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EXERCISING THE RIGHT TO VOTE IN THE EUROPEAN ECONOMIC INTEREST GROUPING

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Abstract

The article proposes an analysis with respect to the exercise of the right to vote in the European Economic Interest Grouping.

Both the European legislator through the Regulation No. 2137/1985, and the Romanian one, through the Law No. 161 of April 19th, 2003 related to certain measures to ensure the transparency in the exercise of the public dignities, of the public functions and in business, the prevention and sanction of corruption have given an important place to the autonomy of the will of the members with regard to the functioning of the group, the first one limited itself regarding the Organization of the group to determine the minimum number of bodies of the group, namely the decision-making and the group administrator. The analysis of the exercise of the right to vote has a triple purpose: the exercise of the right to vote, the criteria for the award of the right to vote and making decisions.

Keywords: *Regulation, law, Romanian, group, vote, decisions.*

Introduction

The To enable the adoption of the European Economic Interest Grouping to a multitude of y situations it may face to achieve its objective, the European legislator has reserved an important place to the autonomy of will of its members regarding its operation, though it provided certain mandatory rules and it authorized the Member States to draw others into their national laws. This one, related to the European Economic Interest Grouping organization, limited itself to only set a minimum number of organs of the group, leaving to its members the opportunity to also provide the existence of other organs, provided, however, that they are stipulated in the contract of association[1].

Like a legal person, the European Economic Interest Grouping has no organic existence and therefore no natural will. Therefore, its will is manifested itself through its bodies.

According to Article 16 of the Regulation No.2137/1985 the will of the European Economic Interest Grouping will be formed in the body of deliberation which consists of the group members acting collectively, this body being equivalent to the general meeting of a profit making company. The Group's will be accomplished by the legal acts of the administrator or the Group's administrators[2].

[1] Members can also predict in the content of the contract of incorporation of the grouping, bodies, such as a supervisory board, a technical committee or a censor.
[2] Gh. Piperea, *Drept comercial*, C.H. Beck Publishing House, Bucharest, 2012, pp. 139 and the next ones.

The Exercise of the Right to Vote

The European legislator has not referred to as to the Regulation of the collegial body of the European Economic Interest Grouping, but it has limited to indicate how the decision-making power can be exercised within the group, by its members, i.e. only collectively and not individually. The Romanian legislator has not included in its national law provisions regarding the way of consulting its members, leaving them to decide on issues related to the European Economic Interest Grouping.

The absence of the name of the collective body of the European Economic Interest Grouping can be justified by the purpose for which this legal structure was created, namely to mitigate, within this cooperation, the drawbacks related to the geographical distance between its members. It also may indicate the intention of the European legislator to detach the way the decisions are made within the group, from the traditional way to make decisions within a general meeting, specific to profit-making companies.

While doing so, the legislator intended to grant greater freedom to decision-making within the European Economic Interest Grouping, either its members physically meet in a general meeting, or vote from a distance by mail or other means, some national legislations provided mandatory physical reunions of the group members for making decisions, while leaving the possibility that the decisions may be taken by written consultations, however to comply with the spirit of the Regulation.

With regard to the expression used with the Regulation to denote the collegial body of the European Economic Interest Grouping, there are different opinions in the literature. Some authors use the expression „The College of Members"[3] which in their view corresponds to a broader concept than the „General Assembly"[4] that they use for the meeting of the members[5]. However, other authors use the term „General Assembly" more traditional in the French law of the profit companies[6]. Considering the purpose for which the group was created, to facilitate the cross-border cooperation between its members, which involves overcoming the barriers linked, and the presence of members in a particular place, we believe that the term of the College of Members reflects better the designation of the body represented by the members of the grouping acting collectively.

Indeed, if we consider the literal meaning of the Regulation provision, designating one of the compulsory bodies of the European Economic Interest Grouping „the members acting collectively" we may consider an European Economic Interest Grouping operating without a general meeting of its members, i.e. the assumption that its members adopt collegial decisions jointly, but without meeting physically (using postal voting, for example).

Neither the Regulation nor the Romanian law does not reveal any obligation of the members to meet, or to approve the annual accounts or to consult members on a topic concerning the administrators or one proposed by the members. This possibility of extreme decentralization fits well the purpose for which the European Economic Interest Grouping was created, namely to mitigate the drawbacks related to the geographical distance between

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[3] College: „Organ of collective leadership of the ministries and other central bodies of the State administration or certain enterprises and institutions which examines and decides on issues of competence." According to *DEX* 2nd Edition, Univers Encyclopedia Publishing House, Bucharest, 1998, p. 196.

[4] General Assembly: „General Assembly with the participation of members in certain organizations, enterprises, etc.", according to *DEX*, *op. cit.*, p. 15.

[5] F. Lemeunier, *Le Groupement d'intérêt économique (GIE); Groupement européen d'interet économique (GEIE)*, 10-e Edition, Dalloz Publishing House Paris, 1999, p. 221; A. Pételaud, *La construction de la EEC et le GEIE*, Revue des sociétés, 1986, p. 201; J-P Ferret, *Un nouvel instrument au service de la Coopération des entreprises: le Groupement européen d'intérêt économique (GEIE)*, Rép Defrénois, 1989, p.409.

[6] C.Saint-Alary-Houin, *Le Groupement européen d'intérêt économique, instrument de Coopération dans les marchés the travaux*, RMC, 1993, p. 887; D. Lepeltier, G. Lesguillier, *GIE, GEIE. Groupement d'intérêt économique, Groupement d'intérêt européen économique*, 2e édition, GLN Joly Publishing House, Paris, 1995, pp. 137 et les suivantes.

the members, the distance given by the requirement that the members be part of two different states of the European Union.

When the members of the European Economic Interest Grouping deem appropriate to meet the members in a general meeting, it can form a single body or it can be divided into two distinct structures, such as the Ordinary General Meeting and the Extraordinary General Meeting. The members' option for a single body or one divided into two distinct parts is usually determined by the bond they have with the national corporate structures, whether they themselves are such a structure, whether they are more familiar with the way it works.

A first aspect on the general meeting to be covered by the contract for the formation of the group is its competence. Group members may agree that all the decisions be taken by the general meeting or certain tasks be assigned to the general ordinary meeting and certain tasks that to the extraordinary one. In the absence of some express provisions of the Regulation and of the Romanian law on the body where the collective will of members is formed the provisions applicable to joint stock companies or limited liability companies may constitute the inspiration and this because in the national Romanian legislation there are no rules governing the general meetings of companies of persons, companies with which the European Economic Interest Group resembles as legal structure[7]. The Ordinary General Assembly is the meeting that decides on the current business issues stock company, while the extraordinary one is the very existence of the group.

Regarding the exercise of voting rights issues related to the frequency of meetings, the call ways, quorum, majority of the General Meeting, the decision-making, the members' representation in the general assembly etc. would be useful to form the subject of the constituent group provisions contract.

Given that the group members are from different countries of the European Union in terms of their option to exercise their voting rights can reach out to its exercise by mail. Choosing this method of exercising the right requires the regulation by the members of the applicable rules of procedure from the form of the voting paper on which it should be determined not only the vote (positive or negative expressed by each member), but also the right content of the decision on which the members were consulted and the date when it was taken, the consultation and the deadline for submitting the voting papers, the place of consignment, the measures to be taken by the administrator in case of a delayed response of a member and any other aspect that supports the legality of the decisions taken.

Criteria to Award the Right to Vote

The right to vote is one of the fundamental prerogatives attached to a membership of the European Economic Interest Grouping[8].

To ensure flexibility to the legal structure represented by the European Economic Interest Grouping, the European legislator limited itself to provide only two rules, with a mandatory character, on the assign criteria of the right to vote, the provisions of the Regulation being unfilled by the Romanian legislation governing the European Economic Interest Grouping. Thus, according to Article 17 section (1) each member has one vote. However, the incorporation agreement of the European Economic Interest Grouping may assign more than one vote to certain members, provided that no member does hold a majority.

The first rule is not to deprive any member of the main prerogative attached to his membership to an European Economic Interest Grouping, while the second was set up to avoid the situation where one member would impose his will on the other members.

Excepting these two restrictions, the group members are free to determine the manner and criteria for awarding the right to vote, their choice for a particular assignment principle of

[7] S. D. Carpenaru, *Drept comercial român*, 8th Edition, reviewed and supplemented, Universul Juridic Publishing House, Bucharest, 2008, pp. 220-222.

[8] C. Gheorghe, *Drept comercial european*, C.H. Beck Publishing House, Bucharest, 2009, p. 138; D. Lepeltier, G. Lesguillier, *op.cit.*, p. 137.

the right to vote can be influenced by the legal space in which group members come from or by their legal form.

Choosing between the egalitarian system (one member=one vote) and that of an unequal assignment of votes can be influenced on one hand by the majority laid down by law or the incorporation agreement of the group for decision making. The solution one member one vote is an optimal solution when the decisions are taken by unanimity, while the second is the right solution to majority decisions. Also, the choice of the egalitarian system for the distribution of the voting right is a solution where there are marked differences between the economic power of the members and a diversity of their legal form, in order to meet the purpose for which it was created this legal structure i.e., which is the legal instrument for cooperation.

The hypothesis of the unequal distribution choice of voting rights among the members of the European Economic Interest Grouping rises the problem of criteria, which are at the basis of assignment, criteria that may be different and may concern: participation to capital, when the grouping is set up with a capital, or the participation in financing the grouping, when it is formed without a capital, the capacity of a founding member of the group etc.

Regarding the determination of the award criteria unevenly of the voting right, we consider that the members, regardless of their legal space of origin and their legal form should take into account the character of legal instrument for cross-border cooperation of the European Economic Interest Grouping and the need to ensure a structural stability by selecting certain criteria with a low degree of variability in time.

The two mandatory rules concerning the award of the right to vote must be respected throughout the European Economic Interest Group operation, so that on the acquisition by a member by giving up to the group participation of another member is required to take into account that through this operation one member should hold the majority of votes.

Making Decisions by the Voting Members

Mainly, adopting the members' decisions by voting within the European Economic Interest Grouping is governed by the unanimity rule (Article 17 from the Regulation). This rule can be an absolute one or its applicability can be derived from the lack of certain provisions from the incorporation agreement of the European Economic Interest Grouping[9].

The decisions for which the unanimity rule is required are those covered by the paragraph (2) of Article 17 of the Regulation and concern:

- alter the objects of activity of a grouping;
- alter the number of votes allotted to each member;
- alter the conditions for the decision making;
- extend the duration of a grouping beyond any period set in the incorporation agreement for the formation of the grouping;
- alter the contribution of each member or of some members to the grouping's financing.

Unanimity is also required as an absolute rule, in the following cases, too:

- any member of a grouping may assign his participation in the grouping, or a proportion thereof, either to another member or to a third party;
- the assignment shall not take effect without the unanimous authorization of the other members;
- the decision to admit new members shall be taken unanimously by the members of the grouping [Article 26 section (1) of the Regulations].

If the grouping memorandum does not contain provisions by which the members derogate from the unanimity rule, the unanimous decision is required in the following cases:

[9] D. Lepeltier, G. Lesguillier, *op. cit.* pp. 136; *GEIE: aspects pratiques: France et autres pays de la Communauté*, Levallois-Perret: Editions Francis Lefebvre, Paris, 1993, pp. 167-170.

– the establishment by one of a grouping member of a guarantee on his participation in a grouping [Article 22 section (1) of the Regulations];

– a member of a grouping may resign in accordance with the terms laid down in the agreement for the formation of the grouping or, in the absence of such conditions, with the unanimous consent of the other members [Article 27 paragraph (1) of the Regulations];

– n the event of the death of an individual who is a member of the grouping, no person may become a member in his/her place except as provided by the contract for the formation of the grouping or, in its absence, with the unanimous agreement of the members [Article 28 section (2) of the Regulations].

A grouping may be dissolved up by a decision of its members ordering its dissolution. Such a decision should be taken unanimously, unless otherwise laid down in the agreement for the formation of the grouping.

The decisions for the adoption of which it is necessary unanimity are expressly provided for in the Regulations; accordingly and as otherwise clear from the provisions of section (3) of the article indicated above, all other decisions about the group can be taken by majority and quorum provided for in the articles of incorporation of the grouping. Where the contract does not provide otherwise, the decisions shall be taken unanimously.

Regarding the possibility of regulating on a conventional way the quorum and majority required for the adoption of decisions which are outside the unanimity rule we consider that it is important to analyze some issues connected to the election of quorum and majority that ensures the optimal functioning of the European Economic Interest Grouping and the scope of the conventional derogation from the unanimity rule.

Taking decisions in a general meeting requires, in the absence of such provisions both at an European level and with the Romanian law, the need of determination on a conventional of the number of members required to be present for the decisions to be representative. The members' option for a high quorum is to ensure the requirement that the decision taken within the general meeting to be representative, but it may undermine the flexibility of the legal structure created in the form of the European Economic Interest Grouping. Consequently, in the process of determining a quorum, the members should consider the need to maintain a balance between the requirement that the decisions be representative and the cross-border nature of the grouping.

In respect of terms provided that the decisions adopted by the members of a grouping also meet the vote of a majority (the favorable votes that a decision must obtain to be validly adopted). If a decision-making based on a majority was preferred to that based on an unanimous agreement establishing an European Economic Interest Grouping can specify whether it is a simple or qualified majority. The choice of the type of majority with which the decisions will be made will be based on their importance. For example, decisions regarding the voluntary dissolution of the grouping, turning the grouping into another legal form or the sale of property belonging to the grouping are decisions that by the importance they have would require a qualified majority.

The option of the European Economic Interest Grouping members for a system based on majority decision-making practices can generate three types of decisions:

– decisions to be taken by unanimity;
– decisions to be taken by qualified majority;
– decisions that are subject to a simple majority.

Taking decisions also raises the issue of decision blocking that may arise during the operation of the European Economic Interest Grouping by exercising in bad faith by one of the members of the voting rights which would not enable the unanimity, when it is required, or by regulation or by the contract of association, or as a result of a parity (equal number of positive and negative votes).

For these situations the members will have to stipulate who will have the decisive right (the members who are also managing the grouping, the president, etc.).

