political power. Under the first aspect, according to the approaches initiated by R. Dahl, the power assumes such relation between social units (individual subjects and groups) in which the behavior of agent B depends on the behavior of agent A.

This observation refers both to the exercise of power, as well as to its possession, regarding the institutional concept, when it refers to the political power as an institution, or using D. Fisichella's expression "a power holding and exerting the power".

Conclusions

The analysis of the political power from the view of the relation power-opposition is made from the perspective of both approaches of the concept of political power. Using D. Fisichella's feature by political power is shall be considered, with priority, the power holding the political power, and the opposition shall be the one who wants to gain this power for itself.

The power, from the institutional perspective, is the goal and finality of the competition between the governing political forces holding this power and the political forces who want to conquer it, being in opposition.

Placed on opposite positions, the power and opposition have different roles, in the meaning that the democratic experience shows that opposite political forces can play either functional and constructive or dysfunctional roles, by this becoming good or bad for themselves or the society.

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A FEW CONSIDERATIONS REGARDING THE SPECIFIC LEGISLATION DEALT WITH BY THE LOCAL POLICE OFFICER

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Abstract
The Local Police have extensive powers and function at the level of each locality where there are Local Police forces. The Local Police Law[1] transferred the powers that should be held by the local communities in order for them to better carry out their work and be closer to citizens, in terms of the protection of goods, protection of physical integrity, as well as the management of road traffic on public thoroughfares, especially in the inner cities, including car parkings and car lifting.

Keywords: local police officer, law, regulation, service, citizen

Introduction

Considering the various areas in which the Local Police operate, the duties of this entity are numerous. Local police officers maintain public order and tranquillity, have taken over some of the duties of the current Road Police, ensuring traffic fluency and having the right to pull over vehicle drivers, perform checks to identify construction works carried out without a construction permit and verify the legality of trading activities carried out in agricultural and food markets by freelance workers and economic operators.

The duties of local police officers according to the law and the framework regulation

The Local Police personnel consist of civil servants and contractual persons, in accordance with law provisions[2]. It operates on the basis of Government Decision 1332/2010 approving the Framework Regulation on the Organization and Functioning of the Local Police and the Ministry of Administration and Interior Order no. 92/5.05.2011 approving the Methodology for the Preparation of the Local Police Public Order and Safety Plan.

In this context, there are two types of police officers in Romania: the *Local Police* and the *National Police*.

The Local Police have extensive powers and operate at the level of each locality where there are Local Police forces. The Local Police Law[3] transferred the powers that should be held by the local communities in order for them to better carry out their work and be closer to the citizen, in terms of the protection of goods, protection of physical integrity, as well as the management of road traffic on public thoroughfares, especially in the inner cities, including

[1] Local Police Law no. 155 of 12 July 2010.
[2] Local Police Law no. 155 of 12 July 2010, Government Decision no. 1332/2010, Order no. 92 of 5 May 2011 for the approval of the Methodology approving the Local Police public order and safety plan.
[3] Local Police Law no. 155 of 12 July 2010.

car parkings and car lifting. The Local Police will be closer to the citizens and their needs, while the National Police will handle actions in the intervention domain, managing police activities such as those of the Romanian Police or fraud investigation. Also, officers of the National Police wear a new uniform and have a new logo, *which differentiates them from their colleagues in the Local Police.*

The Local Police have got increased powers through Law 155/2010

Local police officers have among their duties "the prevention and detection of crimes in areas such as public order and tranquillity, the protection of goods; traffic on public thoroughfares; discipline of construction works, street display, environmental protection; trading activities and population statistics".

The fines imposed by the local police are either those provided by the legislation in force or those established by the Local Councils which they are subordinated. Sanctions can only be annuled by the law courts if challenged within 15 days of receipt of the minutes. In a chart of the fines imposed by the local police, the first position is held by those for illegal parking, the second by those for disturbing public order and tranquillity, and the third position is occupied by unauthorized trade.

Since 1 January 2011, the Community Police turned into the Local Police and has increased its activity, as follows:

* Police Community officers, who have become Local Police, can pull over vehicles in traffic and can impose sanctions for irregularities concerning the maximum permissible mass and access to certain sections of the road.

* The sanctions may include penalty points.

* They may sanction pedestrians, cyclists, drivers of mopeds and carters for irregularities in the traffic.

* Local Police officers in the field of road traffic will work for one year, with officers from the County Police Inspectorate.

* The Local Committee for Public Order is founded, which will be run by the mayor.

Example: Article 7, lettre i) of Law 155/2010 - "*they find offences and impose sanctions for the violation of legal norms on the maximum permissible mass and access to certain sections of the road, having the right to perform stop signals addresses to the drivers of the respective vehicles".*

Local Police officers are *armed with handguns with bullets, handguns with non-lethal ammunition and electric shock batons*, in accordance with the Framework Regulation on the Organization and Functioning of the Local Police, adopted by Government Decision 1332/2010 published in the Official Journal (Annex no. 3). In Article 42, the Regulation provides one weapon and an amount of 12 cartridges, at the most, for *local police officers and contractual personnel with duties in the field of protection of goods and of local interest sites.* If the gun is lethal, it will only be used by its holder, under the conditions laid down in Article 33, para. 3 of Law 295/2004, with its subsequent amendments and additions.

A key issue lies in the fact that the Local Police, although subordinate to the Mayoralty, is obliged to cooperate with the Romanian Police, the two entities being meant to act as one.

Another priority is the training of local police officers. In accordance with Article 18 of Law 155/2010, local police officers emerging from the structures of the Community Police have the obligation to complete an initial training programme organized in an educational institution under the Ministry of Administration and Interior, within 5 years. Local police officers selected following the operationalization of the structure that will have duties in the field of public order and tranquillity and those with duties in the field of road traffic will be required to complete an initial training programme organized by the Ministry of Administration and Interior, within a year. An exception will be made for the local police officers emerging from the public order and security structures of the Ministry of

Administration and Interior, as well as for those who have completed the initial training programme organized in an educational institution under the same ministry, according to Article 18, para. 3 of Law 155/2010. The level of professional training for the hiring of local police officers with duties in the field of environmental protection, trading activities and construction works discipline, will be determined according to the Regulation on the organization and functioning of each Local Police in part.

A preliminary analysis of the transformation of the Community Police into the Local Police and/or the establishment of the Local Police shows that the disadvantages related to the poor financial motivation, the lack of necessary equipment and logisticsm etc., outweigh the benefits provided by Law 155/2010.

Thus, the Government's plan has recently supplemented some of the measures concerning public order and security by granting new powers to the local police officer through Law 155/2010, but this action was not accompanied by measures for endowment with the equipment and logistics necessary in order to operate within normal activity parameters. Moreover, in both Law 371/2004 (Community Police Law) and Law 155/2010, the local police officer is not assimilated in financial terms to the integrated public order and security system, as are the Romanian Police, Gendarmerie, where the pecuniary motivation is higher, a situation which is about to be remedied.

With all these difficulties they are experiencing, local police officers must be aware at all times of the purpose and importance of the work they are obliged to carry out in the community to ensure a climate of order and tranquility for citizens and the safety of both their person and their property.

The Local Police is more at the service of the citizens than "the Local Guard" especially by the power of law

The Local Police as a police force at the service of the citizens is a manner of approaching and carrying out all police missions aimed at a better understanding of the needs and expectations of the population, a better control of the territory in order to anticipate antisocial actions and a sustainable and adaptive response in order to provide security. The Local Police, in the broad sense of the concept, is the modern working method in which the attitude towards work, leadership style and organizational strategy are geared towards the preventive and proactive recognition of the community problems that cause fear and insecurity, as well as of the causes that may lead to crime and antisocial acts, approaching and solving or removing them by working closely with the population and with other institutions.

The concept of Local Police allows meeting citizens' requirements, setting the following priorities:

• reducing fear among the population by encouraging preventive thinking and actions;
• promoting increased accountability among citizens so that they feel in control of their lives and property;
• showing the public that security contributes to an increased quality of life;
• free and objective counseling of citizens in matters of security;
• fostering collaboration between the public and the police, encouraging citizens to inform the police when they have knowledge of an antisocial act;
• teaching the population how to properly assess crime in order to decrease the rate of criminal acts and the fear they cause;
• protecting the population only through police actions is not enough to reduce crime. The security of the population largely depends on the behaviour of the community.

Conclusions

According to the normative act, the Local Police were set up to in order exercise duties regarding the protection of the fundamental rights and freedoms of individuals, private and public property, the prevention and detection of crimes in the following areas:

• public order and tranquillity, as well as the protection of goods
• traffic on public thoroughfares

- construction works and street display discipline
- environmental protection
- trading activities
- population statistics
- other fields established by law

The Local Police function as a department within the specialized apparatus of the mayor or as a local public institution, with a distinct legal personality.

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STEREOTYPE IMPACT ON CONTEMPORARY SOCIETY

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Abstract

On analyzing the society we live in, we can say that transition from industrial to modern and postmodern society up to now has led to a change of the roles well established by our society, namely women perform men's tasks and they get jobs which seem specific to them, and men start to develop furthermore this side of relationing which is basically specific to women. The household issues are solved by both life partners and within organizational environment women have begun to occupy important executive positions. However, there are specific stereotypes including at the level of these changes.

Stereotype analysis draws our attention to interpretations which might devalue individuals or create a negative context without allowing any possibility to exploit certain potentials of individuals. However it is necessary to recognize the complementarity between the two genders. Stereotypes are more and more underlined in the Romanian society as they keep on perpetuating. The emergence of these stereotypes owes basically to changes occurred within society.

This study seeks to show the way these transformations aim the individuals' lifestyle and how these stereotypes coordinate our entire existence. There are opinions and discriminations within a society in relation to personalities of individuals which are part of a certain social category and we learn the most of them from the ones around us and depending on them we guide ourselves when meeting people. Stereotypes are harmful in their meaning and they hurt us by prejudice and discrimination.

Keywords: stereotypes, discrimination, change of roles, complexity of genders, transformation

Motto:
We do not see before defining, but define before seeing.
Lippman

Introduction

Identification of stereotype notion

Cambridge dictionary explains the notion of stereotype as a "fixed idea people have about something or somebody, in particular about something wrong". [1]According to the same dictionary, prejudices are "an opinion or an unfair and unreasonable feeling formed without enough thought or knowledge".[2] In other words, stereotypes are preconceptions, clichés which individuals use frequently while prejudices are irrational feelings of fear and dislike. These can be understood as protection filters against the multitude of information which allows us to judge people without interacting personally with them or knowing them only superficially: they limit our view to reality.

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[1] Boia, Lucian, *Istorie şi mit în conştiinţa românească*, 2nd Edition, "Humanitas" Publishing House, Bucharest, 2000, pp. 112.
[2] Idem, pp. 123.

These situations arise because we communicate differently and each of us has his own style to communicate as we use it differently depending on our social, professional and cultural identity, turning into resources which make communication possible. The more familiar speakers are with the context of a situation, the more they can manipulate the respective situation giving it another connotation. Sociologists and specialists in communication sciences often emphasize that both individual and collective actions are visible due to rituals, social rules and practices.

One of the most striking things in relation to stereotypes and prejudices is that they are regularly created by persons with strong personalities and applied to individuals with weak personalities which cannot control the way others perceive them and they cannot change these perceptions. Individuals who suffer from stereotypes are not those whose feelings of fear are exploited, but those persons who are shown in a negative light. Stereotypes and prejudices are so deeply rooted in the European culture that many times they are not perceived as such, but as an ordinary, usual fact. Those who suffer from them must embark on a long exhausting way to convince others that they are unreasonably discriminated.

In relation to stereotype formation, there are three ways to explain this process, namely[3]:

- Stereotypes arise because human mind works as such, cognitive processes lead to stereotyping;
- The main reason for classification and discrimination is the fact that our personality makes us to use them or we use stereotypes in order to respond to certain psychological needs;
- There are social factors that constrain us to have this restrictive view on society.

Stereotypes and social rules between adults and children

Examples of stereotypes which are frequently used in relationships between adults and children:

- ”How are we supposed to buy this pink teddy bear? It’s for little girls, not for boys. Let’s look for another toy suitable for you”.
- ”I told you not to play in the mud. You are being dirty all day as if you were a boy not a girl. Look at the other little girls, they are all clean and they wear dresses, only you are full of mud” they are reactions which many parents have when their children show preferences which are “not appropriate” to behaviors specific to boys, respectively to girls.

There are disproportionate requirements for children of a specific gender:

- “Boys don’t cry”,
- “Girls must be tidy, learn to cook and to clean”,
- “Boys must be strong and girls delicate”,
- “Boys are better at mathematics, exact sciences than girls”,
- “Girls must be good at handiness activities (sewing, for instance)”.

Such stereotypes underlie discrimination in various situations: girls who are not encouraged to develop a career in fields dominated by men or boys who are socially rejected because they have a more “gentle” behavior than they “should”.

The environment where children learn these frequent prejudices are as follows:

- from TV;
- from video games;
- on internet;
- from school;
- in the family;
- from ads;

[3] Antonesei, Liviu, *Fundamentele culturale ale educației*, Polirom Publishing House, Iași, 1996, pp. 11-12.

• from books.

Children are not born with stereotypes and they do not learn them either as if a poem, they born from interaction with people. Prejudice represents the affective dimension associated to stereotypes and stereotypes are preconceptions.[4] They are a fixed opinion someone has about something or someone else without knowing many things about it. These fixed ideas are unfair and unjustifiable and made up of erroneous knowledge and a generalization which arises in relation to them. Prejudice leads to hate, hate leads to radicalism expressed in words and the radicalism of words leads to radicalism of facts. If these arguments are complemented by the fact that children watch plenty of stereotypical situations at TV and mass-media and they watch cartoons and games which built inside their personality violent reactions then those children will become some stereotypical adults.

Voltaire claims that "Prejudice is an opinion without judgment"[5], it is formed without a real knowledge about a person or a group of people. Prejudices involve stereotypes, which represents generalizations of some individual aspects to a whole group.

Stereotypes and prejudices show in time that the child's skills and interests haven't been valued. A stereotype like "Girls do not hockey, only boys", does not allow girls which might be champions at this sport to use and value all her innate abilities thereof. The same happens with ballet in case of boys who are not allowed to practice it because it turns them into "girls". Sport is meant to develop our body, to create a discipline for individual, to show him how a positive competition is created and not to create him stereotypes or prejudices whatsoever.

Social environment of stereotypes

Most stereotypes are visible in social environment or better said in the environment we live in. Most of the time they are related to the group we belong to, then with community we live in and last but not least what we call the "culture" we are born in. Stereotypes are difficult to change and most of the time they are perpetuated and transmitted from generation to generation, recognized to be values by many individuals.

Mass-media, leaders of opinion, opinion polls, conversation networks, sometimes even ad speech, commercials generate first a tacit pressure on individuals and subsequently they lead to stereotypes.

These stereotypes are fueled by social memory, by traditions and rituals, common symbols. They are induced by mental structures which some member of a community might have and they are formed by a process of indoctrination, fact that worked very well during communism regime we passed through. This indoctrination is intended to replace certain social, family, cultural values from the individuals' collective mind with others values deemed to be indispensable at that time. [6]They were present everywhere in people's lives,

[4] Iliescu Laura Jiga, *Despre Europa în cultura populară românească a secolului al XVIII-lea, in Interculturalitatea – studii, cercetări, experienţe*, "Centrul Educaţia 2000+" Publishing House, Bucharest, 2007, pp. 114.

[5] Durandin, Catherine, *Une mort roumaine*, Paris, Éditions Guy Épaud, 1988, pp. 87. See the historical esseys and fiction about Romania by the same author: Ceausescu, vérités et mensonges d'un roi communiste, Paris, Éditions Albin Michel, 1990; Histoire de la nation roumaine, Paris, Éditions Complexe, 1994; Histoire des Roumains, Paris, Éditions Fayard, 1995 (Romanians' history, Iaşi, "Institutul European" Publishing House, 1998).

[6] Foucault, Michel, *Altfel de spaţii*, in The*atrum philosophicum. Studii, eseuri, interviuri. 1963- 1984*, "Casa Cărţii de Ştiinţă" Publishing House, Cluj-Napoca, 2001, pp. 251-60;

starting with children and ending with old people (literature, education, music etc.). The formulas used in the communist regime were: formation of a new individual, education of a multilateral developed personality, scientific organization of work. In fact, behind these short phrases there were totally different intentions. In order to control people there was only one way that of unification namely of stereotype introduction.

Discrimination is the action induced by prejudices and it means unequal treatment applied to individuals or groups in relation to ethnicity, religion, social category, gender, aspect and others. Stereotypical thinking is a long-term process which starts always from childhood, in family and continues in school, group of friends. Much easier, we can say that stereotype is: we are plus and you are minus, as we have always tended to consider people different from us not only different but inferior. This mean san important source of world conflict: (Holocaust, genocides and violent racist conflicts)

Stereotype and prejudice change can be achieved by[7]

- underlying some representatives of the group where we identify the existence of some stereotypes which refutes the stereotype.
- providing a significant amount of information in relation to that group – concerning all the values and norms specific to it and their members;
- motivating individuals to understand properly the group they want to communicate with;
- involving in activities with regard to achieve common goals;
- identification of our own stereotypes and prejudices is essential on achieving a real communication on long term among various cultural groups. It is also the first step to the other one and development of new perspectives on cultural groups we interact with.

Each of us puts labels or has certain stereotypes at a given time. They can prevent us from seeing reality as it is.

Stereotype is perhaps the best known notion of social psychology next to discrimination and prejudice.[8] These occur in intergroup relationships and not between singular individuals, consisting of generalization of some attributes met in few members of a group over all the persons belonging to that group. Each of us forms part of different groups and social categories, based on some characteristics which distinguish them from others. It may be the age, social category, race, gender, field of activity, observing a tendency to favor the group we belong to in the detriment of external groups. It is about a society division into us and them which makes us to "admire and praise ourselves" but to depreciate and denigrate them, to be on our people's side and not theirs".

In a hierarchically organized society, individuals have a certain behavior to their superiors and another one to those situated on a lower position and that's why there are stereotypes and lies as they can be directed in both ways. Individuals are always surrounded by social constraints, especially by inherited obligations which can't be explained if analyzing individuals' behavior only. Social facts have social causes different from psychological ones and these causes are different from their functions. Compliance with social rules by individuals must not lead them to certain discriminations or stereotypes as they constrain the individuals and they also provide them opportunities.

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[7] Nemoianu, Virgil, *Tradiţie şi libertate*, "Curtea Veche" Publishing House, Bucharest, 2001, pp. 144;
[8] Todorova, M., *Balcanii şi balcanismul*, Humanitas Publishing House, Bucharest, 2000, pp. 47-54;

Many times people are not sure of their capacities and opinions because the observations on their personalities are not objective and then they self-assess by comparison with other similar individuals. On each assessment, individuals tend to use stereotypes like "Mr. Such is...in comparison with me... but I have more...than him." When we answer the question "whom do we compare with?" the answer is that we usually compare ourselves with those similar to us, avoiding to make comparisons with others much more efficient than us for not to feel inferior.

There are plenty of stereotype beliefs perpetuated by adults in our contemporary society[9]:

- All gypsies are sly, lazy and thieves;
- All Hungarians are chauvinistic, conceited and irredentist;
- All Russians are alcoholic, cruel and sentimentalist;
- All English are phlegmatic, snobs and pragmatic;
- All Japanese are hardworking;
- Athletes are not quite intelligent;
- All librarians are silent;
- All accountant are boring;
- All teachers are pedantic;
- All students are absent-minded and unserious.

We can realize that these stereotypes are not realistic, although they exist and make individuals behave many times unduly in relation to the categories they once disfavored. People usually behave inadequately with their fellows when their self-esteem is threatened by a failure in performing an important task these are much more motivates to negatively stereotype the others for a self-image improvement. Stereotype activation is facilitated and stimulated by the presence of some members of stereotyped groups[10].

Effects of stereotypes in society

No individual can escape from labeling and we all are the target of the others' stereotypes and prejudices; we are stereotyped and treated differently depending on how we look, how we talk and where we come from. If labeling comes in a moment of life when self-esteem is low, then the danger is bigger as the respective person adopts a more and more indecisive behavior, loses his motivation which may lead to dishonorable acts for society on long term. If social influence represents the way people are affected by real or imaginary pressure the others exercise over them, then this may determine individuals to behave the way they were labeled due to stereotypes, even if they know that stereotype is not real and it is obvious to happen this, because we form our self-identity and the games we play in society and they way we are perceived by others. Stereotypes disarm people, kill their potential and aspirations and make discriminated persons feel ashamed of what they are even without having done something reprehensible. Stereotypes and their evil effect and superiority reduce the success opportunity of some initiatives intended to cause a change in "bad reputation" communities".

Stereotypes do as much harm as those who use and perpetuate them. Besides they poison their soul and spirit, they keep them away from the truth and a genuine knowledge of reality…**namely they affect their development too.** When someone uses stereotypes in his speeches, replaces the complexity of situations and various shades, with a simple, rigid thinking closed to new and change namely to life itself which changes incessantly. In other words, stereotypes keep prisoners the minds of those who express, defend and perpetuate them.

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[10] Idem, pp. 38.

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IMPORTANCE AND NECESSITY OF INTERNATIONAL JUDICIAL COOPERATION IN CRIMINAL MATTERS

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Abstract
After careful consideration, we can say that in evolution, human society was and is threatened by a number of factors that can be generally divided into internal, external and natural. Currently, it is difficult to assess which are the most dangerous threats to a community, requiring a rather complex analysis that ultimately will reveal that each threat as minor should be duly untreated immediate reaction in terms of society, can become a real threat as less than or greater. The unprecedented development of international relations in contemporary society has been accompanied by an increase also unprecedented, international crime, the proliferation of forms of organized crime in several states.

Keywords: *measures of self-defence, crime, contemporary society*

Introduction

Over time, the cooperation of the states was made on the basis of bilateral or multilateral legal instruments, resulting in agreements, conventions, treaties, etc. These legal instruments are of zone, regional or universal, according to the interests of the Parties, the magnitude and importance of the area addressed.

Concerns for international cooperation have existed since ancient times (particularly in the military and commercial), these developing and diversifying permanently, over time, according to the existing common interests at a time between different states.

A key element that led to the emergence and further development of international cooperation and without which it could not conceive, was the mutual trust in a well regulated institutional framework.

In this context, we define international cooperation as a means of mutual aid between different states, in different areas, specifically established by treaties, conventions, agreements and so on, ultimately aimed at promoting and protecting national interests, regional or world, based on the principle of the independence and sovereignty of each Contracting Party.
International judicial cooperation in criminal matters is just an area specific cooperative activity between states, extremely important area, which has become a necessity since the beginning of last century.

In its historical development, the company has constantly sought and found various ways of self defence, which did not represent anything other than immediate reactions to a number of dangers that threatened peace or even existence. Dangers faced by human society can certainly be considered, but only in the general context determined by the overall development of society it self.

Thus, some were dangers threatening peace or even the existence of a community during slavery, feudalism others and therefore more at this stage. Given the historical development of society, we find that these dangers are not identical; they are ultimately

determined by a number of features specific to certain human communities, area, regional or global[1].

After careful consideration, we can say that in evolution, human society was and is threatened by a number of factors that can be generally divided into internal, external and natural. Currently, it is difficult to assess which are the most dangerous threats to a community, requiring a rather complex analysis that ultimately will reveal that each threat as minor should be duly untreated immediate reaction in terms of society, can become a real threat as less than or greater. It is known that most of the times, the company responded by producing an event taking take a number of measures of self-defence or coercive.

The unprecedented development of international relations in contemporary society has been accompanied by an increase also unprecedented, international crime, the proliferation of forms of organized crime in several states.

Scientific and technical progress made, as well as enhancing the democratization process in several states created the possibility of movement of people and goods easily, thus leading to the development of human society as a whole. Unquestionably beneficial effect for the entire humanity, created some advantages for the wide proliferation of possibilities crime phenomena worldwide.

The growing threat caused by the growth of transnational crime, the need to prevent and combat more effectively in an organized worldwide led to the adoption of international instruments zone, regional and global efforts to unify the world states.

The United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Protocol against the smuggling of migrants by land, air and sea (both additional to the Convention) adopted in New York on 15 November 2000, established a series of measures primarily aimed at international judicial cooperation in criminal matters in order to prevent and combat more effectively (through a joint effort of Member) organized transnational crime.

According to the Convention, " organized criminal group expression means a structured group of three or more persons, existing for a certain period of time and acting in concert with the aim of committing one or more serious crimes or offences under this Convention to get direct or indirectly a financial or other material benefit. "

To avoid a unilateral interpretation of the state or another, the Convention defines the crime of “transnational” as that offence “is committed in more than one State;
- Is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- Is committed in one State but involves an organized criminal group that engages in criminal activities in more than one state or
- Is committed in one State but has substantial effects in another State”.

A particular danger to the security of states is the unprecedented growth of organized crime in all its forms of manifestation.

The current phase of development of human society face other hazards models, much different from those known in earlier historical periods. The largest and important in this regard is the danger of terrorism.

About terrorism, although it is known in some form since ancient times, has been written and will write for a long time, as is currently the most dangerous manifestation of organized crime. Contemporary terrorism is the most advanced form of organization and action in the service of anarchist groups, often religious, with claims of mostly political[2]. An

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[1] C. Bulai B., N. Bulai, *Drept penal, Partea generala*, Legal Universe Publishing House, Bucharest, 2007, p. 102;
[2] R.M. Stănoiu, *Asistenta juridica internationala in materie penala*, Academy Publishing House, Bucharest 2003, p. 83;

overall analysis of forms of international crime highlights first diversification methods of action, organization and logistics often perfect those involved in such events in the past 30-40 years, in addition to terrorism, they developed other forms of crime, namely trafficking and consumption of drugs, arms trafficking, human trafficking, human trafficking, trafficking for the purpose of immigration etc., criminal activity, even if not up to the dangers of terrorism, may be the subject of analysis and concern at the level of any state.

Accession to the European Union since January 2007 it involves a number of new obligations imposed by statute or by the Union, obligations mainly focused on the need to contribute to ensuring a European area of freedom, security and justice to the highest standards.

In this context, Romania became EU border country with the mission to ensure the external border of the EU Member illegal immigration, trafficking in weapons, ammunition, drugs, radioactive substances, etc..

Schengen enlargement will create new facilities for easy movement without risk of criminal elements from corner to corner of Europe.

An absolute must is the improvement of the legislative framework aimed at criminalizing the threat of new acts committed in different villages States.

Harmonization criminalization of acts of danger and discovery procedures, research and trial in the Member States, will allow the best conditions of safety climate civic.

The most important aspect in preventing and combating crime is the intensification and improvement of specific activities to identify, catch and prosecuting the perpetrators of criminal acts.

It is known that all persons who have committed criminal trying to evade liability established by law, adopting different strategies increasingly sophisticated, stretching from corrupt members of institutions of law enforcement officials to hide the in other states.

Legislative and procedural measures taken in the execution of laws must be consistent with the rights and fundamental freedoms enshrined in international instruments and the European Union.

The unprecedented development of human society as a whole in the twentieth century paved the permanent developments in line with the new achievements of science in the field of crime unwanted.

In this context, emerged the growing crime increased, reaching peak by improving complex forms of manifestation of organized crime, namely terrorism, manufacture, trafficking and abuse of drugs, human trafficking, trafficking weapons and ammunition, counterfeit currency or other valuables, etc.

In recent years, these complex forms of manifestation of crime have crossed the borders of a single state, manifesting itself in most situations in several countries or continents. Although quite heavy, world states known democracies understood, however, that the only way to achieve a better control under preventive aspect (the phenomenon itself) is related to the implementation of the relevant international judicial cooperation.

Organized crime currently has the ability to create great economic and political tensions, causing even the failure of governments, where managed to get in the leading political parties in coalition[3].

Criminal organizations take full advantage of the sharp rise in international tourism, a certain relaxation of migration policy liberalization, free trade expansion, advanced communication equipment and not least money laundering technique to realize and protect goals. A circulation facility to citizens within the European Union, especially in the Schengen area, creates other advantages criminal organizations.

[3] Pocora Monica, *Special seizure Stipulated in Romanian Criminal Law and Special Law*, Lambert Academic Publishing House, Germany 2011, p. 28;

Moreover, due to difficulties experienced by the economies of many countries, in particular those in developing criminal organizations were directly involved in the processes of privatization, buying some companies sold some governments trying in this way to restart economies after long periods of national crisis. The purchase of state owned banks, manufacturing companies, telecommunications service or have served them as a shield covering their clandestine operations, while helping to increase power and influence in the contemporary world[4].

Crime Developed and always growing so- called “white-collar" is a particular danger, always topical for the rule of law, as the heads of these structures have economic and political power to change certain decisions of governments to their advantage.

Currently and in the future, the most serious threat to human existence is the resurgence of international terrorism which has reached an unprecedented scale, often affecting safety states, destabilizing national economies, organizations and institutions, implications on the civilian population panic, scared and outraged by the cruel and despicable means used by terrorists.

The bloody events in recent years, culminating blow to U.S. 11 September 2001 by members of the terrorist network " Al- Qaeda “, led by billionaire Osama bin- Laden (considered liable and bomb attacks on American embassies in Kenya and Tanzania on August 7, 1998) are appalled and aware while all humanity, in the same context enrol terrorist attacks in Russia, Spain, England, Italy and Japan, resulting in significant casualties and property damage.

Hijacking of aircraft attacks bacteriological substances, bomb attacks on trains or subways, suicide bombings are just some of the tools and sites used by terrorists in recent years.

The presence and proliferation of international concern crime caused a response of solidarity from the States, making them aware of the need to intensify cooperation in identifying specific activities, catch, arrest and conviction of the guilty.

The ultimate goal of the work of judicial cooperation between different countries is to achieve a reduction to acceptable levels of crime and hence more safety of its citizens.

The main problem that arises in the current acceleration of the globalization process is to coordinate national policies and strategies with the strategies, policies and regulations stated and accepted internationally.

In recent years, international judicial cooperation has seen new and diverse forms, some domestic legal rules enacted by other specified in various international treaties and conventions. Specialists in the field have made the definition of international judicial cooperation, the institution appeared and manifested only quite active lately due to mutations that occurred in the activity of criminal organizations and the need to prevent and reduce crime generated.

We appreciate that this institution can be defined broadly or narrowly, against the rather complex issue addressed.

Thus, broadly, the international judicial cooperation can understand that form of cooperation aimed at complex activities that world governments in order to reduce crime and increase safety of their citizens, working together, with and help each other to achieve specific activities that: extradition, surrender under a European arrest warrant, transfer of proceedings in criminal matters and the recognition and enforcement of judgments, transfer of sentenced persons, mutual legal assistance in criminal matters or similar forms or rules established by the laws, treaties, agreements, conventions or reciprocity.

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[4] Pocora Monica, *General Aspects regarding the particular seizure in Romanian Legislation*, Lambert Academic Publishing House, Germany 2011, p. 15;

Narrow by international judicial cooperation means a specific way of action by world governments and unions act granting the forms established by law, agreements, treaties, conventions, in order to trap, proving criminal activity and punish perpetrators of acts proceedings and of the reduction of crime.

The best known form of judicial cooperation in criminal matters is arguably extradition, there is a certain period in the Romanian law was the only one. Referring to the above provisions of the Criminal Code Charles II is estimated that: the old Romanian criminal enactment contained no provision governing extradition. Article 32 of Constitution 1923 (was 30 in The Constitution of 1866) provides only that "the extradition of political refugees is stopped." Also in art. 6 of the Act of June 9, 1886 regarding the abolition of the State Council shall provide that extradition decided by the Council of Ministers, after a preliminary inquiry.

These were the only devices until the coming of the new Criminal Code Charles II. Therefore, pending criminal Code Charles II there were no provisions governing judicial cooperation, even for extradition. Nevertheless, Romania, during the end of the twelfth century and beginning of the twentieth century, numerous conventions concluded extradition.

We see, therefore, a particular concern in forms quite shy, but safe for international judicial cooperation between the Romanian state and other states since that time.

But I must mention that the institution of extradition, as the only known form of judicial cooperation, extradition did not allow Romanian citizens, such provisions appearing in both the international conventions ratified by Romania and in other international instruments of this kind. Carol Criminal Code II provides a number of legal rules on extradition, which is the main form of international judicial cooperation in criminal matters recognized. To remember is that these rules, except the provisions prohibiting extradition of Romanian citizens and political refugees, are so complete that some may be outdated even today.

Regarding the substance of extradition, criminal law rules provide that they are "the established international conventions, and their lack of reciprocity exists and the provisions of this section".

As we can see, in the Criminal Code are not provided other forms of international judicial cooperation in criminal matters.

During the communist dictatorship, according to treaties and conventions ratified by Romania, with the statements of reciprocity bilateral forms of cooperation have diversified, but the most important remaining extradition.

We split therefore from this point of view, forms of criminal assistance in accordance with the purpose (which the offence in general) and forms the criminal procedure (relating to a specific crime) outside these circular forms and procedural information meeting according to the first classification mentioned above, both religious forms and forms possibly acceptable.

