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THE MEDIATION IN THE MEDICAL MALPRAXIS
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Abstract

The conflict has been defined over time in many forms. Dispute, disagreement, fight, litigation, divergence are common terms that we hear every day and that talk about the existence of conflict situations. When there is a clash of interests, concepts or egos of people, we are dealing with a conflict.

The medical malpraxis is a topic that throughout the last years has raised many controversies.

Keywords: **malpraxis, law, mediation, measures, justice, victim, controversies, insurance company, doctor,**

Introduction

The malpraxis complain is undoubtly the worst accusation which can be addressed to healthcare staff which is working in the health protection and public health promotion. This is why is a sensible subject for the medical staff, although, is quite important to specify that in our country were very few people being found guilty for malpraxis.

The medical malpraxis is a topic that throughout the last years has raised many controversies. Obviously we are dealing with many parties involved in these controversies.

One side is certainly represented by the medical staff which is complaining on the environment where they have to exert their work, sometimes with doubtful gear or short staff.

Even more, often being harassed by many criminal complaints and being continuously under the public opinion collimator and not the least under prosecutors' attention as possible law breakers.

On the other side are positioned the patients which are more and more unsatisfied by the way they are treated in this medical system. These patients are criticizing the slowness or,

from other points of view, the defiant way in which the abilitated institutions are managing in doing justice.

The malpraxis victim can is addressing to the Commission of motorization and professional competency. This Commission is having the competence to clarify the malpraxis accusation in a three months' period from the complaint submission day, based on an expertise report.

If either victim, the physician or the insurance company or any other person involved in this case is dissatisfied with the solution, then after can summit a disagreement attacking the report in a 15 days' deadline. If the Experts Commission establishes a case of malpraxis, the injured party can ask the court for indemnification.

The procedure under the Commission expertise is not really mandatory. The victim involved can apply directly the justice court, civil or criminal, upon the gravity of situation, which will give a solution based un a forensic medical expertize report.

Instead, only the court can force the persons found guilty of a malpraxis act to pay indemnification. Obviously the victim of a malpraxis must prove to the court that he suffered a moral or a material prejudice, and to show the period of time being prejudiced.

If the material prejudice could be easily proved to the court, in what concerning the moral prejudice, this can't be quantified. So, the court must grant compensations for the moral prejudice, which has to be fair and satisfactory, compensations proportional to the victim suffering, not available any mathematical or economic criteria to be applied for quantification.

An important role in a malpraxis case is played by the insurance company. This can pay indemnifications to those persons they have being subject of medical negligence and also can cover costs of the civil trial fees.

"The indemnifications will be granted wherever the place of medical assistance has been given"[1].

The Article 17th from the same normative act show that: *"(1) The indemnifications will be granted from the insurance company for the harm caused and for the trial costs also, to the person or the persons injured from the medical negligence, which can lead to body injury or even death; (2) In a death case, the indemnifications will be granted to the patient's successors in title, those who initiated ascertainment actions regarding provided unsuitable medical assistance; (3) The indemnification is grated also when the medical assistance was not provided, despite the fact that the medical condition would have been imposed an intervention for the person or the persons who asked for or for whom was required"*[2].

According to the Law no. 95/2006, regarding the reform in the healthcare system, with the modifications and further addendums, *"the malpraxis is the professional error made during a medical or a pharmaceutical-medical action, leading prejudices to the patient, implying civil responsibility of the medical staff or of the ware supplier or from the medical, sanitary or pharmaceutical services provider."* Therefore, when we are talking about malpraxis we are talking about a professional error, a medical activity error, made by the physician's duty, which can lead to a health or a body integrity injury, or even worst to the patient death.

The Romanian language dictionary gives the following definition for the malpraxis term: "*an incorrect or negligent treatment applied from a doctor to a patient, which produces to him any prejudice, in relationship with the degree of physic or psychological capacity harm*[3]*"*.

[1] Art. 16, alin (2) Law of medical malpraxis;
[2] Art. 17, Law of medical malpraxis;
[3] *https://dexonline.ro/*;

The British Universal Encyclopedia defines the term of malpraxis as being "*negligence, incompetence practice, lack of training or breaking job duties from the professional point of view, which cause a patient prejudice in any nature*[4]*".*

Before presenting a case study, assuming to be iconic for this article topic is important to make a distinction, when we are going to analyze a malpraxis, between a mistake and an error. The mistake consists in failure to follow the rules of good professional behavior from the physician, and the error is raising when the physician is aware that the illness progress towards a complication and he is not taking proper actions to avoid the worst.

The medical staff, well all those who are providing medical services are responsible when they evolve an effective medical activity but they responsible also in case of not acting according to the expectations.

The doctor has the obligation to provide to the patient good and competent care, according to the evidenced based medicine and following updated guidelines and protocols.

So that person designated to prove or not a malpraxis accusation must clear up if the care provided was according to the standards as stated in the medical guidelines and has or not scientific proves.

The article 14 from the malpraxis law show that: "*During providing medical assistance, the medical staff has the duty to apply therapeutically standards set through practice guidelines in that specialty, approved by a national body, or in absence, by recognized standards of that medical specialty comunity"*[5].

It is well known that after many years of studies and specializing, after many years of hardworking for the general and particular wellbeing of the people, that doctor who is accused of malpraxis is suffering and emotional stress, not only for the fact that his skills and professionalism are in doubt but also for the fact that after building a patient-doctor relationship, he is feeling that his trust is broken.

A doctor can be charged of malpraxis either on civil or criminal background. Usually these patients choose the criminal complaint to prosecution body, just because there are no fees to be paid or no costs to obtain a forensic medical report and the prosecutors obtain the medical documents in a very short deadline of 30 days. When a harmed party choose for the criminal grievance, the doctor is under a criminal investigation, this being quite hard to be proved in intention, and as in many cases, the prosecutors decide do not open a criminal investigation.

On the civil side the doctor is sued only for the prejudices the patient suffered. This is asking for indemnizations on this background.

The practice shows there are higher chances to win a civil trial for malpraxis than a criminal one, because is easier to prove the victim suffers from a medical error or negligence in the medical activity. If the victim believes the medical act was causing prejudice, that hedge his daily activities, can ask for indemnizations to the court.

The fact that many patients are choosing to sued under a criminal complaint is because through a civil action the patient has to pay different fees, cost that are really considerable.

Is desirable that the victim, the insurance company and the insured person to have an agreement to avoid the court, agreement on the guiltiness, to set the quantum and the procedure to pay the prejudice caused by a malpraxis act. In fact, when the insured person liability is questioning and all the parties have an agreement regarding all the aspects concerning the malpraxis act, the insurance company will grant indemnizations on an amiably way.

Ideally, just saying ideally, the doctor in a position of a malpraxis accusation should recognize the fact that he was committed a mistake and to accept that he should pay for this without the implication of the insurance company. But obviously hard to put on practice.

[4] *www.litera.ro/.../col-enciclopedia-universala-britannica;*
[5] Art. 14 Law of medical malpraxis.

As a person who has suffered from the medical errors should receive compensations for the prejudices created, so the person responsible for a malpraxis act should be sanctioned for his deed.

For this reason, the mediation is an advised solution in malpraxis cases, in the way that the benefits from approaching this option to break down conflicts are far the most preferable.

Unfortunately, the mediation was not enough promoted through the doctors, in hospitals or to the insurance companies, fact that means a big loss from our point of view, because the procedure of the mediation could easily create opportunities of all parties' agreement, reduces significantly the costs generated by a call into a court, and why not, could lead o a practice of trust for the medical institutions.

Through the mediation, both parties are going to ask a third party, the mediator, a person specialized which is impartial and neutral and committed to help the conflict parties to negotiate to reach a final agreement.

The mediation is having multiple advantages.

The first, but not necessary the most important, is that the patient will receive his indemnification in a shorter time than throughout a court procedure (here could take even years). Extremely important that here is not necessary to bring proves, all that needs would be a common sense from everybody willing to reach an easy and fast agreement. These are all arguments why the mediation could be a challenging and an attractive option in a situation of malpraxis accusation.

For settleling the malpraxis cases through mediation is very important to gain all parties trust. If this could be happening, would be an enormously benefit for the doctors, hospitals, insurance companies and all the peoples that might be involved in a way or another in a malpraxis situation.

In practice, the doctor's layers are motivating their clients' absence in the mediation procedure by their busy schedule or by the fact that they want to protect against any verbal or physical assaults that might be raised from the patients or their families. These „excuses" made by the layers are making the gap deeper between the doctor and the patient. Sometimes, the simple presence of the doctor during the mediation procedure could satisfy the patient needs, because in this way the doctors is showing the respect and compassions for his patient sufferance. In this way through a real communication, the doctor and the patient are creating the opportunity for a "moral recovery", sometimes an honest excuse could be sufficient and enough for a conciliation.

The confidentiality is one of the most important principles of the mediation procedure, what actually remove any fear from the doctor's side regarding that his statements could return against him and so, his reputation might be questioning.

In other countries the mediation in a malpraxis case is mandatory, that not meaning the free acces to the justice is fenced or brooking the principal for the voluntary option to the mediation. On the contrary, here is provided and supported a higher interest for difficulties and needs in communication of the people. The parties in a mediation process are not looking to gain or to lose something. These parties are not looking to make the other one to loose, they are trying to communicate, to settle their problems.

It is necessary in a mediation process, to sit to the negotiation table, also an insurance company representant. His biggest concern will be the value of the insurance prime, because medical malpraxis insurances are usually made on quite small amounts. In a real situation this could be high likely to be insufficient to cover the harm requested by the patient. The mediation procedure is preferred even by the insurance because the indemnification amount is not imposed by a court, and will be about a negotiated amount by the both involved parties which should be realistic, justified and possible.

The mediation procedure is not looking to establish any guilty or unguilty feature of the parties, instead is looking to set advantageous bilateral agreement.

Case study

1.Case history (Ioana's Case)

Ioana is 24 years old and is a mother of a 1.8 years old child with neuromotor disability. She is living together with her husband and his parents in low, and she is now on a maternity leave. Her past job was worker in a wood factory.

A. *Main complains*

Five years ago, because of the final high school exam failure, Ioana was complaining of migraines headache. She was taking but not regularly Extraveral pills, an anxiolytic drug. She would have been desired to follow some university studies, but she wasn't able to reach her dreams. Ioana was admitted together with her child under a neuromotory rehabilitation clinic. There, her baby was following a treatment being diagnosed with neuromotor retard. This is the first admition in a hospital. She had presented symptoms of depression and anxiety, reason for being referred to a psychologist.

a) The history of the present disorder

After Ioana getting married, she moved to her parents in low, not far from her parents. She gave birth to a child, who during the delivery time presented some perinatal sufferance. The child was delivered after a caesarian section. She is telling the fact that because of the delivery complications her access to the child was not permitted. Because the child was aspirated meconial amniotic liquid, suffered a perinatal asphyxia, after being resuscitated, was given oxygen and presented isolated seizures. She wasn't informed by her child sufferance in those early days. This triggered some suspicions and concerns on her baby health. The fact she wasn't let to have a contact with the child after giving birth, and without being informed properly about what was going on, all these lead to a deep concerns and fear.

After 5 days, finally the mother found the reality about the child, without being offered details and explications about the situation what caused this disorder. Meeting the reality, the mother started to develop more anxiety and even panic symptoms on a high emotional stress background, followed by a period of deep sadness and even some crying episodes. All these emotional symptoms prouved a high psychological tension. The doctor proposed her an „injection" for improving her emotional condition but not having big effect on her. She was thinking that her child has a serious trouble, with no big chances for recovery, feeling not much could be done and feeling helpless on this situation (cognitive symptoms). It is obvious the catastrophic feeling. She started to look for lonlyness, her auto isolation was always coming with crying episodes (behavior symptoms).

The mother left the maternity hospital after 6 weeks without having a clear diagnose of her baby, without having been told what to expect regarding the outcome of this disorder. After 6 months from the hospital discharge, the mother observed no progress of development and so, she has been booked a neurology follow-up. There she has been told that her child is suffering of cerebral palsy, spastic tetraparezis post encephalopathy and moderate/sever neuromotor retard.

Since then, they started a neuromotor rehabilitation program in different children neurology clinics from Cluj-Napoca, and after that in Oradea. In between being at home and constantly applied the rehabilitation activities learned during the previous sessions. Ioana's parents in low and her husband were not happy with the diagnostic, and furthermore they were considering unjustified these rehabilitation procedures for the baby, too much stressful for the little one. Even more, because Ioana she was caring on the rehabilitation program, her unsupportive family made accusations as an insensible mother and not able to care a baby. Ioana ended to lose her self-confidence and lost her trust on facing the reality.

Despite all these issues, she carried on her child daily exercises, when no other members of the family were around. Ioana recognize that during that period of feeling not supported by her husband and her parents in low, she had thoughts of leaving her husband and that house and move back to her parents. During this period, she was visiting some religious

confessors, even following religious fasting and joining some religious service in Deva, dedicated to her child cure.

Ioana was feeling overwhelmed about this situation, about rehabilitation activities, about living in a family which is not accepting and is not aware about the health issues of her child. She was sad because her husband was not listening to her, and more than that he was accusing her. He was denying his child health problems.

b) The personal and social history

Ioana grew up in a family with an authoritatively father but a very kind and a supportive mother, opened and keen for discussions, well empathic. She and her mother were quite reserved to share problems with the father and the husband. Ioana, she had a very good friend from a neighbor family, friendship which was ongoing for long time. She is describing herself a very obedient daughter. She was a pupil in-between mediocrity.

As a teenager she was not having any boyfriend. She married her husband, meeting him at the job. He is 11 years older than Ioana. She says that she loves her husband but she is expecting him to accept the reality and to be more supportive. She would be happy to see her husband being involved in caring on together this situation. She is gurdging him that he is to bound to his parents, especially to his mother and his two sisters and is too much apprehensive in relationship with his family to whom is offering much more attention despite his wife. She is also saying that all the decisions in this house are taken without her implication and her husband is following to tide his parents' opinions on the child health problems. Her husband is a fire stoker in a wood processing factory, working in two rotations, offering short time to his child and his family. He is avoiding interactions with his baby (he is not feeding him, is not washing him, is not holding in his arms only in his wife presence).