Conclusions

The European legislator's option to regulate by the main mandatory provisions the rules applicable in the matter of the right to vote (the way in which it can be exercised within the decision-making power of its members, the criteria for the award of the right to vote, the situations where the decisions are taken by unanimity) and leave at the same time a great freedom for the group members to organize the contractual relations, provides a sufficient degree of uniformity and flexibility of the group. Although a regulation in detail of the exercise of the right to vote in the European Economic Interest Group would have ensured uniformity and a high level of legal certainty, this option would have interfered to flexibility so necessary for a legal instrument for the cross-border cooperation and would have required a complete harmonization of the national laws.

Bibliography:

- Gh. Piperea, *Drept comercial*, C.H. Beck Publishing House, Bucharest, 2012;
- C. Gheorghe, *Drept comercial european*, C.H. Beck Publishing House, Bucharest, 2009;
- S. D. Carpenaru, *Drept comercial român*, 8th Edition, reviewed and supplemented, Universul Juridic Publishing House, Bucharest, 2008;
- F. Lemeunier, *Le Groupement d'intérêt économique (GIE); Groupement européen d'interet économique (GEIE)*, 10-e Edition, Dalloz Publishing House Paris, 1999;
- D. Lepeltier, G. Lesguillier, *GIE, GEIE. Groupement d'intérêt économique, Groupement d'intérêt européen économique*, 2e édition, GLN Joly Publishing House, Paris, 1995.

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ONE OF THE IMPORTANT ROLES OF INTERNATIONAL JUDICIAL ACT IN THE PROCESS OF MAINTAINING INTERNATIONAL PEACE AND SECURITY

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Abstract

Through the functions it performs, the judicial act has an important role in the maintenance of international peace and security, the prevention and repression of crime, as well as of the international protection of human rights and fundamental freedoms. Even the duties of public international law coincide with these goals.

Keywords: *cooperation, international jurisdictions, cases*.

Introduction

Since it is an act of jurisdiction to decide a dispute which is a threat to international peace and security, it should be treated from now on as a particular source, since it ensures the realization of the fundamental principles of international law.

One of the fundamental requirements of the maintenance of international peace and security is the peaceful settlement of international conflicts. International disputes were solved over history-for the restitution of the rights claimed or actually infringed-on the battlefield, often resorting to force of arms, ignoring the law.

Before resorting to military force, in case of an Interstate dispute, it is best to finish all the means suitable to bring about a peaceful solution, especially with no human casualties.

Peaceful settlementof international disputes

Either in the practice of international relations and in the theory of international law, the means of resolving disputes are particularly varied, international law representing one of the guarantees of peace and constructive international cooperation in the light of the principle of peaceful coexistence between nations.

The maintenance of this unique coexisting is the principle of the settlement by peaceful means of disputes-international fundamental - principle of international law and international relations-whence the obligation of all subjects of international law to settle all conflicts arising between them only by peaceful means, regardless of the nature and reasons, we are referring here, including the obligation to refrain from the application and the threat of force.

The establishment of a competence as a conflict situation issue belongs, practically, to the UN Security Council not developing general criteria of qualifications, the Council appreciatingthe circumstances of each case in particular.

A particular importance has the differentiation of divisions, which are not yet qualified as conflict situations – which, as a result of unilateral actions of States, aimed at changing the existing position in his favour – and turns in international conflicts, acquiring the qualification of threatening situations of peace or act of aggression.

The experience of history, the current evolution of the international situation, yet again demonstrates that recourse to peaceful means is the only possible and logical way of solving

any disputes.

Peace guarantee is given by the peaceful resolution of disputes between States because:

- Other way, it comes down to a stable recovery of endangered due to the dispute arose;
- as a result of peaceful regulation we understand better the causes that gave rise to the conflict, thus reinforcing the close warring parties;
- by using peaceful means we regain confidence between the two sides, shaken by the appearance of the strain and the conflict that sparked.

Practice has shown that regulations imposed by violence have fared relatively short, because the party has been forced to accept themcannot remember to forget the injustice that was caused and that she was forced to endure. Doctrine and practice show that several essential elementscan be found in configuring the solution for stability based on peaceful means:

a) the option for peaceful means is proof that both sides have expressed their attachment to this inadequate force, based on the pressures and coercion;

b) a peaceful resolution to the conflict is preventing the negative evolution of preventing its damage to a state of serious conflict;

c) the conclusion of the process during which the dispute has been resolved finally leads to the restoration of the original relations between the two sides, being created the prerequisites of normal cohabitation.

The dispute is a disagreement between two or more States, resulting from the difference of opinions or interests.

The dispute has been defined in international law and even the Permanent Court of International Justice as a disagreement over an issue of fact or law, opposition legal theses or of interests between two persons.

Thus, the notion of a dispute, in a broad sense, includes appeals, differences or conflicts between at least two subjects of international law, such disputes having either legal or political.

According to the article 36 of the Statute of International Court of Justice legal disputes are those who oppose legal claims between States and which have as their object the interpretation of a treaty, a matter of international law, the existence of a fact which, if established, would constitute a violation of international obligations, as well as determining the extent and nature of the repair due to a breach of an international obligation.

What's certain is that the doctrine of international law was particularly concerned about the distinction between the two concepts, that the difference between a legal dispute and a dispute considered political in nature is founded primarily on the claims of the parties in the dispute. It should be noted that if the claims are legal and based on legal considerations, the dispute will be legal and will be solved according to the rules of international law.

Also, conflicts and conflict situations are mentioned by the UN Charter, without establishing certain criteria for differentiating them. The UN Charter gives high importance to differentiation and conflict situations, the extension of which could threaten peace and security in the world or who created such a threat and those conflicts and situations that do not in any way threaten international security. The Foundation is political in this differentiation, whereas the UN Charter obliges States to resolve, in the first place, conflicts and situationswhose extension is threatening international peace and security. And at the same time, the distinction has a legal arrangement as permanent member of UN Security Council, which is a party in the conflict, and is obliged to abstain from voting during the discussion on the conflict and during the clarifying of the situation (in accordance with article 27 of the Charter).

However, this rule of the Charter has produced a non-concentrated practice, being rarely raised in front of the Security Council, prompting one undeniable precedent to

obtaining the Eichmann in Argentina in 1960, however, being a permanent member of the UN Security Council.

The article 36 of the Charter of the United Nations shows the recommendations made in the Security Council when faced with a dispute, to take account of the fact that legal disputes shall be submitted to the International Court of Justice.

Thus, by carrying out the differentiation between a political dispute and a legal one, the Charter operates a „separation" between the competence of the UN Security Council and ICJ in matters of dispute settlement.

The UN Security Council has followed, for the first time; this recommendation in the Corfu affair, when by Resolution No. 22 of 9 April 1947has recommended the two countries (Albania and the United Kingdom) to "submit soon this dispute to International Court of Justice in accordance with the provisions of the Statute of the Court".

Although Albania has accepted the recommendation of the Security Council, however art. 36 of the Charter do not establish a case of compulsory jurisdiction and the doctrine unanimously accepted this point of view. Because of this issue, it is explained the reluctance of the Security Council to recommend the jurisdictional dispute, the Parties shall ensure that its recipients are willing to recognize the competence of the Court, because, otherwise a recommendation without reaction will affect undeniably the Council credibility.

These discussions lead us to the reflections on the role international jurisdictions play into maintaining international peace and security.

According to the position expressed by UN officials, namely examining the dispute about issuing judicial decisions binding on the parties, the ICJ may contribute to the maintenance of international peace and security, and a greater confidence in the Court would constitute an important contribution to the work of the United Nations *peace-making*.

However, the doctrine is more reticent in promising positions. Even G. Shinkaretkaya remarked that in the Mission of maintaining international peace and security, the expectations of international tribunals are an exaggeration of their abilities, their role in ensuring the rule of law. According to the doctrine, international jurisdictions should contribute to establishing a climate of cooperation and good neighbourly relations, while they themselves can enable effectively only within such a climate.

Despite the doctrinal reticence, however the ICJ has settled a number of disputes threatening to international peace and security, the curious fact is that in exercising their role of contributing to the preservation of peace, the ICJ ruling on the substantive issues, ruling the precautionary measures, but also advisory opinions, which exceed the contentious jurisdiction.

So far, the International Court of Justice has received 17 casesof involvement and/or the use of force in international relations, of which 10 cases have been initiated from Serbia and Montenegro (Yugoslavia at that time) against the allied States members of NATO, accusing them of bombing its territory. Serbia filed a writ against us and yet 9 States (France, Spain, Italy, United Kingdom, Netherlands, Germany, Canada, Belgium, Portugal) on 29 April 1999.

On the same date, the applicant has requested the application of conservatory measures, urging the Court to order the U.S.A. to immediately cease recourse to use of force and refraining from any act that constitutes the threat or use of force against the Federal Yugoslav Republic. By order of 2 June 1999, the Court refused to apply such measures, since it indicated that this obviously has no competence to examine the cause, relinquishing jurisdiction. Through the vote of the 12 judges against three judges, the ICJ ordered the removal of the case from his role. The same order was handed down to Spain.

The other 8 cases have been removed from the pending by clone decisions on the 15 December 2004 on the preliminary exceptions, declaring that the ICJ stated that it is not competent to examine the case.

Another cause in which the ICJ has been asked to cut the armed conflict between the

two countries was Border and Cross-Border Armed Actions (Nicaragua vs. Honduras); the dispute is referred to the activities of armed gangs on the territory of Honduras conducted by them to the border with Nicaragua and the Nicaraguan territory. The Court declared unanimously that it is competent to examine the cause and that the applicant's request as admissible, by decision upon the competence and admissibility of 20 December 1988. However, the case was removed from the role of the Court by order of 27 May 1992as a result of extrajudicial agreement concluded between the parties „aimed at fostering their neighbourly relations" and to renounce his claims to the plaintiff.

Conclusions

These examples do not combat doctrinal criticism which is satisfied that the settlement of disputes by judicial process can be a means of securing peace only in two conditions:

1) If the danger results from the dispute itself, but not from other conflicts;

2) If peace is not affected, in particular, until such time as it has not yet applied to armed force.

There are few cases in which the ICJ however ordered protective measures aimed to ensure the freezing of the conflict, such as in the matter of Nuclear Experiments (Australia vs. France). The Court has indicated the Australian government and that of the French to avoid any action that would aggravate or extend the dispute or prejudice to another party to obtain the execution of any judgment which the Court could have concerned, by order of 22 June 1973. Particularly, the ICJ ordered France to refrain from proceeding to the nuclear experiments likely to cause radioactive deposits on Australian territory.

Concluding, the functions of the international instrument are not likely to typological classification, which shall be exercised by an international jurisdiction in the process of examining a specific litigation, either as a whole or separately, contributing substantially to the achievement of public international law: the maintenance of international peace and security, the prevention and suppression of international crime and the protection of human rights and fundamental freedoms.

Annex I

Territorial disputes

No crt.	Business	Year of referral	Date of the judgment
1.	Antarctica (United Kingdom vs. Argentina)	1955	Ordinance pending removal — 16 March 1956
2.	Antarctica (United Kingdom vs.	1955	Ordinance pending removal — 16 March 1956
3.	Right of passing on Indian territory (Portugal vs. India)	1955	E-26 November 1957 F-12 April 1960
4.	Sovereignty over the plots border (Belgium vs. Netherlands)	1957	F-20 June 1959
5.	The Temple of Preah Vihear (Cambodia vs. Thailand)	1959	E-26 May 1961 F-15 June 1962
6.	African South West (Ethiopia vs. South Africa)	1960	E-21 December 1962 F-18 July 1966
7.	African South West (Liberia vs. South Africa)	1960	E-21 December 1962 F-18 July 1966
8.	Septentrional Cameroon (Cameroon vs. United Kingdom)	1961	E-2 December 1963
9.	Frontier dispute (Burkina Faso vs. Mali)	1983	F-22 December 1986
10.	Territorial dispute (Libya vs. Chad)	1990	F-3 February 1994
11.	Oriental Timor (Libya vs. Chad)	1991	F-30 June 1955
12.	Kasikili/Sedudu Island (Botswana vs. Namibia)	1996	F-13 December 1999
13.	Sovereignty over Pulau Ligitan Sipadan (Indonesia c. Malaieziei)	1998	I-October 23, 2002 (Philippines) F-17 December 2002
14.	Frontier dispute (Benin vs. Niger)	2002	F-12 July 2005
15.	Sovereignty over Pedra Branca, Middle Rocks and South Ledge (Malaysia vs. Singapore)	2003	F-23 May 2008
16.	Frontier dispute (Burkina Faso vs. Niger)	2010	-
17.	Some activities undertaken by Nicaragua in border region (Costa Rica vs. Nicaragua)	2010	-

See: Annex 1.

Bibliography:

- D. Sârcu, *Rolul actului jurisdicţional internaţional în Cultură şi civilizaţie românească*, 2013, no. 1-12;
- DEXI, *Dicţionar explicativ ilustrat al limbii române*, Academia Română, Publishing House, Bucharest, 2010;
- J.P. Cot etaut La Charte des Nations Unies. Commentaire article par article. Paris Economica, 2 vol, 2005;
- B. Aurescu, *Sistemul jurisdicţiilor internaţionale*, All Beck, Publishing House, Bucharest, 2005;

- Korocob Ю.M, крդbýИkoba З.С. МеЖtyНapor Hoe mpabo.Mockba: МеЖdyhaporhbieOtHOLUeHИe, 2003;
- D. Mazilu, *Drept internaţional public*, Publishing House, Bucharest, 2001;
- Cause of *Legalism of using force* (Iugoslavia, USA), CIJ order on 2 June 1999, published on http://www.icj_cij.org/docket/files/144/8035.pdf (visited on 02.05.2012);
- Cause of *Legalism of using force* (Serbia and Muntenegru vs. Spania) CIJ order on 2 June 1999, published on http://www.icj-cij.org/docket/files/112/7991.pdf (visited on 02.05.2012);
- Cause of *Border and cross-border military actions* (Nicaragua vs. Honduras), CIJ order on 27 May 1992, published on http://www.icj-cij.org/docket/files/74/6588.pdf (visited on 02.05.2012);
- Cause of *Border and cross-border military actions* (Nicaragua vs. Honduras), CIJ judgement competence and admisibility on 20 December 1988, published on http://www.icj-cij.org/docket/files/74/6590.pdf (visited on 02.05.2012);
- Cause of *Border and cross-border military actions* (Nicaragua vs. Honduras), CIJ judgement competence and admisibility on 20 December 1988, published on http://www.icj-cij.org/docket/files/74/6590.pdf (visited on 02.05.2012);
- T. Parrish, *The Encyclopedia of World War II. London: Secker and Warburg*, 1978;
- Cause of Nuclear Experiments (Australia vs. France), CIJ order on 22 June 1973, published on http://www.icj-cij.org/docket/files/58/6048.pdf (visited on 02.05.2012);
- M.D. Donelan, M.J. Grieve, International disputes: Case Histories 1945-1970, Europa Publications, 1973;
- Rezolution CS ONU nr. 22 adopted on 9 aprilie 1947, published on http://www.un.org/french/documents/view_doc.asp.symbol=S/RES/22(1947)&Lang=E&style=B (visited on 1.05.2012);
- Cause of *ConcesiunileMaurommatisînPalestina* (Grecia c. Marii Britanie), CPJI decision of 30 August 1924, p. 11, published on http://www.icj_cij.org/pcij/serieA/A_02/06 Mavrommatis en Palestine Arret.pdf (visited on 28.04.2012).