In the literature, it was shown that there are part of the religious forms which have as their object the purchase of information, therefore, informative forms: submission of copies of or extracts from criminal judgments, remittance slips criminal record and, finally, the exchange international information on a range of issues of interest to states in their fight common crime count.

Other complementary forms aimed at special immunities which immunity from prosecution and arrest of witnesses who come to the country for offences committed by them before being present in the country. Of course, this immunity does not operate when the witness in question commit criminal acts, after coming into the country and not leave Romania in a certain period. Another form complementary refers to the operation thereof. Thus, proof of service of the summons or the finding of impossibility of dispatch, the requested State shall be transmitted. When submitting a prisoner is held under certain agreements, it may be subject to certain conditions laid down in the Treaties or Conventions.

Effects of handing a prisoner for the purpose of hearing or confrontation are limited to a witness in the cause for which it was submitted. Therefore, the applicant may not proceed to any other act, apart from hearing or submitted in person confrontation because, for which remission was sought, the requested State may agree, however, under certain conditions, the performance and other acts against the person submitted.

Conclusions

1. Another form of cooperation with procedural character is sending pieces form, in which any State may, even in the absence of any agreement, to send to another state record that are in possession of the parts to which it is required by another state four solving a case.

2. Literature included in the activity are procedural character and work through the Interpol police cooperation, relying on the fact that this organization performs specific activities tracking, identification and arrest of persons wanted by law in connection with the suspicious, it is stated: " but the predominant activity that aims to identify and arrest some criminals exposures sat on this form under the criminal procedure forms."

3. Cooperation about letters rogatory is another form of international cooperation with the criminal procedure, which is conducted at the request of interested state unit. Discovering crime and identify authors is only the first step in the work of international legal assistance.

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THE FAMILY - A BIOLOGICAL, SOCIAL AND JURIDICAL REALITY

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Abstract

The family is a biological reality entailed by the union between a man and a woman and by procreation; it is a social reality, given the community of life between the spouses, between parents and children and, generally, between the family members; last but not least, it is a legal reality, by way of the legal regulations regarding the family.

In a narrow sense, the notion of the family includes the spouses and their minor children. In a broader sense, the notion of the family would mean the genealogical tree that includes the totality of the persons descended from a common author, to whom are added the spouses of those persons.

A precise and rigorous definition of the notion of family is hindered by many difficulties, simply because it is an object of research in various and numerous sciences, such as sociology, psychology, law, medicine, etc., each trying to capture its characteristic aspects from their particular angles. The motivation? The legislators themselves are not consistent in establishing a legal definition of the family, providing this notion with an array of different meanings.

In this paper, we will attempt to outline and account for these realities of the family from a legal standpoint, as evinced by various statutory regulations in this field.

Keywords: *family, reality, spouses, sciences, children, persons, legislators*

Introduction

Comprehensive meanings of the concept of family are to be found mainly in special laws. Thus, according to Law no. 114/1996,[1] *as amended by EO No. 40/1977*[2]*, "the family (...) means the husband, the wife, the minor and major children and the parents of the spouses who live and share a household together. "The meaning of the notion is relatively similar in Law no. 5/1973 (repealed by Law no. 114/1996), with the difference that insofar as the spouses' parents are concerned, the legislation requires that they "be maintained" by their children*[3]*.*

It is to this category that Law no. 67/1995 on social welfare[4] *also belongs: under the provisions of Art. 2 paragraph 2, the term family also refers to an unmarried person who lives together with his or her child.*

2. The members and functions of the family.

[1] Published in the Official Gazette of Romania, P. I, no. 254 of 21 October 1996, Art. 17 and republished in the Official Gazette of Romania, P. I, no. 393 of 31.12.1997.
[2] Published in the Official Gazette of Romania, P.I, no. 154 of 14.07.1977, Art. 1 point 7.
[3] Published in the Official Gazette of Romania, no. 47 of 31.03.1973, Art. 15 para 2.
[4] Published in the Official Gazette of Romania, P. I, no. 279 of 29.11.1995, Art. 2.

The members of the family. The family[5] is based on the freely consented marriage between the spouses, on their equality and on the parents' right and duty to ensure the upbringing, education and formation of their children (Art. 44 Section 1 of the Romanian Constitution). Children born out of wedlock are equal, before the law, with those born in wedlock (Art. 44 Section 3 of the Romanian Constitution). Children and youth enjoy a special protection and assistance regime as regards the achievement of their rights (Art. 45 Section 1 of the Romanian Constitution). Persons with disabilities enjoy social protection (Art. 46 Section 1 of the Romanian Constitution).

Parents have the right to ensure, according to their own beliefs, the education of their minor children, for which they are responsible (Art. 29 Section 6 of the Romanian Constitution).

The functions of the family. The family fulfills a set of functions for itself and for society, ranging from the biological, natural function of procreation and child rearing, to the manifold internal functions of the family group, of household managing and living in common, of behaving and acquiring the skills for moral and material solidarity between the family members, and to the important social functions of educating and training the children for their normal integration into society.[6]

The family performs the following functions:

A) *The function of perpetuating the human species*

From the prehistoric emergence of the family by groups to the contemporary monogamous family, the process of perpetuating the human species has taken place primarily within the family, not outside it.

The biological function of the family can, to some extent, be influenced by society.

Population growth directly depends on the demographic structure of society, the structure of various social organisms and the society's birth-rate related policies. In this regard, some countries promote a policy of stimulating birth rates, while others attempt to prevent population growth.

The stimulation and support of birth-rate growth is achieved primarily by legal means and socio-economic measures.

B) *The educational function*

In all historical periods, the family has played a determining role in the children's education. Within the family, education is mainly aimed at the formation of the child's character and personality, ensuring its growth, physical and spiritual development, the acquisition of skills and essential characteristics, outlining thus its future moral and social profile[7]. The atmosphere in the family, the examples it witnesses, the education and training it receives are preserved in the child's mind for the rest of its life and are decisive in shaping its future character and personality[8]. The parents are bound to raise their child, tending to its health and physical development, education and professional training, according to its characteristics, so that the child may become useful to the community. In addition, Art. 29 Section 6 of the Romanian Constitution enshrines the parents' right to ensure, according to their own beliefs, the education of their minor children, for which they are responsible.

Through their way of life and their attitude towards work and society, parents implicitly have the duty to be a positive example for their children and a model of behavior in the family and society.[9]

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[5] Ioan Trifa, Florin I. Moldovan, *Curs de Dreptul Familiei,* Cluj Napoca: "Cordial Lex" Publishing House, 2012, p.5 et seq.

[6] I. Albu, *Dreptul familiei*, Bucharest: "Didactică şi Pedagogică" Publishing House, 1975, p. 8.

[7] I. Albu, *op. cit*., p. 13.

[8] *Ibidem*, p. 13.

[9] M. Banciu, *Dreptul familiei*, Cluj-Napoca: "Argonaut" Publishing House, 1995, p. 8.

The family has an educational role also as regards the parents and its adult members, because it develops family cohesion and solidarity, the sense of responsibility for the happiness of others, the custom of living in common and the consciousness of fulfilling the family and social duties.

C) *The economic function*

This finds its expression in the spouses' jointly owned property regime and in their legal duty of maintenance in cases specially provided by the law.

The economic function of the family differs from one society to another and is influenced by the degree of the economic and social development of society.

3. Family legislation

In the old Romanian statutes, the family was not defined as a distinct institution. Thus, in the Ipsilante Code *(Pravalniceasca Condică)* of 1780-1817, the Andronachi Donici Code of 1814-1817, the Caragea Code of 1817-1832 and in others, up until the Constitution of 1866, there were legal provisions relating to "the man and his woman," "for parents and their offspring," "family council," or institutions such as marriage or betrothal. However, the importance of the family institution required the separation of a distinct branch of the legal science, which would regulate family relations: Family Law. In our system of law, Family Law did not appear suddenly, through the implementation of the Family Code. On the contrary, its appearance was marked by a series of enactments, which, in their sequence, outlined its branching off from Civil Law.

The starting point of this evolution was the Constitution of 1948, which included provisions in the field of family relationships, especially those relating to the equality between man and woman.

The Constitution of 1952 gave the possibility for the consecration of Family Law as an independent branch of law.

Family Law provisions were also included in the Constitution of 1965, republished in 1986. Also, the Constitution of 1991, republished in 2003, contains Family Law provisions. The appearance of the Family Code adopted by Law no. 4 of 04.01.1954 modified the overall conception of the family institution and, especially, of the members it includes. Over time, it was amended and completed, up until 2011, when with the enactment and entry into force of the new Civil Code, the Family Code was repealed. The new law radically changed the overall outlook on civil matters, choosing the model of European codes to incorporate all the provisions concerning persons and family relations.

4. Family Law. Its concept and object.

The definition of Family Law.

Family Law represents the totality of the legal provisions governing the personal and property relations entailed by marriage, kinship, adoption and similar relations assimilated by the law, in some respects, with family relationships, for the purpose of protecting and strengthening the family.[10]

The object of Family Law

Family Law comprises regulations governing family relationships, as follows:

a) **Marriage relationships.** The provisions of Art. 44 Section 1 of the Romanian Constitution establish that the family is based on the freely consented marriage between the spouses, the personal and property relations between spouses, as well as the conclusion, annulment, termination and dissolution of marriage.

b) **Kinship relationships**

Kinship is of two types: *blood kinship,* which is based on the blood relation between several persons, either of direct lineal descent and ascent or of collateral consanguinity, and *affinal kinship,* resulting from the act of marriage or of adoption.[11]

[10] I.P. Filipescu, *Tratat de dreptul familiei*, Bucharest: “All” Publishing House, 1993, p. 6.

[11] Republished in the Official Gazette of Romania P. I, no. 276 of 24.07.1998.

c) **Relations regarding parental care.**

This type of relations consists of the entire sum of the parents' legal rights and obligations to fulfill the personal and property interests of their children.

d) Some relationships are assimilated, under the law, in certain respects, with family
relationships.

This category may include:

- spousal maintenance obligation;
- the maintenance obligation to the spouse who helped with the child maintenance of the other spouse;
- the relations arising in connection with the protection of minors;
- guardianship and trusteeship.

5. The general principles of Family Law

The principle of the state-protection offered to marriage and the family. (Art. 258 paragraphs 2 and 3 of the Civil Code)

The state protects marriage and the family through economic and social measures.

The protection of marriage and the family is achieved not only under the provisions of Family Law, but also under other legal rules. Thus, Art. 44 Section 2 of the Romanian Constitution provides that the conditions relating to the conclusion, dissolution and annulment of marriage are regulated by law. Moreover, the protection of marriage is achieved through the equality between the spouses, their relationships with the children and the maintenance obligations that spouses owe each other.

The principle of monogamy. Art. 273 of the Civil Code establishes that "the man who is married or the woman who is married shall not marry," which means that a valid marriage can be concluded only between unmarried persons, in other words, that the future spouses must be, depending on the situation, single, widowed or divorced.

The legal violation of the monogamy principle, which, in our country, is a principle of public order, is punishable by Art. 293 paragraph 1 of the Civil Code, entailing the absolute nullity of the second or subsequent marriages, and imprisonment for offenses of bigamy -stipulated in and punishable under Art. 303 of the Criminal Code - or of adultery, stipulated in and punishable under Art. 304 of the Criminal Code.

The principle of the freely consented marriage between the spouses This principle is enshrined in the provisions of Art. 48 Section 1 of the Romanian Constitution and Art. 258 paragraph 1, Art. 259 paragraph land Art. 271 of the Civil Code, which stipulate that the family is based on the marriage between the spouses.

Consent to marriage is free, meaning that all racial, religious and legal restrictions to choosing one's spouse have been removed: making marriage conditional upon the approval of others, including of parents, is utterly excluded.

The principle of equality between the spouses Under the provisions of Art 258 paragraph 1 of the Civil Code, the man and the woman have equal rights as regards spousal relations and the exercise of the rights over the children.

The principle of prohibiting marriage between persons of the same sex. (Art. 258 paragraph 1 of the Civil Code).

Art. 277 paragraph 1 of the Civil Code categorically establishes that "the marriage between persons of the same sex is prohibited."

The principle of the spouses granting mutual moral and material support to each other and to the other family members.

This principle is enshrined in several provisions of the Civil Code: Art. 309 paragraph 1, Art. 325 paragraph 1, Art. 261, Art. 483 et seq., Art.513 et seq.

As a rule, moral and material support is provided voluntarily. Exceptionally, material provision can be obtained if necessary, by legal means.

The principle of choosing the applicable matrimonial regime.

Spouses can currently organize their own property relations and the property relations between them and third parties, according to the specific situation of each family and their own desires and interests, being free to choose one of the matrimonial regimes provided by Art. 312 of the Civil Code.

The principle of the child's best interest.

This principle is governed by Art. 263 of the Civil Code, Art. 6 letter a of Law no.272/2004 governing the protection and promotion of the child's rights, as later amended and supplemented.

This principle is also enshrined in the provisions of Art. 3 paragraph 1 of the Convention on the Rights of the Child, which states: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

The principle of the protection of children and youth

According to Art. 49 paragraph 1 of the Romanian Constitution, republished, “Children and young people shall enjoy special protection and assistance in the pursuit of their rights”.

The principle of equal rights for children.

The principle of the parents' right and duty of to ensure the upbringing and education of their children.

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ANALYSIS OF NORMATIVE AND SOCIAL ASPECTS OF PUBLIC PROTECTION OF WAGES

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Abstract
The need to protect employee wages is based on the premise that these wages fulfill a vital function of maintenance and support of the employee and his family. Wage protection tools provided by the legislation seek to ensure the actual receipt of payment by the employer, either wholly or in a minimal part, even when their employer is in a situation of insolvency or inability to meet debt payment.

Keywords*: payment, wages, employees, insolvency, work*

Introduction

Salary is the main determinant of labor contract. In the case of this contract there are situations in which, although the prerequisites of its termination are not created, the employer cannot meet his primary obligation, that is, to pay wages because of insolvency. Insolvency is a contemporary reality, occurring often and being established and regulated as a means of protection and recovery of operators, so as to keep them on the competitive market. Maintaining them on the market implies the maintenance and protection of the employees of these operators and of their jobs. It is therefore important to understand and improve the mechanism of public protection of wages in the case of operators in insolvency, because this mechanism has both economic and social implications, both being particularly extensive.

1. Methodology

In order to properly understand the legal institution of public protection of pecuniary rights in the case of employees working in a company that is in insolvency, a presentation of normative regulations at European level is required, as well as one of the national legislation. An analysis of the way in which Romania has agreed to transpose the EU Directive in the field and also an analysis of the legislative changes in our country are essential. These legislative changes, although they have incidence in the field, are not clear regarding the applicability of the European standard. And here we are talking about the lack of legislative correlation when the act which regulates the financial crisis and the insolvency of administrative units was adopted[1].

1.1 International and European regulations regarding the protection of pecuniary rights of the employees hired by employers in insolvency.

[1] Government Emergency Ordinance no. 46/2013, published in Official Gazette of Romania, Part I, no. 299 of May 24, 2013.

Article 11 of Convention 95/1949 of the International Labor Organization[2], established the wages protection mechanism based on the privileged position of the employee to other creditors of the employer. This article states that, in the event of bankruptcy or judicial liquidation of a company, the employees of this company will be considered preferential creditors. This refers to wages owed to them for services performed in a prior bankruptcy or judicial liquidation period, to be determined in accordance with national law, or to salaries that do not exceed an amount determined in accordance with national legislation. Salary that is a preferential loan must be paid in full before ordinary creditors can claim part of the company's assets. It is the role of national legislation to establish the priority relationship between the salary which is a preferential loan and other loans. In the Romanian law, according to art. 123 of Law no. 85/2006 on insolvency proceedings[3], claims arising from employment relationships will be paid first after covering the costs of the insolvency proceedings.

Judicial proceedings for bankruptcy or suspension of payments of the insolvent employer generate an objective situation of uncertainty for employees of an employer in debt and, therefore, the European Union considered that it was necessary to create state institutions to guarantee the wages that would automatically provide employees immediate and direct collection of debt or at least part of their minimum[4]. These institutions substitute employees to require the insolvent employer that contracted debt collection. Therefore, the state must create a public insurance system of liabilities arising from legal work relationships. Internationally, there are at least three rules requiring the creation of a guarantee of salary, as follows:

l. At European level, the European Social Charter, revised 1996 law that establishes in article 25 that "work credits from contracts of employment or employment relationship will be secured by a guarantee institution or other effective form of protection";

2. In the European Union Directive 80/987/EEC was approved, in this respect, subsequently revised by Directive 2002/74/EC on the approximation of the laws protecting the rights of salaried employees in case of insolvency of the employer, repealed by the entry into force of Directive 2008/94/EC.

3. At international level, within the International Labor Organization, Convention 173/1992 and Recommendation 180 were adopted, relating to the protection of wage credits in employer insolvency cases, which have not yet been ratified by Romania. By the adoption of Directive 80/987/EEC a rule was first established in European Community relating to the protection of employees in the situation of being in a legal relationship with an insolvent employer. The main aim of the Directive was not a social but an economic one, namely to ensure fair competition between companies of different EU countries in a single market, all under an obligation to establish and contribute to a fund to protect workers whose employer has been declared insolvent and has contracted debts to be paid to them. However, the Directive has had a clear social objective consisting in guaranteeing employees a Community minimum protection in the event of insolvency of the employer, without prejudice to more favorable provisions existing in the Member States.

Directive 80/987/EEC was subsequently revised by Directive 2002/74/EC which added new dimensions to the Community law. One new dimension is, for example, the legislative treatment of situations where an employee provides services successively or simultaneously in many EU countries and, therefore, there are several institutions that may be responsible in cases of unpaid wages after the declaration of insolvency of the employer.

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[2] Ratified by Romania by Decree no.284/1973, published in Official Buletin, part I, no.81 of July 6, 1973.

[3] Published in Official Gazette of Romania, part I, no. 359 of April 21 2006, with subsequent amendments.

[4] For details of the reasoning that led to the Community law of Fund claims Guarantee, see M. Basuc, C. Nenu s.a *Relaţii de muncă. Modul de curs*, Labor Inspection and Social Security, Spain, RO-03/IB/SO-01PHARE Project, Oscar Print, Bucharest, 2005, pp.227-230.

Subsequently, since the Directive 90/987/CEE had been amended several times substantially, it was encoded by the adoption of Directive 2008/94/EC.[5]

1.2. The national regulation of employees' rights protection in the case of insolvency

Directive 80/987/EEC was transposed into national law by Law no. 200 of 2006 concerning the establishment and use of the Guarantee Fund for the payment of wage claims[6]. According to art. 2 of this law, the Guarantee Fund shall be used to ensure payment of wage claims arising from individual employment contracts and from collective bargaining agreements. These were concluded by employees with employers against whom final judgments of opening insolvency proceedings were given and against whom the measure of total or partial deprivation of the right of administration was taken, name insolvent employers. According to art. 3, paragraph 1 of Law no. 85/2006 on the insolvency procedure, the insolvency of the debtor's assets is a state characterized by lack of funds available for payment of due debts. The law also provides that insolvency is obvious when the debtor, after 30 days from the due date, has not paid his debt to one or more creditors.

By applying art. 4. 3 of Directive 80/987/EEC, the Romanian legislature established in art. 14 p. 1 of Law no. 200/2006, a limit for the State guarantee of the payment of wages, that is, three gross average wages for each employee. The Romanian legislator has set a time limit for protected labor rights, stating that by unpaid remunerаţionis covered for a period of three calendar months prior to the opening of insolvency proceedings. Claims arising from employment relationships, paid in case of bankruptcy, according to Law. 85/2006 shall be reduced by the amounts paid from the Fund for guaranteeing employment claims[7]. The national legislation guaranteeing wage claims establishes, under Community Law, legal measures related to the case of transnational employers. The preamble to the adoption of Directive 2002/74/EC has reported that, in order to ensure legal safety for employees in case of insolvency of companies which operate in different Member States, it is necessary to introduce provisions to explicitly establish the institution responsible for payment of unpaid wage claims of employees in this situation. Therefore, this directive introduced Article 8a, which provides that "when some business developed in at least two Member States is insolvent, the institution responsible for payment of unpaid loans is the one of the Member State where the business is done" and that "expanding employee rights will be determined by the lawof hired employees governed by the competent guaranteeing institution". The Romanian legislature established in art. 20 of Law no. 200/2006 that, in case of transnational employer insolvency, determining the amount of claims for employees who habitually perform their work activities in Romania and their payment is made by the territorial agency in whose employees operate. In determining the insolvency the judgment of the competent authority of a Member State of the European Union or of the European Economic Area will be considered, which opens proceedings or, where applicable, states that there are no goods owned by the debtor or they are insufficient to warrant the opening of insolvency proceedings and erasure from the register is decided.

1.3. National regulations of administrative unit insolvency.

For the first time in Romania, through the adoption of Ordinance 46/2013, the legal insolvency of administrative units was regulated, as a distinct legal institution of insolvency regulated by Law 85/2006. According to the above mentioned normative act, insolvency is a state of the territorial administrative unit assets characterized by the existence of financial difficulties, by the severe shortage of cash on hand, which leads to the non-payment of liabilities for a certain period of time. Insolvency is presumed, under the same act, in the case of nonpayment of wages arising from employment relationships and provided

[5] Published in the Official Journal of theEuropean Union no.L 283/36 of 28.10.2008.
[6] Published in Official Gazette of Romania, Part I, no.453of 25 May2006, as amended and supplemented.
[7] SeeI.T.Stefanescu, *Tratat de dreptul muncii*, Wolters Kluwer Publishing House, Bucharest, 2007, p 594.

in the budget of income and expenses for a period exceeding 120 days from the due date. The Order introduces a new legal institution, namely the financial crisis defined as a state of the territorial administrative unit assets characterized by the existence of financial difficulties, by the severe shortage of cash on hand, which leads to non-payment of liabilities, payable on a given period of time. The financial crisis is presumed, among others, in case of non-payment of wages under the local budget revenue and expenditure budgets of the institutions of local or county public services, as appropriate, for a period exceeding 90 days from the due date. Regulation of insolvency proceedings of territorial administrative units is similar to that applicable to the merchants, being triggered by the delivery by the bankruptcy judge of a reasoned decision of opening insolvency proceedings.

In the contents of the final and transient provisions of GEO 46/2013 adaptations of Law 273/2006 regarding the local public finance can be found[8], but no reference to the guarantee of salary claims established by Law 200/2006 is made. This law excludes employees of public institutions from the application of the Directive.

2. Results

From the comparative analysis of national legislation on the protection of the rights of public employees hired by employers in a state of insolvency, especially after the latest legislative intervention which consists in adopting Ordinance 46/2013, with the provisions and purpose of the directive, the conclusion is that the domestic legislation does not fully meet the EU regulatory framework in the field. Some of these inconsistencies will be briefly stated as follows:

3.1. According to art. 1 paragraph. 2 of the Directive, Member States may exclude from the scope of the Directive claims of certain employees, based on the existence of other forms of guarantee, if they offer equivalent protection. As seen from the analysis of EGO 46/2013, no other form of protection of employees' claims is offered if they are hired by territorial administrative units in insolvency, which means that the provisions of law 200/2006 should have been applied to them as well.

Moreover, according to Art. 2 paragraph 4 of the Directive, Member States may extend the protection of workers in situations other than insolvency. Consequently, since the introduction of the concept of the financial crisis in the case of territorial administrative units, legislature could have had the possibility, not the obligation not to create a public protection of wages in such situations.

3.2. Regarding the concept of employer, art. 4 letter a of Law 200/2006 defines it as the natural or legal person, excluding public institutions defined by Law no. 500/2002 on public finances, that can hire workers with an individual employment contract, as provided by Law no. 53/2003 - Labor Code. This definition clearly shows that public institutions, therefore territorial administrative units as well, are excluded. This exclusion represented at the time of adopting law 200/2006 a consequence of the fact that public institutions cannot be in a state of insolvency. But after adopting GEO 46/2013, stating that the territorial administrative units may be declared insolvent, the exclusion provided by art. 4 letter a of Law 200/200 no longer has a legal basis and is discriminatory and inconsistent with the purpose and aim of the directive.

3.3. According to the European Regulation, the employer is insolvent if a request has been made for the opening of a collective proceeding based on the insolvency of the employer, but, under the national legislation, the public protection of pecuniary rights in the case of employees intervenes in case against them final judgment for opening insolvency complete or partial withdrawal of administration rights has been rendered.

[8] Published in Official Gazette of Romania, Part I, no. 618 of 18 July 2006, with subsequent amendments

Conclusions

From the brief presentation of the current regulatory framework, what can be drawn is that the Romanian legislation is more restrictive than the European legislation, which leads to discriminatory treatment between employees of employers who are insolvent, on the one hand, and between them and those of the employers who are in a position of cessation of payments or insolvency. Social implications of lack of regulation in the case of public protection of wages, in the mentioned situations, are significant because employees are deprived of their fundamental right, that is, to receive their salary for the work performed in critical situations and to maintain their job. Therefore, it is suggested that the legislator should consider the principle of non-discrimination of both employees and employers as a fundamental principle of labor law. Moreover, another aspect to be considered is related to the social consequences of the current legal regulation of public protection of employees' rights, when their employers are unable to fulfill their obligation regarding the payment of wages.

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THEORETICAL AND PRACTICAL CONSIDERATIONS REFERRING THE DEADLINES OF COURTS IN INDIVIDUAL WORK IN CONFLICT SETTLEMENT ACCORDING THE LABOUR CODE AND LAW NO. 62/2011 OF THE SOCIAL DIALOGUE

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Abstract

The scientific approach aims to analyse a topic of particular interest, both for current doctrine and also for professional practice. The institution of notification deadlines of the court in the matters of the resolution of individual labor dispute is currently governed by the provisions the Labor Code, art.283 para.1 letter a. and by those of art. 211 of Law nr. 62/2011 of the Social Dialogue. A simple analysis of these provisions shows that, unlike the Labor Code, Law of the Social Dialogue refers to the assumptions which are subject to art.268 letter b. are not provided the letter d, art.268. Thus, the solutions offered by those regulations are different and at the same time contradictory doctrine should aim to formulate hypotheses to solve "real conflict of laws", able to avoid delivery of divergent and contradictory solutions of courts in matters which make the subject of our analysis.

Keywords: *time limits for bringing cases to court, Labor Code, Law on Social Dialogue, individual labor disputes.*

Introduction

1. General aspects concerning the deadlines for notification of the courts in settling individual labor disputes

Law 62/2011 of social dialogue[1] and art.248 of the Labor Code was amended by Law no. 40/2011[2] replaced the concepts of *conflict of rights* and *conflicts of interest* with the following expressions: *collective labor disputes* and *individual labor disputes* as forms of labor disputes.

Individual labor disputes[3] represents that category of labor disputes aiming to exercise certain rights or obligations arising from individual and collective labor contracts or from collective labor agreements of civil servants as well as from other laws and normative acts. Individual labor conflicts are also considered to be: conflicts related to compensation payments for damages caused by parts through failure or inadequate performance of the obligations established within the individual labor contract or employment relationship; conflicts regarding the nullity of individual labor contracts or of their terms as well as conflicts regarding the cessation of employment relations or of some employment terms.

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[1]Law no. 62/2011 of the social dialogue published in the Romanian Official Gazette no.322/2011;
[2]Law no. 40/2011 published in the Romanian Official Gazette, part I, 225/31.III.2011;
[3]Art. 1 letter p from Law no. 62/2011 of the social dialogue;

Labor conflict resolution highlights an important aspect of labor jurisdiction, namely time of referral of the competent courts. The mentioned institution is regulated at this time by the provisions of art.283 of the Labor Code, a non-repealed article by the Law of Social Dialogue and by art.211 of the mentioned legislative act.

2. Referral deadlines of courts in resolving individual labor conflicts

Applications aiming to solve conflicts of rights must be made by those whose rights have been violated, by respecting certain legislative deadlines, under the penalty of request rejection by the competent court as being submitted too late[4].

According to art.268 paragraph 1 of the Labor Code, *the requests to solve a labor dispute can be formulated as follows*:

a. within 30 calendar days from the date when employer's unilateral decision regarding the conclusion, execution, amendment, suspension or cessation of individual employment contract and disciplinary sanction decision were communicated

b. within 3 years after the emergence of the action right, when the subject of individual labor dispute regards the payment of unpaid wages or rights to employee as well as the property liability of the employee in relation to the employer;

c. on the entire period of the contract, if the invalidity of an individual or collective employment contract or of its clauses is required;

d. within 6 months after the emergence of the action right, in case of non-execution of the collective employment contract or of its clauses;

e. in all other cases within 3 years from the after the emergence of the action right (paragraph 2).

In terms of representation conditions` completion by trade unions at unit level, law does not expressly set a time limit for submitting the application, their representation being established by the court at their request, the decision being appealed[5]. Moreover, Law no. 122/1996[6] does not set a deadline within which the notification of the court is made regarding employee unions; the employees decide when to submit documents in order to obtain legal personality.

If the employer's unilateral decision regarding the conclusion, execution, amendment, suspension or termination of individual employment contract is challenged, he or she is obliged to submit the evidence which the measure was taken before the first day of the legal hearing. According to art.1887 of the Civil Code, the period of 30 days starts when the employee was acquainted with the decision of the employer and shall be calculated excluding the first day, but taken into account, however, the day of completion of the term.

In order that this term of 30 days to be fulfilled, the following conditions are necessary: the existence of a unilateral legal act issued by that employer; the employer`s act must determine the modification, suspension or termination of individual or collective labor contract; the employer`s act may cover any right of the employee based on the individual or collective labor contract; the employer`s act must be communicated based on the forms prescribed by law.

Derogated from the provisions of common law, according to which the absolute nullity may be invoked at any time by action or exception, and the relative nullity may be invoked within 18 months, art.268, paragraph 1, letter d., establishes, without making

[4]Athanasiu, Al., Dima, L., *Labor Law. University Course*, All Beck Publishing House, Bucharest, 2005, p.363;
[5]Art.51 paragraph.2, 3, 4 from *Law no. 62/2011*;
[6]*Law no. 122/1996* published in the Romanian Official Gazette, part a I, no. 262 from 25 October 1996, modified;

distinction between absolute and relative nullity, that this elements can be invoked at any time as long as individual or collective labor contract is being valid[7].

Regarding the provisions of art.268 paragraph 1 letter d. of the Labor Code, there was raised an objection of unconstitutionality motivated by the statement that, unlike civil contracts, labor contracts generate various legal effects even after their cessation. In disputes where the exception of unconstitutionality was arose, the cessation of labor relations is contested based on the fact that the valid period of the individual employment contract expired and it is claimed that the limited period of employment has violated the law, and the effect of this clause has occurred since the date of the cessation of employment legal relationships. It should be noted that this clause regarding the period of the individual labor contract could have been subject of the invalidity observation request during the entire validity period of the contract. The effect of this clause has occurred since the date the employer had observed or disposed the cessation of employment relations, only by recording this fact in the labor card, decision that can be appealed within the period prescribed by art.268 paragraph 1, letter a. of the Labor Code.

To these allegations, the Constitutional Court[8] established that the challenged legal regulations are based on the principle that allows the request of nullity or annulment of some acts. If an individual or collective labor contract is no longer valid, its terms do not exist also, and the request of nullity has no object. But, it is possible that the legal effects of some contractual provisions could continue to occur after the cessation of contracts. The Constitutional Court concluded that the text itself is not unconstitutional, and in such cases those juridical effects can be challenged in court by way of exception if they are contrary to the rights, freedoms or legitimate interests of the individual. Thus, the right of free access to justice and the right to a fair trial are not restricted.

Regarding art.268 paragraph 2 of the Labor Code, according to which in all other contexts not mentioned at paragraph 1, the request is addressed to the court within 3 years from the emergence of the right to action, was raised another unconstitutionality exception based on the idea of discrimination between different classes of actions. By Decision no. 342/2006[9], the Constitutional Court dismissed from this legal text the exception of unconstitutionality, emphasizing that the 30 days mentioned in art.268 paragraph 1 letters a. and b. shall apply when the labor dispute is linked to the unilateral decision of the employer, including disciplinary sanctions, which involves emergency in solving the conflict concerned. The legal norm that establishes a period of 3 years, in other situations, is not a discriminatory provision, the legislature having the right to decide for the establishment of different terms for the observation of real differences between the nature and the subject of various labor disputes[10].