Between Ioana's family and his husband family are religious and cultural discrepancies. Ioana being of Romanian ethnicity and orthodox religion, and his husband being oh hungarian ethnicity and reformed religion. Ioana she is considering herself a religious person, she is keep quite closed to this, praying often, following every Sunday the church service, and respecting the religion fasting periods typical of the orthodoxies doctrine.

B. *Medical history*

From the history we find that she was fit and well before, not having important contacts with the medicine before.

C. *Mental status/Tools used*

The patient is alert and oriented having a obvious anxiety disposition. The clinical investigations pretest, to which Ioana has been submissed, after giving her formal consent, where the following:

For the subjective-affective level: Hamilon scale of depression (17 items) – the preintervention score 18 points (moderate depression); Hamilton anxiety scale (14 items) - preintervention score 17 points (subclinical anxiety); Profile of a dysfunctional emotional distress (PDE) – 29 points – high level of dysfunctional negative emotions associated with a low level of functional negative emotions (18 points); Self-esteem scale (Rosenberg) – second class – low level of self-esteem (28 points).

For the cognitive level: The automatic thoughts questionnaire (ATQ) – she is obtaining 32 points, which can be assumed as high level of dysfunctional automatic thoughts (4^{th} class); irrational cognitive scale (IRCS) – total score (obtained through totaling all the scores from the component subscales) 97 points – high level of global irrational thinking.

D. *Diagnostic DSM –IV Tr*

The 1^{st} Axis (clinical disorders): Distimic disorder with late onset; the patients presents generalized anxiety with a subclinical intensity without meeting criteria for no one of anxiety disorder. Throughout the disease history it was not recorded any major depressive episode, manic, hypomanic or mixt and she had no medication so far for these depression symptoms.

The diagnostic was established fallowing the investigations based on the Structural

Clinic Interview (SCID I) for clinical disorders on the Axis 1, in conformity with de diagnostic criteria of the DSM IV Tr.

The 2nd Axis (personality disorder): no clinic abnormalities. The pacients shows some of the features of the dependent personality, but not meeting the full diagnostic criteria of the dependent personality disorder.

The 3rd Axis (somatic disease or general medical conditions): no clinical significant abnormalities.

The 4th Axis (psychosocial stressors): a presence of a child with cerebral palsy, inadequate social support (living in a new family, quite different from her own one, low involvement of her husband in the child care and treatment, multiple hospital admission) for her child diagnostic and treatment.

The 5th Axis (general functioning index – GFI): GFI 70 (current).

The case conceptualization

A. *Ethyologic factor*

As triggering factor of Ioana's problems we are mentioning the birth of disability child, on a background of social skills lack and assertiveness feature (favoraising factors). All these added to social environment changing by moving to her husband family and parents in low cohabitation. We are also mentioning in the triggering factors category the absence of her husband support and upsets from her parents in low in what concerning her skills in raising the child. All these factors lead to an overwhelming feeling. Her expectations related to the happiness in the marriage and child birth were so different from the reality she is passing through now.

B. *Assessment of cognition and actual behaviors*

Ioana came to the hospital admition for her child symptoms, and she was explained the rare and severe condition of her baby, condition that need long term treatment with lots of other admition in the future. Now she had an emotional break-down because she was afraid she will not be able to face this situation, basically she was giving herself to small chances to go through. After the psychological assessment of the baby she was expecting all the information received to confirm her hypothesis that her child health status is really bad, because her baby psychological progress was deeply delayed. At that moment she was phoned by her husband, but due to the fact that he was showing irritability on the conversation, she decided to cut off the call abruptly. Following that she regretted doing this. Her hospital room mates noticed her sad disposition. They tried to get chatting her, but she refused telling them she wants to sleep.

To the psychologist she came quite suspicious. She didn't know what was going on to be, but being confident that someone should do something for her, to help her to pass through this low emotional disposition.

C. *Longitudinal assessment of cognition*

Ioana throughout her life developed focused believes, growing up in a family with an authoritatively father and hyper protective mother. Her focused believes are:

The first irrational believe is related to the affiliation: "I have to be accepted and approved by the others; otherwise I am feeling of no value. Is terrible bad that my ideas are not considered".

The second irrational believe is concerned to personal achievement: "I just can't afford to fail, could be so bad".

The third irrational believe is related to situational control: "If the other are not on my side I will not be able to face the reality and I will not be able to manage the important challenging of my life".

D. *Aspects and strong features of the patient*

Ioana is a fit and healthy woman, with a strong desire for changing and to find a balance in her family relationships; she wants to achieve progress aside of her husband and

for this she is ready to put all the efforts in. She really wants to see her child recovered and she is looking to find her happiness together with her husband. Coping mechanisms used by her: in an initial phase to deny the problems, substantial unhappiness from her husband compensated with more dedication to the child. Ioana accepted the psychologist to offer her the help she need it, despite the fact that he will not be able to prescribe medication.

E. *Work hypothesis*

From the Ioana history, we notify her failure on the desire of following some university learning. This was probably the moment, she started to feel incapable and unapt, leading to a low self-esteem and a negative attitude on self-assessment. On the fail from the professional development were added marriage disillusions. Her move in a new house and a new family and her mother separations were triggering factors for her depression. Her believes focused on personal achievement, affiliations and situational control (predisposing factors) all these contributed to the onset and the manifestation of Ioana's depression. As well, as the asertivity lack and decreased social interaction skills, shown by a social environment with a very narrow role of the personal support.

Intervention plan:

A. *Problems panel*

- Ioana's depression disposition and anxiety
- Her relationship with her husband and his family in what concerning support
- Low self-esteem, lack of asertivity and of the social skills

B. *Therapeutically aims*

- Depressive disposition and anxiety amelioration
- Improving the negative distortional thinking with the impact on the depression and anxiety
- Stimulation of assertivity and social skills for amelioration and building a better relationship with her husband and his family

C. *Therapy scheduling*

The treatment plan was focused, in the early phase, on decreasing depressive disposition and general anxiety. Afterwards, we intervened on the asertivity stimulation and on improving self esteem and social skills.

For fulfilling the first aspects from the issues panel, the patient depression and anxiety amelioration, we were using: cognitive restructuring techniques, for the automatic thinking central believes changing. For the assertively increasing and for improving the social skills, we were using the assertive training. As well, we used techniques of solving problems related to searching and implementing practical solutions to the issues on the living with her husband family, for becoming less dependent.

For changing of the automatic thinking, of the catastrophic interpretations and of the central believes, the patient was taught cognitive restructuration techniques. We were focused on the modification of the assessment cognitions and corrections of cognitive errors from the patients thinking.

For stress and anxiety amelioration, Ioana has learned a procedure of stress inoculation, which will help her to better control the distress level and the anxiety. We were focused on the restructuring the way in which she is giving interpretation to her child diagnostic and of course on her negative predictions related to the child health status progress. She was taught to replace her dysfunctional dialogue (autodistructive) with a functional one (auto encouraging), through a roll play.

The assertive training and problems solving were used for improving the patient social relations and her skills of solving problems at a personal and intrafamiliar level.

D. *Therapy obstacles*

Ioana hasn't had a high educational level, reason for approaching a reduced complexity level through the conversation. As well, testing her depression and anxiety was assuming observation and scales terms explaining

Results

Ioana's treatment was lasting 3 weeks, the entire period she was admitted under the neuro rehabilitation Clinique. There were in total 9 appointments, 3 for each week.

The posttest results of the testing were the followings:

a. For the subjective-affective level: Hamilton scale of depression – post intervantion score 14 points (mild depression); Hamilton scale of anxiety – post intervention score 12 points (subclinical anxiety); The profile of the dysfunctional emotional distress (PDE): 18 points – low level of negative dysfunctional emotions, associated with raising the functional negative emotions – 26 points; Rosenberg scale of self-esteem – 32 points (3^{rd} class) – moderate level of self-esteem.

b. For the cognitive level: The automatic thoughts questionnaire (ATQ): 18 points (2^{nd} class), meaning a low level of dysfunctional automatic thoughts.

c. Irrational cognition scale (IRCS): 49 points (global), low level of irrationality.

Ioana's emotional disposition was remarkably improved, seen also by rehabilitation doctor, from her hospital room mates and of course recognized by Ioana herself. She said that she is ready to go home and to put into practice what she learned during the psychology follow-up. She is determined to talk to her husband more seriously about their child rehabilitation issues, and even about their relationship disfunctionalities. She also wants to tell her husband about her plans for more psychologist treatment in the following period.

This case report is not by random, on the contrary, the message showed up is that a wrong or delayed medical intervention can easily destroy life, can destroy dreams, as we saw in this case, Ioana's dreams.

Conclusions:

The doctor has to choose the mediation because through the perspectives of the profession nature they are healers. The mediation could be "*a healing seen from another perspective".*

Another important message from this case is that medical staff should approach with more empathy, to provide more attention and care, to discuss all the aspects of the disease with their patients. The reality is that more and more patients are complaining about an impersonal and careless treatment from their doctors. "*The compassion and empathy is not regulated by the law! But can easily generate avoiding problems from the doctors"*

This article is not only a modality to promote the mediation as a more efficient backup to set conflicts, this article is also a way to raise awareness among those people to whom we are giving our lives. Do not forget the moment when they made the Hipocrate oath when they said "*the patients' health will be for them a sacred obligation".*

Bibliography:

1. Law no. 95/2006;
2. Law of medical malpractice;
3. www.litera.ro/.../col-enciclopedia-universala-britannica;
4. *https://dexonline.ro/*

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THE IMPORTANCE OF BALLISTICS EXPERTISE IN IDENTIFYING THE WEAPON USED FOR COMMITTING A MURDER THROUGH SHOOTING
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Abstract

As the number of crimes committed using firearms, a new branch made room within the art of forensic ballistics. It is a relatively young branch of forensic engineering, which must keep up with the development of general ballistics and the development of military technology in the construction of portable firearms and ammunition used for them.

Key words: ballistics, forensic ballistics, weapons

Introduction:

As the first weapons were not safe, their loading lasted a long and sometimes exploded unexpectedly, it has been attempted since ancient times perfecting the weapons, creating new and more effective weapons.

"Judicial Ballistics is a branch of forensic techniques studying the construction and operation of firearms, shooting and traces related phenomena determined by them in order to achieve the issues raised by the prosecution"[1].

Article 1 of Law 295/2004 highlights the provisions of categories of weapons and ammunition, and also the conditions under which it is permitted, throughout the country, the holding, carrying and use in different situations of weapons and ammunition. However, paragraph 2 of Article 1 of Law 295/2004 records that it is not applying to operations with arms and ammunition, transactions by public institutions dealing with national defense, national security and the public order[2].

The legislator, under Article 2 defined as firearm "any portable barreled weapon that can throw, is designed to throw or may be converted to throw shot, bullet or projectile by the action of a combustible propellant"[3].

Since firearms are increasingly being used in offenses it is required a distinct field of forensic technique called ballistic court. This field of judicial ballistics became independently in the decade of our 20th century, developing and perfecting of some own methods of examination, particularly after traces formed on identifying weapons and projectile tube.

According to the specialty literature[4], general ballistics is divided in 3 parts: interior ballistics, exterior ballistics, target ballistics.

The interior ballistics is studying the phenomenon that occurs inside the pipe after percussion. Exterior ballistics is examining the phenomena occurring when the bullet leaves the muzzle end, the trajectory it has when reaching the target.

[1] V. Măcelaru, *Balistica judiciară,* Ministerului de Interne Publishing House, Bucharest, 1972, p. 8;
[2] Articolul 1 din Legea nr. 295/2004 privind regimul armelor și munițiilor, modificată și completată pin Legea nr. 117/2011, http://www.clr.ro/rep_htm/L295_2004_Rep1.htm;
[3] Articolul 2 din Legea nr. 295/2004 privind regimul armelor și munițiilor, modificată și completată pin Legea nr. 117/2011, http://www.clr.ro/rep_htm/L295_2004_Rep1.htm;
[4] V. Măcelaru, op. cit., p. 7-8;

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The target ballistics is to research the phenomena that occur when touching the target by bullet or projectile.

The parts of a firearm are the barrel, closing mechanism, firing mechanism (percussion) and removal of the tube pulled the bed or butt of the weapon and the sighting system.

In terms of forensic examination, the particular interest is on the barrel and the firing mechanism, due to the value that shows the identification process [5].

The one that provides the direction and the trajectory is the barrel, which consists of the chamber or detonation chamber, forcing the cone or the connection that ensures the bullet penetration in the last area of the pipe and the rifle barrel area[6].

The rotation of the bullet is given by the rifling of the barrel channel. The rifling is some fullness and emptiness parallel twisted to the right or left and the number, width, direction and angle of twist varies from weapon to weapon and they are printed on the surface of the bullet determining the type of weapon that was fired with.

An important feature of the gun barrel is the caliber. It is the millimeter distance between two full tanks in opposite positions. In America, it is measured the distance between two opposite rifling and two opposite full tanks and then the average is done[7]. In case we have a smooth-bore weapon, the caliber is an abstract number and inversely proportional to the diameter of the pipe[8].

The ensemble closing mechanisms, fired percussion and removal of the tube is used in the identification process since the engineering and machining component parts come into direct contact with the cartridge.

The firing mechanism is mainly made of trigger, arch recovery and to whom striker. The traces of top bolt on the bottom of the tube cartridge are used to identify gender and individual weapon.

The mechanism of flinging tubes ensures the extraction of cartridge in the chamber, and it consists of a claw extractor and a threshold pitcher. After the burning explosive charge, when the switch makes the race back, the claw extractor catches the tube upstand rosette out of its chamber. Because of this blow on the collar tube is formed the threshold, after that it appears on the opposite side produced by the paw extractor[9].

The ammunition feed mechanism (charger) differs from one type of weapon to another, as this is with rehearsal, semiautomatic or automatic.

On the bed or handle are imprinted the digital prints of the person who pulls the trigger and is designed to ease the use of weapons.

The ammunitions of the hand weapons are known as cartridges and are distinguished by the channel characteristics for the intended trace pipe and their caliber[10].

The parts of the cartridge for the rifled barrel weapons are: bullet, powder, tube and staple. The bullets can be made of a core of steel, steel coated with lead or lead and a metal jacket. A simple examination of the general characteristics of one bullet can determine the type of weapon used.