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SELF DEFENSE IN THE NEW REGULATION. ELEMENTS OF COMPARED CRIMINAL LAW
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Abstract: *Article aims to bring in the most important aspects of self-defense. The paper refers to issues of comparative criminal law regarding self-defense. The second chapter of the new Romanian Criminal Code describes those justifiable causes, certain circumstances which eliminate the second essential trait of crime - the unjustified character. The New Criminal Code chose to divide the causes which eliminate criminal liability in justifiable causes, those causes which make a deed lose its illegal character and non punitive causes, which remove the third essential trait of crime – accountability.*

Key words: Romanian Criminal Code, self defence, justifiable causes, illegal.

Introduction

The second chapter of the new Romanian Criminal Code describes those justifiable causes, certain circumstances which eliminate the second essential trait of crime - the unjustified character. This regards *in rem* circumstances, as their effects extend to the participants as well. The New Criminal Code chose to divide the causes which eliminate criminal liability in justifiable causes, those causes which make a deed lose its illegal character and non punitive causes, which remove the third essential trait of crime – accountability. The difference between these two criteria is obvious. First of all, unjustified causes do not question whether the crime was committed by the person who benefits from the justifiable cause. It comes from the will of the person who commits the deed fully aware and responsible for his actions. Still, although the fact exists, it is committed in certain circumstances which make room for the presumption that the person who committed it must have had a serious legal reason, as stated by law. Thus, the deed appears as "justified" and the incompatibility between the deed and the regulation created by the lawmaker no longer exists. Second of all, the non punitive clauses question the freedom of the person to act (as is the case of physical or moral constraint), the judgment (minority and irresponsibility) or the contribution of other factors which have either affected the perpetrator's ability to act and think (intoxication) or have hid the existence of a state, situation, circumstance (error). In regard to accidental circumstances, it goes without saying that the person couldn't have foreseen that he will commit such a deed for reasons outside of his will.

In regard to self defense, several opinions were considered, opinions expressed by doctrine and the experience of other laws (article 15 of the Swiss Criminal Code, article 20 of the Spanish Criminal Code, article 122-5 of the French Criminal Code); in the light of all these regulations, the condition of grave danger generated by the attack was eliminated, as the gravity of the danger and the actions for its removal being appreciated from a proportionality point of view. Also, we will notice that the title used by the Romanian lawmaker, namely "justifiable causes" is not one seen in other European states' law, which preferred to regulate these causes without distinctive names, as they are found in the section which regulates that certain crime. Furthermore, we will notice that not all justifiable causes stated by the Romanian law are found in other European states' law and those who are found, comprise different regulations, either more strict or more permissive in regard to what the lawmaker wished to achieve at the time of the regulation.

Differences between the old regulation and the new Criminal Code (article 19 of the Romanian Criminal Code and the former article 44 of the Romanian Criminal Code)

Article 19 of the new Romanian Criminal Code, which regulates self defense, as opposed to the former article 44 of the Romanian Criminal Code, which states, in the first alignment, that the deed stated by criminal law which is committed in self defense is justified. According to the provisions of the second alignment, the person who acts to remove a material, direct, immediate and unjust attack on his person, on others, on the rights of others or a general interest, acts in self defense as long as the defense is proportional to the severity of the attack; alignment (3) states that the person who commits the deed, under the circumstances regulated in alignment (2), in order to prevent the wrongful, violent, devious breaking in of a person inside a house, room of other surrounded place, during the night, is presumed to have acted in self defense. Under these new conditions, the report between the severity of the danger generated by the attack and the actions undertook in order to remove it will be analyzed from the perspective of proportionality between the attack and the defense. The removal of the serious character of the danger generated by the attack widens the area of self defense, thus creating a reason for applying the most favorable criminal law. According to the new Romanian Criminal Code, the condition that the attack be serious enough to endanger the person and its rights will no longer be considered; neither will be the condition of the proportionality of the defense. The analyzed aspects will regard only the proportionality conditions.

Alignment (2): the spaces considered by the presumption of self defense no longer include the spaces marked by clear distinctive marks, only involving houses, rooms, dependences and other surrounded spaces. This was as a turn back to the phrasing of article 44 second alignment of the Romanian Criminal Code, as it was before being modified by Law no 247/2005.

The area of the presumption is limited, as the conditions become more specific, requiring the location be surrounded and connected to a domicile. From this perspective, the old law will be the most favorable criminal law. The content of the new regulation, in regard to spaces considered by the presumption of self defense, is identical to that of the trespassing crime (*see article 244 of the new Criminal Code*).

It was also stated that the breaking in must be illegal; the statement didn't seem to be necessary considering that the wrongful character of the breaking in was already regulated.

Otherwise said, as long as the breaking in occurs without right and the means by which it is accomplished will also be illegal (we are in the presence of a hypothesis of an analogy clause with a homogenous character). As illegal and without right are synonyms, the text may seem redundant, may even cause some difficulty in being applied; probably the lawmaker wished to strengthen and make the existence of the analogy clause even more obvious, a hypothesis in which there is no analogy contrary to the principle of legality. The phrasing "other such illegal ways" replaces the phrasing "other such means".

When listing the ways of breaking in, the one committed during night time was added; in order to identify night time, the criteria already stated by doctrine will be applied, since they have already proven to be quite useful in practice. Night time is the period of time when there is darkness outside, regardless of the astronomical time of sunrise and sunset. According to the text, it would appear that breaking in during the night would be enough, without there having to be committed by violent, devious ways.

Another significant difference in the current regulation is that in longer regulates as self defense the so-called justified excess of self defense regulated by article 44 third alignment of the Romanian Criminal Code. This becomes, according to the new Romanian Criminal Code, a cause which eliminates guilt (see article 26 of the new Romanian Criminal Code).

If in the Romanian law we can find the existence of four justifiable causes: self defense, state of necessity, exercising a right or fulfilling an obligation, consent from the injured person, in German law only two are regulated, as the other two are just variants of the first ones. Thus, we will find self defense and state of necessity as well as the exceeding the limits of self defense and justifiable excess, as a variant of the state of necessity[1]; these are all regulated in "Self defense and the state of necessity". Thus, article 32 of the German Criminal Code states that "the deed regulated by criminal law but committed in self defense is not punished". The German lawmaker defines self defense as "that defense which is necessary for avoiding an immediate and illegal attack against a person or a third party". Although the regulation seems to be a general one, we can distinguish the conditions for self defense and for the attack.

In regard to the defense, it must consist of a deed regulated by criminal law, it must be necessary in order to avoid (and reject) an attack, and by it the defense of a person or a third party must be accomplished. By expressly regulating the need for defense, the German lawmaker wished to point out that it must be able to reject or avoid the attack and it also must be proportional to the attack. As for the defense, it must be said that it should be able to protect the person who commits it (the person under attack) or a third party; the area of things which can be protected is much more limited than the one stated by Romanian law.

The German lawmaker expressed the idea that the attack which is rejected by committing a deed regulated by criminal law in self defense must be immediate, illegal and directed against the person (who acts in self defense) or a third party. As we can see, the conditions of the attack as regulated by the German lawmaker are found in the ones regulated by the Romanian lawmaker as well, who was more rigorous by clearly expressing it. Another difference regarding the attack is that it is directed only against a person; the deed regulated by criminal law committed in order to protect a right or a general interest will not be qualified as self defense. As for exceeding the limits of self defense, this will be considered only if it is owed to the state of confusion, fear or terror of the person who commits the criminal act, as we can see from the regulations of article 33. This provision, which is correctly tied to self defense by the German lawmaker, is found in Romanian law under the name if "non imputable excess"[2].

The French Criminal Code doesn't regulate the justifiable causes regulated in Romanian law; they are described and regulated together with the regulation of the crime itself; they are named "causes which eliminate or mitigate criminal liability". In French law we will find self defense, presumed self defense, state of necessity, the exercising of a right or fulfilling an obligation[3].

As for self defense, the French lawmaker states two such situations: when "the person who commits a deed regulated by criminal law in self defense, in order to protect itself or others from an unjust attack directed at him or at another person, except for the situation in which the means used are disproportionate in regard to the severity of the attack" and when "the person who, in order to reject a crime or an offence directed against a good, commits an act of defense (thus committing a deed regulated by criminal law), except for murder, as long as that act is necessary for the desired purpose and the means used are proportional to the severity of the attack".

In regard to the first situation, we can see that, in order to have self defense, it will have to comprise several conditions: to be a deed regulated by criminal law, to be committed with the purpose of protecting a person and to be proportional to the severity of the attack. It is worth noticing that, in case the latest condition is not fulfilled, there will be no self defense,

[1] In Romanian law, no imputable excess – the former justified excess – in case of self defense and state of necessity are regulated in the chapter regarding the non punitive clauses.

[2] This provision replaces justifiable excess from the old regulation.

[3] It is worth mentioning that the legal provisions have no marginal names in the French Criminal Code; they were used merely to east their description.

as the French lawmaker does not regulate justified excess. As for the attack, it must be unjust and directed against a person, regardless of whether that person is the one who is protecting itself or he is protecting another person.

As for the second situation, the conditions of attack and defense are a little different in regard to what is to be protected by the defense. Thus, the defense must comprise of a deed regulated by criminal law, it must be committed in order to stop a crime or an offence against a good, it must be necessary for the desired purpose[4], it must be proportional to the severity of the attack and it must not be murder. The specific element to take into consideration is the negative condition which is expressly regulated. In regard to the attack, the only difference from the previously described situation is represented by the fact that attack is directed against a good.

Article 122-6 regulates presumed self defense as follows "It is presumed that the person who committed a deed regulated by criminal law 1. in order to reject the attempt of breaking into a living space by violence or devious means during the night; 2. in order to protect himself from the authors of a theft or robbery[5],,.

The first described situation is similar to the Romanian regulations regarding the presumed self defense, except for the fact that the French lawmaker makes no distinction between "breaking in" and "the attempt to break in"; this first one (breaking in) must be deduced by way of interpretation. Also, we can notice that the French lawmaker is stricter in, as opposed to the Romanian lawmaker who provides an example listing.

The second situation is not found in Romanian law, as this is the most obvious difference between the two laws in regard to presumed self defense.

Another law in which justifiable causes regulated by the Romanian lawmaker have a correspondent is the Italian law; the regulations of justifiable causes don't have a distinctive title and are listed along with the general provisions about crimes. The Italian Criminal Code regulates "self defense" (and, as a corollary, "the legitimate use of a weapon"), state of necessity, exercising a right or fulfilling an obligation and the consent of the holder of the right; we can even notice that the provisions of the Italian Criminal Code are the closest to those of the Romanian Criminal Code.

In regard to self defense, the lawmaker states in article 52 first alignment that "the person who committed a deed regulated by criminal law while being forced by the need to protect a right of his own of belonging to others from the present danger of a unjust attack, as long as the defense is proportional to the attack, will not be punished".

As we have done in case of the previously analyzed laws, we will distinguish between the conditions of self defense and the conditions of the attack. In order to have self defense, the defense must be accomplished by committing a deed regulated by criminal law, to be necessary for protecting a personal right or a right belonging to another person, to be proportional with the attack. These conditions must all be fulfilled. Furthermore, by means of interpretation, we can deduce that the deed committed this way must be the only available means to protect this right. As a similarity to all other analyzed laws, we notice the condition of the proportionality between the deed and the attack. In regard to the latter, it must be unjust, it must be directed against a right and it must be a present danger.

Another variant of self defense is found in alignment (2)[6] of the same article, the novelty being that the person who commits the deed regulated by criminal law uses a weapon which he owns legally or another means to produce the defense. In the second case, the attack

[4] So, as a result, we can deduce that this (the deed regulated by criminal law) must be the only way to protect the good from the attack.

[5] In the French Criminal Code, theft is the equivalent of robbery from the Romanian Criminal Code.

[6] In the cases regulated by article 614 alignment (1) and (2), the proportionality report exists as regulated by alignment (1) of the present article in case a person who is legally present at a determined place uses a legally owned weapon or another mean to produce defense in order to reject an assault:

a. own safety or the safety of a third party;

b. own or third party goods, when there is no desist and there is a threat of aggression.

can be directed against his own safety of the safety of a third person, as well as personal or third party goods. In case the attack is directed against a good there must be no desist and, as a second condition, there must be the danger of an aggression (physical or otherwise). These regulations can be applied in any situation, except for when the defense was made at where the person exercising the defense practices his job, profession or business.

As a novelty in regard to the limiting of liability, the Italian lawmaker regulates in article 53 "the legitimate use of a weapon". As a result, according to the provisions of the first alignment of the same article "the public servant who, while exercising his duties, uses a weapon or any other means of physical constraint when he is forced to do so by the circumstances in order to reject an act of violence or to defeat an act of resistance regarding the exercising of authority and by this course of action he prevents crimes such as murder, shipwreck, drowning, plane crash, train wreck, homicide, armed robbery or kidnapping is not punished".