The period of 30 days, 6 months and 3 years are prescrition terms and therefore their suspension or interruption in accordance with the Civil Code, Law nr.287/2009 republished can be possible[11]. Under the provisions of art. 2532 of the Civil Code the statute of limitations

[7]Ștefănescu, I., T., *Theoretical and Practical Treaty of Labor Law,* The Legal Universe Publishing House, Bucharest, 2012, p.905;

[8]The Decision of the Constitutional Court published no. 45/11.01.2007, published in the Romanian Official Gazette no. 92/06.02.2007;

[9]The Decision of the Constitutional Court no. 342/2006, published in the Romanian Official Gazette, part I, from 10.05.2006;

[10]Ţiclea, Al., *Treaty of Labor Law*, The Legal Universe Publishing House, Bucharest, 2007, p.963;

[11]Civil Code, Law n.287/2009, published in the Official Monitor no.511 of 24 July 2009, amended by Law no.71/2011 and no.427 corrected in the Official Monitor from 17 June 2011 and in the Official Monitor no. 489 from 8 July 2011; the mentioned normative act repealed the provision of the Decree no. 167/1958 on the extinctive prescription;

is suspended: on the duration of negotiations in order to amicably solve disputes between parties, if they were held in the last 6 months before the expiry of the limitation period; if the legally entitled in action person should or can, by law or contract, use a certain preliminary procedure, as administrative complaint, seeking reconciliation or others alike, while he or she do not known or did not need to know the outcome of that procedure but not more than 3 months after initiation of the procedure, whether the law or contract did not set another term; if the holder of the right or one who violated it is part of the Romanian armed forces, as long as they are in a state of emergency or war, including people who are in the armed forces for reasons of service required by necessities of war; if the one against which flows or would flow the limitation is prevented by an extreme situation to interrupt acts, as long as this limitation exists, the force majeure not being the suspension cause for the limitation period when it is temporary, unless occurs in the last 6 months before the expiry of the limitation period. Also, the provisions of art. 2537 of the Civil Code governs situations where the prescription is interrupted, namely: by a voluntary act of enforcement or recognition in any other way, of the right whose action is prescribed, made by the person who benefits of the prescription; by submitting a request for judgement or arbitration, by registering the debt, by filing the intervention request within the forced observation started by other creditors or by invoking, by way of exception, the right whose action is prescribing; by establishing as a civil part during the criminal investigation or in front of the court, until the beginning of the legal investigation and if compensation are granted by law from officio, the criminal prosecution interrupts the prescription, even if the constitution as civil party did not take place; by any act by which the person who benefits from the prescription is in default.

Article 211 of Law no. 62/2011 regarding Social Dialogue offers a different but contradictory solution in relation to the before mentioned provisions of the Code, regarding the appealing terms within labor disputes in relation to the subject of the litigation.

Thus, according to the text mentioned above, the requests can be submitted by those whose rights have been violated, as follows:

- unilateral measures taken by the employer on the execution, amendment, suspension or cessation of individual labor contract, including certain commitments of payment, may be appealed within 45 calendar days from the date on which the interested part became aware of the measure taken;
- nullity of an individual employment contract may be requested by the parties during the entire period in which the contract applies;
- compensation payments for the damage caused and restitution of certain amounts of money that have formed the subject of undue payment, may be required within 3 years from the date of damage.

A simple analysis of these norms shows that, unlike the Labor Code provisions, art.211 of the Law on Social Dialogue does not refer anymore to the assumptions of art.268 letters b. and e., and partially are no longer stipulated the assumptions of art. 268 letter d. In essence, according to Law no. 62/2011 disciplinary sanctions, invalidity of collective labor contracts and non-execution of collective labor contracts` clauses cannot be challenged anymore[12].

The doctrinal opinion that was mentioned before considers the solution offered by art.211 of Law of Social Dialogue as "fundamentally flawed, and its application enter in strong collision with the present Labor Code provisions and after the amendments made by Law.40/2011. "Thus, it is considered that in order to avoid violating the constitutional right to

[12]Athanasiu, Al., *Theoretical and Practical Aspects of Labor Jurisdiction in Light of Law no.40/2011 and Law no. 62/2011*, in Athanasiu, Al. (coord.), *Amendmets to the Labor Code and the Social Dialogue Code*, The Legal Universe Publishing House, Bucharest, 2011, pp. 194-195;

defense and the international documents to which Romania is party, challenging disciplinary sanctions, including disciplinary dismissal, should apply the provisions of art.268 of the Labor Code. The same reasoning imposes the application of the same dispositions also for the assumptions regarding collective labor contracts, namely observing the invalidity, challenging the non-execution of their terms, because the very provisions of Law no. 62/2011 expressly state that disputes arising from implementation of collective labor contracts are settled by the courts.

Regarding the deadline for notifying the court in relation to such litigation, Law no. 62/2011 has not introduced an express term, so that the provisions of art.268 letter e. of the Labor Code will be valid further which stipulate that claims to solve a labor dispute may be made in terms is 6 months after the emergence of the right to action, in the case of non-execution of the collective labor contract or of some of its clauses.

We state that the change regarding the employee`s possibility to challenge the unilateral measures taken by the employer on the execution, amendment, suspension or cessation of the individual labor contract, by giving up the regulation of a specific term when a unilateral measures on the individual labor contract is challenged, will create difficulties. The reason of this interpretation is based on the expressly manifested legislator's intention to establish a different, difficult or even impossible term starting from which the term of 45 days is valid, the term in which the interested part takes knowledge about the decision, although in practice, the most commonly used method is that of communication by the employer of the unilateral decision.

Moreover, the mentioned doctrinal opinion draws attention to the erroneous classification of those 45 days as a calendar period, "as long as is well known and gained within the legal theory" that the term in question is an extinctive limitation period, within which a right of debt could be reclaimed and the appeal can have the character of annulment action.

It also stated, that the only situation when the real conflict of laws would be removed and the provisions of art.211 letter a. of the Law of Social Dialogue would be applicable, aim at unilateral measures relating to the execution, amendment, suspension of labor contract, including commitments of payment, which, in order to produce legal effects does not require the completion of the communication procedure, or it is not expressly regulated in the Labor Code (see, for example, in case when the employer decides the suspension of the labor contract, the procedure regarding the communication of the decision of suspension is not covered).

The proposed solution, in order to remove the divergent and contradictory future solutions of the courts, is to promote a legal appeal or to repeal the provisions on the same terms contained in one of the legal acts.

The doctrine state also that[13] the correct determination of notifying terms of the courts regarding the resolution of individual labor disputes involves the relationship between the provisions of the Labor Code and those of Law no. 62/2011[14]. The sustainable solution is to consider that the common law in this area currently consists of the provisions of art.266-275 of the Labor Code, art.208-216 the Law of Social Dialogue. With that reasoning of time sequence of legal acts, the prevalence of notifying terms of court shall be considered case by case as follows: unchanged terms and situations provided by the Labor Code continue to apply and cause their effects and those newly introduced by the Law of Social Dialogue

[13] Gheorghe, M., *Considerations Concerning the Deadlines for Notification of the Court in Respect of Individual Labor Disputes,* Romanian Journal of Labor Law, no. 5 / 2011, pp.72-73;
[14] *Idem*, pp. 72-76;

modified in accordance with the Labor Code are being first applied, representing norms adopted later.

Thus, regarding the situation of the coexistence of provisions stipulated in art. 268 paragraph 1 letter a. of the Labor Code and the dispositions of art.211 letter a. of the Law of Social Dialogue, cannot be supported the interpretation according to which in the first situation we find ourselves in the presence of an appeal against an employer's unilateral decision, and in the second one, in the presence of a complaint against a unilateral action of the employer or employee, which was not followed by the issuance of a decision (for example, the employer has taken the measure of employee dismissal, forbids the employee to come to work, but does not issue a decision in this respect). The symmetry principle regarding legal norms requires that the *ad validitatem* written form of an individual labor contract, established by Law no. 40/2011, should be present also in the case of subsequent documents, namely modification, suspension or cessation, in interdependence with it. Thus, the only possible interpretation remains the one that state that against unilateral measures of execution, modification, suspension or cessation of individual labor contract, the requests may be made within 45 days from the date on which the party concerned became aware of the decision, except the requests for damages payment based on pecuniary liability and for those based on the repayment obligation.

Regarding the requests to solve a lobar dispute whose subject is the employer's unilateral decision to stop the individual labor contract, the same doctrine considers rightly that not mentioning them within art. 211 letter a. of Law of Dialogue Social is "a regrettable omission of the legislature". The solution is that of submitting of these requests within the term of 45 calendar days and not admitting that these litigations are not labor disputes, being in the presence of a civil litigation practice[15].

A new aspect contained in the art. 211 letter a. of Law no. 62/2011 is the possibility of disputing payment agreements within the same term of 45 calendar days. The above mentioned doctrinal[16] opinion supports that the legal text should be interpreted not as a recognition of the commitment to pay as a new method to recover the prejudice caused by employees, but referring to those situations recognized by special law[17], when a payment commitment could be assumed, namely as a procedure to recover the damages caused by civil servants, military personnel or military units or third parties.

Different point of view were expressed in the specialized literature regarding the appreciation whether or not the payment commitment aimed also at evaluation and damage assessment, stipulated by art.270 paragraph 3 regulated in the Labor Code. Thus, one opinion[18] (Gheorghe, 2011) states that the payment commitment cannot support the evaluation assessment, because there are different documents, a bilateral and a unilateral act, issued by the employer to achieve an eventual agreement, thus having different vocation. The second opinion[19] states that through "the payment commitment" the legislature aimed at "the evaluation and damage assessment" and its recovery "by parts agreement" referred to in art.270 paragraph 3 of the Labor Code, or the legal instrument of damages recovery in the case of civil servants (Article 85 of Law no. 188/1999, etc.).

If the situation regulated by the provisions of art. 211 letter b. of the Law of Social Dialogue, it is outlined the legislator's intention to maintain the period of time in which the nullity of an individual labor contract can be requested in the range in which the contract

[15] For details regarding the qualifications of a labor dispute as the one that arises in connection with negotiating individual labor contract, regardless of the existence of a legal relationship born under an individual contract of employment, see Ștefănescu, I., T., *op. cit.*, 2012, p.906;

[16] Gheorghe, M., *op. cit*, in Romanian Journal of Labor Law, no. 5/2011 p.75;

[17] Special laws for the subject analysed, are: Law no.188/1999 regarding the Status of the Public Officer and the Government Order no. 121/1998 regarding the material responsability of military officers;

[18] Gheorghe, M., *op. cit.*, in Romanian Journal of Labor Law, no. 5/2011, p.76;

[19] Țiclea, Al., *Commented Labor Code,* 2nd, Universe Publishing Law, Bucharest, 2011, p.299;

applies. We believe that the legislature`s option is correct, expressed both by the provisions of the Labor Code art.268 paragraph d and by those of art.211 letter b. of Law of Social Dialogue. The rationality of this interpretation starts from the above mentioned idea that if certain legal effects of some contractual clauses continue to occur even after the cessation of such contracts, exists the possibility of contesting them in court through the method of exception, if they are contrary to the rights, freedoms or legitimate interests of the individual. Furthermore, Labor Code recognizes a party in an individual labor dispute for former employees, for the recovery and fulfillment of rights arising from their employment relationship.

The doctrine has expressed the view that the legislature`s option is natural because a legal act cannot be abolished as long as it is valid. Moreover, the provisions of art.142 of the Law of Social Dialogue are invoked, referring to the possibility to request the nullity of a collective labor contract or of certain clauses within, all throughout the existence of that contract.

I also draw attention on the provisions of art. 211 letter c. of Law no. 62/2011, which can be susceptible of consequences difficult to overcome, which sets the starting point of the 3 years term beginning from the date of damage[20] and not from the date when the right to action occurred, given the fact that the mere production of the prejudice is not likely to mark the beginning of the term, requiring more cumulative requirements that are subsumed under the concept of right to action. The legal qualification of the 3 years term, as a prescription and not as a decline term (only in the event of a decline term, the damage could trigger the term), requires the solution regarding the emergence of the right of action and not of the one marking the damage[21].

The doctrine[22] has also expressed the view according to which, by setting the prescription term as being that of the flow of the damage, a single legal regime between employees (formerly art.268 letter c. of the Labor Code in conjunction with art. 8 paragraph 1 from the Decree no.167/1958 stipulated the term for the emergence of right at action) and civil servants (in this situation, the term was stipulated at the time of damage) has been created (Gheorghe, 2011), which up to this change had no objective grounds to be set up differently.

Another opinion[23] supports the view that it is both logical and legal the application of art. 211 letter c. of Law. 62/2011, starting from both the objective character of time covered by the text and the fact that the regulation is more favorable to employees.

The violation of legal terms generates the rejection of the request by the competent court, as being filed too late, and the reinstatement within the time limit can occur if the violation of the term was the result of objective circumstances. The doctrine states that proper grounds for reinstatement within term limit are represented by those situations which, without representing extreme cases, are outside the will and the field of activity of the interestes part, and by their intensity, prevents the part from exercising the right of appeal within the legal time: prolongued hospitalisation, the execution of a custodial sentence, incapability to move, etc.[24]. Also it is considered that invoking reason such as: misinterpretations or errors of law,

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[20]*Idem*, p.77;

[21]Athanasiu, Al., *Theoretical and Practical Aspects of Labor Jurisdiction in Light of Law no.40/2011 and Law no. 62/2011*, in Athanasiu, Al. (coord.), *Amendmets to the Labor Code and the Social Dialogue Code*, The Legal Universe Publishing House, Bucharest, 2011, p. 197;

[22]Gheorghe, M., *op. cit*., in Romanian Journal of Labor Law, no. 5/2011, p.78;

[23]Ţiclea, Al., *Differentiation and non-correlation between the provisions of the Labor Code and Law No 62/2011 on Social Dialogue Regarding Labor Jurisdiction,* the Romanian Journal of Labor Law, no. 4 / 2011, p. 15;

[24] The doctrine states that proper grounds for reinstatement within term limit are represented by those situations which, without representing extreme cases, are outside the will and the field of activity of the interestes part, and

the absence of the legal counselor due to objective reasons – as hospitalization, does not justify the reisnatlment within the term[25].

The interested part may request the competent court the reinstatement within the time limit within 30 days of the date on which it knew or ought to know the cessation of reasons justifying the overcome of prescription time and judging the case (art.2522 Civil Code).

Conclusions

The coexistence of two competing rules regarding the investigated domain, namely the provisions of art.268 of the Labor Code and those of art.211 of the Law no.62/2011 of Social Dialogue, generates a number of inaccuracies in both the interpretation and especially in their practical application, which justifies the need for careful doctrinal analysis that can generate concrete solutions.

We state, according to a doctrinal view which was referred to during the scientific study[26], that even in terms of courts referral it concerns, after the adoption of the Law of Social Dialogue, real conflict of laws.

The required solution in order to solve the conflict is certainly a new legislative intervention that can give primacy to Labor Code provisions, case in which the provisions of art.211 of the Law on Social Dialogue should be repealed, or to the mentioned provisions repealing or amending them according to the provisions of art.268 of the Code.

Whatever the legislature decision will be, it will certainly have as main effect that prevention of a non-uniform judicial practice generation, with negative effects on social relations.

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by their intensity, prevents the part from exercising the right of appeal within the legal time: prolongued hospitalisation, the execution of a custodial sentence, incapability to move, etc. For details see Ștefănescu, I., T., *op. cit*., 2010, p.884; also it is considered that invoking reason such as: misinterpretations or errors of law, the absence of the legal counselor due to objective reasons – as hospitalization, does not justify the reisnatlment within the term; For details see Athanasiu, Al., Volonciu, M., Dima, L., Cazan, O., *Labor Code. Comment on Articles*, Volume II, C.H. Beck Publishing House, Bucharest, 2011, pp. 421-422;

[25]Țiclea, Al., Tufan, C., *Solving Labor Disputes*, Lumina Lex Publishing House, Bucharest., 2000, p. 127.

[26]Athanasiu, Al., *Theoretical and Practical Aspects of Labor Jurisdiction in Light of Law no.40/2011 and Law no. 62/2011*, in Athanasiu, Al. (coord.), *Amendmets to the Labor Code and the Social Dialogue Code*, The Legal Universe Publishing House, Bucharest, 2011, p. 198;

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THE APPEARANCE OF THE PENAL INTERNATIONAL LAW AS A BRANCH OF THE PUBLIC INTERNATIONAL LAW

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Abstract
From the oldest times, there appeared certain norms of penal international law meant to prevent the committing of serious offenses, as well as for sanctioning them. This distinct branch of the public international law is called upon to protect - by sanctioning persons guilty of committing serious offenses - peace and security of the whole humanity, the development in conformity with the norms of the law and moral of the international relations, the existence and perenniality of fundamental human values.

Keywords: *penal international law, history, appearance, sanction, international offence*

Introduction

The penal international law represent the totality of legal regulations, also recognised in the international relations, which aim at protecting the legal or international social order by repressing actions that affect it, or, with other words, the totality of regulations established in order to repress the breaches brought to the precepts of public international law[1].

Thus, it defends the perenniality of certain fundamental human rights, aiming at the regulation of the manner of exercising the repression of serious illicit actions, which may be committed in the international reports[2].

The penal international law is a branch of the public international law, having an analogous role to the one held by the domestic criminal law for the domestic order of the states[3].

Sources and connections of the penal international law with other branches of the law

The sources of the penal international law are, generally, the same as in the public international law, although there are some differences regarding their importance. Thus, the

[1] Stefan Glaser, *Droit international penal conventionnel,* volume I, Establissement Emile Bruylant, Bruxelles, 1970, p. 16-17.
[2] Vespasian V. Pella, *La criminalite colective des Etats et le droit penal de l 'avenir,* State House Publishing, Bucharest, 1926, p. 168.
[3] The penal international law presents numerous common points with the public international law, whose generalprinciples are also applied and the penal domain of the international relations.

subsidiary sources of public international law (jurisprudence, doctrine, equity and international usages) indirectly contribute to the formation of the institutions belonging to penal international law, to their development and uniform application.

Together with the conventional law, the international common law fulfils a special role within the framework of these sources, in contradistinction with the domestic law in which it is totally excluded from the sources of penal law.

Along with the entry into force of the Rome Statute[4], the conventional law embodies a higher status within the framework of the international penal justice, also reducing the role of the international common law[5].

The penal international law, as a branch of the public international law, is in close relation with it other branches. Thus, the penal international law is closely related to the law of treaties, to the base of the legal instruments by which the states engage to prohibit and to repress the international offenses, considering the regulations which govern the subject of international treaties[6]. Moreover, there is a close connection between the penal international law and the international law of the human rights, which provides, in a significant proportion, the norms referring to the protection of the human person, whose breach attracts the sanction in conformity to the penal international law.

The penal international law also has connections with other branches of the public international law, especially considering the aerial law and the marine law, as they include principles and norms whose breach enters under the incidence of criminal repression.

The appearance and evolution of the penal international law

Regarding the formation of the penal international law, the conceptions of the jurists are divided.

According to an opinion[7], the penal international law is a recent discipline, which has not materialised, except after the Second World War, when it was constituted as an independent branch of the public international law. The moment of its birth is considered to be that of penal sanctioning of the war criminals[8] and of those who committed offenses against international peace and security by triggering and waging a war of aggression.

The elements of the penal international law appeared long before the modern era, and the first norms of penal international law are related to the aspect of war[9], as the international law itself developed as a law of war and only subsequent as a law of peace and cooperation between the sovereign state[10].

Due to the evolution of the means of waging war, as well as the expansion in the terrestrial, maritime or aerial space, new specific rules regarding armed conflicts were developed, also adding rules concerning the protection of the war victims[11].

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[4] The Statute of the International Penal Court was adopted on the 17th of July 1998, by the Diplomatic Conference of the Plenipotentaries (15-17 July 1998), from Roma; was opened for signing on the 17th of July 1998 and entered into force on the date of the 1st of July 2002.

[5] Pierre-Marie Dupuy, *Droit international public,* 5th edition, Dalloz, Paris, 2000, p. 301-302; Stefan Glaser, [1], p. 49.

[6] Such legal instruments must observe the norms from the law of treaties related to the conclusion, effects, termination or interpretation of treaties and, generally, to all the issues raised by the treaties in the international law.

[7] Stefan Glaser, [1], pp. 17, 26.

[8] Grigore Geamănu, *Drept internaţional public,* Second volume, Didactic and Pedagogical House Publishing, Bucharest, 1983, p. 527.

[9] The preceding elements to the formation of the penal international law appeared together with the enunciation of concept referring to the distinction between just wars and unjust wars, as well as by establishing certain interdictions regarding the manner of waging war -*jus in bello* - since ancient times.

[10] Jean Pictet, *Developpement et principes du droit internaţional humanitaire,* Institute Henry Dunant-Generve, Editions A. Pedone, Paris, 1983, p. 12-19.

[11] Dumitra Popescu, Adrian Năstase, *Drept internaţional public,* Press and Publishing House,,Şansa" S.R.L., Bucharest, 1997, p. 321.

In ancient times, there were also, rules for waging wars which sanctioned the excesses committed by the occupation or invasion troops within different people, on particular persons, their goods or sanctuaries[12].

The customs, as rules of waging war, were inscribed in diverse texts, such as: the Code of Manu[13] from India in the centuries XII-XI b. Ch., which regulated the manner of waging war on land, the treaties of Sun Tzu, entitled “The art of war"; religious writings (Bible, Quran and Mahabharata).

In the Greek state-cities and in the Antique Rome, the neutrality of the states which did not participated in war and which observed certain humanitarian regulations and whose breach was considered a form of barbarism was recognised.

The contributions made for the evolution of the penal international law by Saint Augustine and Aristotle led to the formation of the concept of “international offense” *lato sensu,* from which the concept of “international offense” *stricto sensu* subsequently appeared[14].

The Middle Ages constituted an era in which the principles, ideas and norm referring to the manner of waging war also embodied shadows and light[15], as there were encountered both brutal breaches of the existent regulations, as well as doctrinaire developments with positive effects[16].

As examples of breaches of the norms of natural law which justified war, we may present[17] actions such as: feeding the people human flesh, denying the existence of God or eliminating any religion, practicing piracy, etc.

In the Middle Ages, the Catholic Church, influenced by Thomas d'Aquino, established norms of waging war which prohibited the combatant states to attack certain categories of persons, such as priests, women, children or even prohibited war in certain days or special periods[18]. These types of norms were known as “God's peace", respectively “God's truce”, and in case of non-observance of these regulations, excommunication would be applied for the guilty state[19].

Such examples of processes of penal international law which occurred in the Middle Ages are presented: the case of Corandin van Holenstofen[20], to whom the capital punishment was applied, as a result of the initiation of an unfair war, in the year 1268, as well as in the

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[12] See John O'Brien, *International Law,* Cavendish Publishing Limited, London, 2001, p. 760, which shows that even from the 4th Century af. H. Augustine de Hippo the opinion that in the war, the just cause of waging it may be negated by an excessive conduct of the war participants, as well as in the case in which harsh sanctions were applied to the enemy state, related to the normative breaches committed by the later.

[13] The laws of Manu contained numerous interdictions related to the manner of waging war, such as attacking those who are defenceless or killing an unarmed enemy or an enemy which is ready to surrender, the use of poisonous arrows, destroying religious monuments and tearing fruit trees, rules that were harshly sanctioned it they were breached by warriors.

[14] Beatrice Onica-Jarka, *Jurisdicţia internaţională penală,* C.H. Beck House Publishing, Bucharest, 2006, p. 13.

[15] The principle of chivalrousness, of a German origin, characterised by loyalty, fidelity, moderation and compassion, also contributed in a way to the humanization of wars and creating norms which sanctioned the facts with a criminal character.

[16] Vasile Creţu, *Drept internaţional penal,* Tempus Society, Romania Publishing House, Bucharest, 1996, pp. 12-13.

[17] Grigore Geamănu, [8], p. 525; Gerhard von Glahn, James Larry Taulbee, *Law Among Nations. AnIntroduction to Public International Law,* 8th edition, Pearson Education Inc., New York, 2007, pp. 488-489.

[18] In the same sense acted, in the Islamic world, some principles of the Quran which prohibit, in time of war, thekilling of women, children, old or sick people and politicians, the mutilation of the party defeated, the poisoning of arrows and the food sources, thus imposing a human treatment of the prisoners and their release for certain amounts of money.

[19] Valentin-Stelian Bădescu, Umanizarea dreptului umanitar, C.H. Beck House publishing, Bucharest, 2007, p. 41.

[20] Edward M. Wise, Terrorism and the problems of an International Criminal Court, International Crimininal law and Procedure, edited by John Dougard, Cristine von den Wyngaert, Dortmonth Publiching Company, 1966, p. 44.

case of the knight Peter von Hagenbach, in the year 1474, which also resulted in the conviction to capital punishment- this case is considered by some authors to be the first process of penal international law.[21]

Conclusions

From the analysis of the historical period related to the appearance of the norms of penal international law, it results that they were formed as a reaction to certain factors, such as: technical development, especially spiritual development or the manner of thinking of the international societies, the existence of armed conflicts between various states which had expansionist tendencies etc.[22]

The well-known Romanian Vespasian V. Pella defined penal international laws the totality of regulations of form and substance which govern the manner of exercising the actions committed by the states or by the individuals, in order to disturb the international public order and the harmony between people[23].

The increase in the criminal phenomenon in the modern society, the gradual and frequent harm brought to the values which interest the international community as a whole or are focused on the interest of a large number of states, as well as the expansion of organised criminality which surpasses the national borders by criminal networks which take action on the territory of state that are at the base of constituting and developing *the penal international,* as an expression of coordinating the efforts of prohibiting and repressing the anti-social acts which are harmful for the legal order and the progress of the entire contemporary human society.

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[21] Bassiouni M. Cherif, Draft Statute International Criminal Tribunal, Association International de Droit Penal, ERES, 1992, p. 29, cited by Beatrice Onica-Jarka, [14], p. 14.

[22] See Philippe Malaurie, Antologia gândirii juridice, Humanitas House Publishing, Bucharest, 1997, p. 99.

[23] Iulian Poenaru, Vespasian V. Pella, o viaţă dedicată ideii de justiţie internaţională, Lumina Lex House Publishing, Bucharest, 1992, p. 59.

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DOMESTIC VIOLENCE FROM THE PERSPECTIVE OF MEDIATION

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Abstract

The procedure of mediation is an efficient method of amiably solving the differences, also used in the litigations regarding family violence, as it offers the party the possibility of solving the conflicts in a confidential framework, appropriate for eliminating the tensions accumulated and avoiding the asperities specific to legal trials.

Keywords: *mediation, domestic violence, international regulations, procedure, control.*

Introduction

Family violence represents an extremely serious social problem, and the specialists consider it a form of torture[1]*, due to its characteristics.*

In conf. with art. 22 from Chapter II of the Romanian Constitution[2]*, entitled "Fundamental rights and liberties", the right to life, as well as the right to physical and mental integrity of the person are guaranteed.*

Law no. 217/2003 for preventing and controlling family violence defines family violence as any physical or verbal action performed intentionally performed by a member of the family against another member of the same family, which provokes a sexual, mental or physical suffering or a material prejudice. This law extends the concept of family violence to other forms of aggression, except the physical one, as well as the acts of preventing a woman from exercising her fundamental rights and liberties[3]*.*

The integrity of the person, including the family members, implies for the authorities of the state, the obligation of constituting an efficient legal system, which sanctions the persons guilty of breaching this right[4]*.*

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[1] Radika Coomaraswamy V. (special reporter of the United Nations on the issue of violence against women during the period 1994-2003), "*Lupta împotriva violenţei domestice: obligaţiile statului",* Publication of Innocenti Digest 10, 10 (2000).

[2] *Constituţia României modificată (Amendment of the Romanian Constitution),* was published in the Official Gazette no. 457 from the date of 31.10.2003.

[3] By a family member one can understand the husband or a close relative, and the persons who established similar relations of those between husbands or between parents and children, proven by a social investigation (art. 3 and art. 4 from the Law no. 217/2003).

[4] Gheorghe Costache, *Sistemul legislativ românesc. Despre respectarea drepturilor omului,* Year Book of the Institute of Social and Human Research C.S. Nicläescu Plopşor of the Romanian Academy, vol. VIII, 2007, p. 471 and foll.

International and internal regulations concerning the control of domestic violence

One of the most important values protected by all protection systems of the rights is the integrity of the person, also recognised and consecrated by numerous international instruments.

In accordance with the principle of equality in rights among women and men, consecrated by the Chart of the United Nations, the Universal declaration of Human rights, as well as the international conventions, the state parties decided to apply the principles stipulated in the Declaration regarding the elimination of discrimination towards women, by adopting the *Convention on the elimination of all forms of discrimination towards women*[5].

Within the framework of the World Conference regarding the Human Rights organised by the *United Nations Organisation,* that took place in Vienna in the year 1993, the participants agreed on certain desiderates for the protection of women within the family framework. The Declaration adopted on this occasion refers to the necessity of eliminating violence against women in all its forms, including the conjugal violence, the genital mutilation and forced prostitution, as well as psychological violence.

The Human Rights Commission from within the UNO framework designated, in the year 1994, a special reporter for the sphere of family violence, whose mission was to collect complete data regarding this phenomenon and to propose recommendations at an international, regional and national level, in view of eliminating violence against women.

The international conference that discussed the subject of population and development, which took place in the year 1994 at Cairo, approached the issue of equality between women and men concerning the sexual life and reproduction. The action plans proposed have the following objectives: stopping women and children traffic, promoting education regarding women rights, as a protection measure against family education and establishing recuperation programs for the victims of family violence.

These issues were, also, approached within the framework of the fourth World Conference for Women, which took place in Beijing, in the year 1995[6].

The European states must be in conformity with the recommendations of the European Council and the European Union, as well as the documents adopted by the United Nations Organisation, especially those stipulated in the *Action platform* adopted to the fourth World Conference for Women.

The Committee of Ministers of the Council of Europe adopted several recommendations on this subject, for the members state: REC(79)17 regarding child protection against mistreatments; REC(87)21 concerning assistance given to victims and preventing victimisation; REC(90)2 regarding certain social measures related to inter-family violence; REC(93)2 regarding the medical and social aspects of children abuse; REC(2000)11 concerning certain measures against person traffic aimed at sexual exploitation; REC(2001)16 regarding child protection against sexual exploitation; REC(2002)5 related to woman protection against family violence - the aim of these documents being of providing states with the unitary action instruments against family violence, in view of identifying the common factors at an European level, concerning the legal norms and procedures applicable, both from a criminal and civil point of view.

The efforts of adopting international instruments and specific procedures by which discrimination to women shall be eliminated did not have the expected efficiency in numerous

[5] The Declaration regarding the elimination of discrimination towards women was adopted at the 22nd session of the UNO General Assembly, from the 7th of November 1967 (Resolution no. 2263/XXII).

[6] The action platform adopted in Beijing stipulates that violence against women constitutes one of the 12 obstacles in guaranteeing the right of women, as well as a breach of human rights. Special attention has been granted to primary medical services destined to women who are victims of violence in families and to strategies regarding the elimination of violence against women.

countries where the political regimes do not embody a high level of democracy. Thus, in many Arabian countries, numerous women are victims of domestic violence[7] or sexual slavery[8]; the access to education is cumbered[9]; clothing restrictions are imposed; the right to divorce is also restricted, compared to that of men, as well as the right to custody[10]; restrictions are imposed regarding the development of certain activities[11] or even regarding the right to transmit the citizenship to their offspring[12].

The international regulations in the domain were introduced in the Romanian legislation as a result of signing or ratifying certain treaties which refer to the protection and guaranteeing of human rights.

The Romanian criminal code incriminated both the actions against life, as well as against physical or health integrity (art. 174 - art. 184), which constitutes an important guarantee as to protect these values, by sanctioning those who breach them.

By the Law no. 217/2003 an institution named National Agency for Family Protection has been created at a national level, with attributions in the elaboration, implementation and application of a national strategy in the domain of controlling family violence[13]. Similarly, the law constitutes the obligation of ministries and other specialised central authorities to designate specialised personnel in view of investigating the case of family violence (art. 5 and art. 6). Moreover, it stipulates the collaboration between the local and non-governmental authorities, as well as the involvement of the whole local community in supporting the control and prevention actions of this phenomenon (art. 7).

By the dispositions included in the *Law no. 272/2004 regarding the protection and promotion of the chid rights,* the legal framework referring to the observance and guaranteeing of children rights is established[14].

In art. 28 par. 2 from the law, it is shown that the disciplinary measures of the children cannot be established, except in accordance with the observance of its dignity. Physical punishment or those which affect the physical, mental or emotional development of the child are not permitted, under any circumstance. Similarly, in accordance with art. 85, par. 1 from the law, the child has the right to be protected against any form of violence, abuse, mistreatment or negligence.

The decree no. 384/306/993 from the year 2004 for the approval of the Cooperation procedure in preventing and monitoring the cases of family violence regulates the cooperation in matter of preventing and monitoring the cases of family violence from the three ministries with attribution in the domain, respectively: Labour Ministry, Social and Family Solidarity, Ministry of Interior and Administrative Reforms and the Public Health Ministry.

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[7] Unequal women right increase their vulnerability and exposure to violence. In many Arabian countries, there are no set of regulations or laws which sanction domestic violence, although it represents a wide spread problem. (http://www.descopera.ro/cultura/3666170-10-inegalitati-extreme-intre-sexe).

[8] In Morocco, for instance, women are more exposed to being sanctioned for violating the penal law by adultery in comparison with men (http://www.descopera.ro/cultura/3666170-10-inegalitati-extreme-intre-sexe).