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[5] C. Suciu, *Criminalistica,*. Didactică și pedagocică Publishing House, Bucharest, 1972, p. 337-339; V. Măcelaru, *op. cit,* p. 36-38; V. Manea, C-tin. Dumitrescu, *Curs de tehnică criminalistică,* vol. II, Şcoala de ofiţeri a Mininisterului de Interne Publishing House, Bucharest, 1983, p. 41-43.

[6] E. Stancu, *Tratat de criminalistică*, Ediția a V-a, revăzută și adăugită, Universul Juridic Publishing House, Bucharest, 2010, p. 262.

[7] V. Iftenie, *Medicină legală*, ediție revăzută și adăugită, Științelor medicale Publishing House, Bucharest 2006, p. 83.

[8] V. Măcelaru, op. cit., p. 20.

[9] Idem, p. 151.

[10] I. Mircea, *Criminalistică*, Ed. Lumina Lex, București, p. 168.

To obtain the aimed purpose, the bullet must have more weight compared to its volume, and to reduce gas losses, the bullet is manufactured with 0,33 mm higher than the caliber pipe.

The tube is the second part of the cartridge and its role is to unite all its parts and to shed flammable material and explosives. The tubes of the cartridges for rifled barrel weapons is cylindrical, with open ended, in which it is fixed the bullet and another one closed, called rosette[11].

The capsule forms the third part of the cartridge and it contains an explosive substance, like mercury fulminant or lead antimonite, which explodes at the impact and ignites the powder.

The powder or gunpowder is the last part of the cartridge which develops through burning a large amount of gas, which by their high pressure, creep and removes the projectile in the channel pipe. This powder is divided into black powder or colloidal smoke powder that is used in most of the rifled barrel weapons.

The cartridges for smooth-bore weapons have all parts of cartridges for rifled barrel weapons plus borax and washer. The projectile cartridges smooth-bore weapons lies in blasting, grape shot and bullet. These shots and grape shots are spherical projectiles of varying sizes, generally made of lead mixed with arsenic and antimony.

The sprinkle is made out of felt, even out of paper or rags for recovered cartridges through replacement and changing the powder and projectile. Her role is to separate the powder from projectiles - shot or grape shot.

The dial is made of pressboard, its place is at the "mouth" of the tube and its role is to prevent projectiles from getting out of the cartridge[12].

The forensic research of firearms used to commit crimes, identify or clarify the manner or circumstances in which the author used them, are issues which have the solution lying in the hands of the forensic specialists, which are facing in recent years a growth of such crimes[13].

The concept of lead under forensic aspect has a more concretely character; the traces represent various changes that may occur between the environment and humans which can determine the human behavior in this process[14].

By traces of gunshot means specific tracks formed by projectile and are called main firing traces that are divided in drilling traces, traces of penetration and traces of impact.

For the drilling traces are specific three elements: the inlet orifice, the channel and the outlet orifice.

On the human body the inlet orifice is characterized by a lack of tissue, its diameter is close to the projectile. The edges of the hole are slightly directed inward, secondary traces can be found on them, such as the friction ring. The outlet has no shortage of tissue. The channel perforation in all cases does not have a straight form, the deviations of the projectile by the bone is commonly found, which leads sometimes to the fragmentation of the bullet into several pieces. In such circumstances we have more outlets[15].

In the case of hollow organs and soft tissue we may have larger diameter holes or where the tissue contracts it can be found a smaller hole than the projectile [16].

When the shots are done from 5-10 cm, the inlets also can be larger than the caliber of the bullet and the edges ragged; all due to gas pressure[17]. Also, soot and residue are deposited

[11] Idem, p. 169.
[12] Ibidem, p. 171.
[13] M. Ruiu, *Investigarea omorului săvârșit cu arme de foc,* Universul Juridic Publishing House, Bucharest, 2012, p. 104.
[14] E. A. Nechita, *Criminalistica. Tehnica și tactica criminalistică*, ediția a II-a, revăzută și adăugită, Pro Universitaria Publishing House, Bucharest, 2009, p. 12.
[15] V. Dragomirescu, *Medicină legală*, Teora Publishing House, Bucharest, 1992, p. 98.
[16] N.V. Popov, M*edicina judiciară*, Ed. de stat pentru literatură stiințifică, Bucharest, 1954, p. 184.
[17] C. Suciu, op. cit. p. 357.

in the epidermis, on a small radius and on a dense layer. Sometimes residues enter into the epidermis, creating so-called tattoo gunshot.

The secondary traces of the shooting side[18] are the result of thermal and chemical phenomena that occur in the barrel and at a certain distance from it.

The metallization ring created by deposits of metal particles detached from the surface of the projectile. The friction ring or erasure is created through a deposit on the inlet margins of grease particles, dust or any other substance which is on the surface of the projectile.

The burns made by the hot gases, and by the flame at the mouth of the pipe, are formed by bonding the pipe to the body[19].

The ruptures caused by gases that occur at shoots less than 10 cm, have a stellar shape, and are formed by gases entering in the hole and breaking its edges.

- Traces resulting from the action of flame;
- Trace resulting from gases action;
- Traces of soot;
- Unburnt powder particles (tattoo);
- Grease particles.

Each weapon is unique in its own way leaving, after firing, on the cartridge elements, namely on the fired cartridge, and the projectile (bullet) certain specific traces. These traces, after the discovery and uplifting the bearing objects, are microscopically analyzed, by the homicide detective/officer, and subsequently, the traces are passed through specific databases in identifying firearms.

When the officer must determine the type, mark, model and caliber of a firearm, usually he encounters some difficulties and in this situation he is provides, for an expert or a technical-scientific, with an unknown firearm[20].

To determine the type, mark, model and caliber of firearms with which a crime has been committed, it is preferable to be find shell casings or projectiles (bullets) at the scene of the crime. Conclusions about the characteristics of the firearm used in the commission of an offense are a clue for the police in order to reduce the circle of suspects[21].

Lucia Forensic is analysis software for ballistic image traces being installed on the platform of a compatible PC. This program is operating with several peripherals analysis and image pickup equipment, namely [22]: a scanner, a stereo microscope with video camera. This system enables the operator to control the analysis equipment, taking directly the image and afterwards a complex analysis of it[23].

The *Integrated Ballistics Identification System (IBIS)* has been designed to acquire, store and manage images items of ammunition after firing a firearm. This goal was set to identify, automatically, firearms which are the inventory, this identification transaction being stored in a database[24].

The ballistics examination is conducted by a forensic called in literature *expert* who once arrived at the scene, it seeks clues, traces or other material means of evidence, especially items of ammunition in case of criminal offenses when a fire weapon has been used and it has not been discovered at the scene, in order to later discover the weapon used to commit the offense. However, for faster discovery and uplift of evidence, the intervention at the scene will be done in a short time to not change or even lose the traces of the crime.

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[18] Denumite și urme suplimentare ale tragerii.
[19] E. Stancu, op. cit. p. 269.
[20] Pleșea, I. și Dobrin, G.D., (2013) *Balistica judiciară – aspecte teoretice si practice,* edited by Asociația Criminaliștilor din România și Institutul Național de Criminalistică din cadrul I.G.P.R., Bucharest, p. 59.
[21] Idem, p. 60.
[22] Pleșea, I. și Dobrin, G.D., op. cit., p. 113.
[23] Idem, p. 113.
[24] Ibidem, p. 122.

Conclusion. Although ballistics have not registered remarkable progress in the last 20 years, however, one can notice the increase of experts' professionalism in the field, the emergence of new research methods, which I think is very important, and the acquirement of ballistic expertise for a better place in the criminal trial.

Bibliography

1. Pleșea, I. și Dobrin, G.D., *Balistica judiciară – aspecte teoretice si practice,* edited by Asociația Criminaliștilor din România și Institutul Național de Criminalistică din cadrul I.G.P.R., Bucharest, 2013;
2. M. Ruiu, *Investigarea omorului săvârşit cu arme de foc*, Universul Juridic Publishing House, Bucharest, 2012;
3. Stancu, *Tratat de criminalistică*, ediția a V-a, revăzută și adăugită, Universul Juridic Publishing House, Bucharest, 2010;
4. Nechita, *Criminalistica.Tehnica şi tactica criminalistică,* ediția a II-a, revăzută și adăugită, Pro Universitaria Publishing House, Bucharest, 2009;
5. V. Iftenie, *Medicină legală,* ediție revăzută și adăugită, Științelor medicale Publishing House, Bucharest, 2006;
6. V. Dragomirescu, *Medicină legală*. Teora Publishing House, Bucharest, 1992;
7. C-tin. Dumitrescu, *Curs de tehnică criminalistică,* vol. II, Şcoala de ofiţeri a Mininisterului de Interne Publishing House, Bucharest, 1983;
8. N.V. Popov, M*edicina judiciară*, Ed. de stat pentru literatură stiințifică, Bucharest, 1954;
9. Suciu, *Criminalistica*, Didactică și pedagocică Publishing House, Bucharest, 1972;
10. V. Măcelaru, *Balistica judiciară*, Ministerului de Interne Publishing House, Bucharest, 1972.

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CONSIDERATIONS OF SURVIVING SPOUSE INHERITANCE RIGHTS UNDER THE LEGAL INHERITANCE

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Abstract

This article examines the inheritance rights of the surviving spouse as a legal heir in light of the current rules of the civil code. The current regulations of The Civil code deals with the complex and comprehensive manner the rights of surviving spouse upon inheritance left by the deceased. The current Civil code operates a subversion of moral rights for the surviving spouse thereof, giving him legal status and dignity that he deserves.

Keywords: **surviving spouse, inheritance rights, the special right of inheritance, the legal heir.**

General notions

Just as remarkable a great Russian writer said, "death is an old joke, but new for every one of us" [1], so is the Romanian legislation in the field of the right of inheritance of the surviving spouse.

In the current legislation established in the Civil code, the surviving spouse, although not a part of any class of heirs, benefit from the inheritance rights of their own regardless of their own class of heirs whom he would encounter.

This situation is somewhat privileged for the surviving spouse if we analyze the position that it had under the old Civil Code of 1864, which was unfair conditions. The Civil Code system after which the surviving spouse would be called to the legacy of the deceased spouse only if they did not leave heir degree inheritance, it was defective and was criticized in the old doctrine[2]. He was gaining inheritance if the four classes of heirs were missing and the widow without fortune had certain rights of succession in competition with other legal heirs. In an exceptional way, she had a share of usufruct when she came into the competition with the descendants of the deceased, and in their absence entitled to a quarter full ownership. This situation of inequity was directed by Law no. 319/1944, for the surviving spouse for the right to inheritance, now repealed, which brought a number of improvements to the surviving spouse inheritance situation, recognizing him the right to inheritance in competition with any other class of heirs, including the right to reserve succession, and some inheritance rights and accessories[3].

Succession rights of the surviving spouse are currently governed by the provisions of art. 970-974 of the Civil Code in Book IV of inheritance and liberties, Title II Legal inheritance, Chapter III Legal heirs, Section I, The survivor spouse. This order of the new rules in civil matters is justified primarily by the fact that the surviving spouse comes to

[1] I. S. Turgheniev, *Părinți și copii*, Colecția Carte de buzunar, Editura Litera, 2010.
[2] M. Eliescu, *Moștenirea și devoluțiunea ei în dreptul RSR*, Editura Academiei, București, 1966, p. 125-129.
[3] Dumitru Văduva, *Moștenirea legală. Liberalitățile*, Editura Universul juridic, București, 2012, p. 45.

inheritance in competition with any other class of heirs, and secondly is the fact that in the contest between the surviving spouse and other heirs the share of the first is determined with priority[4].

The new Civil code has kept its essential lines, the rights of inheritance of the surviving spouse enshrined by Law No. 319/1944.

The Civil code recognizes the following categories of rights for surviving spouse:

- the right of inheritance in the competition with all classes of heirs or relatives in the absence of the four classes of heirs
- the right of inheritance to the furniture and household objects belonging to the household;
- temporary right of habitation on tenant house.

The conditions required for the surviving spouse to be able to inherit

In order to have the right to inheritance, the surviving spouse shall satisfy, in addition to the general conditions of entitlement to inheritance **(to have succession capacity, to have a vocation to be succession, not to be unworthy towards the deceased)**, a special condition (instead of relative with the deceased): to have the quality as spouse on the date of the opening of the inheritance[5]. The quality of spouse is proved through the marriage certificate.

Thus, according to art. 970 Civil code, the surviving spouse inherits the deceased husband if, at the date of the opening of the legacy, there is no final Court decission of divorce. The term Court decission used by the legislator refers both to the Act of jurisdiction of the Court and to the certificate of divorce issued by the public notary or the civil status officer6. In the case of amicable divorce, marriage shall be deemed to have been disposed of at the date of issue of the certificate of divorce.

There is no relevance for what was the duration of the marriage with the deceased, the surviving spouse's sex or material situation, whether or not they had children or lived together at the time of opening inheritance or if in fact they were separated, no matter whose fault of the spouses. As separate domicile of the spouses does not affect the property relations of the spouses during life, it cannot influence neither the right to inheritance of the surviving spouse after the death of one of them. But, if two people of different genders live together(concubines), no matter how durable this was, there is no conferred legal entitlement to the surviving concubine.

Where death occurs during a divorce settlement or application during the process of divorce, the surviving spouse retains succession vocation.

In the case of absolute or relative nullity, the marriage is dissolved with retroactive effect, so the question of inheritance rights may not be put in discussion, even if the Court decision on which was found the nullity or marriage was cancelled and subsequent death occurred one of the spouses7. Whether we are talking about an absolute or relative nullity, whereas the quality of spouse is deemed to have never existed, the right of inheritance of the surviving spouse cannot operate.