The person who commits the deed regulated by criminal law is a public servant in the line of duty and his actions are meant to prevent a crime. Unlike self defense, the action which is rejected must be one of those specifically listed by the lawmaker. Furthermore, we will se that these regulations are applied "to any person whose assistance was requested by the public servant". By way of interpretation, we can deduce that the request of the public servant must be previous or at least simultaneous with the deed, as the simple acknowledgement will not exonerate the person from criminal liability. Finally, the third alignment states that "the law can establish other cases in which the use of a weapon or another mean of physical constraint is allowed".

In regard to all these clauses, whose main effect is the removal of the criminal character of the deed, the Italian lawmaker regulated in article 55, the culpable excess, which can be applied in regard to any of the clauses. Thus, when "by committing a deed regulated by article 51, 52, 53 or 54 the limits imposed by the law or authority order are exceeded, the provisions regarding the deed committed without guilt are to be applied". As a result, the Italian Criminal Code states that culpable excess does not remove the criminal character of the deed, but is a legal extenuating circumstance.

In order to underline the facts described above regarding the Romanian law, we will provide an example of judicial practice – a criminal trial solved in 2009, before the coming into force of the new Romanian Criminal Code (Law no 286/2009).

By the indictment of Bacau County attorney at law registered under the number 710/P/2009 complaints were filed against the defendant B.M. for committing manslaughter, a crime regulated by articles 174-175 alignment 1 letter c) of the Romanian Criminal Code by applying article 73 letter c) of the Criminal Code. Thus, in the evening of November 19th, 2009, while she was at her house, as a result of the fact that her husband, the victim B.S., while under the influence of alcohol, provoked her by trying to engage in sexual intercourse with her, she hit the victim in the head with an axe, thus causing massive bleeding, which led to the victim's death over night.

Conclusions

As we have seen from the previously analyzed laws, the Romanian lawmaker is the only one who uses the concept of justifiable causes. In the French law, these are called "causes which eliminate or extenuate criminal liability". In German and Italian laws, these are regulated along with the general content of the crime, without having a distinctive title.

The provisions of the German Criminal Code are much stricter as opposed to other laws, covering a small number of situations. The French law has a middle position, as it is located somewhere between the German and the Romanian law. Thus, the French Criminal Code regulates three such causes (presumed self defense is a corollary of self defense); as we

have noticed, the French lawmaker thinks that the injured party's consent is not reason to commit a deed regulated by criminal law.

Finally, the Italian law covers the widest area of situations among the analyzed laws; unlike the other criminal codes, in the Italian one we can find "the legitimate use of a weapon" but also "culpable excess", which can be applied in regard to all listed causes.

Bibliography:

- The new Romanian Criminal Code and the law for its reinforcement;
- The Criminal Procedure Code;
- Pascu, T. Dima, C. Paun, Mirela Gorunescu, V. Dobrinoiu, M. A. Hotca, I. Chis, M. Dobrinoiu, The new commented Criminal Code General part, Second revised edition, "Judicial Universe" Publishing House, Bucharest, 2014;
- V. Dobrinoiu, M. A. Hotca, Mirela Gorunescu, M. Dobrinoiu, I. Pascu, I. Chis, C. Paun, N. Neagu, M. C. Sinescu, The new commented Criminal Code, Second volume, The special part, "Judicial Universe" Publishing House, Bucharest, 2012;
- The German Criminal Code;
- The French Criminal Code;
- V.Dobrinoiu, W.Branza, Criminal Law, The General Part, "Lumina Lex" Publishing House, Bucharest, 2003;
- The Italian Criminal Code;
- See Explanatory Memorandum on the draft Law on the Criminal Code, http://www.just.ro.

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"OBJEKTFORMEL" – EVENTUAL ACTS OF DAMAGE TO HUMAN DIGNITY

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Abstract

The Object formula („Objecktformel") has been designed and developed in the mid century XX by Günter Dürig, starting from the second formula of Kant's categorical imperative. The Federal Constitutional Court of Germany took the formula and applied it for the first time in the case of the telephone conversations of December 15, 1970. The Object formula („Objecktformel") was taken from the German constitutional law and applied in the jurisprudence of the European Court of Human Rights.

Keywords: *human dignity; the jurisprudence of the Federal Constitutional Court of Germany; the jurisprudence of the European Court of Human Rights.*

Introduction

The Object formula was designed and developed by Günter Dürig, is outlined based on a negative form, but gives some legal possibilities. The theory of the object starts from the second formula of Kantian categorical imperative: "act in your relationship with humanity, in relation to your own person and in relationship with others, as they would be for a purpose and not a simple way".

According to Dürig, the guarantee of the dignity is rooted in the idea that man is distinct from impersonal nature because of his mind that allows him to become self-aware, to self-determination and to shape his own destiny. Therefore, to treat someone as an object is to deny his ability to self-determination and to shape the environment. According to Dürig, the human dignity is affected when a concrete human being is reduced to an object, to a simple way, to an amount that you can dispense. The violations of the human dignity involve the degradation of a person to a thing that can, entirely, be kept in short, to have him be registered, to be brainwashed, to be replaced, to be used and be expelled.

This expression comes from the historical context of post-World War II and is now extensively applied to the Federal Constitutional Court of Germany. The idea was taken up by several German authors, with some nuances. The renowned German professor Josef Wintrich, which started from Kant's formula, stated that a person must remain "an end in itself in society and in the legal system can never be denigrated as a simple means of community, as a simple instrument or simple object without rights in system"[1].

The application of the object theory in german constitutional law

To reify means, according to Kant's philosophy, to use the person only as a means to another end. Treating a person as an object is a denial of the uniqueness of the individual. No

[1] My contribution at this work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013.

matter if reification is done by the state or by another individual as undermining human dignity is retained in both cases, it matters that the person can no longer trace the route of his own life, being completely available to another people. Humiliation, stigmatization, persecution, exile, inhuman or degrading punishment were considered in law as affecting human dignity.

The Federal Constitutional Court of Germany took the theory of the object and explained for the first time the concept of „Objektformel" in the case of telephone tapping of December 15, 1970. In this case it was about a constitutional amendment aimed at restricting the exercise of the right to privacy of correspondence, mail and telecommunications. It was indicated on this occasion that „Often it happens that a man is reduced to being an object of relationships and social development, but also to the law, meaning that he must obey without his interests being taken into account. It is not enough to retain a violation of human dignity. For this, you need that the treatment put in question the quality of the subject, or where it is the case, a violation of dignity that is arbitrary. The human treatment by the law enforcement public authorities should be a treatment that is contemptuous"[2].

The Federal Constitutional Court of Germany (Bundesverfassungsgericht) has frequently held that is contrary to human dignity when a person is considered as a mere object of state. The Court expressed doubt about the fact that a formula such as general as the formula of the object could determine whether there was a violation of dignity in a particular case, and this is one of the weaknesses of the formula. To be an infringement of human dignity, it was argued that in addition, the person must be subjected to a treatment that basically launches doubts about the quality of a subject or in a particular case proves arbitrary disregard for dignity. To violate human dignity, the individual treatment in the hands of the public authority must be the expression of contempt for the incumbent of every human being by virtue of being a person. The Federal Constitutional Court of Germany was concerned that if a person was not notified of the fact that his phones are tapped, the pressure imposed on the citizens by the state for the need to protect the society and the liberal democratic order, do not constitute the expression of contempt for the person whose privacy has been affected. It was also noted that the quality of compliance of the quality of a subject of the person, normally includes the right to apply to a court, but, the exclusion of the judicial routes in question was not motivated by contempt for the human person, as are offered other forms of judiciary control. Therefore, the Federal Constitutional Court of Germany has not removed from the "object" formula, but he attached a subjective conception: "Objeckt - Subjekt – Formel" (the formula considering as object or as subject).

On the other hand, in the Microcensus case[3], the Federal Constitutional Court of Germany established that to compel a person to record all aspects of his personality would treat it as an object. The dignity requires the state to treat the individual as being capable of self-determination, and should be left an internal space for a free and responsible development of his personality.

"Objecktformel" involves determining the obligations of abstention and not the content of human dignity, such a formula addressing the concept of human dignity analyzed for restriction[4]. The content of human dignity can't be defined in a general manner. The definition is a made in a negative way, the German Constitutional Court stating that human dignity must always appreciated by a particular case, and the appreciation from this perspective remains conjectural. Therefore, the general expressions like "the human being

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[2] D. P. Kommers, R. A. Miller, *The constitutional jurisprudence of the Federal Republic of Germany,* 3 edition, "Duke University Press, London" Publishing House, London, 2012, p. 365. For a detailed presentation of the German Constitutional Court's jurisprudence, see *Selecţie de decizii ale Curţii Constituţionale Federale a Germaniei,* Fundaţia Konrad Adenauer, Programul Statul de Drept Europa de Sud Est, "C.H. Beck" Publishing House, Bucharest, 2013.

[3] The Microcensus Case, 27 BVerfGE 1, (1969), see D. P. Kommers, R. A. Miller, *work cited,* p. 356.

[4] K. Zakariás, K. Benke, Demnitatea umană în jurisprudenţa instanţelor constituţionale din Germania, Ungaria şi România, p. 46, http://www.ccr.ro/uploads/zakarias_benke.pdf.

must not be reduced to an object in the hands of state power" can only sketch and can be found within the violations of human dignity"[5].

One of the most controversial cases in which the German Constitutional Court applies the theory of the object is the Case of the Aviation Security Act[6]. As a reaction to the terrorist attacks of 11 September 2001 on the World Trade Center and the Pentagon, in Germany was adopted the Law of aviation security, in 2005. The Section no. 14 of the law has aroused various reactions, as authorized by the Minister of Defence, with the consent of the Minister of Interior to use military force against a passenger of the aerononave if the plane intended to be used against human life, and when it was the only way to avoid an imminent danger.

Several lawyers and flight captains cited the non-compliance of the law with Art. 2 paragraph (2) which guarantee to all persons the right to life, together with Art. 1 paragraph (1) on the inviolability of human dignity in the German Basic Law. They reasoned the position adopted by showing that in doing so the State relativize the human life of the passengers on board, treating them as objects of state action and depriving them of their human value and honor.

The Federal Constitutional Court of Germany agreed with this position. In his view, to allow felling a passenger plane, the passengers and the crew would be deprived of the right to self-determination and thus would be mere objects of any rescue operation for the protection of others. Or, "human life is intrinsically connected with human dignity as the supreme principle of the Constitution and the highest constitutional value. Every human being is endowed with dignity as a person regardless of his physical or mental condition, (...), capacity or social status. No person may be deprived of his dignity. Any violation of this value would be unjust. The principle applies during the entire life of the person and includes the dignity even after death"[7].

The Court held that if the right to life may be restricted by law, the principle of human dignity prohibits absolutely intentional killing of helpless people, passengers on a plane. In addition, the legal authorization of this kind would violate the "essence" of the fundamental right to life and the assumption that passengers when boarding would consent to breaking aircraft is nothing but a "non-realistic fiction"[8]. The court noted that people should not be treated as objects for the purpose of saving others and the killing of innocent passengers can not be used as a means to save the lives of potential victims on the ground, because human life can not be available unilateral to the state in this way, even if there is a statutory authority.

The application of the theory of the object in the jurisprudence of the European Court of Human Rights

The European Court of Human Rights took the formula of the object and applied it in several of its decisions.

The first is the case Tyrer[9], in which the plaintiff Anthony Tyrer was a British citizen, living in Castletown, Isle of Man. As with the other three teens, seriously injured a student in his school at the age of 15, he was sentenced by a local court for youth to corporal punishment consisting of three strokes of rods, for unprovoked assault causing bodily harm. Since his appeal to the High Court of Justice of the Isle of Man has been dismissed, the conviction was executed on April 28, 1972, to the police station in the presence of his father and a doctor. This type of punishment, although they were abolished in England, Wales and

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[5] Beatrice Maurer, *Le principe de respect de la dignité humaine et la Convention européenne des droits de l'homme, "*La documentation française" Publishing House, Paris, 1999, p.125.

[6] Case on aviation security Act, 115 BVerfGE 118, 127 (2006), D. P. Kommers, R. A. Miller, *work cited,* p. 396.

[7] Case on aviation security Act, cited above, § 152.

[8] Case on aviation security Act, cited above, § 157.

[9] E.C.H.R., Case Tyrer vs. R.U., application no. 5856/72, 25 april 1978.

Scotland in 1948 and in Northern Ireland in 1968, was held for certain crimes, in the legislation of the Isle of Man. They apply only to males aged between 10 and 21 years, the number of shots being up to 6 for a person aged up to 13 years and 12 for those aged between 13 and 21 years. These penalties were rarely applied, and in 1969 applied only to crimes of violence against persons. Before the Commission, the applicant complained under Article 3 of the European Convention on Human Rights. Having established that the question is not about torture or inhuman treatment, because the suffering caused by Antony Tyrer involved did not reach these concepts, examined whether the corporal punishment was a degrading treatment. For the purpose of the Court, is degrading the punishment if provoked humiliation and contempt that reach a particular level, which differs from the usual element of humiliation that contained normal and almost inevitable in any corporal punishment. The Court noted that the assessment in this regard is relative, being taken into account, in particular, the nature of the punishment, the context of the punishment and manner of execution. Compared to all the circumstances of the case, decided that the corporal punishment is degrading.

The reasons for the decision, is invoked the object theory. Judicial corporal punishment suppose, by their very nature as a human being to do the physical violence on his fellow man. He added as extra gravity that it was about institutionalized violence, and that those who applies penalty are complete strangers to the punished and to all involved formal punishment (anxiety of waiting for the violence to apply to them, and the shame of having to undress). It prohibited the use of punishment contrary to art. 3 of the Convention, whatever their deterrent effect. The European Court of Human Rights concluded that art. 3 of the Convention was violated because the penalty imposed on the applicant "consisting of being treated as an object of political power injured his dignity and physical integrity"[10].