[9] In many regions of Afghanistan, girls are often removed from school when they reach puberty. (http://www.descopera.ro/cultura/3666170-10-inegalitati-extreme-intre-sexe).

[10] In Bahrain, where no family law exists, the judges have absolute powers of denying the women the custody of their children, from various arbitrary reasons (http://www.descopera.ro/cultura/3666170-10-inegalitati-extreme-intre-sexe).

[11] In Saudi Arabia, women are prohibited from driving vehicles and even riding bicycles (http://www.descopera.ro/cultura/3666170-10-inegalitati-extreme-intre-sexe).

[12] In most of the Arabian and African countries, except Iran, Tunis, Israel and a portion of Egypt, only father are permitted to pass on their citizenship to their offspring. Women married to men of other nationalities are prohibited to have this fundamental right (http://www.descopera.ro/cultura/3666170-10-inegalitati-extreme-intre-sexe).

[13] The agency must finance or to co-finance specific programs in the domain of defending or consolidating the family, as well as the caring and protection of the victims of violence in a certain family. (art. 9, par. 1, let. c).

[14] Article 28, par. one from the law stipulates the right of the child to observe its personality and individuality, as well as the right to not be subjected to physical punishment or other humiliating or degrading treatments.

Mediation procedure in the cases regarding family violence

Mediation represents an alternative to the legal trial, by which the parties may amiably resort to an agreement, without being disadvantaged subsequent to their negotiations.

The mediator has the right to help the parties adopt the best solution as to solve the conflict with the help of a correct management of the mediation procedure and adapting it to the type of litigation deduced to the solution. He is the third person, a person who is not directly involved in the dispute, which represents a key factor in the administration and solving of the conflict, as the participation of a neutral person gives the parties the possibility of having another perspective on the problems discussed[15].

In the Law no. 192/2006, the obligation of the mediator of being impartial during the process of mediation is stipulated.

Taking into consideration the flexibility of the procedure, mediation may embrace numerous forms and to last various periods of time, depending on the nature of the dispute, the social context, the personality of the parties and the procedural alternatives.

As to reach an agreement in the cases of litigations regarding domestic violence, the mediator organises the mediation procedure in several *stages,* using certain specific techniques as to facilitate communication and the understanding of the parties.

In the preliminary phase of mediation, the informing of the parties related to the advantages of mediation as to normalise the family relations and to create a healthy climate, especially for the minors, when they are involved, takes place.

In the cases in which the object is represented by domestic violence, separated sessions would generally be indicated- even from the beginning of the mediation process, until a sense of stress relief of the relations of the aggressor and the victim who are members of the same family, are achieved.

Within the framework of the stage for generating options, there are four essential aspects which must be analyzed, and namely: identifying all solutions possible; searching for those solutions which will bring advantages for both parties, but also the other members of the family, registering the circumstances which determined the choice of a solution; analysing the options in view of adopting a decision.

The objective of mediation consists in achieving a long-term agreement, which is efficient, based on the free-will of the parties. In this sense, the agreement must be founded on objective criteria, to which the parties have referred to, thus eliminating emotions and stress conditions, as to choose a reciprocally advantageous solution, based on logic and reason.

There also remains the possibility of signing *a partial agreement* which covers certain problems, which implies the fact that the mediation process had a partially favourable result for all the parties involved[16].

Irrespective of the manner in which the mediation activity is finalised (partial or total agreement, renouncing to mediation, not reaching an agreement), it is necessary that the mediator drafts the minutes regarding the conclusion of the procedure (art. 57 from the Law no. 192/2006).

Some of the mentions specified, regarding the penal clauses, including the domestic violence, are imposed by art. 68, par. 1, final thesis of the law, thus the minutes must stipulate if the parties benefited from the assistance of a lawyer and the services of an interpreter, or if they expressly renounced to these guarantees. The agreement of mediation in the criminal cases regarding family violence is conditioned by the necessity that the framing of the actions deduced from mediation be included in the sphere of criminal actions for which the withdrawal of complaint or the reconciliation of the parties eliminates the renal liability:

[15] W. Christopher Moore, *The mediation process,* Third edition revised, USA, 2003.

[16] Alina Gorghiu (coordonator), Nicolae Bogdan Codruţ Stănescu, Manuela Sîrbu, Mihai Munteanu, Ion Dedu, *Medierea - oxigen pentru afaceri,* Universul Juridic Publishing House, Bucharest, 2011, pp. 225-229.

percussion or other acts of violence (art. 180 C. pen.), personal injury (art. 181 C. pen.), unintentional injury (art. 184 par. 1-4 C. pen.) and rape (art. 197 par. 1 C. pen.)[17].

In case of a fail of the mediation procedure or termination of the contract, there is no impediment for initiating a new mediation procedure.

If the parties appeal a second time to mediation (after commencing the penal prosecution), the new procedure must not attract the suspension of criminal proceedings for the second time, as this possibility regulated in the interest of the parties may be used against the aim of the law, in order to delay the criminal trial, which would constitute an abuse of the law. For this case, the solution proposed would be to continue the criminal trial, in parallel with the new mediation procedure, as to dispose the cessation of the trial by court order, if the parties conclude an agreement prior to its termination.

Although the law does not stipulate it expressly, we appreciate that the professional deontology forces the mediator to conclude, from his own initiative, the mediation procedure when he considers that one of the parties tends to distort its natural aim and to obtain, by ill will, an agreement of will which is obviously in the detriment of the interest of the other party, especially since it affects the interests of a minor person.

Similarly, the mediator should submit all diligences as to achieve the conclusion of the agreement in full knowledge of the case and not due to the pressure or a party which dominates the other. Thus, before reaching an agreement, the parties must be "brought" on positions of equality, as if a party signs the agreement out of fear or other motives, the "solution" to the conflict cannot be a long-term one, especially for the cases regarding domestic violence.

Conclusions

The mediation in the cases regarding family violence may spare time and financial efforts, it minimises the task of the courts of law, satisfies the victim by means of the repair of moral prejudice and makes the offender acknowledge his wrong conduct.

In case of family violence, the aim is not to obtain compensation or material damages, but to find some ways of understanding for the future, thus ensuring family stability.

The fail of mediation in similar cases of domestic violence re-opens the way to legal confrontation, which, if it leads to the conviction of the guilty party, compromises even more the family relations, also influencing the possibilities of cooperation of the parties in view of raising the children.

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[17] Dumitru-Virgil Diaconu, *Medierea în cauzele penale. Cu referiri la Noul Cod de procedură penală,* C.H. Beck Publishing House, Bucharest, 2012, pp. 6-7.

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LEGAL REGULATION OF THE FIGHT AGAINST AND PREVENTION OF TAX EVASION BY WAYS OF LEGISLATIVE DELEGATION. CONSTITUTIONAL LIMITS

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Abstract

Citizens have an obligation to contribute, through taxes and fees, to public expenditure, as regulated by law, but there are situations where payers of fees, taxes or other contributions avoid paying them, which leads to tax evasion[1].

Over time, the lawmaker was concerned with adopting rules meant to establish specific measures for fighting against and preventing tax evasion, especially in the context of Romania's integration in the European Union. In the present wok, in addition to presenting the implementation at infraconstitutional level of the rules of the Basic Law and the legislative dynamics of the rules that have governed this area, we are trying to answer the natural question of whether the criminalization of tax evasion acts can be achieved by way of legislative delegation, namely by simple or emergency ordinances of the Government or it can only be done by "law" as an act of Parliament.

Keywords: *tax evasion, legislative delegation, taxes and fees, state budget, constitutional review, law.*

Introduction

1. Introductory and Legislative Issues

Romania's economy is a market economy[2]*, based on free enterprise and competition, the need for the state to ensure the protection of fair competition, the establishment of a favourable framework for putting to use all factors of production, as well as the protection of national interests in the economic, financial and currency activity. Also, citizens have an obligation to contribute, through taxes*[3] *and fees, to public expenditure*[4].

[1] According to Article 1 of Law No. 87 of 18th October 1994 on tax evasion, published in the Official Journal of Romania, Part I, no. 299 of 24th October, *"Tax evasion is the avoidance by any means, in whole or in part, of payment of taxes, fees and other amounts owed to the state budget, local budgets, the state social insurance budget and special extra-budgetary funds by Romanian or foreign natural persons and legal entities, hereinafter called taxpayers".*
[2] As stated in the Romanian Constitution in Article 135 - "Economy".
[3] Ţîrlea M. R., Fiscalitate, *Manual de studiu individual* (Taxation, A Self-Study Handbook), p.5.
[4] According to Article 56 of the Romanian Constitution.

Depending on the evolution of society, the needs and opportunities of social and economic reality, laws are modified, supplemented or undergo various legislative events, this being also the case of materials governing the fight against and prevention of tax evasion, a field on which particular emphasis is placed, the lawmaker being constantly concerned with adopting measures conducive to the prevention and limitation of the tax evasion phenomenon.

Thus, over time, after the adoption of the Constitution in 1991, the lawmaker implemented the constitutional provisions by adopting a series of regulatory acts that laid the foundation for a tax system and established a number of tax principles, while, of course, taking into account the Community rules in the matter.

In this sense, for example, the Accounting Law No.82/1991[5] *was adopted, also the Government Ordinance No.17/1993 establishing and sanctioning contraventions of financial - management and tax regulations and one of the first regulatory acts*[6]*, Government Ordinance No. 26/1993 regarding Romania's customs import tariff*[7]*, Law No. 87/1994 on fighting tax evasion, Government Ordinance No. 70/1994 on the income tax*[8]*, Law No.141/1997 – the Romanian Customs Code*[9]*, subsequently repealed in 2001, a new Customs Code being adopted, the Tax Code*[10] *or Law No. 241/2005 on preventing and fighting tax evasion. A particular regulatory act is Government Emergency Ordinance No. 54/2010 on measures aimed at fighting tax evasion*[11]*, which will be a special subject of our analysis.*

2. Criminalization of Tax Evasion Acts and Legislative Delegation

Given the need to strengthen the legal framework of the antifraud fight in order to protect the EU's financial interests, to control the implementation of internationally-funded programmes and the implementation of the acquis communautaire, the Antifraud Fight Department was established, as a contact institution with the European Antifraud Fight Office[12], with the main task of ensuring the coordination of the antifraud fight and an effective and equivalent protection of the European Union's financial interests in Romania. Also, the National Agency for Tax Administration was established, which in 2013 was reorganized[13] as a result of the merger by absorption and takeover of the activity of the Customs National Authority and by takeover of the Financial Guard's activity.

From the analysis of the laws set forth above, it is inferred that, in general, the regulation of taxation measures or measures for fighting and preventing tax evasion, as well as tax fraud were carried out both by law, as an Act of Parliament, and by Government ordinances or emergency ordinances.

Certain regulatory acts, such as Law No. 241/2005 on preventing and fighting tax evasion, the Customs Code, the Tax Code or Government Emergency Ordinance No. 54/2010 on measures aimed at fighting tax evasion, punish certain tax evasion acts, stating that they are contraventions or offences.

The natural question arising and which we are trying to answer is whether the criminalization of tax evasion acts can be achieved by way of legislative delegation, namely by simple or emergency ordinances of the Government or it can only be done by "law" as an

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[5] Published in the Official Journal of Romania, Part I, No. 265 of 27th December 1991.
[6] Published in the Official Journal of Romania, Part I, No. 205 of 25th August 1993.
[7] Published in the Official Journal of Romania, Part I, No. 213 of 31st August 1993.
[8] Published in the Official Journal of Romania, Part I, No. 246 of 31st August 1994.
[9] Published in the Official Journal of Romania, Part I, No. 180 of 1st August 1997.
[10] Law No. 571/2003, published in the Official Journal of Romania, Part I, No. 927 of 23rd December 2003.
[11] Published in the Official Journal of Romania, Part I, No. 421 of 23rd June 2010.
[12] The Antifraud Fight Department was established by Government Emergency Ordinance No. 49/2005 on the setting of some reorganization measures within the central public administration, published in the Official Journal of Romania, Part I, No. 517 of 17th June 2005.
[13] Reorganized by Government Emergency Ordinance No. 74/2013 on measures to improve and reorganize the activity of the National Agency for Tax Administration and amending and supplementing certain regulatory acts, published in the Official Journal of Romania, Part I, No. 389 of 29th June 2013.

act of Parliament and to what extent, as regards the Customs Code or of Law No. 241/2004 on preventing and fighting tax evasion, as organic laws, may they be amended or supplemented by emergency ordinances as "administrative acts in the field of law".

Starting from the constitutional provisions of Article 73 – *Categories of Laws*, corroborated with those of Article 115 – *Legislative Delegation*, certain specifications are required: according to Article 73 para. (1) of the Constitution, *"Parliament passes constitutional, organic and ordinary laws*" and according to para. (3) point h), "The organic law shall regulate: [...] offences, penalties and the execution thereof", at the same time, it is worth mentioning that, by way of legislative delegation, under Article 115 para. (4)-(6), the Government may adopt emergency ordinances and in the field of organic laws. To answer this question, we should start with the constitutional provisions which enshrine the possibility for Parliament to delegate its legislative task, as established by Article 61 para. (1) of the Constitution, endowed with the value of a principle, which states that it is *"the sole legislative authority of the country"*, to the Government, provisions contained in Article 115 on legislative delegation. Under these constitutional provisions, there may be two types of legislative delegation, legislative delegation being an institution specific of constitutional law[14], namely a constitutional legislative delegation and a legal legislative delegation[15].

Therefore, legislative delegation may be given directly by the constitution or by a special law, without requiring prior authorization by a public authority[16].

Legal legislative delegation occurs under a law enabling the Government to issue ordinances. Thus, Parliament may pass a special law enabling the Government to issue ordinances in areas not subject to organic laws, under certain conditions, of course[17].

Constitutional legislative delegation operates directly under the provisions of the Constitution, but it must also meet certain conditions[18].

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[14] See, in this respect, I. Vida, *Legistică formală, Introducere în tehnica şi procedura legislativă,* Bucureşti, 2010, p. 242. *(Formal Laws. Introduction to Legislative Technique and Procedure,* Bucharest, 2010, p. 242).

[15] Idem. It is considered that "legislative delegation means the transfer of legislative tasks from Parliament to the Government under certain conditions established by the Constitution, the law or even the taking over of certain tasks by the executive power, by virtue of certain states of fact".

[16] L. Dragne, A. Pascu, *Delegarea legislativă,* Analele Universităţii Creştine Dimitrie Cantemir", Seria Drept, Anul XIII (2), no.2/2009, Ed. Pro Universitaria, Bucureşti, 2009, p. 43 *(Legislative Delegation,* Annals of the "Dimitrie Cantemir" Christian University, Law Series, Year XIII (2), No. 2/2009, Pro Universitaria Publishing House, Bucharest, 2009, p 43).

[17] Article 115 para. (1)-(3) of the Romanian Constitution: "*(1) Parliament may pass a special law enabling the Government to issue ordinances in fields outside the scope of organic laws. (2) The enabling law shall compulsorily establish the field and the date up to which ordinances may be issued. (3) If the enabling law so requests, ordinances shall be submitted to Parliament for approval, according to the legislative procedure, until the expiry of the enabling time limit. Non-compliance with the term entails discontinuation of the effects of the ordinance".*

[18] Article 115 para. (4)-(8) of the Romanian Constitution: "*(4) The Government can only adopt emergency ordinances in extraordinary situations, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents.*

(5) An emergency ordinance shall only come into force after it has been submitted for debate in an emergency procedure to the Chamber having the competence to be notified, and after it has been published in the Official Journal of Romania. If not in session, the Chambers shall be convened by all means within 5 days after submittal, or, as the case may be, after forwarding. If, within 30 days at the latest of the submitting date, the notified Chamber does not pronounce on the ordinance, the latter shall be deemed adopted and shall be sent to the other Chamber, which shall also make a decision in an emergency procedure. An emergency ordinance containing norms of the same kind as the organic law must be approved by a majority stipulated under article 76 (1).

(6) Emergency ordinances cannot be adopted in the field of constitutional laws, or affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, and cannot establish steps for transferring assets to public property forcibly.

(7) The ordinances the Parliament has been notified about shall be approved or rejected in a law which must also contain the ordinance that ceased to be effective according to paragraph (3).

According to the Basic Law, the Government may adopt emergency ordinances only in extraordinary situations the regulation of which cannot be postponed, and have the obligation to justify the emergency in their contents, but emergency ordinances may not be adopted in the field of constitutional laws, they may not affect the status of the fundamental state institutions, the rights, freedoms and duties enshrined in the Constitution, electoral rights and may not establish measures of forcible transfer of assets to public ownership.

Therefore, according to the constitutional provisions already mentioned, the Government may adopt an emergency ordinance under the following conditions: the existence of an extraordinary situation; its regulation cannot be posponed; the emergency should be motivated in the content of the ordinance; it should not be adopted in the field of constitutional laws; it should not affect the status of the fundamental state institutions; it should not affect the rights, freedoms and duties enshrined in the Constitution, nor electoral rights; it cannot establish measures of forcible transfer of assets to public ownership[19].

As regards their adoption *"only in extraordinary situations the regulation of which cannot be posponed, with the obligation to justify the emergency in their contents",* it is necessary for these three conditions to be met cumulatively.

Moreover, after the constitutional revision of 2003, the term *"exceptional cases"* as used in the Constitution adopted in 1991 has been replaced by that of *"extraordinary situations"*[20].

However, as noted in the jurisprudence, *"beyond the categorical nature of the wording used by the Constitution lawmaker, its intent and the purpose pursued consisted in restricting the scope within which the Government may replace Parliament, adopting primary rules in consideration of reasons that it is sovereign to determine by itself "*[21].

Given the fact that the Basic Law does not specify the content of the concept of "exceptional cases" or *"extraordinary situations"*, it fell upon the Constitutional Court to develop the meaning of these two phrases. Thus, starting from a systematic interpretation, both within the logic of the legislative delegation institution [enshrined by Article 114] and of the constitutional edifice as a whole, it showed that *"exceptional cases*[22]*, within the meaning of Article 114 para. (4) of the Constitution, are those situations that do not fall within those expressly envisaged by the law. Consequently, if the lawmaker did not set a norm specific of an exceptional circumstance, it would be contrary to its very will if the existing rules were applied to the exceptional cases referred to by Article 114 para. 4 of the Constitution. Given this, the public interest adversely affected by the abnormal and excessive nature of exceptional cases justifies Government intervention by way of the emergency ordinance"* and the existence of the exceptional case *"does not depend on the will of the Government which, in such circumstances, is forced to react promptly in order to defend a public interest by way of the emergency ordinance"*[23].

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(8) The law approving or rejecting an ordinance shall regulate, if such is the case, the necessary measures concerning the legal effects caused while the ordinance was in force".

[19] These conditions are set out in the constitutional provisions of Aarticle 115 par. (4)-(6) of the Romanian Constitution.

[20] Idem, it is shown that "although the difference between the two terms, in terms of the degree of deviation from the ordinary or common which they express is evident, the same lawmaker felt the need to prevent any interpretation that might minimize such a difference, by adding the phrase *"the regulation of which cannot be postponed",* thus consecrating *in terminis* the imperative of the emergency of the regulation".

[21] Decision No. 255 of 11th May 2005, published in the Official Journal of Romania, Part I, no. 511 of 16th June 2005.

[22] Decision No. 65 of 20th June 1995, published in the Official Journal of Romania, Part I, no. 129 of 28th June 1995.

[23] Decision No. 83 of 19th May 1998, published in the Official Journal of Romania, Part I, no. 211 of 8th June 1998.

Therefore, such a *"measure can only be grounded on the necessity and urgency to regulate a situation which, because of its exceptional circumstances, calls for immediate solutions, in order to avoid serious harm to the public interest"*[24].

Of course, these interpretations were completed by the wording *"the regulation of which cannot be postponed",* thus consecrating *in terminis* the imperative of the emergency of the regulation and, for reasons of legislative rigour, imposed the requirement of motivating the emergency within the very content of the ordinance adopted outside an enabling law[25].

Also, regarding the *"exceptional case"* and *"emergency"*[26], it was stated that *"emergency regulation is not equivalent to the existence of extraordinary circumstances".*

Regarding the concept of *"law"* used throughout the constitutional provisions, this concept was used in the Constitution, *"in its broadest sense, which includes the Constitution, as the Basic Law, and all other regulatory acts, with a legal force equivalent to the law or inferior to it*[27]*,* having several[28] meanings *"depending on the distinction operating between the formal or organic criterion and the material one, and the law is characterized as an act of the legislative authority, being identified according to the body required to adopt it and the procedure to be followed for this purpose".*

As regards Government ordinances, it was retained both in the doctrine[29] and in the jurisprudence that, by developing such regulatory acts, the administrative body exercises a granted competence which, by its nature, falls within the legislative competence of Parliament. Therefore, the ordinance is not a law in the formal sense, but an administrative act in the field of law, assimilated by the effects it produces to the law, compliant, in this respect, with the material criterion[30].

Hence, given the fact that a regulatory legal act is generally defined both by its form and its content, the law, in a broad sense, is the result of combining the formal criterion with the material one[31], including assimilated regulations, too.

We see, then, that the emergency ordinance may also regulate matters of organic laws and the matter referred to in Article 73 para. (3) point h) regarding offences, penalties and the execution thereof. But to what extent are the constitutional requirements of Article 115 para. (6) regarding the effect on the constitutional status of the rights and freedoms provided for by the Constitution, as well as those regarding the fact that "the law only provides for the future", respected? We have in view, on the one hand, the fact that the sanction of deprivation of freedom restricts a fundamental right, namely individual freedom provided for as such in Article 23 of the Constitution, being found among the fundamental rights enshrined in the

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[24] Decision No. 65 of 20th June 1995, published in the Official Journal of Romania, Part I, no. 129 of 28th June 1995.

[25] *Idem*, Decision No. 255 of 11th May 2005.

[26] Decision No. 421 of 9th May 2007, published in the Official Journal of Romania, Part I, no. 367 of 30th May 2007.

[27] See, in this respect, Decision No. 799 of 17th June 2011 on the draft law on the revision of the Constitution of Romania, published in the Official Journal of Romania, Part I, No. 440 of 23rd June 2011.

[28] Decision No.120 of 16th March 2004, published in the Official Journal of Romania, Part I, no. 296 of 5th April 2004. "This conclusion results from the corroboration of Article 61 para. (1) second thesis of the Constitution, republished, under which 'Parliament is [...] the sole legislative authority of the country' with the provisions of Article 76, Article 77 and Article 78, according to which the law passed by Parliament is subject to promulgation by the President of Romania and shall enter into force three days after its publication in the Official Journal of Romania, unless a later date is provided for in its content. The material criterion has in view the content of the regulation, being defined in considering the object of the rule, respectively the nature of the social relations regulated".

[29] Ioan Vida, *op. cit.*

[30] See, in this respect, Decision No. 799 of 17th June 2011 on the draft law on the revision of the Constitution of Romania, published in the Official Journal of Romania, Part I, No. 440 of 23rd June 2011.

[31] Decision No. 120 of 16th March 2004, published in the Official Journal of Romania, Part I, no. 269 of 5th April 2004.

Romanian Constitution, in Title II – *Fundamental rights, freedoms and duties*, or the inviolability of the domicile.

On the other hand, it is worth noting that, according to Article 115 para. (5) of the Constitution, *"An emergency ordinance shall only come into force after it has been submitted for debate in an emergency procedure to the Chamber having the competence to be notified, and after it has been published in the Official Journal of Romania. If not in session, the Chambers shall be convened by all means within 5 days after submittal, or, as the case may be, after forwarding. If, within 30 days at the latest of the submitting date, the notified Chamber does not pronounce on the ordinance, the latter shall be deemed adopted and shall be sent to the other Chamber, which shall also make a decision in an emergency procedure. An emergency ordinance containing norms of the same kind as the organic law must be approved by a majority stipulated under article 76 (1)"*.

From the analysis of this constitutional text it results that, in order to enter into force and produce legal effects, an emergency ordinance must meet two conditions:

1. to be submitted, *for debate in an emergency procedure, to the Chamber having the competence to be notified;*

2. to be published in the Official Journal of Romania..

Thus, it can be seen that the provisions of Article 115 para. (5) of the Constitution establish an exemption from the entry into force of the law laid down in Article 78 of the Constitution, which operates as a result of the conditions that require the use of enactment by adopting emergency ordinances.

In terms of the time limits for the entry into force of emergency ordinances[32], apparently, there are two of them. The first one concerns the submitting of the ordinance for debate in an emergency procedure to the competent Chamber, and the second, the publication in the Official Journal. It is only an appearance, because it is inconceivable that the ordinance could be published in the Official Journal before submitting the law for approval to the competent Chamber.

From the wording of Article 115 para. (5), and by corroborating it with the provisions of Article 107 para. (4) and the principle *nemo censetur legem ignorare* (nobody is thought to be ignorant of the law), the idea that these ordinances cannot enter into force before being published in the Official Journal emerges[33].

Moreover, both in the doctrine[34] and in the jurisprudence, it is considered that the entry into force of emergency ordinances takes place on the day of their publication in the Official Journal of Romania, under the conditions specified above, or on a date set within the content of the regulatory act. This is also stated by Law no.24/2000 on rules of legislative technique for drafting regulatory acts[35], namely in Article 12[36] – *Entry into force of regulatory acts*.

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[32] I. Muraru, E.S. Tănăsescu (coord.), Constituţia României, Comentariu pe articole, Editura C.H. Beck, Bucureşti, 2008 (The Romanian Constitution, Comments by Articles, Publishing House C.H. Beck, Bucharest, 2008).

[33] I. Vida, *Legistică formală, Introducere în tehnica şi procedura legislativă,* Editura Lumina Lex, Bucureşti, 2010 *(Formal Laws. Introduction to Legislative Technique and Procedure,* Lumina Lex Publishing House, Bucharest, 2010).

[34] See also L. Dragne, Drept constituţional şi instituţii politice, vol. II, Ediţia a II-a revăzută şi adăugită, Editura Universul Juridic, Bucureşti, 2012, pp. 115-116 (Constitutional Law and Political Institutions, Volume II, Second edition revised and enlarged, Legal Publishing House, Bucharest, 2012, pp. 115-116).

[35] Republished in the Official Journal of Romania, Part I, no. 260 of 21st April 2010.

[36] Article 12 of Law no. 24/2000: *"(1) The laws and ordinances issued by the Government based on a special law authorising it to do so shall come into effect 3 days after the date of their publication in the Official Journal of Romania, Part I, or on a subsequent date stipulated in their texts. The 3-day delay shall be calculated based on calendar days, starting on the date of their publication in the Official Journal of Romania, and shall expire at 24:00 hours on the third day from their publication.*

(2) Emergency Government ordinances shall come into effect on the date of their publication in the Official Journal of Romania, Part I, provided they have been previously submitted to the competent Parliament Chamber to be notified, if no subsequent date is stipulated in their contents.

Conclusions

An important moment in the legislative dynamics on fighting and preventing tax evasion was the adoption of Government Emergency Ordinance no. 54/2010 on measures aimed at fighting tax evasion[37].

First, by this regulatory act other deeds were assimilated to the offences of smuggling, namely[38] "(...) the collection, possession, production, transportation, taking over, storage, delivery, marketing and sale of goods or merchandise that must be placed under a customs procedure knowing that they come from smuggling or are intended to committing it, are assimilated to the offence of smuggling" and are punishable by imprisonment of 2-7 years and interdiction of certain rights[39], being thus criminalized acts that had not previously fallen within the criminal illicit sphere. Secondly, the amount of the penalties established by the Tax Code was increased[40].

Also, the date of entry into force is expressly mentioned in its content, by practically taking over the constitutional provisions, namely *"the provisions of this emergency ordinance for the entry into force of which no time limit has been expressly stipulated, shall apply from the date of publication in the Official Journal of Romania, Part I"*[41], provisions which were the subject of unconstitutionality, the motivation being that the ordinance came into force on the day of its publication in the Official Journal of Romania, although it is stated that it enters into force "after" publication, which does not correspond to the day of publication. In answer to this criticism, the contentious constitutional court showed[42] that "the provisions of Article 115 para. (5) of the Constitution are an application of Article 15 para. (2) of the Basic Law, which states that the *law only provides for the future, with the exception of the more favourable criminal law or contraventional law,* in relation to the entry into force of emergency ordinances if they criminalize a socially dangerous act, regulate the constitutive content of the offence by incorporating new, additional elements to the original rule or their sanctioning regime in order to increase the special minimum or maximum".

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(3) The regulatory acts stipulated under article 11 (1), except for laws and ordinances, shall come into effect on the date of their publication in the Official Journal of Romania, Part I, if no subsequent date is date is stipulated in their contents. When it is not necessary that they should come into effect on the date of their publication, such regulatory acts shall state in their contents that they come into effect on a subsequent date set out in the text".

[37] Published in the Official Journal of Romania, Part I, no. 421 of 23rd June 2010.

[38] According to Article IX section 2 of Government Emergency Ordinance no. 54/2010.

[39] As set out in Article 270 para. (1) of the Customs Code. Also, new offences were introduced in the Tax Code, namely those referred to in Article 2961 para. (1) points m) and l), and the punishment for which is imprisonment, which is, from the criminalization of the acts, from one to four years. These new offences were introduced by Article I section 23. "In Article 2961 para (1), after point k), two new points are introduced, points l) and m), with the following content:

"l) the possession by any person outside a fiscal warehouse or marketing on the Romanian territory of excisable products subject to marking, according to Title VII, without being marked or improperly marked or with false markings above the limit of 10,000 cigarettes, 400 cigars of 3 grams, 200 cigars of more than 3 grams, over1 kg of smoking tobacco, more than 200 liters of spirits, more than 300 liters of alcohol intermediates;

m) the use of mobile pipes, flexible hoses or other similar pipes, the use of uncalibrated tanks, and the placement of valves or taps before the meter by means of which alcohol or distilled unmetered amounts can be extracted".

[40] Thus, by Government Emergency Ordinance no. 54/2010, Article 2961 para. (2), point a) of the Tax Code was modified, namely the special maximum penalty for the offences referred to in Article 2961 para. (1) points c), d), e), g), i) in the Tax Code increased 3 to 4 years.

[41] This legal text was subject to constitutional review, the motivation being that the ordinance came into force on the day of its publication in the Official Journal of Romania, although it is stated that it enters into force "after" publication, which does not correspond to the day of publication. The orders challenged in the respective case establish that the provisions of the Government Emergency Ordinance no. 54/2010 on measures aimed at combating tax evasion shall apply *from the date of publication in* the Official Journal of Romania, Part I, the fact that only after publication may we speak of entry into force being obvious enough. As regards the entry into force of regulatory acts, this makes up the subject of another study.

[42] In this respect, see Decision No. 28 of 5th February 2013, published in the Official Journal of Romania, Part I, no. 164 of 27th March 2013.

In the context presented, both the phrase contained in Government Emergency Ordinance no. 54/2010 and that in the Constitution have the same legal effects, being an application of the principle of non-retroactivity of the law, except for the more favourable criminal or contraventional law. Furthermore, by corroborating constitutional provisions, the idea that emergency ordinances cannot enter into force before being published in the Official Journal emerges, the date of publication being relevant to the date of entry into force of the regulatory act.

But the contencious constitutional court shows that *"the situation is different as concerns the date of application of the regulatory act which, according to the principle of mitior lex (milder law) is within the competence of the judicial authority",* therefore, it falls upon the court to interpret and apply the law in the course of time.

So, from the examination of the constitutional provisions it results that for the emergency ordinance to enter into force, hence to produce legal effects, it must meet certain conditions, namely it must be submitted to the Chamber having the competence to be notified in order to be debated in an emergency procedure, and be published in the Official Journal of Romania. If the Senate and the Chamber of Deputies are not in session, they shall be convened mandatorily within 5 days from the submitting or, where appropriate, from the forwarding.

As we see, the submittal of the emergency ordinance to the Chamber having the competence to be notified and its publication are two successive stages in the regulatory process. As regards the entry into force "on the date of its publication in the Official Journal" and "after its publication in the Official Journal" (constitutional text), both phrases express mathematically the same thing: the emergency ordinance shall enter into force on the day when it is published.

As stated in the Official Journal, the publication date for Government Emergency Ordinance no. 54/2010 is 23rd June 2010. This is the day of both its entry into force and the beginning of its application. The date of the publication of the ordinance is the zero hour of that day. Only after this date/time can ordinances be applied. So, the date of entry into force of the Ordinance and *"from the date of publication"* have the same meaning. Thus, it can happen for a person to be held criminally liable for an act he/she has committed just before the unfolding of the procedures provided for by Article 115 para. (5), if the day of entry into force corresponds to the day of publication in the Official Journal or, why not, even to the day of adoption by the Government.