By way of exception, article 304 of the Civil Code, which enshrines the institution of putative marriage, provides that "the spouse in good faith at the conclusion of a marriage invalidity, and or cancelled, keeps, until final Court decision, the situation of a spouse of a marriage which is valid". As a result, if the death of one of the spouses has occurred before the final decision of any declaration or pronouncement of invalidity, and the surviving spouse was in good faith at the conclusion of the marriage, he will be able to come to an inheritance, as it keeps the quality of spouse he/she had at the opening of the inheritance. But, if the surviving spouse was not of good faith, he/she will not inherit, losing the quality of spouse

[4] Ilioara Genoiu, *Ce drepturi are soțul supraviețuitor la moștenirea soțului decedat*, Editura C.H. Beck, București, 2013, p. 5.
[5] Carmen Teodora Popa, *Drept civil. Succesiuni*, Hamangiu, București, 2010, p. 58;
[6] Ioana Nicolae, *Drept civil. Succesiuni. Moștenirea legală*, Editura Hamangiu, București, 2014, p. 145.
[7] N.C. Aniţei, *Dreptul familiei*, Editura Hamangiu, Bucureşti, 2012, p. 108.

with retroactive effects. Obviously, if the death intervenes after the permanent court decision through which was pronounced the nullity of marriage, the putative character remains without relevance under the aspect of right of inheritance of the surviving spouse[8].

The correlation between the rights of inheritance of the surviving spouse and the matrimonial property regime

As in regards to the extent of the right of inheritance of the surviving spouse and the determination of succession, first should be set the matrimonial property regime applicable to the marriage of the spouses during the marriage.

Spouses and prospective spouses have the option of opting for one of the following: legal community matrimonial regimes; separation of goods; conventional community.

This option can be made through the conclusion of an agreement in authentic notarized form.

That matrimonial legal community is identical to one that govern economic relations of spouses in the past, under the provisions of the Family Code. Property acquired by either spouse during the marriage, under the sway of this matrimonial regime, are considered common property, according to art. 339 Civil Code. Under this regime, the spouses have two categories of goods: the common property of both spouses and each spouse 's own assets.

With the death of a spouse, the community of property ceases and liquidation of community is made between surviving spouses and heirs of the deceased spouse, the deceased's duties are divided among heirs, proportional with their share of the inheritance. The estate of the deceased will contain the deceased share of joint assets and assets of its own.

The liquidation of the matrimonial property regime is made by final Court decision or by notarial authentic document. In the context of the community, each of the spouses picks up his own goods, then will proceed to the division of the common assets and the settlement of debts. Thus, it determines the part of deceased that belonged to the spouse in the community on the basis of his contribution to the acquisition of goods, which reunited with the other property of the deceased will form the succession. Until proof to the contrary, the legal presumption is established for equal contribution to the acquisition of joint property.

If the surviving spouse is the only heir of the deceased, the notice of liquidation will take the form of a unilateral act (Declaration), which is completed in the final conclusion of the public notary within heritage debate.

The establishment of appropriate share of each spouse shall be made under the same conditions for both the legal community and the conventional community the latter being essential for the convention between the former spouses, through which they have established as nuptial arrangements conventional goods community[9].

Under the separation of property, each of the spouses is the exclusive owner in respect of property acquired before the marriage, as well as those that acquired on its own account after that date. By the marriage convention, the parties may stipulate matrimonial clauses concerning the liquidation of this scheme in relation to the mass of goods purchased by each of the spouses during the marriage, the basis of which the claim participation will be calculated. If the parties have agreed otherwise, the claim of participation represents one half of the difference in value between the two masses of net purchases and will be due by the spuse whose mass is greater than the net purchases, and can be paid in cash or in nature. Assets acquired jointly by spouses under this regime belong to their common ownership shares, according to the law.

The right of inheritance of the surviving spouse in the contest of heir classes without relatives in the four classes of heirs

[8] Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *Noul Cod civil. Comentariu pe articole*, Ediția 2, Editura C.H. Beck, București, 2014, p. 790.

[9] I. Popa, *Drept civil. Moșteniri și liberalități*, Editura Universul Juridic, București, 2013, p. 145.

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The surviving spouse is not part of any class of legal heirs, but the law recognizes its rights to contest all grades succession of heirs. Surviving spouse's share of the inheritance varies depending on the class of heirs that comes in competition.

Art. 972 of The Civil Code establishes in favor of surviving spouse the following share portion of the estate succession:

a) a quarter of the inheritance, if it comes into competition with the descendants of the deceased;
b) one third of the inheritance, if in the contest comes with a mix of both privileged and non-privileged collaterals of the deceased;
c) one half of the inheritance, if in the contest comes either with a mix of privileged or privileged collaterals of the deceased;
d) three-quarters of inheritance, if in the contest comes with either a mix of regular or ordinary collaterals of the deceased;
e) when the surviving spouse is called to the inheritance, because there are no heirs in the four classes of heirs or, although if they exist, they dropped the rightor they are undeserving or excluded to the inheritance, the surviving spouse gets the entire inheritance.

It is observed that the legislature maintained the same share due to the surviving spouse in the competition with four classes of legal heirs as the old regulations. If the surviving spouse comes to inheriting along with relatives of the deceased (a-d), determining the quota for him is done with precedence in relation to the heirs with whom he/ she is competing. Surviving spouse's share shall be charged to the entire inheritance, being the masses which is calculated first10.

In all cases, is taken into account - for the determination of inheritance share of surviving spouse - only relatives with whom he/she comes into the competition, so those who effectively inherit, i.e. they are not undeserving or renuouncers, disinherited (if in the latter case are not beneficiaries). The absence of this category of relatives who do not inherit, take advantage of surviving spouse only in so far as the total lack of them is within the respective class or subclass. For example, if the deceased has two children and only one of them is renouncing, the spouse does not change her/his quota, and the other child is the beneficiary of the part renounced by the other child. But, if both children are renouncing, the spouse will collect the entire inheritance if there are no other relatives.

As novelty compared to the previous regulation, the Civil Code regulates two special circumstances in the matter of succession rights of the surviving spouse:

► Art. 972 par. 3 Civil Code regulates the hypothesis of bigamy or polygamy in which two or more persons come to inheritance as a survivor. According to this legal document, whether as a result of putative marriage, two or more people to a surviving spouse situation, have the share idivided equally between them11. By comparison, in the Muslim laws survivors of the deceased, polygamist wives shared between them equally, the inheritance that if left for the unique survivor wife.

► Surviving spouse share in competition with the legal heirs of different classes shall be determined as if it had come into the contest only with the closest of them. Such a scenario could be met in practice when the deceased disinherits a whole class of heirs and they collect the reserved share, in which case the setting of the share for the surviving spouse, should be

[10] Daniela Negrilă, *Moștenirea în noul Cod civil. Studii teoretice și practice*, Ediția a II-a, Editura Universul juridic, București, 2015, p. 193.

[11] This solution was accepted in doctrine and prior to entry into force of The New Civil code. Thus, Francisc Deak shows that the solution of assignment for each widow of an integral quota could not be accepted because it would lower the quotas for the other competing heirs (descendants, privileged ascendants or privileged collaterals of the deceased), or would exhaust (in competition only with privileged ascendants or privileged collaterals) or would exceed the legacy of the deceased (in competition with the heirs of classes III and IV), which obviously is not possible.

taken keeping account of their presence. For example, the deceased disinherits descendants, the surviving spouse comes in competition with them both, within the reserve succession and the heirs of Class II. In this case, the surviving spouse will share ¼ of inheritance.

Another practical hypothesis in which the surviving spouse can get to compete with an heir, belonging to different classes is when disinheritance of an heir of a class is direct and partial, consisting of a reduction of the legal quota.

For example, if from class II belongs to the sister of the deceased only, whose share was reduced by testament to the ¼ from the inheritance, without the testator mentioning what will happen to the rest of the inheritance12, the surviving spouse will compete with the sister of the deceased (Prime-grade side –class II) and the IVth class of heirs, the surviving spouse share being ½ from inheritance, established only in relation to the closest class, privileged collaterals. It is important to note that the surviving spouse can come to the inheritance of the deceased only in his own name and not by representation. He's an heir recognized by the law and has to report donations received from the deceased if the inheritance comes into the contest with the descendants of the deceased and the direct heir (a relative).

It is noted that the survivor spouse was included in the category of direct heirs, in accordance with article 1126 paragraph 1, Civil code. Previously The New Civil Code, the surviving spouse was not in this category.

The special right of the surviving spouse upon household furniture and household objects and belonging

When it does not come into competition with the descendants of the deceased, the surviving spouse inherits, in addition to the quota laid down under art. 972 civil code, furniture and household items that have been damaged by both spouses during the common use.

The rationale for the establishment of the legislature of this inheritance law (also known as accessory) has been driven by the need to ensure continuity of the surviving spouse living conditions in the household, by recognizing the right to keep some goods which were used together with the deceased spouse[13].

Is supported as the surviving spouse to collect the goods, as according to 974 of the Civil code, over his succession, but the special conditions must be cumulatively fulfilled.

The first requirement is that the surviving spouse would not come to inherit the deceased with the spouse's descendants, regardless of their number. He/she will acquire these goods in full, more than his/her share of the estate, but only if coming into competition with class II-IV of the heirs, or ascendants and collaterals of the deceased spouse. If the surviving spouse comes to inherit even with a single descendant of the deceased, these goods will fall into the same scheme of division as the rest of the assets in the legacy (1/4 for surviving spouse and ¾ for descendants).

In competition with other legal heirs, namely those in Classes II, III, IV, these goods are entitled to the surviving spouse entirely and solely on the basis of art. 974 Civil Code, the rest of the inheritance property shall be divided between the surviving spouse and the deceased's ascendants or collaterals, according to quotas set by law.

The second requirement is that the husband passed away did not dispose its entire portion of these goods (i.e. the totality of his/her party) through donations or linked14.

If only partly disposed, the surviving spouse will take the rest of the goods in this category with the removal of the heirs of class II-IV.

The documents of liberality made by the deceased upon the goods listed in article 974 Civil code, in favor of a third party or other heirs, are valid, the surviving spouse not being heir in respect of those goods.

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[12] Francisc Deak, Romeo Popescu, *Tratat de drept succesoral. Moștenirea legală*, vol. I, Editura Universul juridic, București, 2013, p. 253.

[13] Trib. Suprem, s. civ., dec. nr. 2218/1971 în RRD nr. 8, 1972, p. 160.

[14] TS, s. civ., dec. nr. 154/1972 în CD, 1972, p. 177-180; dec. nr. 521/1988 în RRD nr. 2, 1989, p. 68.

The legislature had in mind not all of the property belonging to the household, but only the deceased spouse of common goods and own assets of the deceased in this category.

As well as law no. 319/1944, The New Civil code does not define this concept, its content was determined by the literature and case law.

Because of the current regulation is relatively recent, there is still no case law handed down in this matter. But because of the provisions of The New Civil Code does not bring significant changes to the law nr.319 / 1944, the case practice developed on the old legislation is applicable and currently only had adapted to the new regulations.

Into this category, falls in the movable goods, that by nature and affection are intended to serve within the household to household furnishings or household needs, have a common value and were used for this purpose, corresponding to the standard of living of the spouses, such as furniture, TV, washing machine[15], refrigerator, vacuum cleaner, etc.

Do not fall into the category the goods covered by article 974 Civil code, those which by their nature are not used in the household (for example, car, motorcycle, piano), goods that serve the profession16, objects of art, luxury or with value over the usual objects, or those goods mentioned by art. 974 Civil code, but purchased for investment or to be donated, as well as goods belonging to the countryside household (work animals, agricultural implements).

If the spouses have owned several homes that are equipped with household items, the special right of a spouse has to be correlated with criteria of affection for goods. In that case, if the spouses have lived together effectively in all those spaces and used goods according to their standard of living, is it particularly the right of the surviving spouse to target all those goods.

Therefore, the surviving spouse in the marriage valid with the deceased will reap, if the case, assets in this category that were used in the household shared with the deceased and the surviving spouse in good faith, of the null marriage but putative will reap the common household used with the deceased, without taking into account the value of the goods concerned. Equally sharing solution could only be applied if in an exceptional way, certain goods in this category were used and afected by both surviving spouses.

Distinct from the old regulation, the current Civil Code maintains the provisions of article 5 of Law no nr.319 / 1944 on wedding gifts and no longer incudes them in the content of the special right. They will be included in the estate of succession and attributed to heirs of the deceased regarding the common law.

The temporary right of habitation of the surviving spouse

According to art. 973 Civil Code, the surviving spouse is not entitled of any real right to use another suitable house for his/her needs and has a right of habitation in the house where he/she lived until the opening of the inheritance, if this house is part of property inheritance.
To acquire the right to be the main the following conditions must be carried out:

a) the surviving spouse may have actually lived in the house (apartment);
b) the surviving spouse does not have his/her own housing17;
c) the house (apartment) to be part of the deceased husband;
d) the surviving spouse may not inherit alone, as in this case, gaining from date of opening of the inheritance even ownership of the main house, the right cannot arise;

[15] M.M. Pivniceru, C. Susanu, D. Tătăruşanu, *Moştenirea legală şi testamentară. Împărţeala moştenirii. Practică judiciară*, Editura Hamangiu, Bucureşti, 2006, p. 13- C. A. Iaşi, decizia civilă nr. 1627 din 15 octombrie 2002.

[16] In question were not considered to be mobile and household items belonging to their household, the goods of the deceased were used in his profession, i.e. fixing watches tools worth 5000 lei - Court of Hunedoara, civil decision No. 756 on 19 august 1983 in the Romanian Magazine of law No. 3/1984, p. 72.

[17] Court of Apeal Timișoara, Civil section, decision nr.217/30.01.2002, published in Carmen Simona Ricu, *Moștenirea legală. Partajul succesoral. Practică judiciară adnotată*, Editura Hamangiu, 2009, p.120.

e) the deceased has not ordered otherwise; he can remove the right of habitation, as the right of legal inheritance because the surviving spouse is not recognised by law in this matter, only in regards to inheritance rights provided for by art. 972 of the Civil code.

The duration of the habitation of the surviving spouse is limited until partition, but not earlier than one year from the date of opening the inheritance, or even before the expiry of one year, until the remarriage of the surviving spouse.