It is worth recalling the judgment of the European Court of Human Rights in P.E.T.A. Deutschland against Germany on November 8, 2012[11]. In March 2004, the applicant Association P.E.T.A. ("People for the ethical treatment of animals") is planning to start an advertising campaign titled "Holocaust on your plate". The campaign, developed in a similar way to the U.S.A., consisted of a number of posters, each with a photo of prisoners in concentration camps with an image of the animals kept in farms for mass production, accompanied by a brief text. One of the posters exposing a photo of emaciated camp inmates, naked, next to a photo of starving cattle under "walking skeleton". Another poster showed a picture of the human bodies stacked on top of each other with the title „Ultimate humiliation" and rows of prisoners lying in bed crowded with flocks of birds in battery hens under the title "Concerning animals, everyone becomes Nazi". Another poster featured a male prisoner starved and naked with starving cattle, titled „Holocaust on your plate" and the text "Between 1928 and 1945, 12 million human beings were killed in the Holocaust. So many animals are killed every day in Europe for human consumption".

In March 2004, three individuals, P.S, C.K. and S.K., have submitted an application to the Regional Court of Berlin calling for the association to refrain from publishing or not to allow the publication of seven posters listed on the internet, in a public presentation or otherwise. The applicants were then chairman and two vice-chairmen of the German central Hebrew, Holocaust survivors when they were child, and C.K had lost his family in the Holocaust. They argued that the campaign was offensive and violate their human dignity and the personality rights of the deceased family members of C.K.

The Federal Constitutional Court of Germany dismissed the constitutional complaint, saying that the interpretation of images of the civil courts was one coherent. Federal Constitutional Court's reasoning is interesting in several aspects. First, the Court expressed doubts that such a campaign violate the human dignity of any of the persons described or applicants, because „not deny to the Holocaust victims described their value, putting them on par with animals, the scope of the campaign has not been to demean, but to suggest that the

[10] E.C.H.R., Case Tyrer vs. R.U., cited above, §33.
[11] E.C.H.R., Case P.E.T.A. Deutschland vs. Germany, application no. 43481/09, 8 November 2012.

sufference of the people described was equal to the sufference aplied to the animals"[12]. But consider that it is unnecessary to decide whether the campain violated the human dignity of applicants since the contested decision contained sufficient evidence to justify the ban on publication, without reference to the violation of the human dignity of applicants and considered acceptable that the domestic courts based their decisions taking into account the fact that the Basic Law makes a distinction between, on the one hand, human life and human dignity and on the other hand, the interests of animal welfare and that the campaign trivialized the fate of Holocaust victims. The German Federal Constitutional Court held that it was acceptable that the content of the campaign violated the personality rights of the plaintiffs. According to Court "was part of the self-image of Jews living in Germany about the fact that they belonged to a group that was marked by fate and that a special moral obligation was owed by all others, who formed some of their dignity"[13].

On the decision of the Federal Constitutional Court of Germany have made several important clarifications. The principle of human dignity is central in the German legal system. According to art. 1 paragraph 1 of the German Basic Law, "Human dignity is inviolable. All public authorities have an obligation to respect and protect". In German law, commitment to human dignity can be analyzed by the Federal Constitutional Court of Germany. On the other hand, this guarantee "was not open to any form of balancing test. It is the right which may "trump" over all other rights. (...) Being the first norm and unrevised, the human dignity was more than a norm and expressed the spirit of whole fundamental law in a nucleus"[14]. Human dignity acts as principle of interpretation, correcting any teleological interpretation of the German Basic Law which is not in the purpose of the respect of human dignity. In the relationship between freedom of expression and the right to honor, dignity is an impassable limit for the first. When it appears that expression of opinion violated the human dignity of the applicant, that decision does not depend on weighing competing interests. In the conflict between fundamental rights, the Federal Constitutional Court of Germany reviewed the observance of proportionality, particularly checking if Ordinary Courts have ignored the importance of freedom of expression as a fundamental right. Since it was found that freedom of expression was given due consideration by the Regional Court, the Federal Constitutional Court has not considered it necessary to refer the case to the lower courts for review because there were no indications that the latter would have reached to a different conclusion. In addition, the lower courts based their opinion on the fact that the campaign violated the applicants' human dignity as a violation of their personal honor was extremely serious.

We must insist also on the different position stood by the Austrian Supreme Court. In March 2004, the same posters were exhibited in Vienna and a number of Austrian citizens of Hebrew origin, other than the plaintiffs in this case and Holocaust survivors have filed an application with the Austrian courts in order to prohibit the publication of seven posters. The Austrian Supreme Court dismissed on October 12, 2006, saying that the posters are not depreciating the inmates of concentration camps described, and, moreover, the court held that the poster campaign, except that it addresses an important topic interest, had a positive effect to revive the memory of national-socialist genocide.

The European Court of Human Rights ruled that there was no violation of Art. 10 of the European Convention on Human Rights. So deciding, the court considered whether the interference was necessary in a democratic society.

First, it was stated that the association intended a campaign with posters about animal welfare and the environment, so in public interest, making that only strong reasons to justify the interference with freedom of expression of the association in this context. The Court held that domestic courts have held that the campaign did not pursue the purpose to humiliate

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[12] E.C.H.R., Case P.E.T.A. Deutschland vs. Germany, cited above, §48.

[13] E.C.H.R., Case P.E.T.A. Deutschland vs. Germany, cited above, §18.

[14] C. Möllers, *Democracy and Human Dignity: Limits of a Moralized Conception of Rights in German Constitutional Law*, Israel Law Review no. 42/2009, p. 419.

inmates in concentration camps described as the images involved only that the suffering applied to human and animal was equal.

The Object theory provides arguments to ascertain the applicants' personality rights violations. The "instrumentalization" of plaintiffs suffering was the one who infringe their personality rights as Hebrew who lived in Germany and the Holocaust survivors, the violation being compounded by the fact that the victims were shown in their most vulnerable state.

The problem becomes even more interesting by the fact that the court believes that this can not be detached from the historical and social context in which the expression of opinion occurs. Therefore, in the opinion of the Court, referring to the Holocaust should be seen in the specific context of the German past and the government's position that believe they have a special obligation to the Jews living in Germany, must be respected. Moreover, historical considerations, qualified as appropriate historical context, historical past, the particular historical circumstances, historical trend, historical experience, usually invoked by the respondent State to justify an interference with the exercise of the conventionality right guaranteed by the Convention are considered by the European Court regarding its control over the discretion of the state: they are one parameter among others to determine the extent of the discretion[15].

On those facts, the European Court of Human Rights leaves Member States a wide margin of discretion, stating that "other jurisdictions could address similar issues in a different way"[16]. There are still considered two factors: that have not been applied a criminal penalty, but a civil prohibition preventing the association to publish seven posters specified and that it was not demonstrated that the association had no other means available to attract the attention of the protection of animals.

Judges Zupančič and Spielman rejects the arguments of the majority view of the fact that "the impact of an opinion (...) on someone else's personality rights can not be detached from historical and social context in which the statement was made and that a reference to the Holocaust must also be seen in the specific context of the German past"[17]. From such an argument, would clearly be inferred that the European Court would agree with the impunity behavior of the association concerned, if it comes to a jurisdiction where the historical and social context is different according to the statements. The central idea underlying the judgment in the separate opinion is the relativization of an unacceptable uses of freedom of expression. It was argued that one can imagine that the posters were made from the opposite point of view; situation where someone can reach to the contrary impression that prisoners who are shoulders barbed wire should be compared with pigs behind bars. The two judges sharply criticized the majority opinion, stating that: "If such is the kind of statement covered by freedom of expression, one then finds it difficult to understand, what is not covered by freedom of expression. (...)The above relativisation is deeply problematic from a seemingly "democratic" point of view, where everything goes because everything is relative and everything is, to put it metaphorically, for sale. People only have opinions, but they lack convictions, let alone the courage of their convictions. The difference between good and evil, between what is right and what is clearly wrong is thus a matter of opinion, as if reasonable men could reasonably differ on a particular subject matter. Here we may pause and ask, whether reasonable men could indeed or could not differ on the utterly distasteful and unacceptable comparison between pigs on the one hand and the inmates of Auschwitz or some other concentration camp, on the other hand. A few decades ago this kind of *Denkexperiment,* even in the American context, would only yield a result unfavourable to the applicants, because a few decades ago, reasonable persons could not possibly differ on the

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[15] J.F. Flauss, *L'histoire dans la jurisprudence de la Cour Européenne des Droits de l'Homme*, Revue Trimestrielle des Droits de l'Homme no. 65/2006, p.7.

[16] E.C.H.R., Case P.E.T.A. Deutschland vs. Germany, cited above, §49.

[17] E.C.H.R., Case P.E.T.A Deutschland vs. Germany, cited above, concurring opinion of Judges Zupančič şi Spielman, §1.

question we have before us in this case. (...) On the other hand, the unfortunate implication of our own position seems to be that the same kind of "freedom of expression" in the Austrian cultural context would clearly be acceptable – let alone in other countries ranging from Azerbaijan in the east to Iceland in the west"[18].

The dissenting opinion focuses on the theory of the object. Contrary to the view expressed by the majority, in the dissenting opinion, the principle of dignity is first invoked and then developed. The German constitutional concept of dignity coincides with the Kantian categorical imperative ("human being must be treated as an end in itself"). The unit - dignity of the person opposes to the instrumentalization of the person by split between its components[19]. The person should be seen as a whole, as completed, with whose body can't be achieved through inhuman and degrading treatment that provoke a sense of humiliation, to mitigate the social value, of dissocialising. Applying the theory of the object, the Court held that it is about the human dignity, as a mark of distinction between man and the rest of the universe, who would be harmed when the human beings in their suffering and humiliation overall are compared to chickens and pigs to lower order to promote animal rights, for in this case "we are not in a position to argue that human beings viewed in the images are treated as an end in itself"[20].

What are the arguments for recognizing the inherent dignity of each person? And why should not treat people merely as means? Worth to render this way, George Kateb explains our uniqueness among other species, human dignity source: "The human species is really something special in that it has a uniqueness or distinctiveness valuable, laudable, it is distinguished from all other species uniqueness. It has a higher dignity than all other species, or qualitatively different from that of other species. His superior dignity is theoretically based on partial upper discontinuity of humanity with nature. Humanity is not only natural, while all other species are only natural"[21]. George Kateb believes that human dignity derives from the unique ability of humans to reason.

The presence of human dignity in the decision reflects the emergence and maturing of the relationship between dignity and freedom of expression, the first limiting it to the latter. The decision brings new elements, drawing a negative definition of dignity by resorting to the theory of the object, taken from German law and applied in the conventional space.

Conclusions

There is no complete agreement on the utility of the theory of the object. The main drawback of this theory is that it very much appeals to intuition. Part of the doctrine considers that the theory of the object is hopelessly vague, indefinite and fails to provide a principled basis for judgment in a case[22]. It would be several actions that the other is treated as an object, and when, however, does not violate dignity. In German legal literature, some authors call it "*Leerformel*" (formula without substance) as it is applied only on unambiguous restraints[23]. Others cite Schopenhauer's criticism[24] and referring to the decision on wiretapping, believes that the Federal Constitutional Court of Germany deem it an empty formula. Two arguments can be made against the theory of the object. First, is the fact that it is often inconclusive and

[18] E.C.H.R., Case P.E.T.A. Deutschland vs. Germany, cited above, concurring opinion of Judges Zupančič şi Spielman, §3-9.

[19] X. Bioy, *Le concept de personne hum aine en droit public. Recherche sur le sujet des droits fondamentaux*, "Dalloz" Publishing House, Paris, 2003, p. 580.

[20] E.C.H.R., Case P.E.T.A. Deutschland vs. Germany, cited above, concurring opinion of Judges Zupančič şi Spielman, §14.

[21] G. Kateb, *Human Dignity*, Belknap Press of Harvard University Press, Cambridge, 2011, p. 5.

[22] H. Botha, *Human dignity in comparative perspective*, Stellenbosch Law Review, vol. 20/2009, p. 4.

[23] K. Zakariás, K.Benke, *work cited,* p. 46.

[24] It is estimated that the Kantian formula "is very uncertain, undefined, and requirements that indirectly achieved its purpose, must, in each individual case, first be explained, defined and modified".

the second argument is that the contemptuous treatment sets the bar too high, in that it presupposes the existence of an intention to devalue the human person. However, the damages to dignity are not just intentional, but also those resulting from action taken knowingly, with the best intentions and to achieve legitimate objectives.

Bibliography

- D. P. Kommers, R. A. Miller*, The constitutional jurisprudence of the Federal Republic of Germany, 3 edition, "*Duke University Press, London" Publishing House, London, 2012;
- K. Zakariás, K. Benke, *Demnitatea umană în jurisprudenţa instanţelor constituţionale din Germania, Ungaria şi România,* http://www.ccr.ro/uploads/zakarias_benke.pdf, 2011;
- G. Kateb, *Human Dignity,* Belknap Press of Harvard University Press, Cambridge, 2011;
- H. Botha, *Human dignity in comparative perspective,* Stellenbosch Law Review, vol. 20/2009;
- C. Möllers, *Democracy and Human Dignity: Limits of a Moralized Conception of Rights in German Constitutional Law,* Israel Law Review no. 42/2009;
- J. F. Flauss, *L'histoire dans la jurisprudence de la Cour Européenne des Droits de l'Homme,* Revue Trimestrielle des Droits de l'Homme no 65/2006;
- X. Bioy, *Le concept de personne humaine en droit public. Recherche sur le sujet des droits fondamentaux,* Dalloz Publishing House, Paris, 2003;
- Beatrice Maurer, *Le principe de respect de la dignité humaine et la Convention européenne des droits de l'homme, "*La documentation francaise" Publishing House, Paris, 1999;
- J. M. Wintrich, *Űber Eigenard und Methode verfassungsgerichtlicher Rechtsprechung,* in A. Süsterhenn, Verfassung und Verwaltung in Theorie Und Wirklich-keit, Festschrift für W. Laforet anläß-lich seines 75. Geburstages, "München" Publishing House, München, 1952.

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CONSIDERATIONS REGARDING SYSTEMIC INTERACTION OF LAW WITH OTHER SOCIAL NORMATIVE SUBSYSTEMS

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Abstract

This article tackles the issue of systemic interaction between various normative systems. As such, it addresses and analyses the system of law from the perspective the general systems theory. More than that, the paper analyses the links and interactions between various normative systems, called sub-systems in the paper, and the division of law, namely public law and private law.