Given the above, although it is considered that the delegated lawmaker is not bound to legislate in the field of organic law, respectively that of offences or penalties, we believe, however, that an analysis is required concerning the constitutional provisions on the prohibition of regulation by way of legislative delegation provided for in Article 115 para. (6) in relation to the fact that emergency ordinances cannot affect fundamental rights and freedoms, and follow the constitutional regime of the entry into force of the law laid down in Article 78 of the Constitution, namely, *"the law shall enter into force 3 days after the date of its publication in the Official Journal of Romania, Part I, or on a subsequent date stipulated in its text",* which would be consistent with both the constitutional provisions and the conventional ones regarding the predictability of the law, this being also the intention inthe jurisprundece of the European Court of Human Rights, which ruled that the legal rule must be accessible and foreseeable enough for citizens to have sufficient information on the legal rules applicable in a given case and thus, be able to foresse, to a reasonable extent, the consequences that may arise[43].

[43] This is the intention of the Decision of 25th November 1996, in the Case *Wingrove v. United Kingdom*, by which the European Court of Human Rights held that a relevant domestic law, encompassing both written law and unwritten law, must be phrased with enough precision to allow those concerned, who may resort, if necessary, to an expert's advice, to foresee, to a reasonable extent, in the particular circumstances of the case, the consequences that may result from a determined act.

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PUBLIC HEALTH SISTEM IN SWEDEN

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Abstract
The Swedish health care system is a socially responsible system with an explicit public commitment to ensure the health of all citizens. Quality health care for all is a cornerstone of the Swedish welfare state. The 1982 Health and Medical Services Act not only incorporated equal access to services on the basis of need, but also emphasizes a vision of equal health for all. Three basic principles areintended to apply to health care in Sweden. The principle of human dignity means that all human beings have an equal entitlement to dignity, and should have the same rights, regardless of their status in the community. The principle of need and solidarity means that those in greatest need take precedence in medical care. The principle of cost–effectiveness means that when a choice has to be made between different health care options, there should be a reasonable relationship between the costs and the effects, measured in terms of improved health and improved quality of life.

Keywords: *public health, equal acces, authorities, national level, local level.*

Introduction

The present structure of the Swedish health care system reflects a long history of public funding and ownership, together with the growing importance of local self-government. Developments until the late 1960s were characterized by a growth in the number, size and importance of hospitals, largely determined by an expanding medical profession. During the 1960s, county councils' responsibility for hospital services became integrated with responsibility for mental health services and general outpatient services, previously a national government responsibility. By 1982, a new act formally handed over responsibility for the planning and provision of services to the county councils. During both the 1960s and the 1970s, health care expenditures and physical resources grew continuously. The chief concern at both the national and local government levels was to improve equal access to services. Since the late 1980s, attention has shifted to cost control and efficiency, and to a growing demand for performance and quality in more recent times.The Swedish health care system is organized into three levels: the national, regional and local. The Health and Medical Services Act of 1982 specifies that the responsibility for ensuring that everyone living in Sweden has access to good health care lies with the county councils/regions and municipalities. The Act is designed to give county councils and municipalities considerable freedom with regard to the organization of their health services. The state, through the Ministry of Health and Social Affairs, is responsible for overall health care policy. There are eight government agencies directly involved in the area of health care and public health: the National Board of Health and Welfare, the HSAN, the Swedish Council on Technology Assessment in Health Care. The 17 county councils and 4 regional bodies are responsible for the funding and provision of health care services to their populations. The 290 municipalities are legally obliged to meet the care and housing needs of older people and people with disabilities. There is a mix of publicly and

privately owned health care facilities but they are generally publicly funded.. There are about 70 hospitals at the county level.[1]

1. Organization levels of Swedish health system

A. National level

The Ministry of Health and Social Affairs works to meet the objectives setby the Riksdag in the area of health care, health and social issues/insurance.This includes people's financial security, social services, health care, publichealth and the rights of children and people with disabilities. There are eightgovernment agencies directly involved in the area of health, medical care andpublic health: the National Board of Health and Welfare

the HSAN (Hälso- och Sjukvårdens Ansvarsnämnd), the SBU (Statens Beredning för Medicinsk Utvärdering), the MPA (Läkemedelsverket), the TLV(Tandvårds- och Läkemedelsförmånsverket), the Swedish Agency for Health and Care Services Analysis (Myndigheten för vårdanalys) and the National Institute for Public Health(Folkhälsoinstitutet), the Swedish Social Insurance Agency (*Försäkringskassan*).

The National Board of Health and Welfare is a large government agency, engaged in a wide range of activities in the areas of social services, healthcare services, environmental health, communicable disease prevention and epidemiology

The Medical Responsibility Board (*HSAN*) is a government agency that decides on disciplinary measures in the event of complaints or possible malpractice The Swedish Council on Health Technology Assessment – SBU is also a government agency who have the primary objective to promote the use of cost-effective health care technologies. The SBU has the mandate to review and evaluate health care technology from medical, economic, ethical and social points of view. Information on reviews of evidence is disseminated to central and local government officials and medical staff to provide basic data for decisionmaking

The Medical Products Agency is the Swedish national authority responsible for the regulation and surveillance of the development, manufacture and sale of drugs and other medicinal products. All drugs sold in Sweden must be approved by and registered by with the MPA. The TLV (formerly LFN until 2008) started its operation in October 2002 with the primary task of deciding if a medicine or medicinal product should be subsidized and included in the pharmaceutical benefits scheme.Since 2008, the TLV also has the mandate to decide which dental services should be subsidized. The TLV is also responsible for monitoring activities in the pharmacy market In the area of public health, the National Institute for Public Health is also a government agency under the Ministry of Health and Social Affairs. It is similar to the national government health departments that exist in many countries, but it reports both to the Minister of Health and Social Affairs and to an independent board of directors Regarding financial security, the Swedish Social Insurance Agency (*Försäkringskassan*) is the authority that administers the various types of insurance and benefits that make up social insurance in Sweden. Insurance benefits include sickness insurance, parental insurance, basic retirement pension, supplementary pension, child allowance, income support and housing allowance. The Agency is also engaged in work designed to prevent and reduce ill health through positive proactive action with the eventual goal of returning the person to the workforce. The Swedish Social Insurance Agency has a regional branch office in each county council that processes individual cases at the regional and local levels.[2]

The regional and local authorities are represented by the SALAR (*Sveriges Kommuner och Landsting*) at the national level. The SALAR was formed in 2007 by merging the Federation of Swedish County Councils (*Landstingsförbundet*) and the Swedish Association

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[1] Diderichsen, Finn. Devolution in Swedish Health Care." Pub Med Central. *British Medical Journal*", London, 1999, p.22

[2] Anders Amer,Health system in transition, The European Observatory on Health Systems and Policies, in partnership between the World Health Organization Regional Office for Europe,"*Europe Monitor*"Copenhag, 2005, p. 73.

of Local Authorities (*Svenska Kommunförbundet*).The SALAR is a collaborative nationally oriented organization, representing all county councils/regions and municipalities in Sweden. The organization strives to promote and strengthen local self-government and provide local authorities with expert assistance. In addition, it serves as the employers' central association for negotiating terms of employment and local wage bargaining for the personnel employed by the county councils and municipalities.[3]

B. Regional level

At the regional level, the structure of care can be divided into primary care, district county council care (*Länssjukvård*) and regional care (*Regionsjukvård*). There are approximately 1100 primary care centres, about 70 district county council hospitals and 7 regional/university hospitals. The county councils have the overall responsibility for all health care services delivered (including dental care). The executive board of the county council, or an elected hospital board, decides how to organize the management. The county councils are grouped into six medical care regions (the Stockholm Region, the South-Eastern Region, the Southern Region, the Western Region, the Uppsala–Örebro Region and the Northern Region). These regions were established to facilitate cooperation in tertiary care among the county councils.Each region serves a population averaging more than 1 million people. Hospitals are primarily publicly owned. There are six private hospitals in the country of which three are not-for profit. The proportion of private primary care units varies substantially between the county councils.

C.Municipal level

The traditional organization of the municipalities involves a municipal executive board, a municipal council and several local government committees. The municipal executive board leads and coordinates the entire municipality's business and acts as a supervisor for the committees. The board is responsible to the municipal council for following up on matters that influence the development and economy of the municipality. The municipal council's duty is to make decisions about taxes, goals and budgets for all community-run businesses, and about the organization and tasks of the committees.The responsibilities of a municipality include issues relating to the immediate environment of the citizens, for example schools, social welfare services, roads, water, sewerage, energy, etc. Besides providing financial assistance, social services in Sweden cover child care, school health services, environmental hygiene, and care for older and disabled people and long-term psychiatric patients. Patients who have been fully medically treated and have been discharged from emergency care or geriatric hospitals also fall within the remit of the municipalities. There are both public and private nursing homes and home care providers.

2. Decentralization and centralization

Local self-government has a very long tradition in Sweden and is intended to create opportunities for development in service provision throughout the country. Decentralization of responsibilities within the Swedish health care system not only refers to relations between central and local government, but also to decentralization within each county council. Since the 1970s, financial responsibility has gradually been decentralized to providers within each county council. The county councils' financial and planning responsibility for health care services is clearly articulated in the 1982 Health and Medical Services Act, and has been further reflected in decentralization efforts within each county council. Changes in county council management systems reflect the goals and problems that county council politicians and responsible officials have encountered. The degree of decentralization, organization and management has come to vary considerably among county councils. As a result, the tradition of local self-government has led to regional differences in the governance and provision of health care between county councils. Local self-government is partly intended to create different solutions to service delivery rather than similar services in all county councils and

[3] Anna Glenngard,The swedish health care system, "*Comm on wealth Fund*", 2012, Stockolm, p. 153.

regions. The strong tradition of local self-government has however also led to less favourable regional differences, for example with respect to the uptake of new medicines According to the Health and Medical Services Act of 1982, the county councils are expected to plan the development and organization of health care according to the needs of their residents. Thus, the county councils/regions make most of the resource-allocation decisions regarding health services within their geographical area. Traditionally, however, the central government and the county councils have collaborated extensively regarding planning and resource allocation for highly specialized regional (tertiary) health services and certain investments in high technology.

3. Financing of Swedish health system

Health care expenditure as a share of GDP was 9.9% in Sweden since 2009. Health care is largely financed by tax in Sweden. About 80% of all expenditures on health are public expenditures. Both the county councils and the municipalities levy proportional income taxes on the population to cover the services that they provide. The county councils and the municipalities also generate income through state grants and user charges. About 4% of the population have VHI, in most cases paid for by their employer. Funding from VHI constitutes about 0.2% of total funding. About 17% of total funding of health expenditures is private expenditure, predominantly user charges. User charges for health care visits and per bed-day are determined by individual county councils and municipalities. In 2011, the fee for consulting a physician in primary care varied between SEK 100 and SEK 200 (€11–22). The fee for consulting a specialist at a hospital varied between SEK 230 and SEK 320 (€25–35). Patients are charged about SEK 80 (€9) per day of hospitalization. In almost all county councils, patients under 20 years of age are exempt from user charges. The government regulates high-cost protection schemes that cover health care outpatient visits. The national ceiling for out-of-pocket (OOP) payments means that an individual will never pay more than SEK 1100 (€122) for health care visits within a period of 12 months. Co-payments for prescribed drugs are uniform throughout the country and fully regulated by the government. The patient pays the full cost for prescribed drugs up to SEK 1100 (€122), after which level the subsidy gradually increases to 100%. The maximum co-payment for prescribed drugs within a 12-month period is SEK 2200 (€244.The mechanisms for paying providers vary among the county councils, but payments based on global budgets or a mix of global budgets, case-based and performance-based payment are commonly used in hospitals. Payment to primary care providers is generally based on capitation for registered patients, complemented with fee-for-service and performance-based payments. The county councils pay the full cost for all inpatient drugs. For reimbursed prescription drugs, the county councils receive a government grant that is negotiated at central level between the SALAR and the government.[4]

4. Health care services

Most of the work in public health as well as other health-related work is carried out at regional and local levels in Sweden. The county councils manage the health care services while the municipalities manage areas such as compulsory and upper secondary education, pre-school, care for older people, roads and water, waste and energy. Sweden adopted a national public health policy in 2003, which states that public authorities should be guided by 11 objectives, covering the most important determinants of population health. The 11 public health objectives are:

1. participation and influence in society;
2. economic and social prerequisites;
3. conditions during childhood and adolescence;
4. health in working life;
5. environments and products;

[4] Hogberg, David. "Sweden's Single-Payer Health System Provides a Warning to Other Nations.", *MacMillan Press*, Stockolm, 2009, p. 65.

6. health-promoting health services;
7. protection against communicable diseases;
8. sexuality and reproductive health;
9. physical activity;
10. eating habits and food;
11. tobacco, alcohol, illicit drugs, doping and gambling.

Since 2005, there has been a new care guarantee in Sweden, which aims at strengthening the patient's position, improving accessibility and ensuring equal access to elective care in different parts of the country. The guarantee is based on instant contact (zero delay) with the health care system for consultation; seeing a general practitioner (GP) within seven days; consulting a specialist within 90 days; and waiting for no more than 90 days after being diagnosed to receive treatment. From July 2010, the guarantee is regulated by law and includes all elective care in the county councils. One important aim behind structural changes in Swedish health care since the 1990s has been a shift from hospital inpatient care towards outpatient care at hospitals and primary care facilities, respectively. Primary care, delivered by more than 1100 public and private primary care units throughout the country, involves services that do not require advanced medical equipment and is responsible for guiding the patient to the right level within the health system. For conditions requiring hospital treatment, medical services are provided at about 70 public hospitals at the county level and 6 private hospitals. Specialized somatic care involves health care services requiring medical equipment or other technologies that cannot be provided in the primary care setting. A relatively large proportion of the resources available for medical services has been allocated to the provision of care and treatment at hospital level. About two-thirds of the county hospitals are acute care hospitals, where care is offered 24/7 and a larger number of clinical expert competences are represented than in local hospitals with more limited acute services. There is one private acute care hospital in the country. Several local hospitals have been transformed into specialized hospitals since the mid 1990s, offering elective treatments to a wider geographical area, but with no general acute services. Highly specialized care is provided at the seven public university hospitals. There are about 1200 pharmacies throughout the country, distributing prescription and non-prescription drugs to the population and to hospitals and other health services[5]

5. Health reforms in Sweden

Reforms in Swedish health care are often introduced by local authorities in the form of county councils and municipalities. This means that the pattern of reform varies across local government, although mimicking behaviour usually occurs. During the past 10 years, reforms initiated by individual county councils have focused on developing primary care and coordinated care for older people. The number of private primary care providers has increased substantially, although public ownership of health centres is still the norm in most county councils. In parallel, restructuring of the hospital sector, involving specialization and concentration of services that were initiated in the 1990s, has continued. The governance and management of services have increasingly come to focus on comparisons of quality and efficiency. Reforms initiated at the national level have focused on the responsibilities of county councils and municipalities, more direct benefits for patient groups and regional equality of services. Key national reforms since the late 1990s have aimed at shortening waiting times for services. A new waiting-time guarantee was introduced in 2005 and has been regulated by law since 2010. Several national reforms have also aimed to improve primary care, psychiatric care and coordination of care for older people. Since 2002, the TLV has had the responsibility of deciding if a prescription drug should be subsidized and included in the

[5] Glenngard, Anna H, Frida Hjalte, Marianne Svensson, et al. "Health Systems in Transition: Sweden." *The European Observatory on Health Systems and Policies, in partnership between the World Health Organization Regional Office for Europe*, "*Europe Monitor"* Copenhagen, 2005, p. 83.

reimbursement scheme, based on information about the cost–effectiveness of various products.[6]

The themes for refoms was:

• continued specialization and concentration of services within the hospital sector;

• regionalization of health care services including mergers between county councils;

• improved coordinated care, particularly for older people;

• more choice of provider, competition and privatization to support the development of primary care;

• privatization and competition in the pharmacy sector;

• changes in subsidies and co-payments for pharmaceuticals and in particular dental services;

• increased attention to public comparisons of quality and efficiency

Conclusions

Several recent changes in Swedish health system by anemerging performance paradigm in the governance and management ofhealth care. Key words related to the current and expected future trend are national quality registers, public comparison of quality and efficiency across local authorities and providers, value for money invested in health care, health outcomes and benefits from the patient perspective, process orientation and coordinated services. More attention is being paid to the need to establish valid performance indicators and to increase abilities to monitor performance on a regular basis by investments in registers and new information technology (IT) solutions. As a result of increased transparency, more attention is also directed towards differences in results and outcomes across regions and providers, and the learning opportunities that such differences provide. An important obstacle is the preference for local production across county councils, local hospitals and, not least, specialists themselves. Concentration of services to the regional hospitals is not always supported by outcome data available in the national quality registers. An emerging issue is the long-run financing of health care services

The objective of authorities was to improve services by integration between care and social services of the municipalities. In the last decade, a trend towards increased intervention from the national government can be noted. This is exemplified by new legislation regarding waiting times and patient safety and national financial incentives to promote the development of primary care, psychiatric care, care for older people and improved access to elective services.

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BRIEF CONSIDERATIONS ON SOME ASPECTS OF THE PROCEDURE OF DISCIPLINARY INVESTIGATION OF THE CIVIL SERVANTS IN ROMANIA

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Abstract
The procedure of administrative investigation prior to the application of a disciplinary sanction for the civil servant has its origin in the prior disciplinary investigation stated by the Labor Code, but has some additional valences, by a detailed regulation, according to the administrative law. Knowing and correctly applying these legal norms insures the legitimacy of the judicial act establishing the disciplinary responsibility of the civil servant.

Keywords: *civil servant, disciplinary deviance, administrative procedure, judicial liability*

Introduction

In literature was correctly mentioned[1] *that the civil position and the civil servant are legal institutions of the public law, in general, and especially of the administrative law, over which doctrinaire, legislative and jurisprudential controversies have arisen in time, both in nationally, as well as in the practice of different European states*[2] *having an administrative system well anchored in the socio-judicial reality.*

Directly regarding the civil servant, his disciplinary responsibility enjoys a normative regulation different than the disciplinary responsibility of other categories of employees. For disciplinary deviances committed by the first category of employees, according to the Law No 188/1999 on the Status of Civil Servants[3]*, the applicable sanctions are: written reprimand; reduction of salary rights with up to 5-20% for a period up to 3 months; suspension of the advancement right in salary levels or, as it case may be, of the advancement right in public position for a period that goes from 1 to 3 years; degradation in salary levels or degradation in public position for a period up to one year; removal from the public position. For the*

[1] Andreea Drăghici, Ramona Duminică, *Deontologia funcționarului public. Curs pentru studenții programului frecvență redusă*, University of Pitești Publishing House, Pitești, 2010, p. 8.
[2] Elise Nicoleta Vâlcu, *Introducere în dreptul comunitar material*, Sitech Publishing House, Craiova, 2010, pp. 106 and next.
[3] Republished in the Official Gazette of Romania, Part 1, No 251/22 March 2004 and in the Official Gazette No 365/29 May 2007, with subsequent modifications and amendments.

application of these sanctions stated by Art 77 Para 3 of the Statute, it is mandatory the performance of a prior disciplinary investigation.

According to Art 79 of the Statute, in order to analyze the acts appraised as disciplinary deviations and to propose disciplinary sanctions applicable to civil servants within public authorities or bodies, the discipline commissions are to be established. The organization and function of these commissions is stated by Government Decision No 1344/31 October 2007 on the organization and function of the discipline commissions.

The discipline commissions are deliberative structures, without legal personality, independent in the performance of their attributions, being established one for each public authority or institution, by an administrative act of the manager of the entity.

The discipline commissions perform their activity based on the following principles:

a) Presumption of innocence;
b) Guaranteeing the right to defense;
c) Principle of contradiction;
d) Proportionality, according to which must be maintained a fair relation between the seriousness of the disciplinary deviation, the circumstances of its commission and the disciplinary sanction proposed to be applied;
e) The legality of the sanction;
f) The uniqueness of the sanction;
g) The obligation to express an opinion, according to which each member of the commission has the obligation to issue an opinion regarding each cause submitted to the discipline commission.

Also, we may talk about the principle of open sessions[4], but only at the request or based on the written agreement of the civil servant whose action has been appraised as a disciplinary deviation.

The notification of the discipline commission about the disciplinary deviation committed by a civil servant may be made by any person who considers to be prejudiced by the civil servant's action. Considering that the Decision only states about the notification of the discipline commission, we agree with the opinion[5] according to which if the notifications are addressed to the manager of the public authority or institution or to the manager of the department in which the civil servants is registered, they have the obligation to submit the notification to the competent commission.

The notification shall mandatory be written and must comprise the following elements:

a) Name, surname, domicile or, where appropriate, the working place and position held by the person who submitted the complaint or the name and headquarters of the legal person, where appropriate, the name and position of its legal representative, and the mailing address if it is different than the domicile one;
b) Name and surname of the civil servant whose action is appraised as a disciplinary deviation and the name of the public authority or institution where he performs his duties or, if these information are unknown, the complaint must state other identification elements of the civil servant;
c) The description of the action representing the object of the complaint and when it was committed;
d) The evidences on which the complaint is based on;
e) Date
f) Signature

The complaint shall be submitted at the registry office of the public authority or institution where the civil servant performs his activity, namely at the registry office of the

[4] Art. 30 Para 3 of the Government Decision No 1344/2007.
[5] Ana Mocanu-Suciu, *Deontologia funcției publice*, Techno Media Publishing House, Sibiu, 2010, p. 157.

public authority or institution where the competent discipline commission is established according to the present decision. After submission, the complaint shall be sent to the secretary of the discipline commission within maximum 3 working days. The secretary of the discipline commission shall register the complaint and shall present it to the president of the discipline commission within maximum 3 days from the registration date.

After the complaint is received, the president of the discipline commission shall establish with celerity the term of the first session of the discipline commission and shall dispose, by an address, the summoning of all its members.

After the first session of the discipline commission, three solutions may be adopted:

1. The complaint is classified and a report in this regard is filled in, in the following cases:

a) The complaint was not submitted within the term of 18 months from the commission of the action appraised as a disciplinary deviation, term stated by Art 28 Para 2 of the G.D. No 1344/2007;

b) The complaint does not contain the constitutive elements or the civil servant cannot be identified based on the elements stated in the complaint;

c) It regards the same civil servant and the same action committed in the same circumstances for which was performed an administrative investigation followed by the proposal of a disciplinary sanction or the complaint was classified.

2. The commission finds that it does not have the competence to rule about the complaint. In this case, it shall send the complaint to the competent discipline commission and shall inform the person who submitted it about declining the jurisdiction. The notification shall be made by an address signed by the president and all the members of the discipline commission, as well as by its secretary.

3. It shall be ruled the initiation of the administrative investigation. The president of the discipline commission shall establish the date and place of the next session and shall rule the summoning of all members, of the civil servant whose action has been appraised, as well as of the person who submitted the complaint.

The procedure of the administrative investigation is mandatory before the application of the disciplinary sanctions, except for the written reprimand. Though, according to Art 30 of the G.D No 1344/2007, the administrative investigation is mandatory also for the written reprimand if it was appealed to the manager of the public authority or institution. By this normative provision, it is stated a special mean of appeal for the written reprimand. Nevertheless, Art 78 Para 3 of the Law No 188/1999 states the obligation of the performance of the prior investigation of the offence and the hearing of the civil servant, recorded in writing, before the application of any disciplinary sanction. Since the law does not distinguish between sanctions, applying the adage *ubi lex non distinguit, nec nos distinguere debemus*, these provisions are also applicable for the written reprimand, even if Art 30 excludes the written reprimand from the sanctions for which it is necessary an administrative investigation.

Art 77 Para 7 of the Statute states the rule according to which, during the administrative investigation, if the civil servant committed an offence which could influence the administrative investigation, the manager of the public authority or institution has the obligation to prohibit his access to documents which could influence the ongoing investigation or, if necessary, to decide to temporarily transfer the civil servant to another department or another structure part of that public authority or institution, considering the circumstances from the moment when it was taken the decision to prohibit the access or for the temporarily transfer. The High Court of Cassation and Justice[6] showed that it is justified the application of such measure in the case of the executive manager of the institution because he could

[6] Decision No. 1210/21 March 2008 of the High Court of Cassation and Justice, Section for Contentious Administrative and Fiscal Business, in the Cassation Bulletin, No. 3/2008, pp. 9-11.

influence the ongoing investigation for deviations imputed to him, while specifying that the legality of an administrative act is appreciated in relation to the *de jure* and *de facto* situation existing when the act was issued or adopted. According to Art. 44 of the G.D. No. 1344/2007, if there are clues that the civil servant whose action has been appraised as a disciplinary deviation could influence the administrative investigation, the discipline commission must issue a report proposing the temporarily transfer to another department or another structure of that public institution or authority and/or prohibiting the access to documents which could influence the investigation or, if necessary, suspending his labor contract. This report is submitted to the person competent in applying the disciplinary sanction for the civil servant whose offence is under investigation, who has the obligation of notifying the discipline commission within 10 days from when it has received the report regarding the measures to be applied.

The person who submitted the complaint and the civil servant whose action has been appraised may participate in the administrative investigation personally or may be assisted or represented by lawyers.

According to Art. 31 of the Decision, the discipline commission may appoint 1 or 2 members or, if necessary, may request, after the approval from the manager of the public institution or authority where the action was appraised as a disciplinary deviation, or from the department of control of the involved public authority or institution to perform an administrative investigation and to present a report stating the results of that investigation, as well as the documents on which the report is based on.

If the department of control is subordinated or coordinated by the civil servant whose action has been appraised as a disciplinary deviation or such department does not exist, the performance of the administrative investigation can be delegated to the department of control of the superior public authority or institution.

For civil servants from the specialized apparatus of the mayor or county council, the disciplinary investigation can be delegated to the department of control of the prefecture.

Regarding the appointment of the members for the disciplinary investigation, the discipline commission shall elaborate a verbatim record comprising:

a) The registration number of the complaint for which the competence for administrative investigation is delegated;

b) The person who submitted the complaint and the person against whom it was submitted;

c) The person(s) or the department which is delegated with the competence;

d) The limitations of the delegation of competence;

e) The term established for the report stating the results of the investigation, as well as the documents on which it is based on;

f) Date;

g) The signature of the president and of the other members of the commission, as well as of the secretary.

The convocation of all the members of the discipline commission or of the persons appointed to perform the administrative investigation to sessions is made by an address, by the secretary of the commission, at the request of the president. The address is communicated either personally upon signature, by recorded delivery post or by electronic post. The evidences of communication shall be added to the case file.

The persons who are about to be heard shall be convoked by the president of the discipline commission, by individual summon which shall state the following constitutive elements, under the sanction of nullity:

a) Registration number and date of issuance;

b) Name, surname and domicile or headquarters of the institution where the person performs its current activity and his position;

c) Registration number and date of the complaint submitted to the discipline commission;

d) Place, date and hour of the hearing;

e) Name, surname and signature of the discipline commission's president.

The communication of the summon and of all procedural documents shall be made by the secretary of the discipline commission, personally, in the same way as the address convoking the members or persons appointed to perform the administrative investigation, at the domicile or residence of the summoned person, or to the mailing address, within minimum 5 working days before the established term. The presence of the summoned person in front of the discipline commission, personally or by representative, covers any procedural flaw. If the person summoned refuses to accept the summons or to sign for it a verbatim record shall be filled in.

The civil servant whose action is appraised in the complaint shall receive, beside the summons, a copy of the complaint, as well as copies of the writings submitted by the person who submitted the complaint, if necessary. The civil servant may submit a brief motion encompassing his answer to the allegations made, as well as the means of evidence that he intends to use. The means of evidence are writings and witnesses.

According to Art. 38 of the G.D. 1344/2007, the person who submitted the complaint and the civil servant whose action was appraised may require in writing that the administrate investigation be performed in their absence, based on the documents attached to the case file, except the terms established for hearings.

Within the hearings, the discipline commission or the persons appointed to perform the administrative investigation shall hear both the person who submitted the complaint, the civil servant investigated, as well as the called witnesses. The person who submitted the complaint shall be heard separately from the civil servant whose action has been appraised as a disciplinary deviation. At the request of one of the parties and with the other's agreement, the hearing may take place in the presence of the person who submitted the complaint and of the civil servant investigated.

After the hearing verbatim report shall be filled in for each party, containing the questions asked by the members of the discipline commission or by the persons appointed to perform the administrative investigation, as well as the answers of the heard person, signed on each page by all the present persons. If the heard persons do not want or cannot sign, this shall be mentioned in the verbatim report. Also, in the verbatim report is stated for the legally summoned persons their refusal to attend the hearings, refusal which does not impede the administrative investigation. Also, the verbatim report shall mandatory state the term in which the means of evidence which have not been request during the hearing may be invoked in front of the discipline commission or of the persons appointed to perform the investigation, but no later than the deadline when the discipline commission shall administer the evidences. This term shall be communicated to the civil servant whose action has been appraised, as well as to the person who submitted the complaint.

During the sessions shall be analyzed the evidences proposed in the hearing by the parties, as well as the evidences that the discipline commission considers necessary. The parties have the right to study the documents used and the results of the commission's activity regarding the action appraised as disciplinary deviance.

As well, if there are indications that the offence committed by the civil servant may involve his civil, contravention or criminal liability, the discipline commission has the obligation to take the legal measures necessary for the notification of the competent organs.

The discipline commission shall analyze and debate the case based on the following documents:

a) Verbatim reports of the sessions;

b) Verbatim reports of the hearings of the persons who submitted the complaint and of the civil servant whose action is investigated;

c) The evidences submitted;

d) The report of the persons appointed to perform the administrative investigation, if it was initiated;

After the debates, the discipline commission may propose one of the following solutions:

a) The application of one of the disciplinary sanctions, if the commission of a disciplinary deviation has been proven;

b) The classification of the complaint, when the commission of a disciplinary deviation is not confirmed.

If the complaint is classified, a report shall be elaborated and sent to the person who, by an administrative act, approved the discipline commission and shall be communicated to the person who submitted the complaint.

The procedure of administrative investigation shall be concluded:

a) When the debates on the case are over;

b) Within 3 months from the cessation of the professional relations of the civil servant whose action was appraised as a disciplinary deviation, except the case stated by Let c), to the extent to which the civil servant investigated does not regain his position as civil servant during this time;

c) At the death of the civil servant.

For the last two situations, the complaint shall be classified, based on a report communicated to the person who, by an administrative act, approved the discipline commission and to the person who submitted the complaint.

Within 5 working days from the completion of the administrative investigation, the discipline commission shall fill in a report regarding the complaint, which must state the following elements:

a) Registration number and date of the complaint;

b) Full name and position of the civil servant who's action has been appraised as a disciplinary deviation, as well the department where he performs his activity;

c) Full name and address of the person who submitted the complaint or, where appropriate, the working place and position held by him;

d) The brief presentation of the action appraised and of its circumstances;

e) The evidences to be administer;

f) The proposal regarding the disciplinary sanction to be applied or, where appropriate, the proposal to classify the complaint. The proposal shall be formed based on the vote of majority. The member of the commission who has a different opinion shall type and sign his separate opinion, presenting the grounds on which is based. If the discipline commission proposes the application of the disciplinary sanction regarding the diminution of the salary rights, the suspension of the right to promote in the degrees of salary or, to promote in a public position, the degradation in public position, it shall state their duration and shall propose the percentage for the diminution of the salary rights, namely the position on which he shall be degraded.

g) The motivation of the proposal;

h) Full name and signatures of the president and of the other members of the discipline commission, as well as those of its secretary;

i) The date of the report.

This report is communicated to the person with legal abilities in applying the disciplinary sanction, to the person who submitted the complaint and to the civil servant investigated, using the same rules of communication as well as in the case of other procedural acts. Based on this report, the manager of the public institution shall establish the application of the disciplinary sanction, which can be different than the one proposed by the commission.

Conclusions

The specific establishment of the procedure of administrative investigation prior to the application of a disciplinary sanction for civil servants has been imperious necessary in order

to insure the legality of the administrative act for sanction, legality which, beside veracity and authenticity must govern the administrative act. Also, the procedure of administrative investigation stated by G.D No 1344/2007 creates the conditions necessary for an objective analysis of the situation, analysis performed by an independent commission, which is not subjected to the manager of the institution and who is compelled to respect the principles and requirements imposed by the normative act, the procedure of administrative investigation being unitary for all categories of civil servants.

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THE RIGHT OF AUTHORSHIP ON A WORK

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Abstract

The moral rights represent the legal expression of the relationship between the work and its creator; they precede, survive and exert a permanent influence on the economic rights. Moral rights are independent of economic rights, the author of a work preserving these rights even after the transfer of its property rights.

The right to claim recognition as the author of the work, called in the doctrine as the "right of paternity of the work" is enshrined in art. 10 lit. b) of the law and it is based on the need to respect the natural connection between the author and his work. The right to authorship is the most important prerogative that constitutes intellectual property rights in general and consists of recognizing the true author of a scientific, literary or artistic work.