The right of habitation of the surviving spouse has the following legal characters:

a) It is a right in rem, dismemberment of ownership of housing and the residential house; by virtue of this law, the surviving spouse may exercise the use of the house, directly, without needing the intervention of another person18.
b) It is a temporary right, lasts up to partition, but not earlier than one year from the date of the opening of the inheritance, or to the surviving spouse's remarriage;
c) It is a strictly personal right for the benefit of the surviving spouse and is inalienable, i.e. it cannot be assigned or encumbered, and unnoticed, creditors of the surviving spouse not having the right to pursue it;
d) is conferred by law for the surviving spouse free of charge, he/she does not owe rent to the heir who acquired ownership of the house, exempion while enjoying this right.

With respect to the right of habitation of the surviving spouse, the legislature introduces the concept of change of the object of habitation. Thus, in accordance with article 3 para. 973 Civil code, any of the heirs may ask the restriction of the right of habitation, if the house is not entirely needed to the surviving spouse, or the change of habittaion object, if the surviving spouse will receive another appropriate house. This house must be equivalent to that of the deceased spouse and situated in the same locality.

Therefore, it is not sufficient that the heirs to make available to the spouse, a house she can use, with any precarious conditions (for example, lease or bailment).

Conclusions

The afection between spouses secures the surviving spouse, in the current regulation, is in the head of the heirs, different of heirs classes, but being in close contact with them regarding the extent of inheritance rights. This is natural if we think that living together daily leads unquestionably to the birth and consolidation of lasting spiritual ties between the two spouses. Protecting inheritance rights of the surviving spouse continues in the civil code in force, which comes with specific elements. Specialty literature offered solutions that the New Code has taken to ensure as complete regulation of this matter. A positive feature of the new regulations is to regulate first the rights of the surviving spouse then take the rights of the other legal heirs. Shares accruing to the surviving spouse in contest with heir classes are taken from the old regulation.

In regards to the wedding gifts, in the Civil code, these goods are no longer expressly mentioned as forming a special object of the right of inheritance of the surviving spouse (as they were covered in article 5 of Law No. 319/1944). Waiving the rules on wedding gifts could compensate for the surviving spouse with more accurate regulation in relation to goods which are considered family heirlooms found in art. 1141 of the Civil code. This idea makes sense considering the desire of the legislator not to deprive the widow of things which he/she used in conjunction with the deceased, this is the virtue of the purpose to which the special right has been granted for the furniture and household appliances and the right of habitation for the spouse that is still alive.

Therefore, since acquiring a privileged status as the successor of the deceased we believe that it was appropriate to include family memories in this category of special right of inheritance of the surviving spouse along with furniture and household items. Family memories with a large emotional and affective load representing the past of the spouses,

[18] V. Stoica, *Soţul supravieţuitor. Moştenitor legal şi testamentar*, ediţia a II-a revăzută şi adăugită, Editura Editas, Bucureşti, 2004, p. 93.

regardless of their material value, would clearly provide a continuity of the spiritual life of the spouses.

Another improvement on the part of the legislature in connection with inheritance rights of the surviving spouse would be able to come with regard to the right of habitation. A more advantageous rule for the surviving spouse would be able to provide the possibility to acquire the right of habitation to be not only temporary, that is, the legislature would have to waive this right or to maintain the temporary right only in the event of remarriage of the survivor. A permanent habitation right should be at least for a share of the former joint home, in this way ensuring fully cover of the needs because after exiting the joint possession there is a possibility that to the spouse would be given a smaller share cote than the one need by him/her, so use of the domicile within the property title may not match his/her needs.

Furthermore, in order to ensure continuity of living conditions existing in marriage, it would be appropriate that surviving spouse to no longer depend on the will of the deceased upon the house, the surviving spouse should have ensured this right regardless of what was ordered by the deceased, in other words the reserved portion of the surviving spouse should operate in respect of this right.

Bibliography:

1. S. Turgheniev, Părinți și copii, Colecția Carte de buzunar, Litera Publishing House, 2010;
2. M. Eliescu, Moștenirea și devoluțiunea ei în dreptul RSR, Academia Publishing House, București, 1966;
3. Dumitru Văduva, Moștenirea legală. Liberalitățile, Universul juridic Publishing House, București, 2012.
4. Ilioara Genoiu, Ce drepturi are soțul supraviețuitor la moștenirea soțului decedat, C.H. Beck Publishing House, București, 2013.
5. Carmen Teodora Popa, Drept civil. Succesiuni, Hamangiu Publishing House, București, 2010;
6. Ioana Nicolae, Drept civil. Succesiuni. Moștenirea legală, Hamangiu Publishing House, București, 2014;
7. Dan Chirică, Tratat de drept civil. Succesiunile și liberalitățile, C.H. Beck Publishing House, București, 2014;
8. N.C. Aniţei, Dreptul familiei, Hamangiu Publishing House, Bucureşti, 2012;
9. Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, Noul Cod civil. Comentariu pe articole, Ediția 2, C.H. Beck, Publishing House București, 2014;
10. Ioan Popa, Drept civil. Moșteniri și liberalități, Universul juridic Publishing House, București, 2013;
11. Daniela Negrilă, Moștenirea în noul Cod civil. Studii teoretice și practice, Ediția a II-a, Universul Juridic Publishing House, București, 2015;
12. Franscisc Deak, Romeo Popescu, Tratat de drept succesoral. Moștenirea legală, vol. I, Universul Juridic Publishing House, Buurești, 2013;
13. M.M. Pivniceru, C. Susanu, D. Tătăruşanu, Moştenirea legală şi testamentară. Împărţeala moștenirii. Practică judiciară, Hamangiu Publishing House, Bucureşti, 2006;
14. V. Stoica, Soţul supravieţuitor. Moştenitor legal şi testamentar, ediţia a II-a revăzută şi adăugită, Editas Publishing House, Bucureşti, 2004;
15. Maria Marieta Soreață, Noutăți legislative în materia succesiunilor introduse prin noul cod civil, Hamangiu Publishing House, București, 2013;
16. Uniunea Națională a Notarilor Publici din românia, Codul civil al României. Îndrumar notarial, Monitorul oficial Publishing House, București, 2011;
17. Carmen Simona Ricu, Moștenirea legală. Partajul succesoral. Practică judiciară adnotată, Hamangiu Publishing House, 2009.

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POWERS OF THE PRESIDENT OF ROMANIA IN RELATIONSHIP WITH GOVERNMENT O. ŞARAMET

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Abstract: *According to constitutional provisions in force, Romania has a dualist executive whose central authorities are the President of Romania and the Government. Consecrating a semi-presidential regime, the constitutional legislator has built such an executive so the relations between the president and the government have to be characterized by cooperation, collaboration, including those between the President and Prime Minister. Thus, our Constitution recognizes to the President the powers regarding the procedure of investiture of a new government, the appointment and dismissal of some government members, the President also having the possibility to consult with the government and to participate in its meetings.*

Keywords: **powers, President, collaboration, Government, designation, dismissal, Prime Minister.**

Introduction

Putting a dualist executive in which neither of the authorities is not stronger than the other, forces them – the head of state and the government – to manifest within collaboration reports. In this regard, is has been pronounced by the Constitutional Court [1] *that has stressed out that institutional reports between the Prime Minister and the Govern, on the one hand and the President of Romania, on the other hand has to function within the constitutional frame of loyalty and collaboration, the collaboration between these authorities being a necessary condition and essential for the proper functioning of the public authorities of the state.*

The opening and closure of the investiture of the new Government

Regarding the President, the Constitution, Article 85 and 103, recognizes the right to open the procedure of investment of a new Government, and the one to finalize this procedure. Thus, the President[2], after consulting the party that holds the absolute majority in

[1] This view was expressed by the Constitutional Court of Romania by Decision no 356/2007 published in Official Gazette of Romania, Part I, no.322 from May 14th 2007.

[2] Unlike the provisions of our Constitution, the Constitutions of states whose political system is a semi-presidential one, as France, or presidential, in another words a bad copy of the American presidentialism, give the President the right to name the Prime Minister and not jut a candidate for this function. In this regard there are provisions of Article 8 para (1) from the Constitution of France, namely section 99, point 7 from the Constitution of Argentina. In the latter case we would like to point out that although the President of the Republic is, according to section 99, point 1 the head of the Government, with all these he names a head for the Ministerial Cabinet. A similar solution also establishes the constituent Russian legislator through Article 83 a). Constitution of France was consulted: https://www.constituteproject.org/constitution/France_2008.pdf?lang=en, accessed: 25.10.2015. Constitution of Argentina was consulted: https://www.constituteproject.org/constitution/Argentina_1994.pdf?lang=en, accessed: 25.10.2015. Constitution of Russia was consulted: https://www.constituteproject.org/constitution/Russia_2014.pdf?lang=en, accessed: 25.10.2015.

the Parliament or, if there is no such majority, the parties represented in the Parliament, will designate a candidate for the function of Prime Minister[3]. Only just after granting by the Parliament of the vote of confidence in the joint sitting of the two Chambers of the Parliament, in accordance with the provisions of Article 103 para (3) from the Constitution, the President can name a Government. So if initially the President cannot name only the candidate as Prime Minister, later on he will name by presidential decree, not countersigned by any Prime Minister, an entire governmental team. Moreover, naming the Government by the President of Romania is not made in the notification of nor the Prime Minister in function, nor to the one who has just received the vote of confidence from the Parliament, but at referral of the Presidents of the two Chambers of the Parliament and on the decision of the Parliament approving the government program and a complete list of the members of the Government.

But the Government can begin exerting the mandate only after the date of the oath stated in Article 82 from the Constitution, each member individually, including the Prime Minister, all before the President of Romania, issuance and publication in the Official Gazette of Romania, of the presidential decree having the automatic effect of the beginning of the mandate of the Government, with formal character.

The appointment and dismissal of some government members

The President of Romania is the one who has the task to revoke and appoint members of the Government in the case of the occurrence of a vacancy or in the case of government reshuffle[4]. But the President cannot exert this attribution in a discrete manner being forced to take into consideration the proposal of the Prime Minister.

Our recent practice[5] imposed formulating an answer about whether the Romanian President had the possibility to reject a proposal from the Prime Minister for appointing a person as a minister, and in the case where this possibility is recognized according to the legal constitutional provisions – as many times as he can, the President rejects the proposals of the Prime Minister. The need to formulate points of view on these issues was determined due to the onset of constitutional legal conflicts between the Romanian President and the Government, the solution[6] for them, according to Article 146 e) from the Constitution,

[3] The chosen solution by the Romanian constituent is similar to the one of the Spanish materialized in Article 99 1), but also with the Portuguese one deducted by corroborating Article 136 para f) with Article 190 para (1). Constitution of Spain was consulted: https://www.constituteproject.org/constitution/Spain_2011.pdf?lang=en, accessed: 25.10.2015. Constitution of Portugal was consulted: https://www.constituteproject.org/constitution/Portugal_2005.pdf?lang=en, accessed: 25.10.2015.

[4] Law no 90/2001, with amendments and supplements, develops, through Article 7 and 8, the constitutional provisions specifying the fact that in both cases – revocation or vacancy of function – the Romanian President can act only at the proposal of the Prime Minister, and the act through which the decision materializes will be the presidential decree, not countersigned by the Prime Minister. The law identifies it as being distinct and a third situation in which the same conditions, the Romanian President acts, in the moment when a member of the Government that has been convicted by a final judgment or if his estate was declared, in whole or part of it, as being illicitly acquired through a final judgment is dismissed.

[5] There are two cases. The first one is about the moment when Mihai Răzvan Ungureanu submitted his resignation as a Minister of Foreign Affairs, in accordance with the Article 106 from the Constitution and Article 5 from the Law 90/2001, with amendment and supplements, and the Romanian President refused it, for a short period of time, naming in function a person proposed by the Prime Minister, Adrian Mihai Cioroianu. The second case is the resignation from the function of Minster of Justice by Tudor Alexandru Chiuariu and the declaring of a vacant function, the Romanian President refused to name the person proposed by the Prime Minister, moreover he proposed to make a new calling, subsequently being appointed as Interim Minister of a person who already held a portfolio in the Government until the final settlement of the conflict between the Romanian President and the Prime Minister.

[6] The Constitutional Court pronounced the two requests of settlement of legal constitutional between the Romanian President and the Romanian Government, both being made by the Prime Minister Călin Popescu Tăriceanu through the Decision no 356 from April 5th 2007, published in the Official Gazette of Romania, Part I, no 322 from May 10th 2007, and the Decision no 98 from February 7th 2008, published in the Official Gazette of Romania, Part I, no 14 from February 22nd 2008.

republished, to the Constitutional Court. It was emphasized, that as well as the candidates for the function of Prime Minister enlisted to the Government, proposed by the candidate for the function of Prime Minister, be heard by the permanent committees of the Chambers of the Parliament, jurisdiction under objects of activities of the function of the candidate for Minister and, based on the findings, which should be in favor or not, the candidate for the function of Prime Minister proposing another candidate for the function of Minister, so the Romanian President is entitled to check if the candidate corresponds for the function and can motivate another proposal coming from the Prime Minister. By recognizing this right of the Romanian President, the Constitutional Court has not appreciated that he exercises the right to veto against the Prime Minister's proposal, primarily because of the decision of rejection of naming another person in function cannot be taken arbitrarily, the President needs to motivate his decision. This motivation cannot be censured by the Prime Minister because Article 85 para (2) from the Constitution, republished, gives him the right to propose a Minister, not a decision-making competence.

Moreover, pointing out the fact that the reports between the Romanian President and the Government cannot be purely formal, the Constitutional Court held that, on the one hand the Romanian President can refuse, only once, in a motivated way the proposal of the Prime Minister of naming a person in the vacant function of Minister, and on the other hand the Prime Minister, once his proposal is refused, it cannot reiterate, he is forced to propose another person in the function of Minister.

Moreover, the Constitutional Court has recognized, as regards this attribution, a right of appreciation of the Romanian President over the proposition for the function of Minister communicated by the Prime Minister who cannot assume more power from the former, nor the Prime Minister will not be able to act the same. Otherwise, it would reach to an institutional blockage that might take the form of a legal conflict between the authorities involved.

On the other hand, by the same decisions, the Constitutional Court has established that the act of resignation and the declaration of the vacant function of Minister is an attribution that should be made, with or without conditions, by the Romanian President, being an activity incapable of conditionality on the validity of the resignation and its effects.