Keywords: Systems, legal cultures, law, normative systems

Introduction

In most works that analyze the law and legal theories, law is generally defined as a complex of regulations that govern the human society.In the doctrine, law was further defined as an aggregate of general regulations, abstract and impersonal, emanating from the public authority, as an entity invested with powers concerning regulations or decisions of administrative authorities[1].

Law may be analyzed also through the systemic perspective. Also, the interactions between law and the others systems that form the bigger social normative system may be analyzed thoroughly, using systemic approaches.

Law as a system within the General Systems Theory

According to the general theory of systems, a system should be analyzed as a whole, as well as through its non-linear interactions of internal or external nature. This paper continues researches made prior, regarding the systemic structure of law[2], the systemic interactions of law and other normative systems[3] andsystemic approach to legal cultures.

In Legal theory, the system of law is depicted as a normative system, which finds its place and application within the national and international systems. Both in internal and

[1] Sofia Popescu, Teoria generală a dreptului, Lumina Lex Publishing House, Bucharest, 2003, p.123.
[2] C. D. Butculescu, Cuantica dreptului – o nouă perspectivă în percepția fenomenelor juridice, in vol. "Justiție, Stat de drept și cultură juridică", Universul Juridic Publishing House, Bucharest, 2011, pp. 96-104.
[3] C. D. Butculescu, Short considerations regarding the system of law from the perspective of General Systems Theory, Journal of Legal Studies, year VII, no. 3-4/2012, pp. 129 – 134.

international systems, the law interact with other systems, such as morality, religion, customary rules or systems of social coexistence.

Law, as seen in legal theory is also comprised of two major divisions, namely: public law, which encompasses all the branches of law that regulate public interests, and private law, which is formed out of those branches of law that govern private interests of persons.

Law as a system could have the following characteristics[4]: a) open system; b non-linear system); c) stable system; d) system characterized by moderate entropy.

The stability of the law is nowadays particularly precarious, being conditioned by several factors, such as political stability, respect for the principles of the separation of powers[5], the makers of the right configuration, etc.

In the other works cited above, the structure of the law, seen from a systemic perspective was taken into consideration and also certain interactions between the law, as a whole system and the other social normative sub-systems were analyzes. However, we are now considering researching the matter further, as this paper tries to briefly analyze the specific interactions between the social normative sub-systems, as moral, rules of social conduct, religion and the divisions of law: public and private law.

Within the human society, there are at least 6 regulatory operating systems. If, however, we relate these systems to the society itself, then they become sub-systems in relation to the social system.

Short presentation of the social normative sub-systems

As it has been pointed out in the specialized literature[6], the normative legal system interacts with other regulatory systems existing within the society. The law itself is a discipline with a social character which regulates certain relationships between people, through social relationships specific to its own branches: civil, criminal, administrative, commercial etc.

Thus, in the systemic approach, we may analyze the currents values of diversification which occur inter-systemically and intra-systemically. The concept is not new, having been approached in the past by the sociologists of law[7].

In addition to the law, we should also mention the other normative systems that find their application in society.

The moral system is a system of rules that has a high level of cohesion, covering all the rules deemed mandatory, under the penalty of public odium. Between law and moral, there are both differences and similarities. The most important similarities are that both the law and the rules of morality address themselves to social collectivities, and are also based on paradigms applicable to precise factual realities. Morality differs from law through its sources and its purposes.

Morality is a system mostly closed. Moral rules are specific to a certain social system and the interactions taking place in their great majority within the system, not outside it. Moral system also is characterized by linearity and stability.

Law, as a whole, may present moral features, because most of its elements, especially the laws retain such characteristics. Nevertheless, there are specific systemic properties, which are pertaining only to law and are different from the features of its components[8].

Most scholars admit the existence of a close link between law and moral. The principles of good, righteousness, justice and truth belong to the moral system, but are

[4] C. D. Butculescu, Cuanticadreptului – o nouă perspectivă în percepţia fenomenelor juridice, în vol. "Justiţie, Stat de drept şi cultură juridică", Universul Juridic Bucharest, 2011, p. 98.

[5] E. Ciongaru, *Securitatea juridică în statul de drept - concept*, in volumul Sesiunii ştiinţifice a Institutului de Cercetări Juridice, 2012, Universul Juridic Bucharest, 2013, p. 607.

[6] Sofia Popescu, Teoria generală a dreptului, Lumina Lex Bucharest, 2003, p.23.

[7] V. Ferrari, *Note sull'alternativa del diritto contemporano*, Sociologia del diritto, Revista quadrimente fondata da Renato Treves, XX/1993/1, p. 23.

[8] A. F. Măgureanu, Principiile generale ale dreptului, Universul Juridic Bucharest, 2011, p. 188.

protected and promoted by law regulations. Both law and moral are made from a complex of rules of conduct, although the moral precepts are based on immutable truths, while legal norms point towards relative phenomena, resulted from the will and intelligence of people. Moreover, while moral norms guide people toward the fulfillment of the moral good, law does not regard the human person in its supposed perfection, but the everyday individual that shares a permanent connection to its peers[9].

The social rules of conduct are conditional rules that emanate from conventional sources[10]. They include acomplexof precepts that lead the individual to better his life in the community, without negatively influencing the life of the others.

The social rules of conduct must be considered as an open system, constantly changing. The derogation from the rules of social conduct may attract some negative opinions, but when these are exceeded, there is a possibility the incidence of moral system, which is much more strictly[11].

Customs or habits, as they are known in the legal world constitute a unique system in social life. Custom is based on a specific consuetude[12], which involves a long and continuous practice. When such consuetudes acquire the appearance of mandatory norms, they become habits or customs in the legal sense.

Customary systems may be considered as a semi-open system, which allows certain loans. The customary system also is considered a linear system.

The technical regulations may also be envisioned as a normative system, which presents many differentiations from other legal systems presented. They represent today a set of technical rules which, although they do not always have a specific mandatory character similar to the system of law, are almost always mandatory by default. However, the technical standards have had, since their inception, an almost secret character[13].

The system of technical regulations was historically considered a closed system. However, as science evolved, this system became more and more open and is today perhaps the most dynamic of the six analyzed in this paper.

Religion may not be considered a complete normative system, because it does not meet all the conditions to be considered a full normative system. Nevertheless, it interacts closely with other normative systems. In some States, religion may even overlap in certain situations over the normative system of law.

At the same time, over history, the relationship between law and religion appears as unavoidable, substantially influencing the legal cultures. The religious precepts appear as foundation of the legal systems from all periods of time and from all the peoples. Even more so, even today there still are legal systems whose main source is religion, like the Muslim legal system[14].

Religion must be analyzed as a closed system. This is no doubt due to the fact that most religions contain truths that are revealed by specific deities. In these circumstances, the imports of information would probably be hindered by the absolute character of such truths.

Another sub-system is the legal culture, which may be seen as a system that interacts with the others or as an interphase of the law system, facilitating communication within the

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[9] Andreea Drăghici, Ramona Duminică, "Convergences and distinctions between moral and juridical order", in *Agora International Journal of Juridical Sciences*, no. 2/2011, available on www.juridicaljournal.univagora.ro.

[10] M. Tutunaru, R. Morega, C. Popescu, *Drept constituţional şi instituţii politice*, Scrisul românesc Publishing House, Bucharest, 2014, p. 26.

[11] M. Tutunaru, R. Morega, C. Popescu, op. cit., p. 27.

[12] E. Ciongaru, Usages – the legal regime in new civil code, in volume of The International Conference– CKS 2013 – Challenges of the Knowledge Society, "Nicolae Titulescu" University Bucharest, Prouniversitaria Publishing House, 2013, pp. 206-207.

[13] M. G. Losano, Marile sisteme juridice. Introducere în dreptul european și extraeuropean, All Beck Publishing House, Bucharest, 2005, p. 43.

[14] Ramona Duminică, *The divine foundation of the law*, in Agora International Journal of Juridical Sciences, no. 2/2011, available on www.juridicaljournal.univagora.ro.

social normative system. Legal culture could be considered as a partially stable system and non-linear[15].

Interactions between the divisions of law, as systems and the other social normative subsystems

The law and the other subsystems of the social normative system, respectively: the moral system, the customary system, the legal cultures system, the rules of conduct system, religion and the technical norms system permanently interact one with another, determining changes in each system or subsystem.

In its relation with the moral system, it may appear that public law is more closely influenced by it, than private law. Most punitive sanctions originate within the moral system and have been taken, processed and improved by the penal law. Of course, the reversibility of the private law is also a principle strongly related to moral, as any disturbance of equilibrium calls for a restauration, and as we know, all systems tend to an equilibrium state.

The customary system, on the other hand, does not interact very much with the public law division. The public norms are usually imperative and must be upheld to the letter. Still, in civil law, there are regulations related to custom as a source of law, and even the Romanian Civil Law sometimes points to the custom of the land, as seen in article 613 or the Romanian Civil Code, which mentions the law, the planning certificate or the custom of the land, as sources of law.

The rules of social conduct have a profound impact on both private and public law. Within the field of public law, good faith is essential in analyzing various cases and imposing sanctions. In private law, there are also such influences to be found. For instance, in the article 1.272 of the Romanian Civil Code stipulates that a valid contract binds the parties to all the effects that law, custom and equity provide for such contract, with regard to its nature. In this case, equity may be considered as an element from the system of the rules of conduct. In the Romanian Civil Procedure Code, the judge himself may deliberate according to equity, in certain cases, as it is stipulated in article 5, para (3) and article 22, para (7).

The technical norms also influence the divisions of law. Most penal cases resort to technical expertise in order to find an appropriate solution to cases. The same may be said in the field of private law, where most real estate lawsuits depend on cadastral expertise.

The religion has had a significant influence on the development of both private and public law. Most regulations that are in force today, in private law, come from Roman Law, but this norms were also used by Canon Law. The principles that are the basis of the public law also find their roots in religious texts. For example, the Ten Commandments contain a series of biblical principles that contain both instructions and prohibitions against murder, theft and so on.

Conclusions

As we have shown in this paper, the punctual analysis of the interactions between various social normative subsystems and the two divisions of the law allow for a more accurate depiction of the dynamics that move the legal systems. When the interactions between such subsystems and the division of public law and/or private law are analyzed, the results seem different from the analysis of the interactions between the same subsystems and law, as a whole system. Certainly, the current paper constitutes only the beginning of further researches in this area. Hopefully, these researches will help us consolidate our knowledge in the field of systemic analysis of law.

[15] C. D. Butculescu, A systemic approach to legal cultures, in vol. "La Metamorphose de l'Etat en Europe", Universul Juridic Publishing House, Bucharest, 2010, p. 85.

Bibliography

- Tutunaru M., Morega R., Popescu C., Drept constituţional şi instituţii politice, Scrisul Românesc, Publishing House, Craiova, 2014;
- Ciongaru E., Usages – the legal regime in new civil code, in volume of The International Conference– CKS 2013 – Challenges of the Knowledge Society, Nicolae Titulescu University Bucharest, Prouniversitaria Publishing House, 2013;
- Ciongaru E., Securitatea juridică în statul de drept - concept, in volumul Sesiunii ştiinţifice a Institutului de Cercetări Juridice, 2013, Universul Juridic PublishingHouse, Bucharest, 2013;
- Butculescu C. D., Short considerations regarding the system of law from the perspective of General Systems Theory, pp. 129 – 134, Journal of Legal Studies, year VII, no. 3-4/2012;
- Butculescu C. D., Cuanticadreptului – o nouă perspectivă în percepția fenomenelor juridice, în vol. "Justiție, Stat de drept și cultură juridică", Universul Juridic Publishing House, Bucharest, 2011;
- Drăghici Andreea, Duminică Ramona, "Convergences and distinctions between moral and juridical order", in Agora International Journal of Juridical Sciences, no. 2/2011, available on www.juridicaljournal.univagora.ro;
- Duminică Ramona, The divine foundation of the law, in Agora International Journal of Juridical Sciences, no. 2/2011, available on www.juridicaljournal.univagora.ro;
- Măgureanu A. F., Principii legenerale ale dreptului, Universul Juridic Publishing House, Bucharest, 2011;
- Butculescu C.D., A systemic approach to legal cultures, in vol. "La Metamorphose de l'Etat en Europe", Universul Juridic Publishing House, Bucharest, 2010;
- Losano M. G., Marile sisteme juridice. Introducere în dreptul European și extraeuropean, All Beck Publishing House, Bucharest, 2005;
- Popescu Sofia, Teoria generală a dreptului, Lumina Lex Publishing House, Bucharest, 2003;
- Ferrari V., Note sull'alternativa del diritto contemporano, Sociologia del diritto, Revista quadrimente fondata da Renato Treves, XX/1993/1.

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CONSIDERATIONS ON THE LIMITS OF THE PRIVATE PROPERTY RIGHT AND ITS IMPLICATIONS IN THE CONCEPT OF URBAN RENEWAL
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Abstract:
The purpose of our paper is to analyze the concept of "urban renewal", defined by the Wallonian code on land use planning, urban planning, patrimony and energy and by the provisions of the French laws as the phenomenon by means of which towns and cities evolve in order to face new community needs. Urban renewal is closely connected to servitudes and private property limits, to which we will refer in the light of the provisions of the New Civil Code of Romania.

Key words: urban renewal, private servitude, urban planning servitude, principle of non indemnification of urban planning servitude effects.

Introduction

Just like living organisms, cities seem to be in an incessant renewal process, which allows them to survive, despite the ever-changing nature of human activities. The concrete materialization of this transformation consists of hygienic conditions in buildings, access road development, etc. The analysis of the social trends and legal regulations on property rights, servitudes and property right limits throughout Europe is a real challenge. In response to heavy doctrine criticism, the New Romanian Civil Code made the due distinction between the legal limits of the property right and the actual servitudes.

Private Servitudes and Urban Planning Servitudes

According to the provisions of art. 755 of the New Romanian Civil Code, servitude is "the grant of a non-possessory property interest that grants the servitude holder permission to use another person's land". Any servitude usually involves two pieces of land belonging to different owners, where one serves as the *servient* estate that "bears the burden" and the other is the dominant estate, which benefits from the grant of the servitude and has permission to use the servient land in some manner. However, there may be cases when the servitudes are reciprocal. According to art. 755 par. (2) of the New Romanian Civil Code, by the grant of the servitude, the dominant estate may increase its economic value or comfort.