Key words: *author, copyright, moral right, the right of authorship, The Berne Convention from 1886, The Rome Conference from 1928*

Introduction

The Berne Convention for the protection of literary and artistic works of September 9, 1886[1]*, which is the first and primary mean of international protection of copyright of literary, artistic and scientific works, didn't provide exclusive dispositions on which the moral rights of the author to be recognized as a separate faculty of law operating separately from the economic rights. In 1926, during a course held at the Hague National Law Academy, the Italian jurist Francesco Ruffini, a professor at the University of Turin, prophesied, saying that the moral right of the author "is about to become a dogma of international common law".*

Following the research in the field of doctrine and jurisprudence, during the Rome Conference of 1928[2]*, when there was a second revision of the Berne Convention, it was decided the existence of authors moral rights and also the introduction of article 6 bis under the following form: "Independent of the economic rights, and even after the transfer of those rights, the author retains the right to claim the authorship of the work and the right to object to any distortion, mutilation or other change of that work which would be prejudicial to its honour or reputation (paragraph 1). It is reserved for the national legislation of the Union Countries to establish the conditions for exercising these rights. The means to defend them will be governed by the laws of the country where the protection is required (paragraph 2)".*

[1] The Berne Convention for the protection of literary and artistic works of September 9, 1886, revised at Berlin on 13 November 1908 at Rome on June 2, 1928, published in the Official Gazette of Romania no. 123 of 31 May 1935. Romania joined the Berne Convention according to Law no. 77/1998, published in the Official Gazette of Romania, Part I, No. 156 of 17 April 1998.

[2] The Rome Conference was held from May 7 to June 2, 1928. At the reviewing Conference from Rome attended 34 delegates from the 37 member states of the Union, including Romania, and delegates from 21 countries that were not members of the Berne Union. The Rome Act of 1928 was signed by a total of 28 countries including Romania, and by the deadline set by the conference (August 1, 1931) was ratified by 13 states.

Thus, by the introduction of Article 6 bis it was recognised, for the author, the existence of a right that will permit it to claim the authorship of the work and to object to any distortion, mutilation or modification of the work which would be prejudicial to author' honour or reputation[3].

The notion of moral rights

The moral rights of the author are inalienable and imprescriptible rights arising from copyright laws recognized by the most states[4] and whose content is not expressed in a pecuniary form. The moral rights represent the legal expression of the relationship between the work and its creator; they precede, survive and exert a permanent influence on the economic rights. Moral rights are independent of economic rights, the author of a work preserving these rights even after the transfer of its property rights.

The moral rights of the author and their legal protection did not constitute the subject to legislative concerns only very late, the main cause of this was the lack of reproduction means of literary and artistic works. The lack of possibility of multiplying the intellectual creations manuscripts made this operation to be done manual through writing, so it was very heavy and at the same time expensive.

In the foreign doctrine, the moral right was the subject of arguing, some authors disagree on neither its notion nor its definition. Thus, since 1897, the French writer Jules Lermina show that *"artist's moral right is the right to defend the integrity of the work by its matter and form"*[5] and the French deputy Marcel Plaisant defined the moral right as *"high sovereignty"* which the author carries on the product of his talent and enables it to intervene whenever it finds that the integrity of the work is jeopardized and his personal interests are staked. Nicolas Stolfi, an acclaimed jurist of the time, suggested the name of *"personal right"*[6] and jurist Jules Destrée called it the *"right to respect"*.

In Romania, having regard to the provisions of article 3 of the Law on Literary and Artistic Property no. 126/1923[7], Professor Florin C. Tărăbuţă defined the moral right *"as the author's right to create and to control its work and to claim from any person the respect which is due to anyone's personality expressed through the work"*[8] and M. Beiller (former Romanian expert at the conference in Rome in 1928) show that *"moral rights include: the right to the recognition of intellectual authorship of the work; the right to decide whether or not to show the work and the right to claim full and faithful reproduction of the work"*[9]. Based

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[3] See for details Ciprian Raul Romițan, *Authors moral rights*, Universul Juridic Publishing House, Bucharest, 2007, pp. 76-78.

[4] In the common law legislations, such UK and USA, the moral rights of the author are almost ignored, they are not separately protected. According to art. 4-142 of the Copyright Act USA, the author has exclusive rights that can exercise in contractual terms in order to ensure the integrity of the work, but in the case in which an author transfer its right without enforcing such clauses, it loses the rights. In the view of this law, the moral rights of the author are a form of a property right called the right of publicity (eg, the California Civil Code, section 3344 is governed the right of publicity).

[5] Jules Lermina, *Report submitted to the International Literary and Artistic Association*, Congress in Monaco 1897, cited Scondăcescu Barbu I., Dumitru I. Devesel, Constantin N. Duma, *Law on literary and artistic property* - commented and annotated, Romanian Book Publishing House, Bucharest, 1934, p. 60.

[6] Nicolas Stolfi, *Traité théorique et pratique de la propriété littéraire et artistique*, vol.1, Paris, 1916, p. 18, cited M. Beiller, *Author's moral right*, "Pandectele române", 4-th Part, 1929, p. 24.

[7] According to Article 3 of the Law no. 126/1993, *"author's right to control the published work, translations, reproductions or adaptations made from work, with the power to withdraw the assignment or authorization given through judicial summons, with the right of the author to seek justice if the publisher changes the work that was transferred, distort it, publish or reproduce it contrary to contractual conditions or in a manner injurious to author's reputation, subject to damages"*. The law was published in the Official Gazette No. 68 of 28 June 1923.

[8] Florin C.Tărăbuţă, *The moral right of the author on his intellectual work*, Printing and Bookbinding Prison "Văcăreşti", Bucharest, 1939, p. 45.

[9] M. Beiller, *op. cit.* p. 25.

on Decree no. 321/1956 on copyright[10], Professor Paul I. Demetrescu called the moral rights *"personal rights of the author"*[11].

Author's moral rights under the Law no. 8/1996

From the analysis of art. 6 bis of the Berne Convention for the protection of literary and artistic works results that are recognized only two prerogatives of the moral right, namely: the right to paternity and the right to respect the integrity of the work. It also notes that under the provisions of par. 2), these prerogatives are limited in time.

Currently, as shown in doctrine[12], although moral rights are recognized by the national laws of the European Union Member States, there is no regulation of these rights and some directives expressly state that their regulations do not apply to moral rights. In this sense, one can cite the following directives: Paragraph 28 of the preamble to Directive no. 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and related rights applicable to satellite broadcasting and cable retransmission[13]; paragraph 21 of the Preamble and Art. 9 of the Directive no. 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights[14]; paragraph 28 of the preamble to Directive no. 96/9/EC of 11 March 1996 on the legal protection of databases[15].

Although, over time, in Romania, the moral rights have been the subject of numerous scientific disputes[16], since the adoption of Law no. 8/1996 on copyright and related rights[17], any controversy ceased, because the Romanian legislator acknowledged the pre-eminence of moral rights, currently the legislation in force in our country being very generous and recognizing a wide range of specific moral rights (Article 10):

a) to decide whether, how and when the work will be disclosed to the public (the right to divulging the work);

b) to demand recognition of his authorship of the work;

c) to decide under what name the work will be disclosed to the public;

d) to demand respect for the integrity of the work and to oppose any modification or any distortion of the work if it is prejudicial to his honor or reputation (the right to respect the integrity of the work or the inviolability of the work);

e) to withdraw the work, subject to indemnification of any owners of exploitation rights who might be prejudiced by the exercise of the said withdrawal right (the right to withdraw).

The attribute of the author. The principle of the real author

According to article 4 alin. 1) of Law no. 8/1996, "unless proved otherwise, the person under whose name the work was first disclosed to the public shall be presumed to be the author thereof". Where "the work was disclosed to the public anonymously or under a

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[10] Published in the Official Gazette no. 18 from 27 June 1956.

[11] Paul I. Demetrescu, *The right of copyright*, Scientific Annals of the University "Alexandru Ioan Cuza" Iaşi, (new series), Section III (Social Sciences), Tome II, Fasc. 1-2, 1956.

[12] Viorel Roş, Dragos Bogdan, Octavia Spineanu Matthew, *Copyright and related rights, Treaty*, All Beck Publishing House, Bucharest, 2005, pp. 197-198.

[13] Published in OJ no. L 248 of 6 October 1993.

[14] Published in OJ no. L 290/9 of 24 November 1993.

[15] Published in OJ no. L 77/20 of 27 March 1996.

[16] Constantin Stătescu, *Civil Law. The contract of carriage. The rights of intellectual creation. Successions*, Didactic and Pedagogic Publishing House, Bucharest, 1967, p 47; Aurelian Ionaşcu, Comşa Nicolae, Mircea Mureşan, *Copyright in R.S.R.*, R.S.R. Academy Publishing House, Bucharest, 1969, pp. 85-99; Francis Deak, Stanciu D. Cărpenaru, *Civil Law. Special contracts. Copyright. The right of inheritance*, University of Bucharest, 1983, pp. 339-343; Yolanda Eminescu, *Creative works and the law. A comparative look*, R.S.R. Academy Publishing House, Bucharest, 1987, pp. 90-91.

[17] Published in the Official Gazette no. 60 of 26 March 1996, amended by Law no. 285/2004, published in Official Gazette no. 587 of 30 June 2004, as amended by Ordinance no. 123/2005, published in the Official Gazette no. 843 of 19 September 2005, amended by Law no. 329/2006 approving Government Emergency Ordinance no. 123/2005 amending and supplementing Law no. 8/1996 on copyright and related rights, published in the Official no. 657 of 31 July 2006.

pseudonym that does not identify the author, the copyright shall be exercised by the person whether natural person or legal entity who discloses it to the public with the author's consent, as long as the latter does not disclose his identity" (art. 4 alin. 2).

Law no. 8/1996 on copyright and related rights enshrines the principle of the true author being the person protected by copyright. According to article 3 paragraphs 1) of the Law, "The natural person or persons who created the work shall be the author thereof". The authorship of a work belongs only to individuals, because only they have the specific qualities of the creator, namely: intelligence, personality, sensibility, faculty to create, to think, to formulate ideas and also to expose them in an original and personally form.

In order to recognise the authorship of a work, the law does not require any condition because it arises from the mere fact of creating the work, since the opera took a concrete form, even if is not completed. Following the creation of a work, the author acquires within the power of the law, also the status of copyright holder.

The right to demand recognition of the authorship of the work

The right to demand recognition of his authorship of the work called in the doctrine[18] the "right of paternity of the work" is enshrined in art. 10 letters b) of the law and it is based on the need to respect the natural connection between the author and his work. The right to authorship is the most important prerogative that constitutes intellectual property rights in general and *consists of recognizing the true author's right of a scientific, literary or artistic work.*

As shown in the specialized literature[19] entitled the right of has a *positive* aspect which consists in the right of the author to claim authorship no matter when, and a *negative* aspect including the right to oppose any act of usurpation, appealing this quality by third party. Recognition of the right of paternity imposed the obligation of all those who use short quotations, isolated articles or short excerpts from works without the author's consent, to indicate the source and author's name, unless this is impossible.

In a decision of 21 December 2004 the Court of Appeal noted that the right of authorship of the work is rooted in the law and the repeated failure to indicate the author's name on a movie promotional materials violate the dispositions of the law relating to the moral right of the author for the recognition of authorship[20].

To the right to demand recognition of the authorship of the work, the author may not renounce or dispose of by acts inter vivos, but in the everyday life, the transmission of the right to third parties takes place, in this way. In this sense, it can be illustrated that in Romania, in almost all universities the transmission to third parties by developing, reproduction and sale of graduation paper or postgraduate and master. It seems that this situation is not new in our country. Thus, since 1887, in an article entitled "Pieces selected from Romanian plagiarisms" appeared in the "Constitutional" Newspaper of 10 May, stating that *"often one and the same graduation paper served to many candidates"* (...). The author of this article, who signed with the pseudonym "Lorellino" shows that it, is in the possession of more than 39 degree papers from the University of Bucharest, who actually are "textual translations, plagiarized more or less disguised after the French theses".

The French jurisprudence admits giving up to one of the prerogatives, but only as long as it is not final. In this respect, the French Court of Cassation agreed with a decision by a

[18] Ioan Macovei, *Intellectual property law treaty*, C.H. Beck Publishing House, Bucharest, 2010, p. 449.

[19] Yolanda Eminescu, *Copyright. Law no. 8 of March 14, 1996, commented*, Lumina Lex Publishing House, Bucharest, 1997, p 155; Ligia Dănilă, *Copyright*, All Beck Publishing House, Bucharest, 2005, p. 68; Bujorel Florea, *Intellectual property law*, Universul Juridic Publishing House, Bucharest, 2011, p. 67.

[20] Octavia Spineanu – Matei, *Intellectual property. Jurisprudence*, Hamangiu Publishing House, Bucharest, 2006, p. 229.

court that, "declared valid an clause for anonymity, which provided by a person exercising its moral rights, could not constitute a final waiver on any of its powers"[21].

As mentioned above, the right of authorship of the work belongs to only individuals and may also apply to derivative works, common or collective works, but only for the part created by the author[22]. An interesting case was the French Court of Cassation judgment regarding the intention of a co-author of a success movie to make a successful television series which was a sequel to the feature film. In order to make the TV series, the co-author held some talks with another company other than the one to which the producer transferred the property rights for the film and who was the film copyright holder. The Supreme Court agreed with the earlier decision of the Paris Court of Appeal of 13 July 1993 which established that on its features, a new work is not capable to create confusion with the previous film, and that the exclusive rights of the right holder are limited to the title[23].

As previously stated, the right to authorship of the work involves the author's right to decide under under what name the work will be disclosed to the public. If the work is disclosed to the public without indicating the author's name, the author may ask the court to oblige the responsible person to perform any action it deems necessary to remedy the omission.

The author has the right to decide if the work will be disclosed to the public under his name, under a pseudonym or without indicating the names. If the work is published without the name or under pseudonym, the author can reveal its identity at any time[24].

We have to mention that the will of an author on how to write its name (full name, initials, etc.) has to be respected exactly. Failing to respect author's will can constitute not only a violation of the right to the name, but also of the right of authorship[25].

Once born, the right to authorship is inalienable. The right to authorship of the work is transmitted by inheritance indefinitely, according to civil law. If there are no heirs, the exercise of these rights rests to the collective management organisation mandated by the author during his lifetime or, failing a mandate, to the collective administration organization with the largest membership in the area of creation concerned.

The transmission of the right exercise means the possibility of the successors to claim other people to recognize that their predecessor is the author of the work. In other words, the copyright in a procedural meaning and not material is transmitted to the successors[26].

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[21] French Court of Cassation, decision of 5 May 199, in Andre Bertrand, *Le droit d'auteur et les droits voisins*, Dalloz, Paris, 1999, p. 272.
[22] Andre Bertrand, *op. cit.*, p. 270.
[23] French Court of Cassation, Civil Division, judgment of 19 February 2002. For details see Gheorghe Gheorghiu, *Audiovisual works*, Lumina Lex Publishing House, Bucharest, 2004, pp. 362-366.
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REASONS FOR THE APPEAL FOR ANNULMENT ACCORDING TO THE NEW ROMANIAN CODE OF CIVIL PROCEDURE

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Abstract:
With regards to the appeal for annulment, the New Romanian Code of Civil Procedure maintains the possibilities of exercising this extraordinary measure of contest, as regulated in the previous code. It adds, however, the reason for such a measure which is determined by not respecting the rules in assembling the judicial panel. These are essential rules of judicial activity and could have permanently affected the decisions of the appeal courts which could not be contested in any other way.

Keywords: *reasons, appeal for annulment in common law, special appeal for annulment, New Romanian Code of Civil Procedure.*

Introduction

Created in our legal system as a result of jurisprudence, the appeal for annulment was initially accepted in applying the former provisions of article 735 from the Romanian Code of Civil Procedure of 1865, which did not distinguish between the acts of procedure and judicial rulings[1].

It was legally sanctioned by Law 18 from 1948[2]*, keeping its specific features as an extraordinary remedy - used for retraction, impossible to suspend and open to all parts of the process which fit the hypothetical cases mentioned by the law - in all subsequent amended forms.*

Currently, the New Romanian Code of Civil Procedure reestablishes the legal hypothesis for exercising this form of appeal, without suppressing any of the previous ones, on the contrary it adds the reason determined by the not respecting the rules for assembling the judicial panel.

1. Appeal for annulment in common law

[1] Article 735 from the Romanian Code of civil procedure from 1865 stipulated that the act of procedure was nullified if drawn up by an incompetent magistrate or court civil servant, i fit were drawn up in violation of the law, causing damages to the party which could not be mended any other way than by nullifying the document through law - I. Deleanu, *Tratat de procedură civilă,* vol. II, *Noul Cod de procedură civilă,* "Universul Juridic" Publishing House, Bucharest, 2013, p. 310.

[2] I. Deleanu, *Tratat de procedură civilă,* vol. II, *Noul Cod de procedură civilă,* "Universul Juridic" Publishing House, Bucharest, 2013, p. 310.

Article 503 paragraph 1 from the New Romanian Code of Civil Procedure stipulates that final decisions can be appealed by using this extraordinary appeal when the appellant was not duly summoned or was not present at the time of the judgement.

However, the annulment cannot be accepted when the actionable citation could have been rejected through appeal, given the sentences or decisions which can be appealed, pronounced with the stipulations pertaining to the citation. In such circumstances, the code requires that the compulsory reason be cited through an ordinary or extraordinary appeal, but which takes priority over the appeal for annulment.

If the appellate exercised the ordinary or extraordinary appeal and invoked the lack of citation, the appeal for annulment is not open to him/her, because the respective reason has already been analyzed, and the solution is given by the New Code of Civil Procedure. Thus, if he invoked this aspect via appeal or extraordinary appeal, but the appellate court presented with the appeal has assessed the legal provisions found in the citation, even if wrong, the appeal for annulment in common law can no longer be exercised to reiterate the hypothesis mismanaged citations.

It is of no interest whether the party exercised the ordinary appeal or the extraordinary appeal, but it is necessary to assess that these could have been exercised, because they were stipulated by the code despite the decision. The appellant is informed by the solution, since it was communicated to him/her.

Obviously, if the appellant was not aware of this legal solution, since the procedure of communication was not carried out, it is assumed that the appellant cannot exercise these because of the essential aspect of adversarial. In these cases the term is not renewed on these forms of appeal, because they have not commenced yet and the court will go on to resolve these appeals. As such, if the matter of appeal is raised or the appeal for annulment, faced with the inability to exercise these extraordinary appeal procedures as long as the appeal is still open, it will be settled and the appeal for annulment will be dismissed as inadmissible. Also, when the extraordinary appeal and the appeal for annulment have been exercised, the latter procedure takes priority in the conditions of simultaneous exercise of these extraordinary remedies.

If the extraordinary appeal was exercised and the reason for the lack of citation was invoked in the appeal request, the appeal may be accepted if the court of appeal rejected it because it needed to run checks that were incompatible with the extraordinary appeal or if the appeal through no fault of the party, was dismissed without being examined on its merits. Thus, if the court of appeal rejected it, given that it could not verify on the basis of the documents or new evidence submitted on appeal that the proper summoning procedure was not followed, it is necessary to be bring forth other evidence concerning the summons to inform the party of their duty to pick up the summons from the local authority (false registration) etc., the appeal for annulment may be brought against the decision of extraordinary appeal. If, however, the extraordinary appeal was rejected as being too late, something that is determined by fault of the party and involves that is not be researched on its merits, the appeal for annulment may not be approved because the party has exhausted the legal option to analyse the criticism of the summons on merits.

The rulings given in first and last instance are still subject to these forms of appeal, because in their case the law stipulates no ordinary or extraordinary appeal.

The appeal for annulment will not be able to be used against the decision to appeal, if it was exercised as a result of the agreement of the parties, for the purposes of directly appealing a ruling subject to appeal, because through such a convention the party that could have invoked the remedy of appeal has waived this possibility. The fact that under the law the parties involved in this appeal may invoke only aspects related to the violation or misapplication of rules of substantive law (article 459 from the New Romanian Code of Civil Procedure), does not open offer the party the possibility to appeal in annulment, because the act of disposition which must be done in the course of exercising this remedy.

A ruling cannot be challenged through appeal for annulment more than once, although the reasons invoked in the second application are different and therefore from the moment the ruling is delivered, the party should identify the reasons for the appeal and invoke them.

The reason for the annulment in common law represents in reality a reason for nullification, violating the summoning procedure and the adversarial, the right to defense[3] leading to the annulment of the ruling. If this possibility did not exist, the ruling would be delivered without meeting the compulsory requirements of the summons or writ, which ensures the adversarial quality of the civil suit, this despite the fact that the interested party did all everything to prevent such errors, citing the appeal based on these reasons[4].

2. Special appeal for annulment

The special appeal for annulment regulated in the New Romanian Code of Civil Procedure is aimed at situations where the ruling of the court of appeal:

a) was delivered by a court without the authority or in violation of laws concerning the composition of the judicial panel and, although the corresponding exception was invoked, the court of appeal has not yet ruled on the matter;

b) the appeal is approved as a result of clerical errors;

c) while dismissing the appeal and admitting it part, the court of appeal failed to investigate the reasons for cassation invoked by the appellant;

d) the court of appeal has not ruled either one of the appeals.

The object of these appeals for annulment is the decision of the appeal court which, under the law, cannot be appealed[5] given that the provisions relating to the invocation of these reasons by way of ordinary appeal or extraordinary appeal may not be applied.

This time the appeal court is responsible for this error, which either has not noticed that it was not competent to hear the appeal, or the composition of the court was not done in accordance with the law. I could have delivered a solution based on a clerical error, failed to examine an extraordinary appeal or dismissed it without ruling on the reason which would have led to another solution.

When the argument invoked is that the appellate decision was issued by an court without absolutely no jurisdiction or in violation of rules of the composition of the judicial panel, it is required to invoke the exception of jurisdictional matters or the wrong composition under the law but without the appeal court having rules on it[6]. Basically, not invoking this exception also covers the cause of illegality and in equal measure the wrong resolution does not allow for a new analysis.

Only if the appeal court does not rule on the question does it become possible to use this legal remedy, so that if the exception was not invoked before the appellate court, the final decision may not be censored in the appeal for annulment. If the lack of absolute jurisdiction, beside the general one, cannot be directly invoked neither before the appellate court, nor in the first-circuit court within the conditions of the law, but directly in the appeal, compared to article 130 from the New Romanian Code of Civil Procedure, this right can no longer be exercised. So using it as a form of direct appeal will not be effective m given that the admissibility requirement was not met. If this solution is not approved, the exception of no absolute, physical or territorial jurisdiction was directly invoked on appeal, and the court fails to rule on it, it would be like admitting the appeal for annulment were made only to ascertain the incapability to exercise the right to invoke this reason.

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[3] Romanian High Court of Cassation and Justice, Commercial section, Decision no. 3655 from 14 November 2007.

[4] Romanian High Court of Cassation and Justice administrative and fiscal division, Decision no. 1519 from 8 March 2005 from the Revue of the Court of Cassation no. 2/2005, pp. 64-65.

[5] Romanian High Court of Cassation and Justice, Civil and intellectual property section, Decision no. 5180 from 26 May 2006.

[6] Romanian High Court of Cassation and Justice, Civil Section I, Decision no. 2930 from 2 May 2012.

If the composition of the judicial panel is wrong, due to non-compliance with judicial organization rules, besides the appeal for annulment cases and alongside the violation of jurisdiction rules, all fills in the gap in the previous law when appellate decisions could not be challenged due to the lack of procedures paths, although it violated compulsory and public stipulations, which perhaps were more important than those relating to jurisdiction.

If the an appeal is made before the court and rejected, the conclusion can be appealed in a higher court, after the final judgment was delivered (article 53 paragraph 1 from the New Romanian Code of Civil Procedure), so that if the court decides on this exception, the appeal for annulment can no longer be used but rather the extraordinary appeal.

When the solution of the appellate court is the result of a clerical error[7], jurisprudence has retained the fact that this stipulation must be interpreted restrictively, due to the quality of exception of the text. So it was decided that only obvious clerical errors come into this category, errors related to the formal aspects in the ruling, not just simple interpretation or assessment errors of the evidence[8].

This error must have been decisive in the outcome of the appeal, so the causality between it and the solution offered by the appellate court.

If it has been claimed that by dismissing the appeal or admitting it in part the court of appeal has failed to investigate the reasons for the amendment of the cassation[9], invoked[10] here, there must be no fault from the party in reexamining the reasons by the court. But this omission can only be the result of the court[11]. Thus if the appeal has been canceled or rejected as being submitted too late, this solution is in consequence of the complaining party's attitude so therefore it is not allowed for annulment.

Similarly, if the appellate court did not resolve the appeal against the ruling, by failing to analyze it, then the applicant may submit an appeal for annulment along with the consequence of the solution of this appeal, after the annulment. In this case, the appeal for annulment is exercised to nullify the decision to appeal in its entirety because the appeals are usually related; one solution influencing another, therefore one law becomes necessary.

Conclusions

With regards to the appeal for annulment, based on jurisprudence and doctrine which have pointed out that among the hypotheses presented in article 317 from the Romanian Civil Code of Procedure from 1865 the one concerning the violation of the rules of organizing the judicial panel was missing, and the lawmaker added it, but without changing the extraordinary quality of this legal remedy through this extension.

On the contrary, the clarification made in this field, through the terms used limits the possibilities of exercising these legal remedies in regular cases, and the utility of the appeal for annulment appears as obvious in the context of reaching this irrevocable decision, or definitive as expressed in the code, which therefore can no longer be appealed and which were issued by a judicial panel constituted in violation of the law.

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[9] Appellate Court of Bucharest, Section III, Decision no. 556 from 3 May 2010, Pandectele Romane, no. 10/2010, p. 218.
[10] Romanian High Court of Cassation and Justice, Commercial section 782 from 10 March 2009.
[11] Romanian High Court of Cassation and Justice, Commercial section no. 461 from 2 February 2011.

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CONSECRATION AND IDENTITY OF NATIONAL MINORITIES RIGHTS PROTECTION IN THE CONFERENCE FOR SECURITY AND COOPERATION IN EUROPE - CSCE (ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE - OSCE IN DECEMBER 1994)

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Abstract

Promotion and protection of European identity rights of persons belonging to national minorities are part of human rights protection system developed universally under the United Nations and, respectively, in the Regional Council of Europe, Organization for Security and Cooperation in Europe and other European institutions. International instruments adopted by the OSCE human dimension that is circumscribed, and are political in nature (so there are not treated) contributed to a great extent, the development of catalog rights identity for people who belong to national minorities, the evidence of evolution ordination mechanisms and regulations and safeguarding the rights of the category listed and, last but not least, to outline a programmatic directions and certain standards in this field. Documents to be examined, as well as other regulatory and industry (universal or regional) that aim at protecting minorities "does not authorize any activity that is contrary to fundamental principles of international law, or other obligations under international law or provisions of the Helsinki Final Act, in particular the principle of sovereignty and territorial integrity of states".

Keywords: *High Commissioner on National Minorities, the standard identity consecration and protection of national minorities, human dimension, persons belonging to national minorities.*

Introduction

Diversity concrete issues and political interests of states and the international community in the consecration identity of national minorities rights protection that until now did not adopt an international convention can be in this matter to the United Nations. We hold attention on this line, as not all regional human rights documents do not contain provisions aimed at national minorities. In this respect are significant regulations such as the American Convention on Human Rights of 1969[1], the African Charter on Human and Peoples of 1981[2] - which treats only the prohibition of mass expulsions for national groups, racial, ethnic or religious, European Convention on Human Rights 1950[3], a document that requires only association with a "national minority" as a reason for that discrimination is prohibited.

Although the issue of rights of persons belonging to national identity has its global dimension, it has a special significance for Europe. Consequently, it concerns the subject of

[1] It was signed on 22 November 1969 at San Jose (Costa Rica), and came into force in 1978. Corrected by 26 member states of the 35 OSA.
[2] Came into force in 1986.
[3] It was adopted in Rome on 4 November 1950 and came into force on 3 September 1953. Romania has rectified the Convention by Law No. 30 of 18.05.1994, published in Official Gazette no.135 of 31.05.1994.

European institutions among which included the Conference for Security and Cooperation in Europe (CSCE / OSCE).

2. Consecration and protection of rights of persons belonging to national identity. These were the attention of the Conference on Security and Cooperation in Europe in Helsinki in 1975[4] and the Vienna Meeting 1989 of the same body, both final documents adopted at the end of the second general meeting of European, including explicit provisions on the rights of persons belonging national minorities.

Biggest leap, however, substantially higher quality than in the protection of national minorities rightly considered that there was at the Copenhagen meeting of the Conference on the Human Dimension of the CSCE (5 to 29 June 1990) where the document was adopted included an important chapter (IV) devoted to national minorities. The act in question in paragraph 30 of that chapter, "The participating States recognize that issues related to national minorities can not be solved satisfactorily only in a democratic political framework based on the rule of law, with an independent judiciary, effective[5]. This framework, shown below, ensures observance of human rights and fundamental freedoms, equal rights and equal among all citizens, free expression of all their legitimate interests and aspirations, political pluralism and social tolerance.

Final Document of the Copenhagen reaffirmed three fundamental principles aimed at minority issues:

- respect for the rights of persons belonging to national minorities as part of human rights generally recognized, is an essential factor for peace, justice, stability and democracy (point 30 paragraph 3);
- equality before the law for all, regardless of ethnic origin and ban all forms of discrimination and forced assimilation attempts (paragraph 31);
- personal choice of belonging to a national minority, which can result in no disadvantage (point 32, paragraph 1).
- in paragraph 32, paragraph 2 the final document that provides pesoanele belonging to minorities have the right to maintain and develop freely their ethnic, cultural, linguistic or religious and to maintain and develop their culture in any form, safe from any attempts of assimilation against their will. As the identity of these persons rights are stipulated:
- free use of mother tongue, both in private and the public sector (32.1);
- creating and maintaining their own institutions, organizations or educational associations, cultural and religious under national law, to require voluntary financial contributions and other contributions, including public assistance (32.2);
- Professing and practicing their religion (32.3);
- Establish and maintain unimpeded contacts among themselves in their country, and across frontiers with citizens of other states who share ethnic or national origin, cultural heritage or religious beliefs (32.4);
- Dissemination and exchange of information in their native language, and access to information (32.5);
- Create and maintain organizations or associations in their countries and international non-governmental organizations participating in activities (32.6).

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[4] Name the OSCE dates back to January 1, 1995, following the decision of the Budapest Summit in December 1994. For details about the historical aspects of protection of national minorities in the OSCE see Jan Helgesen, 'Protecting Minorities in the Conference on Security and Cooperation in Europe (CSCE) Process ", p. 159-186, in Allan Rosas and Jan Helgesen (eds), The Strength of Diversity: Human Rights and Democracy pluralistic, Dordrecht 1992, Martinues Nijhoff Publishers.

[5] Document of the Copenhagen Meeting of the CSCE Conference on Human dimension in Security and Cooperation in Europe. Documents (1989-1992), edited by Valentin Lipati edition and Ion Diaconu Lipati, Romanian Academy Publishing House, 1993, p. 35.

Another category of provisions contained in the final document refers to the obligations of participating states to ensure the protection of ethnic, cultural, and religious minorities lingivistice their territory and create conditions suitable for promoting this identity, in accordance with the principles of equal rights and discrimination against other citizens of the participating State concerned (P. 33).

Thus, in terms of education, provided that the participating States will strive to ensure that persons belonging to minorities, will be outside the duty to study the language of the State the opportunity to learn their mother tongue or to be able to teach in that language and, if possible and necessary, to use language in relations with public power, according to national legislation (point 34).

It also stipulates the right of persons belonging to national minorities to participate effectively in public affairs, especially in activities concerning the protection and promotion of the identity of these minorities (point 35). The same document provides required participating States to promote the establishment of a favorable climate of understanding and mutual respect among all citizens regardless of ethnic or national origin (point 36, paragr.2). There are convicted in the content of that act, racial and ethnic hatred, anti-Semitism, xenophobia and discrimination or persecution, participating States declaring its determination to intensify efforts to combat these phenomena and to this end to take action against any act of violence based on national discrimination or hatred, to take measures to protect such persons against such acts, to promote understanding and tolerance (point 40).

Sustain attention in the context of the Final Document presented and provisions outlining policy and international law limits the exercise of the rights of national minorities.

In this respect, at point 37 states that none of the commitments set can not be interpreted as leading to any right to undertake any activity or perform any act contrary to the purposes and principles of the Charter of the United Nations, other obligations of international law or provisions of the Final Act, including the principle of territorial integrity of states.

Meeting in Geneva from July 1 to 19, 1991, devoted to the minorities, reiterated in the document adopted, that human rights and fundamental freedoms is the protection and promotion of national minorities.[6]

Within that after they showed qualitative changes recorded on the continent, participating States have taken note of the positive results obtained in a number of countries and stressed that "there may be different approaches to implementing their CSCE commitments corresponding to the problem of national minorities".

It was also reiterated the importance of active participation of persons belonging to minorities in public life as a component of democracy.

It was also stressed that full equality of rights with the majority of particular concern and requires special measures taken by States Parties.