It was also found that neither the Constitution, nor the Law no 90/2001, with amendments and supplements, does not indicate any terms in which the Romanian President should exerts his attributions mentioned, namely, accepting the resignation of a Minister, declaring vacant the function of a Minister and naming another person in that function, to determine any eventual terms awarded to the Parliament as only legislative authority of the country, according to Article 61 from the Constitution and not from the Constitutional Court that does not have the competence to appreciate, by interpretation, on any eventual term in these matters and no motivation to censor documents on the settlement date.

Compared to them, but taking into account the fact that the two cases – now legal disputes of a constitutional nature between the two authorities – have prolonged, creating malfunctions in the everyday life, normal ministries being affected, but also the Government, considered to be appropriate, as a proposal of the law, through a future amendment of the law regarding the organization and function of the Romanian Government and the Ministries, to plan in a term of 5 to maximum 10 day in which the Romanian President should exercises the attributions mentioned above.

Also the Romanian President, and also at the proposal of the Prime Minister, appoints, as interim, a member of the Government in the case where, in situations provided by Article 106 from the Constitution, another member of the Government can no longer hold office, including the situation in which he is in the impossibility to perform his attributions for a period of time.

The duty of the President is to dismiss and appoint members of the Government, at the proposal of the Prime Minister, in which case the proposal of reshuffle changes its structure or

political composition of the Government as it was established as follow up of the grating of the vote of confidence by the Parliament, is conditioned by the prior approval of the Parliament, approval required by the Prime Minister.

However, regardless of the situation where the President is forced to dismiss and appoint another member of the Government for the vacant function, no such member shall be the Prime Minister and this is because, after reviewing the Constitution in 2003, it has been provided, expresis verbis in Article 107 para (2), the prohibition of the dismissal of the Prime Minister[7]. Another argument in this regard takes into consideration the fact that the Romanian President does not recognizes the right to name in function the Prime Minister only once with his entire governmental team and only on the vote of confidence expressed by both Chambers of the Parliament reunited in a common session. Consequently, according to the symmetry principle, the withdrawal of the vote of confidence and implicitly to dismiss from the function of Prime Minister, including his governmental team, is an attribute of the Parliament and not of the Romanian President.

If, according to the Article 107 para (3), the Prime Minister resigns, loses his voting rights, is in a state of incompatibility, or dies or is in situations provided by law, as the ones in the Law no 115/1999 on ministerial responsibility, republished with amendments and supplements, or is in the impossibility of performing his duties, the President, without being conditioned prior or after obtaining the approval or permission for another authority, or grant of another authority, shall designate another member of the Government to fulfill the attributions of the Prime Minister, until the new Government is formed. But, if the Prime Minister resumes his activity in the Government, the interim Prime Minister will stop fulfilling his attributions without having to fulfill any other formalities[8]. We consider to be suitable, a law that can avoid any misunderstanding or misinterpretations as both fulfilling the attributions of the interim Prime Minister as a member of the Government designated in this regard, and also the beginning of the activity as a Prime Minister established by a presidential decree[9].

[7] The constituent legislator was forced to express prohibition in the Constitution precisely because constitutional principles and previous revisions of the Constitution in 2003, between 1996-2000, the Romanian President at that time removed from his function by a presidential decree, without any other formalities, the Prime Minister at that time Radu Vasile.

[8] The constitutional text is developed in Article 9 from the Law no 90/2001, with amendments and supplements, that state that in the period when the temporary occupation of the function is assured by the Prime Minister or for the function of the member of the Government is more than 45 days. So as specified in the constitutional text, as for the legal I see that the interim period may not last longer than 45 days, period in which the Prime Minister must begin the legal procedure to name another member of the Government. If in this situation is the Prime Minister, it is necessary to trigger the constitutional procedure to form a new Government. Regarding the term that this period of 45 days should begin, taking into consideration that no constitutional or legal text does not specify anything in this regard, we believe that, firstly such mention should be found in the content of the Law regarding the organization and function of the Romanian Government and the ministries and secondly this period should start from the date of knowledge by Prime Minister or by the Romanian President, as appropriate, a situation which led to interim and not the date which was designated as the beginning of the period of the interim member of the Government or in place of another authority, or in the place of the Prime Minister.

[9] By the Decree of the Romanian President no 1316 from December 10th 2008 to designate the candidate in the function of Prime Minister, published in the Official Gazette, First part, no 833 from December 11th 2008, was designated in the function of Prime Minister, Mister Theordor Stolojan. However, following the submission given to the mandate by the President of Romania, by the Decree of Romanian President no 1318 from December 15th 2008, published in the Official Gazette of Romania, Part I, no 847 from December 16th 2008, was revoked the decree to designate the candidate in the function of Prime Minister, thus Mister Theodor Stolojan lost the quality of being a candidate to the function of Prime Minister. Subsequently, by the Decree of the Romanian President no 1319 from December 15th 2008, published in the Official Gazette of Romania, Part I, no 847 from December 16th 2008, was designated the new candidate to the function of Prime Minister. Evoking these examples is a favorable argument of the presented solution, under the symmetry principle.

The right of the Romanian President to consult with the Government

The collaboration reports of the two authorities of the executive also translate into the possibility that the President is consulting the Government regarding urgent issues and of extremely importance, but also to take part in the meetings of the Government, in which case ensures their chairing, in compliance with two conditions that do not have to be met cumulatively. One of these is concerned with the subject of meeting that cannot be linked to the areas listed by the constitutional text – Article 87 para (1) – external politics, defending the country, assuring the public order – areas in which the fundamental law recognizes the duty and other attributions of the head of state. The second condition can be fulfilled only if the President and the Prime Minister's collaboration is a "natural" one and not imposed by the role and attribution imposed by the Constitution, because the Prime Minister has the possibility to ask the President to participate in governmental meetings, this time without any condition on the nature of the problems that will be discussed. Neither of the two functions last mentioned do not represent an obligation that is attributed to the President, the decision to consult the Government nor to participate in its meetings belong entirely to him. Also, just as the President has the liberty to appreciate the limits established in Article 86 from the Constitution, in which issues should consult with the Government, as a result of this consultation, can or cannot take into consideration the views expressed by the Government.

Conclusions

Of the mentioned above, we can see that the constitutional legislator has given greater attention to the powers of the head of Romanian state in its relations with the government, leaving the ordinary legislator to develop these constitutional norms from the point of view of government. The option of the constitutional legislator to regulate carefully the powers of the head of state is understandable given that human society has known in all its forms of organization, the existence of a leader, a chief. Also, this attention is justified by the constitutional role which is consecrated to the head of state, by the legislator. According to art. 80 of the Romanian Constitution, the President has a multiple role: he represents the Romanian state, and is the safeguard of national independence, unity and territorial integrity of the country and he shall act as a mediator between the powers in the state, as well as between the state and society, so we can affirm that its role has mostly a political dimension. On the contrary, the two-dimensional role of government - politically and administratively, such as it is enshrined in art. 102 para. (1) of Constitution, consisting in ensuring the implementation of the domestic and foreign policy of the country, and exercising the general management of public administration, it has an administrative connotation stronger than in the case of the powers of the President.

From another perspective, we can see that by exercising these powers in its relations with the Government, the Head of State does not receive a superordinated position to the Government, to the Prime Minister. The relations between those two authorities will remain the collaboration ones that will oblige them, especially the two heads of the executive - Head of State and Prime Minister, to moderate any tendency, attempt to take over all executive power for them, or even to become the only one holder of this power.

Bibliography:

1. Dana Apostol Tofan, *Drept administrativ*, vol. I, "C.H. Beck" Publishing House, Bucharest, 2008;
2. A. Iorgovan, *Tratat de drept administrativ*, vol. I, "All Beck", Publishing House, Bucharest, 2005;
3. M. Constantinescu, A. Iorgovan, I. Muraru, Simina Elena Tănăsescu, *Constituţia României revizuită – comentarii şi explicaţii*, "All Beck", Publishing House, Bucharest, 2004;

4. I. Vida, *Puterea executivă şi administraţia publică*, Regia Autonomă "Monitorul Oficial", Publishing House, Bucharest, 1994;
5. https://www.constituteproject.org/search?lang=en

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SERVICE WORK AS ANANTIDOTE TO PRISON PROBLEMS IN NIGERIA
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Abstract

The prison system and welfare of inmatesin Nigeria has been of great concern because Nigerian prisons are overcrowded due to the rampant use of imprisonment as a form of punishment. The inherent rights and dignity of prisoners are on a daily basis violatedas a result of overcrowding, insanitary and unhygienic conditions, and non-availability of beds to sleep on, amongst others. The aims of imprisonment as a form of reforming offenders have not been achieved and there is a high rate of recidivism amongst ex-inmates. The Nigerian government also made matters worse by not reforming the country's underdeveloped prison system. This paper comparatively explores the prison systems in Nigeria, the United Kingdom and United States. Itexamines service work as a form of punishment and in conclusion, advocates and recommends its use as an alternative to imprisonment because, the dignity of prisoners is maintained. Furthermore, it reduces overcrowding and overstretching of prison facilities and also curbs recidivism.

Keywords: **Prisons, Prisoners, Service Work, Imprisonment and Prison System.**

1. Introduction

A Prison is a building where people are kept as a punishment for a crime they have committed, or while they are awaiting trial or the system of keeping people in prisons. [1] It is also called penitentiaries[2] and has also been defined as an institution designed to securely house people who have been convicted of crimes. These individuals, known as prisoners or inmates, are kept in continuous custody on a long-term basis. Individuals who commit the most serious crimes are sent to prison for one or more years; the more serious the offence, the longer the prison term imposed. For certain crimes, such as murder, offenders may be sentenced to prison for the remainder of their lifetime[3] or to death.

Prisons form part of the criminal justice system of a country, thus imprisonment is a legal penalty that may be imposed by the state for the commission of a crime. It should be noted that prisons are different from jails, which are facilities operated by the counties and are used to detain adult criminal offenders who receive short-term sentences of less than one year as in the United States. Jails are also used to temporarily house individuals awaiting trial, witnesses in protective custody, offenders charged with crimes in other jurisdictions, probation and parole violators, and juveniles awaiting transfer to juvenile facilities. There are other types of detention facilities such as immigration detention centres, police lock up cells, psychiatric wards, prisoners of war camps and military prisons such as the Guantanamo Bay facility operated by the United States government.

An accused who has been charged with or is likely to be charged with a criminal offence may be remandedin prison if he or she is denied or unable to meet conditions of bail

[1] Hornby A.S. *Oxford Advanced Learner's Dictionary of current English* 6th ed, 2000, 926.
[2] The word *penitentiary* was coined in the late 1700s because it was believed that through solitary religious study of the Bible, prisoners would become remorseful and reform their behavior.
[3]Prisons; retrieved from Microsoft Encarta (2009) by Microsoft Corporation.

or while waiting for judgment and if found guilty, such a defendant will be convicted and may receive a custodial sentence requiring imprisonment. Also, dictatorial governments use prisons as a tool of political subjugation to detain political opponents and critics.

Although, prison structures existed in ancient civilizations, the widespread use of long-term confinement as a form of criminal punishment began only in the 15th century. Today every nation of the world has prisons, and their function is to punish criminals by restricting their freedom. In most countries, governments construct and operate prison systems. However, several countries, including the United Kingdom and United States, also permit private organizations to construct and operate prisons under contract for the government.

Prisons frequently offer vocational and educational programmes for inmates' rehabilitation and self-improvement. It should be pointed out that prison facilities are divided into levels, violent inmates' cells are separated from less-dangerous inmates' cells and are surrounded with high walls perimeter fences.

Prisons all over the world are set up by statute to provide restraint and custody of individuals accused or convicted for crimes by the state. In Nigeria, the present prison system dates back to the colonial era and is modelled after the British system. For most of history, imprisonment has not been a punishment in itself, but rather a way to confine criminals until corporal or capital punishment is administered. For instance, there were prisons used for detention in Jerusalem in the Old Testament era.[4] Prisoners were detained in dungeons; those who were not executed or left to die in dungeons often became galley slaves or faced penal transportations.

Prisons arose from the evolution of punishment, which has been part of human culture throughout times.[5] Though imprisonment was not widely used in the pre-colonial era, it was not totally new to the Nigerian legal system.[6] Confinement existed in many Nigerian societies and was used before the advent of the British as one of the customary legal instruments to maintain peace, law and order. During the colonization era, imprisonment was used to incarcerate persons who were threats to the political and economic interests of the British.

The modern system of imprisonment as a societal punishment started in London, Great Britain in the 19th century, due to the views of Jeremy Bentham. The notion of prisoners being imprisoned as part of their punishment, and not simply as a holding state till trial or hanging, was at that time revolutionary. The first modern prisons of the early 19th Century were sometimes known by the term "penitentiary" (a term still used by some prisons in the USA today). It was not until the late 19th Century that rehabilitation through education and skilled labour became the standard goal of prisons.

2. Prison system and administration: the usa, uk and nigeria

A prison system is the organizational arrangement of provision for incarceration of those convicted of committing a crime and it involves the operation of prisons. It is a system that lays emphasis on punishment and deterrence.

In the United States, prisons are funded and operated through state and federal taxes but in the United Kingdom and Nigeria,[7] they are funded by unitary and federal taxes respectively. The Federal Bureau of Prisons oversees all prisons and other facilities designed to incarcerate individuals convicted of violating federal laws in the USA, while in the United Kingdom, Her Majesty's Prison Service oversees all prisons and that of Nigeria is overseen by the Nigerian Prisons Services under the auspices of the Ministry of Interior. The

4"Prisons" Catholic Encyclopedia , 1913,Robert Appleton Company, New York.

5Privatization of the Prison System: A Panacea J. Howard. The state of prisons 1780, 10 culled from Bamgbose O; "Privatization of Prison System: A panacea for Nigeria"inOgungbe. M.O (ed)*Nigerian Law: Contemporary Issues, Essays in Honour of Sir, Chief, (Dr.) G.O Igbinedion, JP., LLD, GCFR*, 154

6*Ibid* at 152

[7] In Nigeria, the Prison system is under the Exclusive list of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) thus it is within the purview of the Federal Government.

administration of the prison system in Nigeria is centralized and it is placed under the direct supervisions of the Ministry of Interior, the Comptroller-General of Prisons, is the overall head while at the State level, it is controlled by the Comptroller. The operational powers of the Nigerian Prison Service, is derived from the Prison Act[8] and it charges the prisons, *inter alia*, to take into lawful custody all those certified to be so kept by courts of competent jurisdiction; produce suspects in courts as and when due; identify the causes of anti-social behaviour; set in motion mechanisms for their treatment; train inmates for eventual reintegration into society as normal law abiding citizens upon discharge; administer prisons farms and industries for this purpose; and in the process generate revenue for the government.