As a novelty, the New Romanian Civil Code restricts the servitudes' category to conventional servitudes, whereas natural and legal servitudes become legal private property right limits, distinctively regulated by the provisions of art. 555 of the New Romanian Civil Code. This law amendment is the result of constant criticism coming from legal advisors who, relying on the classification provided by the 1865 Civil Code, showed that neither natural nor legal servitudes are dismemberments ("dezmembrăminte") of the property right related to the *servient* estate, but they are merely limitations of the property right[1]. As a rule, while

[1] Alexandru- Sorin Ciobanu, *Aspecte specifice privind regimul domeniului public în România şi în Franţa,* "Universul Juridic" Publishing House, Bucharest, 2012, p. 107.

preserving some of the provisions of the former Civil Code, the Law no. 287/2009 implementing the New Romanian Civil Code stipulates that the exercise of the property right may be legally limited for either private or public interests reasons[2].

These property right limitations are referred to in the new provisions regulating water use (natural course[3] or artificial course[4], irrigation costs, the obligation of the owner having too much water for their current needs to offer the surplus to another owner who could only purchase this resource at very high prices), gutter drops, distance and regimen of intermediate works required for certain buildings, works and plantations (minimum distance in construction works), the right to have a view of the neighbour's property (the regimen of the window or opening in the common wall[5], minimum distance for the view window, the regimen of the light window[6]), the right of passage (the former right-of-way servitude for the owner of the estate with no direct access to public road).

The right of passage is accessory to the estate, from which it may not be separated to form an independent right. Therefore, the changing of the holder of the property right over the land which makes up the *servient* estate is legally irrelevant, since the right of passage endures as long as the situation that created it exists[7]. Art. 617 par. 1 of the Romanian Civil Code dwells on the absolute impossibility of access to the public road of the person asking for a right of passage on the land belonging to another person. The text refers to the case in which the owner of the dominant estate has no access to the public road.

On the other hand, urban planning rules define the prescriptions the observance of which is compulsory for all natural persons or corporate bodies using urban areas in one way or another.

Pursuant to art. 10 of the Law no. 350/2001 on land development and urban planning, the main goal of the latter is "to stimulate the complex evolution of localities by creating short-, medium- and long-term development strategies".

The urban planning rule limits the property right, especially the property owners' prerogatives related to the management of their assets. Thus, the encumbrance that they generate is called urban planning servitude. The name is not perfect if we consider that, in classical theory, a servitude is a burden upon a piece of property for the benefit of another, in other words, the charge placed upon a "*servient* estate" for the benefit of a "dominant estate".[8]

Urban planning servitudes (rules) are administrative restrictions applied to the property right, with a view to serving public interest, namely urban development. Thus, servitudes play an essential role in defining the concept of "urban renewal".

Specialists have long ago accepted the existence of the so-called urban servitudes, "i.e. measures taken by various laws and regulations the purpose of which is the embellishment of and hygienic conditions in cities and towns, related to the alignment of houses, height of buildings and number of storeys, to building erection, repairs or demolishing, to sewage works, etc., requirements that all owners must abide by."[9]

Based on the extent criterion, urban planning rules may be classified in: general, local and special rules. General urban planning rules are set by a country's central government and

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[2] See art. 602 par. 1 of the New Romanian Civil Code, republished.
[3] Art. 604 of the New Romanian Civil Code.
[4] Art. 605 of the New Romanian Civil Code.
[5] According to art. 614 of the New Romanian Civil Code, "No window or opening in the common wall may be done except with the owners' agreement".
[6] According to art. 616 of the New Romanian Civil Code, "The provisions of art. 615 do not forbid an owner from opening light windows with no distance limitations if these windows have no view of the neighbouring tenement".
[7] Gabriel Boroi, Liviu Stănciulescu*, Instituţii de drept civil în reglementarea Noului cod civil,* "Hamangiu" Publishing House, Bucharest, 2012, p.26.
[8] Mircea Duţu, *Dreptul urbanismului,* 5th revised and enlarged edition, "Universul Juridic" Publishing House, Bucharest, 2010, p. 160.
[9] C. Hamangiu, I. Rosetti- Bălănescu, Al. Băicoianu, *Tratat de drept civil român, vol. II*, ALL Publishing, Bucharest, 1998, p.31, quoted in Mircea Duţu, op. cit., p. 161.

they are generally valid throughout that country, as they provide land use planning prescriptions and rules restricting the building right. Local rules allow adapting urban planning requirements to the concrete needs of each region, and they are included in local urban planning regulations passed by local councils. As concerns special urban planning rules, they only apply to particular cases, with a well-defined object, such as, for instance, the protection and preservation of urban sectors with special historical-architectural value.

Note that both private servitudes and urban planning servitudes are indivisible real rights involving the whole property, regardless of its form of ownership[10]. The two types of servitudes also share the following similarities[11]: they limit the attributes of the property right over a piece of immovable property; both categories encumber the property and not the owner, which means that the servitude outlives the owner; both categories of servitudes are placed upon property through its nature and not upon property through its destination; they are accessories to the property they encumber and have no independent life, which means that they are transmitted with the *servient* estate.

The elements that distinguish[12] private servitudes from urban planning servitudes result from the fact that, whereas the later are, by their nature, administrative restrictions, enforced to promote public interest, related to a rational management of urban areas, the former originate in two properties neighbouring each other, which leads to a state of things that is the source of a series of obligations of one of the owners to the other and of certain restrictions of the right of each of them.

Whereas in private law servitudes may be generated by the parties' will[13], in urban planning law they occur as a result of the lawmaker's or another official's will. Also, whereas the holder of the *servient* estate is bound only by the obligation not to act, urban planning servitudes also grant the holder prerogatives related to their obligation to act. Another distinction[14] between private servitudes and urban planning servitudes is the fact that the former require the existence of two neighbouring estates with different owners, i.e. a dominant estate and a *servient* one, which is not the case with urban planning servitudes. Urban planning servitude may be altered or changed in relation to the legislative act that expresses it, more precisely depending on the lawmaker's intention in connection with the public interest that it satisfies. This does not prevent some servitudes from having a virtually permanent nature. However, most of them are temporary. On the other hand, civil servitude is perpetual, which means that the servitude will endure as long as the two properties exist and as long as the situation that generated the servitude requires it.

The New Romanian Civil Code allows (under the reserve of their compatibility) the burdening of the exercise of the public property right with any and all limitations acknowledged for the private property right. This category includes the former natural and legal pseudo-servitudes regulated by the Civil Code of 1865.

It is important to note the extension of the analyzed principle to include the private goods in the public domain, a good example being cultural heritage assets[15]. It has been shown that the servitude burdening interdiction also applies to such assets, for the purpose of achieving adequate protection and preservation; however, servitudes that are compatible with these assets and that have been dully constituted are acceptable[16].

[10] Mircea Duţu, op.cit., p.162.
[11] Idem.
[12] Idem.
[13] Viorel Terzea, *Servituţile în dreptul civil român*, "C.H. Beck" Publishing House, Bucharest, 2006, p. 9.
[14] Mircea Duţu, op.cit., p. 163.
[15] Alexandru- Sorin Ciobanu, op.cit., p.156.
[16] Alexandru- Sorin Ciobanu, op. cit., p.156.

Servitudes that are compatible with public use or interest may be placed upon assets which, by their nature, are in general use or upon public interest assets that community profits from indirectly (like schools, hospitals, museums, etc.)[17].

Pursuant to the law, although the servitudes (in the general terminology of the Law no. 213/1998 regulating public property) or the legal limitations (which the New Romanian Civil Code refers to) arose before that piece of property was transferred into the public domain, if the said compatibility does not exist, they will cease to exist automatically, with theoretically no other decision required. In practice, however, an administrative decision is required which acknowledges the state of things and resolves all doubts that may exist. This administrative instrument may be challenged by the concerned and injured party (the beneficiary of the servitude) and sent for settlement by a court of law. Based on this decision, officials may even order the removal ex officio of any facilities, signs, etc. that servitude exercise relied on[18].

The Law no. 350/2001 regulating land use planning and urban planning has general provisions concerning urban planning servitudes, leasing the task of their detailed presentation to the various technical and administrative regulations. The diversification of public utilities and works, of public utility facilities and networks has inevitably led to the need of enforcement of such public domain appurtenances protection instruments.

Nevertheless, the exercise of these special rights is not solely at the discretion of the officials. In most cases, an agreement concluded with the owner or the user of the impaired private property tenement or, failing agreement, a court decision is required. At the same time, one should note that in our legislative system, the exercise of the rights referred to above is usually done for a fee and requires that private owners be indemnified for the damages suffered[19].

"Urban Renewal" Defined by the Wallonian Code on Land Use Planning, Urban Planning, Patrimony and Energy

Community is defined[20] as an enduring social structure, which includes a relatively small number of individuals with similar cultural grounds and social statuses, who live in a relatively big area and who enjoy viable relations of cooperation, which allows the exercise of efficient social control in that group.

Considering the assumption according to which the notion of community development is equivalent to the whole set of mechanisms employed to produce collective welfare, as this latter concept was grounded in market economy-based societies, one may rightfully ask oneself the following question: is collective welfare the result of an individual effort or, on the contrary, the product of joint efforts? If we adhere to the solidarity thesis, do we accept that, in order to prove their efficiency, such efforts should be analyzed at the level of local communities, narrow communities or, on the contrary, of the society?

Community development strategy innovation and efficiency depend on the use of unexplored resources: community and community effort[21].

The object of community development programs is community members' mentality changing, awareness raising and technical skills training, with a view to enhancing community prosperity.

Being closely connected to a local community's efforts, the concept of "urban renewal" is a natural and spontaneous phenomenon by means of which cities evolve. However, during this process, the natural evolution of a city may have to overcome various obstacles or it may be overwhelmed with the much too quickly changing nature of human

[17] Idem.
[18] Ibidem, p.157.
[19] Ibidem, p. 136.
[20] Maria Bulgaru, *Sociologie. Vol II*, Chişinău, 2003, document available online at the following address http://tempus2010.usm.md/ManualePDF/Sociologie%202.pdf, accessed on 20 September 2014.
[21] Idem.

activities. If this is the case, the disequilibrium may only be corrected by systemic planning measures[22].

The society we live in seems to be a reaction, a response to a delayed progress, which is mostly visible in our habitat[23]. Whole families live in abandoned houses in remote neighbourhoods on the outskirts of cities.

Therefore, "urban renewal" is a far-reaching action designed to modernize certain areas or whole neighbourhoods and also an action striving to restore the structure and architectural form "worthy of our times"[24] of city centres uncared for, with abandoned buildings. Renewal operations therefore have both social implications, as they occur as a response to the problems that communities have to face, and an urban planning component, which includes several steps: purchasing the properties that will be renewed, their depopulation by the relocation of their occupants, building demolishing and land management and planning.

The first paragraph of art. 173 of the Wallonian Code on land use planning, urban planning, patrimony and energy[25] defines the concept of "urban renewal" as an action of global and concerted planning initiated by the city, the purpose of which is the restructuring, cleaning or rehabilitation of an urban perimeter in order to support local population conservation or development, while at the same time promoting its social, economic and cultural function, and respecting the cultural and architectural characteristics of the area.

According to these provisions, the urban renewal operation aims at habitat conservation and improvement by one or several of the following actions: dwelling rehabilitation or building; green area creation or improvement; business and service provision building erection or improvement; creation or improvement of public facilities, as they were defined by the Government.

Note also that art. 172 of the same Wallonian Code defines the concept of "urban revival"[26] as the action that is designed, inside a well-defined perimeter, to improve and develop the habitat from the viewpoint of its commercial functions. This action actually consists of the implementation of various agreements the main actors of which are the private sector and the administrative territorial unit. When the city and one or several private natural persons or corporate bodies conclude an agreement related to an urban revival operation, the Region may grant the city a subsidy covering up to 100% of the total costs, if the operation has to do with public domain planning and development consisting of road equipment, public lighting and sewage systems, green area development, urban planning of public areas.

Such planning and development actions are focused on an urban revival perimeter set by the Government, on the proposition of the Local Council. The public works which the urban revival operation consists of must comply with the provisions of the Regional Regulations on Buildings applicable to areas protected by certain administrative and territorial units ("zones protégées de certaines communes"[27]), from an urban planning point of view.

Pursuant to paragraph 4 of the same article 172, any agreement concluded by the city with private natural persons or corporate bodies referred to above must observe the principle according to which, for each franc granted by the Region, private natural persons or corporate bodies must invest at least two francs in at least one of the following activities[28]:

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[22] André Poissonnier, *La rénovation urbaine*, Éditions Beger- Levrault, 5 Rue Auguste-Comte, Paris, 1965, p. 19.
[23] Idem.
[24] This expression belongs to the Minister of Construction of France in 1959, quoted by André Poissonnier in *La rénovation urbaine*, Éditions Beger- Levrault, 5 Rue Auguste-Comte, Paris, 1965, p. 20.
[25] Michel Delnoy, *CWATUPE- Le Code Wallon de l'Aménagement du Territoire, de l'Urbanisme, du Patrimoine et de l'Energie*, Editeur responsable L. Venanzi Edi.pro, Liège, Belgique, 2010, p. 136.
[26] Ibidem, p. 135.
[27] Idem.
[28] Idem.

transformation and improvement of insalubrious dwellings that may be reconditioned; demolishing of insalubrious dwellings and building new ones; turning various buildings into dwellings; building dwellings.

We may therefore conclude that, despite the similarities between "urban revival" and "urban renewal" from the point of view of the goals of each local community, the difference lies in the specific activities encompassed by each concept and in their social, economic and cultural functions, which are more significant in urban renewal. Therefore, although urban revival consists of improving and developing the urban environment by public-private partnerships, in addition to the rehabilitation operations, urban renewal also includes the restructuring, cleaning and creation of a new urban perimeter. In this latter case, local initiative plays the most important role ("initiative communale"[29]).