Promoting the rights contained in the Final Document of the Copenhagen Meeting Report from Geneva, in turn developed new approaches, as follows:

- participating States states that national minorities will enjoy the same rights and duties will have the same citizenship as the rest of the population;
- the problem of minorities is recognized to be an international issue;
- are protected equally and those belonging to the majority in that State, but in some areas are minority;
- freedom to maintain ties with citizens of other states, the same ethnicity, culture or faith. This will encourage cross-border cooperation at all levels.

3. Rights protection mechanisms identity of national minorities in the Organization for Security and Cooperation in Europe.

[6] Report of the Meeting C.S.C.E. Expert in minority issues, Geneva 1991, Security and Cooperation in Europe documents, 1989-1992, p. 110.

In the context of mechanisms to protect the national minorities, noted the establishment by the Conference for Security and Cooperation in Europe, during the meeting Helsinki-European in 1992, the High Commissioner on National[7] Minorities Institution.

High Commissioner operates under the aegis of the Committee of Senior Officials as a means of conflict prevention at an early stage.

The High Commissioner's mandate specific functions are included as assurance that an "early warning" and if necessary, an "early action", the latter being applied in an early stage as related to stress related national minority issues which have not yet passed the stage of early warning, but, according to High Commissioner, are likely to escalate into conflict.

In exercising its powers acting High Commissioner confidential and independent of all parties. It receives information from any source (excluding individuals or groups that practice terrorism), assesses the role of stakeholders as soon as the nature of stress as possible consequences for peace and stability in the OSCE area It also can visit any participating State, after consultation with the State, staff can communicate with the parties and, where possible, to promote dialogue and trust between them.

If there is a potential for conflict, the High Commissioner may initiate an early warning that a President communicate in the Office of the CSCE, it will submit to the Committee of Senior Officials (first session).

It can also be authorized to recommend to the sense of coming into contact and consultation with stakeholders, aiming to find possible solutions. When you consider that a situation is about to degenerate into a conflict and its possibilities of action are exhausted, it shall inform the President of CSCE It is forbidden to engage in the examination of individual cases of human rights violations.

High Commissioner cooperates in fulfilling its mission to international organizations and institutions like the United Nations, World Bank, Council of Europe and the European Commission.

Conclusions

The analysis performed shows that in the European plan to involve regional institutions, among which the CSCE / OSCE, led to the obvious evolution of consecration of regulations and protection of rights of minority identity is taken on the issue of legal and political documents more because adequate detail and institutionalization of norms and procedures relating to the matter mentioned.

OSCE documents submitted attesting that the promotion and protection of European identity rights of persons belonging to national minorities are part of human rights protection system developed at the United Nations under the universal, namely, the Regional Council of Europe, Organization for Security and Cooperation in Europe and other European institutions.

Although international acts dealt with in this material develops a good deal, paying particular attention to human rights catalog rights for persons belonging to national identity, yet they do not impose legal obligations states have adopted.

They determine the programmatic direction but the matter of consecration and protection of rights of persons belonging to national identity, being a political instrument effectively. In context, it is significant that some countries that participated in the documents introduced in their national standards of the kind imposed by the OSCE on issues mentioned, giving them indirectly and necessary legal force.

OSCE documents analyzed circumscribed acts that form the human dimension, as well as other regulatory and industry (universal or regional), which aims to protect the rights of consecration and identity of persons belonging to minorities ational does not authorize any activity that is contrary to fundamental principles of international law, provided the United

[7] See Security and Cooperation in Europe, 1989-1992 Documents, p. 186-190.

Nations Charter, or other obligations under international law or provisions of the Helsinki Final Act, in particular the principle of sovereignty and territorial integrity of states.

Establishment of the institution by OSCE High Commissioner on National Minorities has been establishing an instrument for ensuring security in Europe through the establishment and warning in as early a stage, on the situation of minority identity rights violations which could lead to conflicts in the OSCE region.

In conclusion, we appreciate that although the procedure established by the OSCE in promoting and guaranteeing the rights of persons belonging to national identity is the great political, and its provisions on human dimension, not treated, they express the will of the States which have participated in the to their moral and political force and to engage to respect the rights of the category listed.

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MOVEMENT OF ROMANIAN CITIZENS IN EUROPE

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Abstract
This right is stipulated in the Treaty of Lisbon, which amends paragraph 2 of art. 17 of TEC, as recognizing the right of Union citizens to move and reside freely within the Member States territory. This right can be exercised but only under the conditions and limits defined by treaties and by the measures adopted to implement them.

Keywords: *treaty, limits, right, free movement, measure.*

Introduction

Treaty establishing the European Community (TEC) settled European citizenship, setting in the art. 17 that "any citizen of the Union has the nationality of a Member State"; EU citizens enjoy the rights provided by TEC, one of which is entitled to travel and live where they want on Member States territory (art. 18 of the Treaty).

Correlative to the right of the free movement, the Treaty is governing the circumstances in which this freedom may be restricted. According to art. 39 of the Treaty, restrictions on freedom of movement may be justified only on grounds of public order, public safety and public health.

This right is stipulated in the Treaty of Lisbon, which amends paragraph 2 of art. 17 of TEC, as recognizing the right of Union citizens to move and reside freely within the Member States territory. This right can be exercised but only under the conditions and limits defined by treaties and by the measures adopted to implement them.

The limits of the right of free movement of EU citizens have been laid down by art. 27 of the Directive no. 2004/38/EC of 29.04.2004 on freedom of movement and residence within Member States territory for Union citizens and their family members (the Directive). Under these rules, Member States may restrict the free of movement of Union citizens and their family members, regardless of nationality, only for reasons of public order, public security or public health. The taken measures must comply with the proportionality and to be based solely on the personal conduct of the person concerned.[1] This conduct must represent a genuine, present and sufficiently dangerous to justify the measure of restriction of free movement.[2]

In Romania's accession to the European Union was necessary to transpose the Directive no. 2004/38/EC into national law. Legislature intended for that purpose to issue two

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[1] Octavian Manolache, *Drept comunitar*, All Beck Publishing House, Ed. IV th, Bucharest, 2003, p. 247-248; Felician Cotea, *Dreptul comunitar al afacerilor,* Mediamira Publishing House, Cluj Napoca, 2005, p. 53

[2] According to art. 27 of the Directive. 2004/38/CE/29.04.2004, Member States may restrict freedom of movement and residence of Union citizens and their family members, regardless of nationality, on grounds of public policy, public security or public health. These reasons can not be relied on for economic purposes (para. 1). Measures taken on grounds of public policy or public security must respect the principle of proportionality and be based solely on the person's conduct. Previous criminal convictions can not in itself justify taking such measures. Conduct of the person concerned must represent a genuine, present and sufficiently serious threat to the fundamental interests of society. Will not be accepted motives which are not directly related to the case or on considerations of general prevention (para. 2).

laws, namely: Government Emergency Ordinance (GEO) no. 102/2005, regarding the free movement of citizens of EU Member States on the Romania territory, and the Law no. 248/2005 on the free movement of Romanian citizens abroad.

Analyzing the restrictions of free movement of persons, it is found that when they were taken into account as citizens of EU member states have fully complied with the Directive, GEO No. 102/2005, in fact in art. 25, para. 1, that: “Romanian competent authorities are able to restrict the right of free circulation in Romania for the European Union citizens or their family members only on grounds of public policy, national security or public health”.

Instead, when he covered the free movement of Romanian citizens abroad, the national legislature ignored the restrictions from Directive, and by art. no. 38 from The Law no 248/2005[3], established that: “*restriction of free movement of Romanian citizens abroad can be for a period not exceeding three years, only under conditions andregarding the following persons:*

a) the person who was returned from a state based on a readmission agreement signed between Romania and that country;

b) the person whose presence in a State, through the work they perform or would perform, would seriously prejudice the interests of Romania and, where appropriate, bilateral relations between Romania and that State.”

After 1 st of January 2007, courts were obliged to examine the compatibility of national law on the free movement of persons with Community law and jurisprudence.

The national judge became, thereafter, the Community judge, beeing obliged to apply directly the Community law if he finds it incompatible with national law, under principles of direct effect of Community law[4] and its supremacy[5].

Also, the national court were not able to apply national law contrary to Community law. Thus, any national court must, in a case of falling within its jurisdiction, to apply Community law in its entirety and to protect the rights which it are confered to citizens, what it means to ignore any provision of national law which may conflict with Community law, either before or after entry into force of the Community Rules.[6]

Based on these principles laid down by Community law, court must be examined to what extent are compatible with Community law, provisions of domestic law on free movement of Romanian citizens abroad, provided that, in the limiting cases of this law, domestic law does not transpose the Directive.

In this regard, we note that the Community provides an exhaustive rule only in three situations in which the state could restrict freedom of movement of persons: *effect on public policy, public security or public health.*

The reason of public policy may be invoked in cases where it finds that there is a genuine and serious undermining of the fundamental interests of society. Although Community law does not prescribe a uniform scale of values regarding the assessment of behaviors that could be considered to be contrary to public policy, a behavior could not be considered as sufficiently serious to justify restrictions on freedom of movement across a member of a national of another Member State, if not the first state, reported the same behavior of their citizens, repressive measures or other genuine and effective measures to combat this behavior.

Court of Justice of European Communities has stated that this exception should be seen through the individual behavior of a person, so it can not be arranged collective expulsions or

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[3] Law no. 248 of 20 July 2005 on the free movement of Romanian citizens abroad was published in Official Gazette no. 682 of July 29, 2005.

[4] The case 26/62, The Court Decizion from 05.02.1963, Van Gend en Loos c. Administraţie der Belastingen; The Case C 8/81, The Court Decizion from 19.01.1982, Becker v. Finanzamt Munster – Innenstadt.

[5] The Case C 6/64, The Court Decizion from 15.07.1964, Costa c. E.N.E.L.

[6] The Case 106/77, The Court Decizion from 09.03.1978, Amministrazione delle Finanze dello Stato c. Simmenthal.

for preventive purposes. In this context, the fact that a person has a criminal record is not automatically a reason to refuse entry into another Member State[7], while membership in an organization considered being dangerous in the receiving country, entitles the authorities to refuse entry into their territory or to issue a residence card.[8]

As regards to the second ground of limitation or restriction of free movement, the Community legislature considered the notions of public order and public security as beeing distinct, however the Court of Justice of European Communities treats them as synonymous. However, the literature suggested that the public policy should understand everything about the foundation of society, individual freedom and security, and the public security and state security foundation.[9]

In the exception based on public health, the only diseases justifying measures of restriction of free movement are diseases with epidemic potential, as it defines the relevant OMS documents, and other infectious diseases or contagious parasitic diseases if they are the subject of protective provisions applying to nationals of the host Member State.

The Diseases occurring after a period of three months from the date of arrival shall not constitute grounds for expulsion from the territory.

If the Directive expressly provides limited situations that may be restricted the freedom of movement of EU citizens, that includes and Romanian citizens, instead, *internal standard*, namely Law no. 248/2005, in its original form, provides the possibility of the restriction of the free movement if the Romanian citizen *was returned from a state based on a readmission agreement*.

It is seen that internal law does not make any assessment of the person concerned citizen, that if you represent a danger to public order, public safety or health of the state from he has been returned.

The Internal Rule provides a broader category of situations where it can have the right to restrict the free movement of Romanian citizens in relation to the category of exceptional circumstances provided for by Community.

It follows that the internal rule is partially incompatible with Community standards in relation to other exceptions to the free movement of persons than those concerning policy, public security or public health.

With the Directive 2004/38/EC is clear, unconditional and sufficiently precise and the Romanian State has not transposed into national law before accession, under the direct effect of Community law, national courts will apply the provisions of the Directive and not those contained in Law no. 248/2005.

Domestic courts seized on the restriction of free movement for "illegally staing" on the basis of readmission agreements, have consistently held that the settlement involves assessing the compatibility of the domestic law with the Community Law.

It was thus found that art. 18 (1) TEC is directly applicable in national domestic law, so that EU citizens, including Romanian citizens have the right to leave the territory of a Member State, including Member State of origin, to enter the territory of another Member State.[10]

The right to move freely within the Member States as it is stipulated and guaranteed by Article 18 (1) TEC, includes the right to leave the home. This fundamental right would be

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[7] In a recent decision of 7th of June 2007 in Case C 50/60, Commission v. Netherlands, stated that Community law precludes national provisions based on the presumption that nationals of other Member States who have been convicted to a specific punishment for specific offenses must be expelled. This is because such expulsion is a measure that would severely affect people using the rights and freedoms conferred by the Treaty have been effectively integrated in the host. Consequently, the greater the degree of integration of EU citizens and their families in the host, the greater would be their degree of protection against expulsion.

[8] F. Cotea, *op. cit*., p.76-77.

[9] B. Goldman, A. Lyon-Caen, L. Voegel, *Droit commercial europeen*, Dalloz, Paris, 1994, p.238.

[10] In this respect the High Court of Cassation and Justice ruled, for example, civil decisions no.1109/2010, no. Or No 7337/2009. 2119/2008.

deprived of its substance unless the Member State may, without a good reason, to prohibit their nationals to leave its territory in order to enter the territory of another Member State.

The national judge found that the national provision - Article 38 of Law no. 248/2005 - contrary to Community law, so it requires the application of Community law for the right to leave the state.

A Member State may not limit the right to leave the home state automatically, just because a person has been expelled from another member state "illegally staing" without examining the personal conduct and without assessing the proportionality of the measure sought and purpose.

The mere failure to comply with conditions set by State law, concerning the right of residence in its territory of a Romanian citizen, can not be framed within notions of order, safety or public health, referred to the relevant provisions of Community rules for to be accepted by the applicant brought proceedings.[11]

It is true that the Court, the Court of Justice of European Communities, does not prohibit to Member States to adopt legislation that would restrict the right of a national of a Member State to move in another Member State, but such limitations should be confined to situations expressly provided for by Community Directive 2004/38/EC and that, in any case, the measures required can not violate the principle of proportionality in relation to the purpose.[12]

Although the practice of the courts in our country has been constant in the analysis of standard compatibility with EU law and to apply directly the provisions of the Directive, the Court Dambovita made the Crew in 2007 and agreed reference for a preliminary interpretation of art. 18 TEC and Art. 27 of Directive 2004/38/EC.

In July 2008, the Court of Justice of European Communities ruled[13] that the two Community provisions do not preclude national legislation, which allows restricting the right of a national of a Member State to move on the territory of another Member State, especially because it was previously returned from this state because the situation there was "illegally staing".

The Court stressed that it is necessary, first, that national conduct to represent a genuine, present and sufficiently serious threat to the fundamental interests of society, and, on the other hand, restrictive measure considered to be appropriate to ensure attainment of the objective pursued and not go beyond what is necessary to achieve it. As a result, the Court concluded, it is the national court to determine whether these requirements are met.

Conclusions

Therefore, the Court of Justice of European Communities (CJEC) has confirmed that even for the the restriction of free movement for "illegally staing", has to be ascertain whether this limitation is necessary to comply with EU rules and values quoted in proportion to damage to these values but necessarily to be analyzed also the national's conduct.

[11] For example, the civil no.6208/2009 decision, High Court of Cassation held that the expulsion of respondent is not itself sufficient to prohibit the right of free movement of Romanian citizens on its territory. Also, the civil decision no. 7297/2009, High Court of Cassation ruled that although the defendant has been detained several times by the Italian police, it is not evidence of the commission of antisocial acts that would affect Romania's relations with Italy, for the purposes envisaged by the Directive 2004/38 referring to limits the right of entry and residence on grounds of public policy, public security or public health.

[12] Thus, the civil decision no. 63/A/2009 from Alba Iulia Court of Appeal, unpublished, it was established that it is unnecessary to restrict freedom of movement of the person who worked as a windshield washer in France, without being attached to said relevant departments, whereas no evidence that it committed no such acts of endangering public order, namely that its behavior is a genuine, present and sufficiently serious threat to public order.

[13] The case C-33/07, The Cours Decision from 10 iulie 2008, The Ministery of Administration and Internal – General Direction of Passports, Bucharest/Gheorghe Jipa.

The practice of national courts and the Court of Justice of European Communities upheld the Romanian legislature to coroborate provisions of Law no. 248/2005 with EU rules.

Thus, by Law no. 206/2010 was repealed the art. 38, paragr. a, of Law no. 248/2005, which imposed restrictions of the freedom of movement for Romanian citizens returned from a state, based on a readmission agreement, in fact for “illegally staing” on the territory of another state.

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COORDINATES OF THE CREDIT INSTITUTION ACTIVITY

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Abstract

The Emergency Ordinance no. 99 of 6 December 2006, on credit institutions and capital adequacy, presents the credit institution as "an entity whose business is to attract deposits or other repayable funds from the public and to grant credits in its own account". The 2006/48/EC Directive of the European Parliament and the European Council, presents the credit institution as "an undertaking whose business is to receive deposits and other repayable funds from the public and to grant credits for its own account" definition that seems appropriate, justified by the fact that, in our opinion, the concept of undertaking is assigned to those innovative and imaginative companies that produce goods. Since money is a commodity and economic agents that we call credit institutions produce money by reinventing themselves every day to keep up with technology, we consider that the idea of "undertaking" formulated by the 2006/48/EC Directive of the European Parliament and of the European Council is appropriate and that these credit institutions be hereinafter referred to as undertakings and therefore enterprises. We believe that the enterprise, in our case, the credit institutions, is a matter that produces, consumes and trades services in order to achieve positive economic effects therefore saving and lending are their direct support. Moreover, credit is the source for financing growth and welfare, therefore the engine of the capitalist economy.

Keywords: *credit institution, specific conditions, authorization, general conditions, credit, savings, undertaking, enterprise*

Introduction

1. Coordinates of the "credit institution" theoretical concept

In light of the Emergency Ordinance no. 99 of 6 December 2006, *On credit institutions and capital adequacy*, published in the Official Gazette no. 1027 of 27 December 2006, article 3, paragraph (1), clause 10, the credit institution is presented as "an entity whose business is to attract deposits or other repayable funds from the public and to grant credits in its own account".

In the understanding of the Emergency Ordinance, by public, one should understand "any natural person, legal person or entity with no legal personality, that doesn't have the necessary knowledge and experience to assess the default risk of an investment. The items that do not fall into this category are: the state, central, regional and local public administration authorities, government agencies, central banks, credit institutions, financial institutions and other institutions"[1].

The 2006/48/EC Directive of the European Parliament and the European Council, defines the credit institution as "an undertaking whose business is to receive deposits and other

[1] Emergency Ordinance no. 99 from the 6th of December 2006, On credit institutions and capital adequacy, published in the Official Gazette no. 1027 of the 27th of December 2006.

repayable funds from the public and to grant credits in its own account"[2], definition that seems appropriate.

Starting from this definition, given by the European Parliament and the European Council, the enterprise does not work in isolation; it operates in a complex system that, on a commercial background, produces goods and offers services. The enterprise's functionality within the system, is given by its specific organization on several activity fields, management fields and according to the fields of the patrimony's economic and financial management, organization which is always unique and personal. The company's uniqueness is guaranteed from the moment it is registred as a legal entity, when it is assigned with a unique registration code by the National Trade Register Office and a VAT number by the Department of Public Finance and the organization style, the management and administration style, is specific to each company.

Regardless its legal, economical or decisional existence, its form of organization, the industy it belongs to or the nature and form of the capital use, the company operates in a highly complex nature of material and financial flows. These material and financial flows are finding themselves in a mutual interdependence and conditionality, determined on one hand by its own organizational and operational system, therefore issues related to the company's internal environment, but also by the influence of the company's external environment: legal, economical and social, on the other hand.

2. Specific operational conditions in credit institutions

The way credit institutions are built and the way they operate is determined by the Emergency Ordinance no. 99 of 6 December 2006, on credit institutions and capital adequacy, published in the Official Gazette no. 1027 of 27 December 2006, which regulates specific conditions on the access and performance of the banking activity in Romania, which "pursues the following aspects:

- the prudential supervision of credit institutions and companies providing investment services;
- monitoring and supervising payment systems;
- tracking and supervising the financial instrument operations settlement systems".[3]

As an application field, the ordinance is aimed at:

- Romanian legal entities;
- credit institutions;
- foreign branches of national legal entities;
- companies offering investment services;
- member state credit institutions operating in Romania;
- investment management companies;
- companies managing individual investment portfolios.

Credit institutions activity, according to the Emergency Ordinance number 99/2006 implies and conditions, the cumulative existence of two types of activities:

1. attractic deposits or other repayable funds from the public;
2. granting loans.

With regard to the activity of an authorized credit institution, it's important to mention that "only activities with a substantiated activity plan will be authorized. Also, they must meet the general and specific requirements, whenever they exist, on conducting their activity under the applicable legal conditions."[4]

[2] The 2006/48/CE Directive of the Parliament and the European Council

[3] The Emergency Ordinance no. 99 from the 6th of December 2006, On credit institutions and capital adequacy, published in the Official Gazette no. 1027, from 27th of December 2006.

[4] The National Bank of Romania, Reglementation no. 11/2007

[4] The Emergency Ordinance no. 99 from the 6th of December 2006, On credit institutions and capital adequacy, published in the Official Gazette no. 1027, from 27th of December 2006.

As a result, the National Bank of Romania imposes specific conditions for credit institutions that want to receive the authorization to operate. These specific conditions refer to satisfying the minimum criteria, reffered to by the Emergency Ordinance no. 99 of 6th December 2006, on credit institutions and capital adequacy, according to which "the credit institution:

➢ has its own funds;
➢ the level of the initial capital, must be at least equal to the minimum level established by regulations but it cannot be less than the equivalent of 5 million euros;
➢ the initial capital, when a credit institution is establishment, is the registered capital, except for situations when the credit institution is the result of a merger or division reorganization process;
➢ when a company is created, the registered capital must be fully paid in cash upon subscription;
➢ any increase in capital must be fully paid in cash;
➢ when establishment a credit institution, contributions in kind are not allowed;
➢ the shares belonging to a credit institution can only be nominative;
➢ credit institutions that are Romanian legal entities, don't have the right to establish exceptions to the principle that a share entitles to only one vote;
➢ the capital contributions to the establishment of a credit institution, will be paid into a blocked account, opened with a credit institution, until the credit institution is registered as a Romanian legal entity in the Trade Register Office;
➢ the activity's operational management must be provided by at least two people;
➢ the people assigned as the management of a credit institution, shall have adequate reputation and experience in order to exercise their responsibilities;
➢ the credit institution's registered office, Romanian legal person or its real head office must be located in Romania;
➢ the Romanian credit institution must, conduct the business it was authorized for, effectively and mostly in Romania;
➢ in order to give its authorization for a credit institution, the National Bank of Romania shall be informed of:

- the identities of the shareholders or members, whether natural or legal, that are due to hold a direct or indirect ownership interest in the credit institution;
- the value of those holdings;
- ensure a sound and prudent management of the credit institution;
- ensure the quality of the people who will manage the credit institution;
- if there are close links between the credit institution, Romanian legal entity, and other natural or legal persons, the National Bank of Romania shall grant authorization only if those links do not prevent the effective exercise of its supervisory functions.

In determining a qualifying ownership interest one shall take into account the following:

a) voting rights held by others on behalf of that person;
b) voting rights held by an entity controlled by that person;
c) voting rights held by a third party based on a contract or written agreement, which compels him to act in concertedly;
d) voting rights held by a third party based on a written agreement with that person or an entity under its control, which provides temporary transfer of voting rights to third parties, in exchange for a counterperformance;
e) the voting rights attached to the shares given as collateral by the person; except the situation when the person in whose favor the shares were pledged holds the voting rights and declares its intention of exercising them, in which case the voting rights be considered as belonging to the person in whose favor the shares were pledged;
f) voting rights attached to shares that come with an usufruct right for the beneficiary;

g) voting rights which that person or one of the other persons or entities mentioned in the a) - f) letters is entitled to acquire the on its own initiative, under a formal agreement;
h) voting rights attached to shares deposited with a person, that may be discretionary exercised, in the absence of specific instructions from the holders of these shares."[5]

The National Bank of Romania requires for any authorization application to be accompanied by a business plan. This business plan should include:

- the organizational structure of the credit institution;
- the types of activities it intends to organize;
- solutions to its ability of achieving the proposed objectives, consistent with the rules and regulations of a prudent and sound banking practice;
- solutions for the adequacy of the management framework;
- the existence of internal procedures for the capital mechanism and structure, adapted to the activity's specific and complexity, but also to the volume of transactions that it intends to undertake.

If credit institutions wish so, they can also organize other activities, in addition to the core business, as long as they comply with the regulations imposed by the National Bank of Romania.

In Romania, the National Bank of Romania is the authority that provides the legal framework that regulates, authorizes and ensures prudential supervision of credit institutions.

The National Bank of Romania imposes mandatory conditions for obtaining the functioning authorization, issues clarifications related to the documentation that must accompany approval application and notifies the European Commission about the conditions under which authorization may be granted.

Article 5 of the 99/2006 Ordinance, states that: "Any natural person or legal entity without legal personality, which is not a credit institution, is forbidden to engage in any activity meant for attracting deposits or other reimbursable funds from the public, in any activity involving the issuing of electronic money or in the business of raising and / or managing money from the contributions of members of a group of people especially created to acquire collective funds and then grant loans / borrowings of these accumulated funds, for the purchase of goods and / or services by the group's members"[6].

This prohibition is generally available excepting a few circumstances when different institutions that can take deposits or other repayable funds:
a) member states, regional governments or local authorities of a member state;
b) public international bodies, one or more of which is a member states;
c) in cases specifically stipulated by the Romanian legislation, the national law of another member state or the community's legislation, provided that these activities are properly regulated and supervised in order to protect depositors and investors.
(3) In applying the provisions of paragraph (1) and (2) a bond issue or other similar financial instruments is considered attraction of funds from the public if at least one of the following conditions is met:
a) it is the issuer's sole or main activity;
b) the issuer conducts a professional lending activity, or one or more of the activities referred to in article 18 paragraph (1) letter c)-1).[7]

The National Bank of Romania is the only bank authorized to appreciate whether an activity is or not deposit drawing according to Ordinance No. 99/2006 or other repayable funds from the public.

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[5] The Emergency Ordinance no. 99 from the 6th of December 2006, On credit institutions and capital adequacy, published in the Official Gazette no. 1027, from 27th of December 2006.
[6] The Emergency Ordinance no. 99 from the 6th of December 2006, On credit institutions and capital adequacy, published in the Official Gazette no. 1027, from 27th of December 2006.
[7] Idem.

Article 6 paragraph (1) of the ordinance "prohibits any person, other than an authorized credit institution, to use the name "bank" or "credit cooperative organization", "credit cooperative", "central credit union", "cooperative bank", "central cooperative bank", "mortgage bank", "bank for association savings and loans", "electronic money institution" or derivatives or translations of these names, in relation to an activity, a product or service unless such use is established or recognized by law or an international agreement, or when the context in which that name is used, visibly shows that banking activity is not being pursued."[8].

Dismemberments of a credit institution (branches, agencies, subsidiaries, operational branches) in Romania may use in their name, according to the 99/2006 Ordinance, the name or other identification elements of their parent company, its initials, logo or emblem.

3. Common conditions for the establishment and operation of credit institutions

In Romania, credit institutions must operate only as stock companies. The current legislative regulations on the establishment and functioning of banks are based on:

- Law no. 31/1990, Commercial company law - common Law;
- Articles of the company's memorandum of association;
- Law no. 58, Banking Law - specific law;
- Government Emergency Ordinance no. 99/2006, which supplements and amends Law no. 58 - specific law;
- The authorization issued by the National Bank of Romania.

The National Bank of Romania grants authorization to credit institutions only if it is convinced that they can carry activities safely, in compliance with sound and prudent management criteria, in such a way as to protect the interests of clients, respecting the Government Emergency Ordinance no. 99/2006 and the regulations issued for its implementation.

When considering a credit institution for authorization, the National Bank of Romania will consider the following: name of the credit institution, its activity, people ensuring the administration and / or the management, shareholders, financial auditor.

Establishing a credit institution involves two stages, resulting in:

- under common law, establishment formalities and the credit institution's approval by the National Bank of Romania, must be met;
- authorization of the company's banking activity by the National Bank of Romania.

Legal provisions state that the authorization of banks by the Central Bank of Romania involves two stages[9]: approval of the banking company in accordance to Law no. 31/1990 on commercial companies and the Government Emergency Ordinance no. 99/2006, authorizing the bank's activity.

The method for establishing credit institutions is unique in accordance with the requirements of Law 31/1990, in compliance with the minimum level of the registered capital, namely "separate owned funds or an initial capital that cannot be less than the equivalent in lei of 5 million euros"[10] and conditions regarding the shareholders.

Article 32, paragraph 2 of the Ordinance 99/2006, comes with a prohibition, in the sense that any credit institution "cannot be established by public subscription".[11]

After receiving the approval statement by the Central Bank of Romania, within two months, the credit institution must submit to the National Bank of Romania "the documents certifying the legal establishment, according to the applicable provisions in order to obtain the operating authorization[12].

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[8] Idem.

[9] Article 3 paragraph (1) of the National Bank's reglementation no. 11/2007.

[10] Article 25 paragraph 1 of the Gouverment Emergency Ordinance no. 99/2006.

[11] Article 21 in Law no. 31/1990 publiched in the Official Gazette of Romania, Part I, no. 126-127 from the 17th of November 1990.

[12] Article 33, paragraph 5 of the Gouverment Emergency Ordinance no. 99/2006.

Then the credit institution's registration in the Trade Register Office takes place, followed by doing the inventory and the publicity.

Establishing a credit institution, a Romanian legal entity, assumes that it has its own funds, which may not be less in value than the equivalent in lei of 5 million euros, fully paid upon subscription in cash, situation which is also valid if the capital increases. The contributions to the initial capital are paid into an account previously opened at a credit institution, the account remaining locked until the credit institution is registration with the Trade Register Office.

The shares can only be nominative, with no exceptions to the principle: one share entitles to one vote.

The registered office or the head office of the credit institution, recorded as a Romanian legal entity must be located in Romania.

The management of a credit institution has the possibility to opt for a unitary management system, according to article 137-152 of law no. 31/1990 or for the dual administration system according to article 153-153 of the law no. 31/1990.

On the territory of a third country, credit institutions can perform the activities authorized by the National Bank of Romania "only by establishing a branch"[13] and making it subject to the prior approval of the Central Bank

The establishment of credit institutions is based on common law no. 31/1990 of the commercial companies and the provisions of the specific law Government Emergency Ordinance no. 99/2006, concerning the authorization and operation of credit institutions.

4. The legal framework for the establishment and operation of banking institutions

Regulations underlying the establishment and operation of credit institutions are:

- Law no. 31/1990, the commercial companies' law;
- Law no. 58, banking law - specific law;
- Gouvernment Emergency Ordinance no. 99/2006, supplementing and amending law no. 58;
- The authorization issued by the National Bank of Romania.

The National Bank of Romania grants authorization to credit institutions only if it is convinced that they can carry activities safely, in compliance with sound and prudent management criteria, in such a way as to protect the interests of clients, respecting the Government Emergency Ordinance no. 99/2006 and the regulations issued for its implementation.

When considering a credit institution for authorization, the National Bank of Romania will consider the following: name of the credit institution, its activity, people ensuring the administration and / or the management, shareholders, financial auditor.

Establishing a credit institution involves two stages:

- receiving approval from the National Bank of Romania;
- authorization of the company's activity by the National Bank of Romania.

The credit institutions' authorization process by the Central Bank of Romania involves two stages[14]: "approval of the credit institution's establishment in accordance to law no. 31/1990 on commercial companies and the Government Emergency Ordinance no. 99/2006, authorizing the bank's activity.

After registration and authorization, credit institutions are subject to registration in the special register for credit institutions, which is kept by the National Bank of Romania as a main body of control and is permanently accessible to the public.

The National Bank of Romania as a main body of banking control, keep in a computerized chronological system, the records of all credit institutions, performing the job of recording all issued authorizations as well as those in force, in the register of credit

[13] Article 91 of the Goverment Ordinance no. 99/2006.

[14] Article 3 paragraph (1) in the National Bank of Romania, Reglementation no. 11/2007.

institutions. This register is publicly accessible permanently. The National Bank's Regulation no. 1/2007[15] on the register of credit institutions, establishes the register's content as well as the way records on credit institutions are made.

The information contained in the register of credit institutions, according to the regulations, cover the following information: date of registration, the unique trade registration code and the date of registration, the unique tax registration code, the date of the functioning approval, number and date of the authorization received from the National Bank Romania.

The register of credit institutions "is both a means of control for the Central Bank as well as a legal means of advertising the existence and activities of a banking company. In this context, alongside with the things mentioned above, under "Remarks" they will be mentioning all changes in the status of the banks: authorization withdrawal, name change, reorganization, liquidation, bankruptcy, setting up a new management system, financial and operational restructuring for privatization, merger, absorption and other situations"[16].

In the case of the National Bank of Romania, the task of dealing with the records of the credit institutions in their special registry belongs to:

- Communication Directorate of the General Secretariat.
- General Directorate for licensing, regulation and prudential supervision of the banks;

After being registred in the register of credit institutions, provided they notify the National Bank of their first operation, credit institutions may start to run the business.