Some facilities operated by the United States federal government accommodate prisoners who have physical or mental ailments and are more like hospitals, while state prisons house inmates who have been convicted of violating state criminal laws. Given the focus of this paper, particular attention shall be placed on the prison and administration of criminal justice system in Nigeria.

3. Imprisonment under nigerian criminal justice system

Section 24 of the Criminal Procedure Code provides that except in the case of a sentence of death, the court passing such sentence or order shall issue a warrant for the execution of any sentence or order of a criminal court. Upon the passing of an imprisonment sentence, the judge fills out the warrant in judicial form (NR.30) committing the convict to prison. If the convict is found guilty of several offences, the court may direct that the terms of imprisonment for each offence shall run consecutively or concurrently. Imprisonment is available either in addition or in alternative to a fine or in some rare cases without the option of a fine. Other conditions attached to imprisonment may include 'with hard labour' or apartments of maximum, medium, or minimum security definitions within the prison yard. Detention in Borstal or remand homes is used to correct the criminal tendencies in the behaviour of convicted children, so as to make better citizens of them.[9]

3.1 *Open Prison*

This is a variation of the terms of a prisoner, who may have conducted himself in good stead while in prison and is about to be released. Such a prisoner maybe taken to an open prison where there is no total restraint on his freedom of movement and where he could be given time within which to visit other places and return back to prison unaccompanied. If such freedom is violated, the prison sentence earlier imposed on him maybe doubled, this is an administrative concession of the prisons department.[10]

3.2 *Prison Problems in Nigeria*

According to Amnesty International, "Nigeria's prisons are filled with people whose human rights are systematically violated. Approximately 65 per cent of the inmates are awaiting trial most of whom have been waiting for their trial for years. Most of the people in Nigeria's prisons are too poor to be able to pay lawyers, and only one in seven of those awaiting trial have private legal representation."[11] Though free legal aid is provided by the Legal Aid Council of Nigeria and Citizens Rights Departments of the various States Ministries of Justice, there is still a dearth of legal representation for those who require same.

At times, people not suspected of committing any crime are imprisoned along with convicted criminals. Some of such people were often arrested in place of family members the Police could not locate, while others suffer from mental illness and were brought to prison due to lack of persons to take care of them. Most have no lawyer to advocate on their behalf, thereby violating their rights because when a state arrests or imprisons someone solely

[8] CAP. P29, Laws of the Federation of Nigeria, 2004

[9] Section 77 of the Penal Code Act, (Cap P.3), Laws of the Federation of Nigeria, 2004

[10] Section 5(2) of the Prisons Act, (Cap P.29), LFN 2004

[11] Amnesty International., *Nigeria: Human Rights Agenda 2011-2015* AI Index: AFR 44/014/2011 Amnesty International Publications (2011) 3

because he/she is a relative of a suspect or because he/she suffers from mental illness, it violates that person's right not to be subjected to arbitrary arrest or detention, This is a fundamental right guaranteed under the Constitution of the Federal Republic of Nigeria, 1999, the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Right (African Charter), which Nigeria is a signatory.

Amnesty International also highlights the plight of prison staff, who work long and stressful hours for low wages that are often paid late. Poor pay often leads to petty extortion of prisoners, and staff shortages create security risks for both staff and inmates. Inmates are often relied on to govern themselves as a result of high ratio of prisoners to prison staff and have taken on disciplinary functions, including meting out corporal punishment, close confinement and diet restrictions - all of which do not comply with international standards.[12]

Living conditions in Nigerian prisons are appalling. They are damaging to the physical and mental well-being of inmates and in many cases, constitute clear threats to health. Conditions such as overcrowding, poor sanitation, lack of food and medicines and denial of contact with families and friends fall short of the UN standard minimum rules for the treatment of prisoners. The worst conditions constitute ill-treatment. In many Nigerian prisons inmates sleep two to a bed or on the floor in filthy cells. Toilets are blocked and overflowing or simply non-existent, and most often, there is no running water. As a result, disease is widespread.

Most prisons have small clinics or sick bays which lack medicines, and in many prisons, inmates have to pay for their own medicines. Guards frequently demand that inmates pay bribes for such privileges as visiting the hospital, receiving visitors, contacting their families and, in some cases, being allowed outside their cells at all. Prisoners with money may even be allowed mobile phones, whereas those that are poor are left languishing in their cells. Consequently, Nigerian prison system is one of the most under-developed institutions in the criminal justice sector globally.

Imprisonment in the United States on the other hand is a concurrent power held by both the federal and state governments. The federal government, states, counties, and many individual cities have facilities to confine people. Incarceration is one of the main forms of punishment for the commission of felony offences in the United States. Less serious offenders, who are convicted of misdemeanour offences, may be sentenced to a short term in a local jail or with alternative forms of sanctions such as community corrections halfway house, house arrest, probation, and/or restitution. Prisons are operated at various levels of security, ranging from minimum-security prisons that mainly house non-violent offenders to Supermax facilities that house violent and high profiled criminals and terrorists.

It is reported that more than 10.2 million people are held in penal institutions throughout the World mostly as pre-trial detainees/remand prisoners or sentenced prisoners and almost half of these are in the United States, which has the highest documented incarceration rate and total documented prison population in the world.[13] Available statistics show that at the beginning of October 2013, 2.24 million prisoners were incarcerated in the United States.[14]

The same prison congestion scenario in Nigeria also plays out in the United States in that, many prisons are congested. For example, California's 33 prisons have a total capacity of 100,000, but they hold 170,000 inmates.[15] As a result, old gymnasiums and classrooms are turned into huge bunkhouses for inmates by placing hundreds of bunk beds next to one

[12]*Ibid*, at 17

[13]Walmsley, R (2010).*World Prison Population List. 10th edition"*Available at http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf. Accessed on 10/5/2015.

[14]*Ibid*

[15]Thompson, D. *Prison Attacks Calling Attention to Overcrowding*". Available at http://www.utsandiego.com/uniontrib/20080405/news_1n5prisons.html. Accessed on 10/5/2015.

another, in these gyms, without any type of barriers to keep inmates separated. The derisory security caused by this situation, coupled with insufficient staffing levels, has led to increased violence and a prison health system that causes one unnecessary death a week. This situation has led the courts to order California to release 27% of the current prison population, citing the Eight Amendment's prohibition of cruel and unusual punishment.[16] The three-judge court in considering the requests in *Plata v. Schwarzenegger*[17] and *Coleman v. Schwarzenegger*[18] found that California's prisons have become criminalized as a result of overcrowding.[19]

4. Private prisons as solution to prison congestion

A private prison, jail, or detention centre is a place in which individuals are physically confined or interned by a third party that is contracted by a local, state or federal government agency. Private prison companies typically enter into contractual agreements with local, state, or federal governments that commit prisoners and then pay daily fee or monthly rate for each prisoner confined in the facility.

For many governments and emerging economies, the private finance initiative (PFI) appears to be fiscally and economically approved;[20] the government hands over the finance, design and construction of a new facility and the provision of related service to a company or consortium in exchange for monthly fee over a period of years. Here, the government has no immediate capital cost as the company or consortium borrows the necessary finance.[21] The privatization of prisons involves the takeover of existing public facilities by private operators and the building and operation of new and additional prisons by for-profit prison companies.

The United Kingdom was the first country in Europe to use private prisons to hold its prisoners. Wolds Prison opened as the first privately managed prison in the UK in April, 1993 by the Group 4 Remand Services. It should be noted that the said G4S lost its contract to run Wolds prison in East Yorkshire in 2012.[22] A prisoner who had done time in most of the northern jails in England felt Wolds was more of a nursing home than a prison because of the relaxed atmosphere and the treatment she received there unlike in public prisons at Hull and Leeds.[23]Thereafter, private prisons were established under the government's Private Finance Initiative, contracts were awarded for the entire design, construction, management and finance of a prison.

Private prisons emerged in England to provide a source of competition and new ideas, so as to raise standard throughout the prison system and also as a result of the tougher sentencing laws and complaints from tax payers on the huge amount allocated to the prison system.[24]

All private prisons in the UK are regularly inspected by Her Majesty's Chief Inspector of Prisons in the same way as public sector prisons. All private prisons have a Controller linking them to the Ministry of Justice, and the Governors of private prisons are called 'Directors'.[25]

The first for-profit prison in the United States was San Quentin prison in California, which was opened in 1852. It initially operated as a private enterprise. After a number of

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[16]Moore, S. *California Prisons Must Cut Inmate Population*. New York Times. http://www.nytimes.com/2009/08/05/us/05calif.html?pagewanted=print. accessed on 10/5/2015.

[17] Docket no. 3:01-C-0-1351-TEH (N.D. Cal.)

[18] Docket no. 2:90-CIV-S-90-0520-LKK-JFM (E.D. Cal.)

[19]Order for population reduction plan, pg. 9, three-judge court convened by the Chief Judge of the United States Court of Appeals for the Ninth Circuit hearing *Plata v. Schwarzenegger* and *Coleman v. Schwarzenegger*. Available at http://www.cdcr.ca.gov/News/docs/Order-population-reduction.pdf. accessed on 10/5/2015

[20]Bamgbose, *op. cit*., at 153

[21] *Ibid*

[22]http://www.bbc.com/news/uk-20252359.Accessed on 10/5/2015

[23] Bean, J, A private sort of place, New Law Journal, vol. 142, No. 6577, Friday, November 20, 1992, 1610

[24]Bamgbose, *op. cit*., at 155

25http://www.hmprisonservice.gov.uk/prisoninformation/privateprison/ accessed on 30/6/2009

major scandals surfaced due to the mismanagement of the facility, the government of the State of California took control of San Quentin prison.[26]

Private sector participation in United States prisons is not new, federal and state governments contracted out specific services such as medical services, food preparation, vocational training, and inmate transportation to private firms. With a growing prison population due to the "war on drugs" and increased use of imprisonment, prison overcrowding and rising costs became increasingly problematic for local, state and federal governments in the 1980s. In response to this expanding criminal justice system, private business interests saw an opportunity for expansion, and consequently, private-sector involvement in prisons moved from the simple contracting of services to contracting for the complete management and operation of entire prisons.[27]

Modern private prison business first emerged and established itself publicly in 1984 when the Corrections Corporation of America (CCA) was awarded a contract to take over a facility in Hamilton County, Tennessee.[28] The USA government unlike its British counterpart did not divest itself of the complete control of prisons but a few states have proved to be exceptions.[29]

It should be noted that, private prisons contracts were awarded due to the need for new facilities in South Africa, while in the Netherlands, private prisons emerged due to the need and pressure to end human rights abuses and appalling prison conditions.[30]

The genesis of private prisons is similar in most jurisdictions where it has been introduced though operation of private prisons varies from jurisdiction to jurisdiction; private firms would build the needed facilities using their own capital and then charge the government a price that would recoup both the capital investment and current operation cost. The industry has grown rapidly over the past decade and is now an established part of the correctional landscape[31]

In recent years, there has been much debate over the privatization of prisons. The argument for privatization stresses cost reduction, whereas the arguments against it focus on standards of care, and the question of whether a market economy for prisons might not also lead to a market demand for prisoners, that is tougher sentencing for cheap labour. While privatized prisons have only a short history, there is a long tradition of inmates in state and federal-run prisons undertaking active employment in prison for low pay.

Privatization of the Prison system in Nigeria is yet to be a reality. However, due to the poor state of the Nigerian economy, as a result of dwindling oil revenue, the construction of new prisons is not a priority of the government, therefore private prisons with the option of private finance maybe used to reform the prison system, thereby removing the burden of capital loss on the government.

However, high profit margin associated with the private sector and capitalism may come into play thereby negatively affecting public safety, staff and inmate safety, environmental well being and integration of inmates, as such the government should be cautious in adopting the concept of private prisons.

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[26]Schmalleger, F., &Smykla, J. (2007, 2005, 2002). *Corrections in the 21st Century.* New York: McGraw-Hill, 552.

[27]The Sentencing Project, "Prison Privatization and the Use of Incarceration" (2004)

[28] This was the first time that any government had contracted out the complete operation of a jail to a private operator.

[29]the District of Columbia in 1999 sold its correctional facilities to the Corrections Corporation of America for a sum of fifty-nine million dollars for a twenty year lease agreement.

[30]Bamgbose, *op. cit.*, at 155

[31]*Ibid*

5. The concept of service work

The nation of Israel introduced a new manner of implementing an old sanction in 1987, whereby offenders could be sentenced to imprisonment and serve their sentence without actually ever passing through prison gates. This was not a suspended sentence.[32]

Under the service work scheme, an offender could apply to the prison Governor or police officer responsible for his/her custody requesting that permission be given to serve the sentence while remaining at home and reporting daily for work at the local police station.

This system was criticized because it gives the police the power to determine the sentence, it favours well-connected offenders and caters for a small number of offenders despite the increase pressure of overcrowding on the prison system. To correct these shortcomings, Judges are empowered to make decisions on terms of imprisonment (not exceeding six months) to be converted into service work. However, it has been proposed that this type of penal disposition be extended as well to offenders sentenced to prison terms of nine or twelve months.[33] The work was no longer to be performed at the police station, (although this possibility was not overruled) but in any state or other public institution and for the benefit of the public.

Service work differs from community service in that the offender has been sentenced to prison and is, therefore, legally a prisoner, the offender is not supervised by the probation service but by prison officers and the work is to be full-time and not merely a few hours a week.

Under the Israeli Penal Code, there are two forms of service work;

- ***service in work related to the economy:*** this is work outside the prison walls including in state institutions, as to which type, the place and conditions have been determined by the employment service according to the needs of the economy.[34] Here, the offender is to be paid the minimum statutory wage for such work through the Prisons Service, which may deduct from it the payment of fines and restitution to victims ordered by the Court as well as ten percent for administrative expenses. However, this has not been utilized by the court because of organizational considerations, lack of paid work available in times of high unemployment and perceived non-punitive character. Furthermore, such a sanction may be seen as a reward.
- ***service in public work:*** this is work in a state or other public institution, and does not amount to work for the economy and is for the benefit of the public and not for profit bodies such as hospitals and homes for the disabled.[35] This type of work is unpaid. This form of sentence is highly popular and is similar to community service.