5. Method for credit institutions registration and authorization

All credit institutions are subject to the process of registration and licensing by the National Trade Register Office, where they acquire the quality of legal entities, then they get the authorization from the Central Bank of Romania and are recorded into the register of credit institutions.

The National Bank of Romania requires credit institutions to comply with the specific and general founding conditions. After obtaining the unique registration certificate from the National Trade Register Office, credit institutions are subject to the second stage for obtaining the authorization issued by the National Bank of Romania. In the next step, credit institutions shall be registered into the register of credit institutions. Besides keeping track of the authorizations it issues the National Bank of Romania will also supervise the information recorded in the register of the credit institutions.

Each credit institution must have a formal frame business administrator rigorously designed, which include a clear organizational structure with clearly defined lines of responsibility, transparent and consistent, effective processes to identify, manage, monitor and report the risks who is or might be exposed, adequate internal control mechanisms, including administrative and accounting procedures and rigorous remuneration policies and practices that promote and is consistent with healthy and effective risk management.[17]

The register of credit institution in permanently available to the public and it respects regulation no. 1/2007 of the National Bank of Romania. After being recorded in the register, credit institutions will be able to perform the activities they were authorized for.

6. Types of activities allowed to credit institutions

Credit institutions operate under the Gouvernment Emergency Ordinance no.99 of 6 December 2006, on credit institutions and capital adequacy, after obtaining authorization from the National Bank of Romania.

The types of activities permited to credit institutions are reflected, according to Ordinance No.99/2006, in:

a) attracting deposits and other repayable funds;

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[15] National Bank's standards no. 18/2002, on bank registry and the registry of credit co-operative organizations.
[16] Turcu, I., Observations on the legal reglementation of the banking activity", R.D.C. no. 11/1998, page 24.
[17] Petre Lazaroi, Agata Mihaela Popescu, 2012, Study Manual of Law Banking and Currency, PRO Univesitaria, pag. 117.

b) lending money, including: consumer credits, mortgage credits, factoring with or without recourse, financing commercial transactions, including forfeiting;
c) financial leasing;
d) payment operations;
e) issuing and administering means of payment such as: credit cards, travelers checks and others, including electronic money;
f) issuing guarantees and assuming commitments;
g) dealing on its own account and / or on the account of its customers, according to the law, with:
1. instruments of the monetary market, such as: checks, bills, promissory notes, etc;
2. currency;
3. futures and options financial contracts;
4. instruments based on exchange rates and interest rates;

h) securities and other transferable financial instruments; participation into the issuing of securities and other financial instruments;
i) consultancy services related to capital's structure, business strategy and other aspects related to commercial business, services related to mergers and acquisitions and the supply of other advisory services;
j) portfolio management and consultancy;
k) custody and administration of financial instruments;
l) interbank intermediation;
m) services related to providing data and references related to the loan;
n) rental of safe deposit boxes;
o) operations with precious metals and stones;
p) acquisition of shares in other entities;
q) any other activities or services, to the extent that they are part of the financial field of activity, while respecting the special legal provisions governing those activities, if any.

Credit institutions may also carry out other allowed activities, under the authorization granted by the National Bank of Romania, as follows: mandated or commissioned non-financial operations, property management operations, customer services, activities that are compatible with the requirements of the credit institution's business and with protecting the interests of depositors. However they are prohibited from engaging in operations like:

- pledging their shares on the account of the bank's debts;
- granting loans secured by shares, other equity securities or bonds issued by the credit institution or another entity in its group;
- attracting deposits or other repayable funds, securities or other valuables from the public, when the credit institution is insolvent."

All the activities of credit institutions can be held to the extent of the authorization granted by the National Bank of Romania, by respecting the effective special and common law.

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PREVENTIVE PROCEEDINGS IN THE VISION OF THE CODE ON PREVENTINVE PROCEEDINGS OF INSOLVENCY AND OF INSOLVENCY - A FIRST STEP FOR THE HARMONIZATION OF THE EU MEMBER STATE'S LEGISLATIONS IN THIS AREA

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Abstract

In order to improve and accelerate the insolvency with cross border implications, the Council has adopted the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings establishing the common norms on the jurisdiction, recognition and applicable law in this area, European norm which does not harmonizes the national material law systems in the area of insolvency, thus it can be identified significant differences at a national legislative level regarding the insolvency in relation to fundamental considerations of politics, structure and content, in other words, there are not unique insolvency proceedings, with applicability throughout the European union. Nevertheless we consider that a first step in the achievement of a legislative uniformity was already taken, at least regarding the unity regulation of certain preventive proceedings which will allow the avoidance of insolvency of the debtor, mentioning in this respect Law No 381/2009 on the preventive concordat and the ad-hoc mandate, whose provisions are taken from the new code on the preventive proceedings of insolvency and of insolvency, code which eases the direct application of the Council Regulation (EC) No 1346/2000.

Keywords: *financial difficulty, preventive concordat, ad-hoc mandate, recovery plan, proceeding*

Introduction

The preventive proceedings stated by the Law 381/2009[1] *and inserted in the new code on the preventive proceedings of insolvency and of insolvency*[2] *have as purpose the*

[1] Official Gazette No 870/14 October 2009.

[2] With the entrance into force of the new code the followings normative documents shall be abrogated: Law No 85/2006 on insolvency procedure, Law No 381/2009 on the on the preventive concordat and the ad-hoc mandate, Government Ordinance No 10/2004 on the bankruptcy of credit institutions, Chapter 3 and 4 "The procedure of insolvency for insurance undertakings" of the Law No 503/2004 on the financial recovery and bankruptcy of insurance undertakings, Law No 637/2002 regulating the international Private law relations concerning insolvency, published in the Official Gazette No 931/19 December 2002, as further amended and supplemented. Also, the Project of Law reiterates the actual legal provisions of transposing the EU Directive in the area of bankruptcy for credit institutions: Directive No 2001/24/EC of the European Parliament and of the Council of 4

safeguarding the debtor found in a financial difficulty, and as main purpose the continuance of his activity, but also the maintenance of the creditors' debts on the debtor, by amicable settlements of renegotiating the debts or their conditions. The settlements between the debtor and creditor are accomplished by the procedure of the ad-hoc mandate[3] *or by the conclusion of a preventive concordat.*

According to Art 4 of the project-code on the preventive proceedings of insolvency and of insolvency, the preventive proceedings are based on the principle of granting an opportunity for the honest debtors to an efficient and effective recovery of their business, either by the preventive proceedings of insolvency, or by the judicial reorganization procedure, namely favoring, in the procedure of pre-insolvency, the amicable negotiation/renegotiation of the debts and a preventive concordat.

I. Preventive concordat - a preventive procedure applicable for the debtors found in difficulty

a) Definition and features of the preventive concordat

The preventive concordat is a contract concluded between, on the one hand, the debtor found in a financial difficulty and on the other hand the creditors having at least two thirds of the value of the debts accepted and undisputed, on the other hand, by which the debtor proposes a plan for the recovery and achievements of the debts to this creditors, and the creditors agree to support the efforts of the debtor to overcome the difficulty in which he is in (Art 3 Let d)) of the Law No 381/2009, as well Art 5 Point 17 of the code of insolvency.

The features of the preventive concordat are:

i) The preventive concordat is the contract concluded between the debtor found in difficulty and his creditors. The law considers only the creditors who have at least two thirds of the value of the debts accepted and undisputed of the debtor.

ii) The preventive concordat states a deal on the financial recovery plan of the debtor's business and for covering the debts, elaborated by the debtor with a conciliator.

iii) The object of the preventive concordat is the financial recovery plan for the debtor's business and for covering the debts, elaborated by the debtor with a conciliator.

iv) The preventive concordat is established by the court.

b) The participants in the procedure of the preventive concordat are: the debtor
found in difficulty, the syndic judge, the conciliator and the creditors, namely the creditor's assembly.

The debtor - the beneficiary of the procedure. As the beneficiary of the procedure, every debtor may appeal the procedure of the preventive concordat, running a business found in a financial difficulty, without being in insolvency[4].

April 200Ion the reorganization and winding up of credit institutions, published in the Official Journal of the European Communities L 125/5 May 2001.

[3] The ad-hoc mandate is a confidential procedure, triggered by the request of the debtor, by which an ad-hoc representative renegotiates with the creditors with the purpose of reaching an agreement between one or more creditors and the debtor, in order to overcome the difficulty in which he is found (Art. 3 Let c) of the Law No 381/2009, as well as Art. 5 Point 34 of the Code of insolvency. The representative may propose deletions, reschedules or partial reductions of debts, the continuation or termination of contracts under execution, cutbacks, as well as any other measures considered to be necessary for the object of the mandate. According to Art. 13 Para. 2 of the new code, the object of the ad-hoc mandate must be achieved within 90 days from the appointment of the ad-hoc mandate.

[4] Art. 13 Let a)-f) of the Law No 381/2009, namely Art. 16 of the new code of insolvency states certain debtors for who is forbidden the procedure of preventive concordat. Specifically, it does enjoy the access to this procedure the debtor against whom was issued a definitive and irrevocable decision of conviction for economic offences or the procedure of insolvency was opened 5 years prior the offer for preventive concordat. Also, the debtor cannot access the procedure of concordat, if with 3 years prior the offer for preventive concordat, has been the beneficiary of another preventive concordat, or if the debtor and/or the shareholders/silent partners or his administrators were convicted in the past 5 years prior to the opening of the preventive concordat, for the

The syndic judge. In the procedure of preventive concordat, the syndic judge has, according to the analyzed text, the following attributions:

i) Appoints the provisional conciliator;

ii) Ascertains, at the request of the conciliator, the preventive concordat, as well as to the request of a creditor not-signatory of the concordat, the fulfillment of the conditions required for his enlistment on the list of the creditors who have joined the preventive concordat;

iii) Provisionally suspends the enforcement procedures against the debtor based on the project of preventive concordat;

iv) Trials the actions for nullity or resolution of the preventive concordat.

The requests regarding the preventive concordat are trialed in the council chamber, with emergency and priority. Regarding the decisions stated by the syndic judge these are definitive and enforceable, being subjected to the appeal, without being suspended from enforcement[5].

The conciliator. The procedure of the preventive concordat involves a conciliator who can be an insolvency practitioner[6], whose honorary is a fixed amount, a monthly remuneration or an honorary for success established by the preventive concordat and supported by the debtor.

According to the law[7], the conciliator or the concordat administrator has the following attributions:

i) Elaborates the list of the contestant and concordat creditors;

ii) Elaborates, with the debtor, the offer for concordat with its elements, namely the project for a preventive concordat and the recovery plan;

iii) Makes the necessary arrangements for the amicable resolution of any dispute between the debtor and creditors, or between the creditors;

iv)Requests to the syndic judge the establishment and/or, where appropriate, the homologation of the preventive concordat;

v) Supervises the fulfillment of the obligations assumed by the debtor in the preventive concordat;

vi) Elaborates and submits to the concordat creditors' assembly monthly or trimestral reports regarding his and the debtor's activities;

vii) Convokes the reunion of the concordat creditors;

viii) Asks the court to conclude the procedure of the preventive concordat;

ix) Fulfills any other attributions stated by the present chapter, by the preventive concordat or by the syndic judge.

The assembly of the concordat creditors. The creditors participating in the procedure of the preventive concordat form the assembly of the concordat creditors.

According to Art 18 of the Law No 381/2009, namely Art 21 of the new code of insolvency, the assembly of the concordat creditors has the following attributions:

a) Approves the reports from the conciliator on the activity of the debtor and the fulfillment of the obligations assumed by the preventive concordat;

b) Appoints the creditors' representative;

c) Is the initiator of the action for the resolution of the admission in composition with creditors.

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offences stated by the law, or if the members of the management/supervision organs of the debtor were held liable according to the Law No 85/2006 on the procedure of insolvency. Not ultimately, the debtor does not have access to the procedure of preventive concordat if his tax offence record according to the Government Decision No 75/2001 on the organization of the tax offence records.

[5] Art. 18 of the new code of insolvency.

[6] Authorized in the conditions of G.D No 86/2006 on insolvency practitioners.

[7] Art. 16 of the Law No 381/2009, namely Art. 19 of the new code of insolvency.

We notice that the code of insolvency no longer states the obligation of the creditors' assembly to modify, with the participation of the debtor, the conciliator's honorary.

During the procedure of the preventive concordat, the assembly of creditors can be convoked by the conciliator, ex officio or at the request of the creditors representing 10% of the total amount of the debts.

c) Opening the procedure and the offer for a preventive concordat

According to Art 20 of the Law No 381/2009, namely Art 23 of the code on insolvency, any debtor who is a legal person found in financial difficulty, may submit to the court a request to open the procedure of the preventive concordat by which he proposes for a provisional conciliator, from the insolvency practitioners authorized by the law, who will be appointed by the syndic judge, by an irrevocable agreement.

The offer for a preventive concordat. According to the law, within 30 days from his appointment, the conciliator and the debtor shall elaborate the list of creditors and the offer for a preventive concordat.

The offer for a preventive concordat shall comprise the project of the preventive concordat and the recovery plan[8].

1. The project for a preventive concordat - represents the card of the debtor which must present the detailed analytical situation of the actives and passives owned by the debtor, certified by a chartered management accountant or, where appropriate, audited by an authorized auditor; the circumstances of the financial difficulty situation and the measures adopted by the debtor to overcome it; the financial evolution for the following 24 months, to which is annexed the declaration on the financial difficulty status containing also the list of known creditors of the debtor. We note that the code of insolvency is modified in relation to the law that is about to abrogate, the latter one stating a term of 6 months for which the debtor was compelled to elaborate a projection of his financial evolution. Using the project for a preventive concordat the debtors proposes the confirmation of the provisional conciliator.
2. *The recovery plan* states measures such as: reorganization of the debtor's activity (the restructuraţi on of the debtor's management, the modification of the functional structure, cutbacks etc.); means to overcome the financial difficulty situation (capital increment); issuance of bonds, bank loans, opening or closing branches or working points, selling actives, establishment of guarantees etc.; the percentage of satisfaction of the creditors' claims, with the possibility to ask for postpones or reschedules for the payment of the debts, total or partial erase of certain debts or only of the interests or delay penalties, compensations, novation; the deadline for satisfying the debts by the concordat, which can be of maximum 18 months from the conclusion of the preventive concordat. The version proposed by the new code state for the latter point above mentioned a term of 24 months from the moment of ascertain or homologation by an enforcement decision[9].

The conciliator presents to the creditors the offer for a preventive concordat and is attached to the case file.

d) **Conclusion, approval, ascertain and homologation of the preventive concordat**

The conclusion of the preventive concordat is achieved as a result of the negotiations between the debtor and creditors regarding the offer for a preventive concordat within collective or individual sessions in the presence of the conciliator, with a duration which cannot exceed 30 calendar days. The new code states substantial modifications regarding the limit for the negotiations, namely 60 days[10].

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[8] Art. 21 of the Law No 381/2009 and Art. 23 Para 6 of the code on insolvency.
[9] See in this regard Art. 24 Para 2 of the code on insolvency.
[10] See Art. 26 Para 3 of the code on insolvency.

e) *Approving the preventive concordat by the creditors.* The offer for a preventive concordat and any amendments resulted after the negotiations are subjected to the creditors' vote[11].

The preventive concordat is considered to be approved by the creditors if it meets the votes of the creditors representing two thirds of the value of accepted and undisputed debts. If the majority stated by the law is not met, the debtor has the right that after 30 days to make a new offer for a preventive concordat.

The ascertaining of the preventive concordat by the syndic judge[12] is made at the request of the conciliator, by a decision adopted in the council chamber, with emergency and priority, after hearing the concordat administrator.

The preventive concordat, approved by the creditors and ascertained by the syndic judge is communicated to the creditors by the concordat administrator and registered in the trade register.

The ascertaining of the preventive concordat has as effects the rightful suspension of the individual pursuits performed by the creditors against their debtors and the beginning of the prescription of the right to ask for the enforcement of the debts against the debtor.

The homologation of the preventive concordat by the syndic judge is made at the request of the concordat administrator, with the purpose of insuring the opposability of the preventive concordat to the non-signatory creditors, including the unknown or contested creditors. In order to state the homologation, the syndic judge shall verify the cumulative fulfillment of the following conditions:

i) The value of the debts contested and/or found in litigation must not exceed 20% of the statement of affairs;

ii) The preventive concordat was approved by the creditors representing at least 80% of the total amount of the debts;

By a decision homologating the preventive concordat, the syndic judge suspends all procedures of enforcement against the debtor, being able to ask the non-signatory creditors for a term of maximum 18 months to postpone the deadline of their claims. During this period, shall not be imposed any interests, penalties or other expenses added to the debts.

Regarding the budgetary creditors, the law states that the opposability of the preventive concordat is conditioned by the compliance with the legal provisions regarding the state aid and its approval by the inter-ministerial commission.

e) Conclusion of the preventive concordat

The preventive concordat is concluded with the successful closure of the procedure, the impossibility of concluding a preventive concordat or, where appropriate, the annulment of the contract or the termination of the preventive concordat.

Art 34 of the Law No 381/2009, namely Art 102 of the code on insolvency, states that once the objectives established by the concordat were fulfilled, we are in the situation of the successful closure of the procedure, the syndic judge stating a decision ascertaining the achievement of the preventive concordat's objective.

Also, the procedure of the preventive concordat shall be closed if during its performance, but before the expiration of the deadline established for the procedure, the concordat administrator appreciates as impossible the achievement of the preventive concordat's objectives, for reasons which cannot be imputed to the debtor[13], the latter one

[11] Art. 24 of the Law No 381/2009, namely Art. 27 Para 2 of the code on insolvency. In principle, the creditors vote by mail. They must communicate their vote to the debtor within 30 calendar days from the moment they received the offer for a preventive concordat. The unconditioned favorable vote for the preventive concordat has the value of the acceptation for the concordat. Any conditioning of the vote is considered a negative vote.

[12] Art. 26 of the Law No 381/2009, namely Art. 28 of the code on insolvency.

[13] See in this regard Art. 34 Para 2 of the Law 381/2009 and Art. 103 of the code on insolvency.

being able to ask the syndic judge to state a decision ascertaining the failure of the preventive concordat and the conclusion of the procedure.

The annulment of the preventive concordat. The creditors who voted against the preventive concordat may request the annulment of the contract within 15 days from the registration of the concordat in the trade register.

If are invoked the reasons for full invalidity, the new code on insolvency states different than the old law, so if Art 32 of the Law No 381/2009 states that the right to invoke the nullity is imprescriptible and belongs to every interested person, the code states that when the reasons for full invalidity are invoked, the right to ask for a ruling of invalidity shall be prescribed within 6 months from the registration of the concordat in the register where the debtor is mentioned and belongs to every interested person.

The request regarding the *termination of the preventive concordat* shall be made by the concordat creditors' assembly if it is ascertained the serious breach by the debtor of the obligations assumed in the preventive concordat, namely favoring one or more creditors at the expenses of the others, hiding or externalizing assets during the preventive concordat, performing payments without a consideration or in ruinous conditions etc.[14].

Conclusions

We consider that if in this moment the preventive procedures are stated differently by a special norm in relation to the procedure of insolvency, the code on the procedures of preventing the insolvency and on insolvency has the credit to propose an integrative vision, including in a single body the general legislation applicable to all business operators, the legislation in the area of preventing the insolvency, namely the ad-hoc mandate and the preventive concordat, and the special legislation, applicable for credit institutions and insurance undertakings, stating the insolvency for groups of societies, as well as rules on the cross border insolvency, covering the requirements for the legislative unification under the Regulation (EC) No 1346/2000 of 29 May 2010.

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[14] See in this regard Art. 98 of the code on insolvency.

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EUROPEAN PERSPECTIVE ON ENVIRONMENTAL LIABILITY FOR INJURY

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Abstract

As is known, pollution (in all its forms) is most often a latent threat, particularly serious. It is not, as a rule, a sudden event, but is the result of slow accumulation of negative effects, which, unchecked and unrepaired timely touch time limits that exceed natural levels of balance, causing extremely dangerous consequences for the existence and functioning naturally.

Keywords: *pollution, environmental law, directive, pollutant*

Introduction

In ecological field is particularly important to ensure in all cases reparation due to specific and very serious consequences that may generate losses. National interest nature of environmental protection and enhancement and other relevant considerations outlined above have imposed liability so as to adopt a more secure system that would provide full compensation, effective and, if possible, the nature of the damage caused to the environment.

Through environmental and collective interests are affected thereby indirectly, for which repair could not be adequately covered in terms of classical law, which involves damage to individual interests clearly identified. In 1972 the right to a healthy environment was enshrined in the Declaration of Stockholm3 in Principle 1: "Man has the fundamental right to freedom, equality and satisfactory living conditions, in a quality which enables him to live in dignity and prosperity. He has the sacred duty to protect and improve the environment for present and future generations".

European Convention on Human Rights does not have a text itself to guarantee the right to a healthy environment.

Countries have adopted an Additional Protocol providing the right environment and, as was the case of other fundamental rights such as the right to property, education, free, to not be tried twice for the same offense, etc.., although a draft additional protocol was prepared by Professor Steiger since 1973.

Tried also protecting the right to a healthy environment in the scope of art. 6 European Convention on Human Rights. Thus, in 1993 because Zender against Sweden, the Court sanctioned the violation of those saying that a well water pollution as a result of prejudice landfill ownership and im prejurarea that the applicants had no opportunity to challenge the decision in court management led to the conviction of Sweden.

In accordance with the "polluter pays" an operator causing environmental damage or creating an imminent threat of such damage should bear, in principle, the costs of preventive or remedial measures. Where a competent authority acts, itself or through a third party, instead of an operator, that authority should ensure that the costs it has incurred will be recovered from the operator. Also, operators should bear the ultimate cost of assessing environmental damage and, if necessary, assessing an imminent threat of such damage. People affected or likely to be affected by environmental damage should be entitled to request

the competent authority to take action. However, environmental protection is a diffuse interest that individuals always act or are not always able to act.

Subjective liability based on fault who committed tort, negligence to be proven by the victim. In our civil code, article 998 and 999, the entire one another, based solely on its liability and the negligence or intentional negligence.

Liability for damages appears to be based on breach of statutory duty for all individuals and businesses to protect the environment. That does not mean, however, an exception to the general principle that anyone who causes injury should fix it. What will make this specific responsibilities, as we shall see below, there are conditions and how liability for compensation from the point of view of the author and establish victim entitled to compensation.

Given the peculiarities of the domain, there can be no certainty about causality and ought to accept the existence of one eminently probable. Then there is the issue of the measure, which must take into account all the elements in this, so you need not reach its negation, but not a high certainty, so is an offense and shall be punished accordingly, breaching obligations of natural and legal to bear the cost of compensation for damage and remove the consequences of this damage occurred restoring previous conditions, according to the "polluter pays" [Art. 96 para. (3) Section 14 of Ordinance no. 195/2005] or corporate obligations to cover the costs of measures to prevent and/or reduce the adverse consequences of the activities that genetic organisms [art. 96 para. (3) Section 10].

In environmental law is often used in administrative responsibility (against conventional) to prevent or combat non statutory requirements. Procedure for the determination and application of administrative sanctions is much faster and more flexible in relation to other legal proceedings, which is favorable repair requirements with priority environmental damage. According regulatory framework in force, by law or government decisions may determine and punish offenses in all fields, and by the decisions of local authorities or county shall be established and sanctioned offenses in all fields in which their tasks they are set by law, in so far as these areas are not established by law or by offenses Government decisions. From the point of view of environmental issues that historically the first law in the field nr.9/1973 Act established certain categories of offenses relating to various environmental factors: air, water, soil. After 1989 updating and improving the contravention in GD was performed on certain offenses nr.127/1994 environmental rules. Environmental Protection Law no.137/1995 devote a number of offenses punishable by fine.

The new regulatory framework in this area, the Government Emergency Ordinance no. 195/2005 has preserved, in general, the same conception of offenses, with some adjustments on their subject and especially financial penalties apply. Criterion applicable fines in art. 96 of the Ordinance are three categories of offenses:

- Group I are 27 offenses consisting in violations of the law such as corporate obligations to perform self-monitoring systems and report the results to the competent authorities, to keep strict records of dangerous substances and preparations, identify and prevent risks they may pose to human health and the environment, the obligation to maintain alignment windbreaks and protection.
- Group II with 34 offenses, including the violations of legal provisions such: duty individuals requesting and obtaining regulatory acts, the obligation to inform the public about the risks of operating or environmental risk objectives existence.
- Group III offenses, environment, considered the worst, at least in terms of fines, including a number of 15 violations of the law, for example, individuals and legal obligation to reduce, modify or terminate generating activities pollution reasoned request from the competent authorities, natural and legal obligations to bear the cost of compensation for damage and remove the consequences of this damage occurred restoring previous conditions, according to the "polluter pays" etc.

The current regulatory framework provides not update regularly (annually) of fines.

Passive subject of liability offenses in is undeniably the entire community, represented by the formal-legal state. Rules on the liability issue is that the individual offenses is responsible for committing the offense.

As such, it is punishable by a sanction under the law, any person, regardless of nationality or residence. The legal entity responsible contravention cases and conditions stipulated by the legislation which established and sanctioned offenses. Some additional sanctions apply only to businesses (shutting down, suspending work, etc.). Environmental offenses appear as subjects of responsibility, with individuals and businesses in general, and some situational, such as local authorities, land owners and holders of title or no title, legal and natural persons authorized etc.

Whatever the nature conferred (civil, administrative, specific contravention), the procedure involves the stages contravention contravention finding, the sanction and remedies against acts of enforcing. Ascertained and the sanctioning (fine) are persons appointed by the Commissioner and the National Guard Environmental and Biosphere Reserve "Danube Delta" specialized people of the National Commission for Nuclear Activities Control. Judgment resolving the complaint may be appealed within 15 days of communication, with the peculiarity that its motivation is not mandatory, it can be sustained and orally before the court. The appeal suspended the judgment. Crime against the environment (ecological) is becoming more profitable and therefore more intense, creating a global annual turnover estimated at between 18 and 24 billion euros, mainly through the activities of illegal storage of hazardous waste, traffic toxic substances prohibited and protected natural resource smuggling. Illicit trade from rare, endangered ensure the highest profit, constituting the second illegal market in the world after the drugs.

Globalization has been rapid and substantial benefits it brings, have expanded Environmental crime in Romania. Illegal importation of toxic, massive deforestation, irrational trade of protected species (sturgeon, game etc.) and numerous acts of pollution and environmental deterioration illicit profits for million and produce incalculable environmental damage.

Such acts are encouraged by the fact that most of them, though contrary to the law and a great social danger, remain unpunished. Among the reasons: an inadequate criminal law field and a chronic state of inefficiency in its application. Use of criminal law to protect the environment has become a rare protected traditional values, such as a person\'s life or property were replaced in this case with res nullius, such as water or air, and quantifiable damage and repaired economically, diffuse, hard cash assessable. However, under pressure to adapt and juridical realities in this regard, so starting with the German law on the fight against environmental crime in 1980, environmental offenses and have appeared in criminal register. They were multiplied and diversified gradually included in special sections of the criminal code or systematized in environmental codes.

Romanian law long remained tributary system failure dependence organic criminalization of administrative obligations (subject to authorization or provided by it). Environmental promotion to the rank Attempt core values protected by criminal law offenses environmental via incorporation in even the Criminal Code (Law no. 301/2004) remained at this stage, given that its fate is uncertain, on the contrary, the new Penal Code environmental crimes in the sphere of special legislation. In these conditions, the new regulatory framework Emergency Ordinance no. 195/2005 on environmental protection, some progress, keep the major limitations in the conception and criminal environmental protection instruments. Inadequacy of the peculiarities of illicit environmental legislation is an important cause of inefficiency fight against environmental crime.

Opting for a sectorial approach, were provided crimes and offenses for violation of rules on atmosphere protection (Article 395), violation of rules on water protection (Article 396), violation of water management rules (Article 397), violation rules on the use of drinking water (art. 398), destroying water protection works (art. 399), breaking the rules on forest protection (art. 401), noise pollution (art. 402), accidental pollution (art. 403). As a particular

legal entity shall be punished for offenses against the environment. However, the enactment failed to provide an adequate framework domain, create an ecological crime type to configure on which the whole edifice of environmental criminal. Then there are some situations where the exact setting of the author injury is impossible, and the consequences can not get covered products, moreover, can worsen if not addressed in a timely manner. It was necessary, therefore, especially in terms of pollution, as statutory provisions to ensure a complete repair, efficiency, timeliness of any damage to the environment, establish liability rule regime also allowed risk based stimulation and diligent attitude prudent, sustainable use of environmental factors, the establishment and improvement of a system of life insurance adapted to the new economic and social requirements. Consequently, in those cases in which environmental pollution is produced, and if he could identify the damage resulting in a breach of the provisions of special legislation (Law no. 9/1973, Law no. 61/1974) on the legal of responsibility, it must be found in art. 1000 par. (1) Civil Code. In favor of such a position is raised and the fact that always, environmental pollution is achieved through a thing (or a power), and according to a 1953 decision of the supreme court, the thing is any material form, including energy. In concept become classics, strict liability is based on the idea of risk, and any other activity that creates the risk, is the author or responsible for the damage it can cause, without the need to prove a culpable attitude.

Liability Risk Theory started initially with the idea of justice that any human activity follows a profit, therefore, it is reasonable that any damage you cause to be repaired (emolumentum ubi, ibi onus). Responsibility for risk brought to the environment and ecological balance - which we are (or should represent) actually specific manifestation of civil liability in organic matter - not to diminish or cancel the preventive-corrective it aims liability for negligence, this role moves significance other steps to achieve repair such damage caused. Given that pollution is caused primarily by the general activity of economic agents must therefore their liability risk, whose consequence is to be passed collectively or individually. From this perspective, retains responsibility for environmental risk and even increase their function to prevent and combat the negative effects on environmental quality.

For more exact dimensions circumstantiation such liability is required highlighting certain features of environmental risk. As is known, the risk of civil liability regime has a number of advantages, especially in organic matter in relation to liability based on fault. First, compensating the victim will always be contrary to the theory of liability for negligence, when sometimes there are cases where it can not be held liable, and accordingly, such damage product. Even exemptions from restrictive covered replied to force majeure, it\'s recognizing the effects of graduation in certain conditions. Within the European Union, the obligation to protect the environment and natural habitat has been stated by the Directive on the responsibility for the prevention and remedying of environmental damage. The scope, this raises the possibility that a company be held liable for damage to the environment. Its effectiveness will depend upon the quality of the infrastructure that the EU will create and use in the process of implementation (internal regulations, regulators, control devices, etc..).

Within the European Union, the obligation to protect the environment and natural habitat has been stated by the Directive on the responsibility for the prevention and remedying of environmental damage. The scope, this raises the possibility that a company be held liable for damage to the environment. Its effectiveness will depend upon the quality of the infrastructure that the EU will create and use in the process of implementation (internal regulations, regulators, control devices, etc.). EU approach will have a major impact on companies that focus on the product or its component sub-expand the circle of those who can be held liable in case of a risk event. In these circumstances, appropriate management of environmental risk requires a company to have a global vision of the life cycle of its products and operations. The Directive was implemented in Hungary, Italy, Lithuania and Latvia until 30 April 2007. Later, it was incorporated into the national legislation in 15 EU Member States, including Romania. Austria and Belgium were aligned with EU requirements by federal law, and the remaining six countries, including Britain, are to implement this Directive in no time.

From an operational perspective, environmental risks may cause disruption of business (production of accidents, suspension or cancellation of license, etc..), With serious consequences for the company. Measures to adapt to the environment help to optimize operations and reduce the possibility of sanctions from the authorities. Reputational risk they expose a company or non-compliant practices that generate risk events is difficult to estimate the financial consequences and sustainable over time.

On the other hand, as the existing rules require effective guarantees against discrimination and discriminatory practices is absolutely necessary in a democratic society, all in this way rules governing protection of the environment are useful and also healthy.

A special case of the mergers and acquisitions transactions where the risk environment has become an item of great interest. In assessing asset entities required knowledge and careful analysis of historical practices to identify potential damage that could occur in the future, state assets (possible contamination) and how environmental risks have been transferred through insurance.

A new element introduced by the European Directive on environmental responsibility is that it extends the principle of "polluter pays" on measures to prevent and remedy environmental damage products. Another improvement is to cover new categories of damage, namely those on protected species, natural habitats, soil (significant health risks) and water (adverse effects). Taken together, the Directive focuses on preventing damage, eliminate adverse environmental effects and recovery of damaged items through rehabilitation, restoration or replacement of natural resources (including the provision of an equivalent).

Conclusions

Operator whose activity causes imminent threat to the environment shall immediately take the necessary preventive measures. If damages have already occurred by primary remedial measures must ensure resume services or restoration of natural resources in the previous condition. Where primary remediation is not possible, in the sense of full restoration of the previous situation, operators are required to act to remedy complementary. Between the time of the damage and that the primary remedy takes effect, compensatory remedial measures to be taken in order to cover the temporary loss of natural resources or services.

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