  Service work benefits the justice system because it provides an equitable, cost effective sanction, and punishes offenders through measures that benefit the community wherein the offence occurred. Also service work benefits the offender by making non-monetary restitution to the community where the offence was committed, enabling the offender to keep family ties and provides such offender with the prospect of gaining work experience, occupational skills and training. Though the work performed may be manual in nature, there are opportunities such as clerical assistance, carpentry, painting and other skilled services. Furthermore, service work benefits the community by saving tax payers, prison costs.

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[32]A sanction similar in form to this was found in communist countries and it was related to official ideologies. Thus in Hungary, it served primarily to "re-educate" the "worksly". See Bard K; "work in liberty under surveillance in Hungary" in Zvekic U(ed); Alternatives to imprisonment in comparative perspective, Chicago: UNICRI, 1994. pp. 293-304.

[33]Sebba L, Horovitz M &Geva R; *ISRAEL, Criminal Justice Systems in Europe and North America*; the European Institute for Crime Prevention and Control, affiliated with the United Nations, (2003) Helsinki, Finland 64

34Section 51 A, Penal Law, 1977

[35]*Ibid*

6. Can service work be deemed as imprisonment?

According to Sebba, there are three perspectives to this question; legal realism, normative formalism and penal policy.[36] A legal realist might focus on the external-physical attributes, for instance whether there is any similarity between service work and conventional ideas of a prison, that is, a closed fortress-like building in which offenders are compelled to live is non-existent. Also, pains of imprisonment maybe presumed to be absent.

A normative formalist on the other hand believes that service work was deemed to be a form of imprisonment in the legislation. This legislative technique was employed to overcome the external-physical reality, which would indicate that service work was a form of community sanction. This has led to the imposition of service work in cases where imprisonment was perceived as inappropriate.

The sentence work imposed is one of actual imprisonment and even when converted to service work, the offender still has to serve the prison sentence. This is to encourage the courts to limit the use of sanctions to cases that are serious to have justified a sentence of imprisonment. The penal policy view is that the community in which the sentence is carried out maybe perceived as rehabilitative in a way that prison is not.

It is trite among judges that the court should determine what is the appropriate term to be imposed and only at the second stage should the court now decide whether it should be peremptory or suspended, for instance, the sentencing court would decide first, whether a prison sentence was called for and if so, secondly, the appropriate duration of time and thirdly, whether the terms should be suspended.[37] It should be noted that service work is still a prison sentence but the prisoner serves the sentence within the community.

7. Lessons for nigeria

Punishment is the indispensable reasonable complement for a crime and its philosophies are that of deterrence, reformation, rehabilitation and retribution. Imprisonment as a form of punishment has not yielded the desired results especially that of deterrence in that it does not discourage current and potential criminals from committing crime. Also, it does not reform convicts who have served time for crime especially in Nigerian prisons, they come out of prison, worsen and hardened as if prison is an institution of higher criminal learning. Ex-prisoners due to non-rehabilitation while in prison are not able to re-integrate into the society thereby resorting back to a life of crime. Furthermore, overcrowding and inadequate provisions of basic amenities has led to violence in Nigerian prisons. For instance, on the 28th day of March, 2007, inmates at the Kuje prisons went on rampage due to shortage of food and water. Also at the Kano Prisons and Ibadan prisons, there were cases of riots on 31st August, 2007 and 11th September, 2007 respectively.

It is suggested that Nigeria emulates the Israeli approach because the Israeli experience with service work, it can be deduced that service work is far better than imprisonment in that it reduces prison overcrowding especially future/further increases in the prison population and its non-custodial nature has not caused a problem in Israel because there seems not to have been high crime rates committed by prisoners while at large. Furthermore, the recidivism rate among such prisoners is lower than that of similar offenders who served terms behind bars.[38]

It is therefore submitted that service work can be practiced in Nigeria with the help of the Nigeria Police (NP) and Nigerian Prison Service (NPS) monitoring and administering the

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[36]Sebba L, When is a prisoner not a prisoner? The Criminal Law Review 2001, Sweet & Maxwell, 849

[37]Havevi J, then president of the Jerusalem district court and subsequently elevated to the Supreme Court. This was also followed by the English Court of Appeal in *O'keefe*[1962] 2 Q.B 29. See also BottomsA.E "The suspended sentences in England 1967-1978 ".This formulation was later incorporated into statute. B.J Crim. Pp 1; The Criminal Courts Act, 1973

[38]Nirel, R., Landau, S.F., Sebba, L. &Sagiv, B. (1997) "The effectiveness of service work: The analysis of recidivism**",** *Journal of Quantitative Criminology*, Vol. 13, pp. 73-92 cited in Sebba et al, *op. cit*., at 64.

scheme respectively. With Nigeria adopting service work as a form of punishment into its criminal justice system, inmates will have a sense of human dignity.[39]

Furthermore, even though inmates are prisoners, they still possess their inherent and inalienable right except if deprived by law as emphasised by the Court of Appeal in *Peter Nemiv. Attorney General of Lagos State &Ors*.[40]

Furthermore, through service work, prisoners will be easily rehabilitated and re-integrate into society upon release and probably not revert to crime.

It is further suggested that Nigerian courts should have supervisory and oversight powers over the scheme, whereby convicts who adequately complete their service work will be released from the scheme and those who fail in their service work debt will have their cases reverted to the court for appropriate action such as possible sentence to term in prison. It is opined that fear of time in prison will put such convicts on their toes towards successful completion of the scheme.

8. Recommendations and conclusion

Cases take so long to get to court that once an inmate has been tried and convicted, they are reluctant to launch an appeal. Even those claiming innocence say they risk staying in prison longer waiting for their appeal to be heard than if they simply serve their sentence.

The use of holding charges to detain suspects for prolonged periods is prevalent in Nigeria. The Nigerian Police charge people suspected of capital offences, such as armed robbery or murder to a Magistrate Court instead of forwarding the case file to the Public Prosecution Department of the relevant State Ministry of Justice for legal advice on whether a charge should be recommended against the suspect at the High Court. Magistrates do not have jurisdiction over capital offences, neither can they grant bail in such cases. Suspects brought before Magistrates are remanded in prison pending police investigation and rendering of legal advice. In many cases, this takes several years. Though the practice of holding charge has been abolished with the passage into law of the *Administration of Criminal Justice Act*, 2015 by the erstwhile President, Goodluck Jonathan, shortly before he left in May, 2015, its impact is yet to be felt because of partial implementation.

Many court cases are repeatedly adjourned. Witnesses often fail to appear because police and the various states Department of Public Prosecutions lack the funds to bring witnesses or Investigating Police Officers (IPOs) to court, and at times, such IPOs are transferred outside jurisdictions by the police high command. Inmates or their family members with means, at times, pay for these costs. Those who cannot afford to pay, remain in prison untried and without remedy.

The Nigerian government has, on numerous occasions, stated its willingness to reform the criminal justice system, acknowledging its role in creating a situation of prolonged detention and overcrowding. Many Presidential Commissions and Committees[41] recommended reform of the criminal justice system but these recommendations have not been implemented. Instead, the government has simply set up new committees and commissions to study, review and harmonize the previous recommendations. The truth is that inmates stand little chance of their rights being respected, while those who lack money stand even less chance.

The Nigerian prison system has numerous problems like overcrowding/congestions, run down facilities, lack of amenities, among others and in need for urgent reforms and that's why

[39]Article 10 (1) of the ICCPR, states: *"All persons deprived of their liberty shallbe treated with humanity and with respect for the inherent dignity of the human person"*

[40] (1996) 6 NWLR (Pt.452) 42

[41]Such presidential commissions and committees include; the National Working Group on Prison Reform and Decongestion, Inter-Ministerial Summit on the State of Remand Inmates in Nigeria's Prisons, Presidential Committee on Prison Reform and Rehabilitation, Presidential Commission on the Reform of the Administration of Justice, the Committee on the Harmonization of Reports of Presidential Committees Working on Justice Sector Reform andthe Committee on the implementation of the Justice Sector reforms.

the Nigerian government through the office of the Attorney-General of the Federation (AGF) has put in place measures to decongest the Nigerian prisons and reduce the problem of over-crowding by giving out prison decongestion briefs to private Legal Practitioners. However, this turn out not to be the best solution because it is quite expensive and highly politicized. Moreover, its impact is not felt much because it does not tackle the cause of delay in the criminal justice sector.

A draft Prison Bill presented to the Nigerian National Assembly in 2004 has not been enacted into law up till date. The National Assembly should take a cue from the Israeli Knesset (Parliament) and enact the said draft prison bill in order to provide a legal regime for an ample reform of the Nigerian prison system and administration.

Also, statistics and data of prisoners should be properly documented like it is in the USA, which has the highest rate of prisoners and well documented data of all its prisoners. The immediate past Comptroller-General of the Nigerian Prisons Services while in office had once confessed that he did not know the prison number of a former Chairman of the Nigerian Ports Authority, and a chieftain of the People Democratic Party of Nigeria, Chief Olabode George, who was imprisoned in October, 2009 because, according to him, there are about 40,000 inmates within the Nigerian Prisons system.[42] This is an evidence of lack of articulate and proper documentation of mere 40,000 prisoners in Nigeria compared to the USA which has millions of prisoners in its custody with proper documentations.

Given the foregoing, the following solutions are hereby suggested as anantidote to prison problems in Nigeria:

- the concept of service work should be introduced as a form of sentence into the Nigerian criminal justice system for lesser offences punishable with up to two years imprisonment in order to reduce overcrowding in prisons.
- the National Assembly should accelerate and fast track action on the new Prison Bill to bring in the desired and much expected reforms.
- forms of non-custodial punishments like fines, community service, compensation, curfew orders and especially service work should be embraced for lesser offences.
- Pre-trial detention should be out-rightly discouragedin order to stop overcrowding and overstretching of facilities in the prisons. Furthermore, the provisions of the new*Administration of the Criminal Justice Act, 2015* in respect of pre-trial detention should be fully implemented.
- The Nigerian government should also adopt a correctional and not only a penal approach on the issue of prisoners. Prisoners should not be punished alone but reformed and rehabilitated with skills acquisitions and job trainings.
- Nigerian superior courts of records should be empowered with supervisory and oversight functions over the service work scheme in order to regulate same.
- Men and officers of the Nigeria Police and Nigeria Prisons Service should be properly trained on monitoring and administering the suggested service work scheme.
- Service work should be one of the recommendations of the Presidential Advisory Committee on the Prerogative of Mercy and the various State Advisory Council on Prerogative of Mercy while making recommendations in respect of the prerogative powers of the President and that of the State Governors as provided for in sections 175 and 212 respectively of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

[42] The Punch Newspaper; (Saturday, December 5, 2009) 14. It should be noted that the said former NPA Chairman, Chief Bode George has since been released from prison after serving his prison term.

Bibliography

1. A. S. Hornby, *Oxford Advanced Learner's Dictionary of current English* 6th ed, 2000, 926
2. Amnesty International., *Nigeria: Human Rights Agenda 2011-2015* AI Index: AFR 44/014/2011 Amnesty International Publications, 2011
3. CatholicEncyclopedia, *Prisons*, Robert Appleton Company, New York, 1913
4. *Coleman v. Schwarzenegger*. Available at http://www.cdcr.ca.gov/News/docs/Order-population-reduction.pdf. accessed on 10/5/2015
5. D. Thompson, *Prison Attacks Calling Attention to Overcrowding*". Available at http://www.utsandiego.com/uniontrib/20080405/news_1n5prisons.html. Accessed on 10/5/2015.
6. F. Schmalleger, J. Smykla, *Corrections in the 21st Century*. McGraw-Hill New York, 2007
7. International Covenant on Civil and Political Rights, 1966
8. J. Bean, A private sort of place, *New Law Journal*, vol. 142, No. 6577, 1610, Friday, November 20, 1992,
9. J. Howard, Privatization of the Prison System: A Panacea, The state of prisons, 1780
10. K. Bard, "Work in Liberty under Surveillance in Hungary" in U. Zvekic (ed); *Alternatives to Imprisonment in Comparative Perspective*, UNICRI, Chicago 1994. pp. 293-304
11. L. Sebba, M. Horovitz, R. Geva, *ISRAEL, Criminal Justice Systems in Europe and North America*; the European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki, Finland, 2003
12. L. Sebba, When is a prisoner not a prisoner? *The Criminal Law Review*, Sweet & Maxwell, 2001
13. Microsoft Corporation, *Prisons*,Microsoft Encarta, 2009
14. S. Moore, *California Prisons Must Cut Inmate Population*. New York Times. Available at http://www.nytimes.com/2009/08/05/us/05calif.html?pagewanted=print. accessed on 10/5/2015.
15. O. Bamgbose, "Privatization of Prison System: A panacea for Nigeria" in M. O. Ogungbe. (ed) *Nigerian Law: Contemporary Issues, Essays in Honour of Sir, Chief, (Dr.) G.O Igbinedion, JP., LLD, GCFR*, 154.
16. *Plata v. Schwarzenegger*. Available at http://www.cdcr.ca.gov/News/docs/Order-population-reduction.pdf. accessed on 10/5/2015
17. Peter Nemiv. Attorney General of Lagos State &Ors(1996) 6 NWLR (Pt.452) 42
18. Penal Code Act, (Cap P.3), Laws of the Federation of Nigeria, 2004
19. Prisons Act, (Cap P.29), Laws of the Federation of Nigeria, 2004
20. R. Nirel, S. F. Landau, L. Sebba, B. Sagiv, "The effectiveness of service work: The analysis of recidivism**",***Journal of Quantitative Criminology*, Vol. 13, pp. 73-92, 1997.
21. R. Walmsley, *World Prison Population List, 10th edition*, 2010, Available at http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf. Accessed on 10/5/2015.
22. The Punch Newspaper; (Saturday, December 5, 2009) 14