When most of the buildings that need renewal have private owners and private initiative often proves insufficient, it is the lawmaker's duty to authorize officials to enforce various measures meant to rehabilitate these lands.

Thus, notwithstanding private law provisions governing land ownership, renewal operations include all the legal proceedings that allow private assets to be assigned to a public use. The legal actions taken to carry out urban renewal should consider preserving this fine balance between public and private ownership law.

"Urban Renewal" in the Light of the French Legislation

Being urged by the need to have the cities in the northern and eastern areas of the country rebuilt, the Parliament passed the Cornudet Law on 14 March 1919 that was the first law regulating urban planning, named after the reporter's name[30].

According to this law, towns and cities with more than 10,000 inhabitants had the obligation to conceive town planning, embellishment and enlargement projects within a deadline of 3 years. These projects also involved green areas, easements and types of buildings adapted to the area where they were erected. The Law of 1924, which was the second urban planning law, regulated the parcelling procedure. Based on an official layout plan and on a set of technical specifications, the mayor was authorized to hold back land that would be used for green areas, new buildings or public utilities.

At the same time, the Urban Planning Law of 15 June 1943 brought to the public's attention the notion of "urban regrouping" applying to "intercommunal"[31] project, like plans including several localities. The legal provisions emphasized two important principles meant to facilitate the creation of these official layout plans, namely the "principle of public interest" and the "principle of non indemnification of urban planning servitude effects", which servitudes derived from these very plans.

In France, the Decree no. 560 of 20 May 1955 on the simplification of urban planning operations and on the support of "city islands" to the detriment of the suburbs abolished the special rules allowing expropriation for unsanitary conditions, and the expropriations required for "city island" improvement and planning began to be regulated by common law provisions. In fact, the Degree above is the first legal provision using the expression "city island renewal".

In case of large industrial and business areas as the ones around Lyon or Lille-Roubaix- Tourcoing- Armentières, it is imperative to pass a unique renewal policy for each of them, and that this initiative be passed on to a local body able to group together the concerned communities[32]. In order to fulfil their mission, local communities are authorized to resell the

[29] Michel Delnoy, op.cit., p. 136.
[30] Oliviu Puie, *Reglementări juridice în materia urbanismului. Dreptul de proprietate şi contenciosul administrativ în materie*, "Universul Juridic" Publishing House, Bucharest, 2011, p. 6.
[31] Ibidem, p. 7
[32] Ibidem, p. 32.

land on which any inadequate buildings were demolished to contractors willing and able to build new neighbourhoods on it.

In France[33], the provisions of the Law no. 683 of 6 August 1953 first authorized the central and local governments, as well as any qualified public bodies, to expropriate open and even built-on land in order to support the erection of new buildings or to satisfy the need of planning and development of the areas included in official layout plans provided for in the abovementioned law.

This text was later amended and finally abolished by the provisions of the Ordinance no. 997 of 23 October 1958 on the consolidation of the expropriation procedure, pursuant to which the land resulted from expropriations for public interest purposes was assigned to various contractors provided they used it according to the technical specifications enclosed to the assignment contracts[34]. Thus, the only requirement that had to be met was that the operation be declared of public interest, "as the renewal operations are of public interest just as erecting building complexes is of public interest"[35].

Starting with the 1970's, one may note a certain evolution of the legal environmental protection provisions, the effects of which extended and covered the manner in which private property was protected. The Law on urban solidarity and renewal (also called the SRU Law), passed on 13 December 2000, provided better coordination between urban planning policies and space division policies, considering the concept of sustainable development. The law had three components: an urban planning component that referred to the tax reform in the field, a habitat component focusing on the solidarity between cities with an emphasis on the social implications of urbanized areas and, last but not least, an "urban displacement" component related to transportation in large urbanized areas.

The Principle of Non Indemnification of Urban Planning Servitude Effects

Special doctrinary and legislative attention is currently paid in Romania to urban planning conduct.

Urban planning rules come to limit the private property right and the prerogatives of the owners related to the manner in which they manage their own assets. The encumbrances originating here are called "urban planning servitudes", as they are considered to satisfy public interest, as rational urban planning and management[36].

Their purpose is to ensure the harmonious layout of buildings erected in an urban environment or to more or less assign to these buildings other forms of urban soil uses designed to prevent serious malfunctions: spills, natural environment destruction, and uncontrollable rise of equipment needs.

Whereas urban planning rules are concerned with the actual disposition of buildings in space, with their volume, or exterior aspect, general building regulations that contractors have to comply with, which are separate from urban panning regulations, are concerned with interior volume, noise insulation, protection against leaks, material strength, in short with the very building to erect, and not with space planning[37].

Urban planning servitudes are governed by the principle of non indemnification of their effects. Servitudes may directly influence the right to erect buildings (*non aedificandi* servitudes, concerned with building density and height), the manner of erecting buildings (like the ones derived from the architectural prescriptions of urban plans) or, in a more general manner, the possibility to use the land.

[33] Oliviu Puie, op. cit., p. 36.
[34] André Poissonnier, op. cit, p. 36.
[35] Ibidem, p. 24.
[36] Alexandru- Sorin Ciobanu, op. cit., p. 160.
[37] Mircea Duţu, op. cit., p. 166.

Continental law, and more specifically French law, established the principle of non indemnification of urban planning servitude effects as early as the first half of the 19th century, which principle was also imported by Romanian law. The arguments of its establishment are, on the one hand, the fact that urban planning, as a general interest activity, imposes such inconveniences on people and, on the other hand, the fact that indemnifying this type of easements would generate a financial burden and a fast, excessive and unbearable price increase for the public budget, which would impede on urban planning policies thus leading to serious problems[38].

Thus, it is stipulated that private owners cannot claim any compensation for the damage arising from and related to an urban planning servitude, except when there is proof of the officials' illegal behaviour.

The case law of the Constitutional Court of Romania states that "… land owners are entitled to compensations if they are prevented from using their land, which is used for green areas and/or provided as such in urban planning documents". Thus, "nothing prevents an individual having suffered damages as a result of their legal interdiction from claiming compensations for these damages from the local government officials, in accordance with the common law" [39], which means transferring the case into the realm of tort liability, with the consequences associated with it.

A principle accepted in some western countries, such as France, but not in Romania, is the principle of independence of legislations, in the sense that urban planning rules remain parallel to the other regulations influencing soil use. This also means that, unless otherwise provided by a law, any licence or permit granted under a particular regulation does not also grant authorization in another field, even when they are similar[40].

Conclusions

Although the urban renewal process seems to be a national imperative mobilizing public power energies, each operation bears a local interest[41]. Harmonizing public interests, based on which building and urban planning officials intervene, with private interests, when the need arises to protect private property rights, is currently a challenge for both lawmakers and officials authorized to implement and enforce legal provisions. Therefore, the use of coercion means made available to public officials by lawmakers may seriously prejudice private property rights, by depriving owners of their right to freely dispose of their own assets. Consequently, in our opinion, in order to find the answer to the question whether common welfare is the result of individual or common efforts, and in order to be able to implement, in Romania, an urban renewal initiative, which may have implications on the whole local community and subsequently on the whole society, it is necessary that at least the identification of the problems that a community faces and the finding of the best solution be the fruit of individual efforts. Their subsequent implementation should be then left to competent official bodies, if this is too great a task to be solved by individual effort.

Bibliography

- A.- S. Ciobanu, *Aspecte specifice privind regimul domeniului public în România şi în Franţa,* "Universul Juridic" Publishing House, Bucharest, 2012;
- G. Boroi, Liviu Stănciulescu*, Instituţii de drept civil în reglementarea Noului cod civil,* "Hamangiu" Publishing House, Bucharest, 2012;
- Puie, *Reglementări juridice în materia urbanismului. Dreptul de proprietate şi contenciosul administrativ în materie*, "Universul Juridic" Publishing House, Bucharest, 2011;

[38] Mircea Duţu, op. cit., p. 166.
[39] Ibidem, p. 167.
[40] Idem.
[41] André Poissonnier, op. cit, p. 31.

- *Noul Cod Civil şi 9 legi uzuale,* "Hamangiu" Publishing House, Bucharest, 2011;
- M. Delnoy, *CWATUPE- Le Code Wallon de l'Aménagement du Territoire, de l'Urbanisme, du Patrimoine et de l'Energie*, Editeur responsable L. Venanzi Edi. pro, Liège, Belgique, 2010;
- M. Duţu, *Dreptul urbanismului,* 5th revised and enlarged edition, "Universul Juridic" Publishing House, Bucharest, 2010;
- V. Terzea, *Servituţile în dreptul civil român*, "C.H. Beck" Publishing House, Bucharest, 2006;
- Maria Bulgaru, *Sociologie. Vol II*, Chişinău, 2003, document available online at the following address http://tempus2010.usm.md/ManualePDF/Sociologie%202.pdf, accessed on 20 September 2014;
- André Poissonnier, *La rénovation urbaine*, Éditions Beger- Levrault, 5 Rue Auguste-Comte, Paris, 1965.

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THEORETICAL AND PRACTICAL ASPECTS REGARDING THE PHASE OF THE PRE-TRIAL CHAMBER PHASE IN THE CRIMINAL TRIAL

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Abstract

The entrance into force of the new Criminal Procedure Code – namely of the Law No 135/2010 – on the 1st of February 2014, has brought in a series of modifications regarding the so-called "phases of the criminal trial". This is why, explicitly for the Romanian procedural legislation, was inserted by the legislator, before the trial itself, a pre-trial phase – hearing in the pre-trial chamber. The details of this hearing shall be analyzed below.

Keywords: criminal trial, judge, trial phase, criminal investigation phase

Introduction

The pre-trial chamber phase of the criminal trial is stated by Art 342-348 of the Code of Criminal Procedure. This institution emerged from the perspective in incrementing the celerity of the criminal trial, the new Criminal Procedure Code[1] being thought from the perspective of closely stating the activity performed by the judicial authorities. By this new phase of the criminal trial was aimed the compliance with the celerity of solving criminal trials, and also a more effective use of human and financial resources.

The pre-trial chamber mainly analyzes the compliance by the criminal investigation and prosecution authorities of all procedural rights, in this procedure the judge being able to ex officio invoke exceptions, requests or exceptions may also be invoked by the other participants in the criminal trial[2].

What the new Criminal Procedure Code stated, as novelty, is the impossibility of refund the case file to the prosecutor during the trial, due to the fact that the judge in the pre-trial chamber analyzes the legality of evidences and of the indictment.

This is totally different than the old regulation, because the previous Criminal Procedure Code[3] stated that the indictment submitted by the prosecutor to enter directly into the criminal trial phase. Also, as a novelty element, in the pre-trial chamber emerged the

[1] Law No 135/2010, published in the Official Gazette of Romania, Part I, No 486/15 July 2010.
[2] According to Art 345 Para 1 of the new Code of Criminal Procedure.
[3] Adopted by the Law No 29/1968, published in the Official Bulletin, No 145-146/12 November 1968, with its subsequent modifications and amendments.

principle of loyalty in managing evidences[4], its violation resulting in the exclusion of the illegally obtained evidences[5].

According to an expert analysis[6], the pre-trial chamber is not an absolute novelty, the older Romanian legislation knowing the procedure called "the preparatory meeting", inserted by the Decree No 506/1953, modified by Law No 3/1956. Subsequently, by the Decree No 473/1957 this institution disappeared.

The object of the pre-trial chamber

Beyond the fact that, the criminal trial has four procedural phases, the institution is independent with attributions very well determined by the legislator by the ones stated for the judge in the pre-trial chamber[7].

From the perspective of the legal text, the object of the pre-trial chamber is to verify, after the indictment, the competence and legality of notifying the court, as well as to verify the legality of the evidences and the preparation of the documents by the criminal investigation bodies[8]. As an effect, this phase aims only the aspects regarding the review of legality of the documents prepared by the criminal investigation bodies, the pre-trial chamber's judge limiting his activity only to this aspect.

In this meaning, as it has been expressed, one can say that, in this new phase of the criminal trial, is performed only an *a posteriori*review of the legality of the indictment and of the evidences that supports it[9]. From this point of view, the new regulation is different than the one stated by the old Criminal Procedure Code, when the prosecutor presented the indictment, insuring the possibility of informing[10], before compiling a minute[11], presentation which is no longer found in the new Criminal Procedure Code because this attribution belongs to the pre-trial chamber's judge as the notification of the indictment.

The duration of the pre-trial chamber procedure

Art 343 of the new Code of Criminal Procedure states that it is of maximum 60 days from the notification of the competent court, thus, being possible that the procedure to last lesser than the term pointed by the legislator.

From the perspective of the judicial nature of this term, regarding which the law does not make any references to a sanction for non-compliance, the practice and literature are

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[4] According to Art 101 of the new Code of Criminal Procedure.

[5] According to Art 102 of the new Code of Criminal Procedure.

[6] C. Voicu, A. Uzlău, G. Tudor, V. Văduva, *Noul Cod de procedură penală. Ghid de aplicare pentru practicieni*, Hamangiu Publising House, Bucharest, 2014, p 395.

[7] According to Art 54 of the new Code of Criminal Procedure, the pre-trial chamber's judge is the one who, according to his competence: a) verifies the legality of the indictment submitted by the prosecutor; b) verifies the legality of the evidences and of the preparation of the documents by the criminal investigation bodies; c) solves the complaints against the solutions of not initiating the criminal investigation or not to indict; d) solves other situations express stated by the law.

[8] According to Art 342 of the new Code of Criminal Procedure, as it has been modified by Art 102 Point 219 of the Law No 255/2013 for the implementation of the Law No 135/2010 on the Criminal Procedure Code and for the amendment and supplementation of certain legislative acts which comprise criminal procedure provisions, published in the Official Gazette of Romania, No 515/14 August 2013.

[9] C. Voicu, A. Uzlău, G. Tudor, V. Văduva, *op.cit.*, p. 396.

[10] According to Art 250 of the old Criminal Procedure Code, After the initiation of the criminal action, if all necessary investigation acts have been performed, the criminal investigation body calls the defendant and: a) informs him on the right to familiarize himself with the criminal investigation material, also showing him the judicial framing of the deed committed; b) offers him the possibility to immediately familiarize himself with the material. If the defendant cannot read, the criminal investigation body reads the material for him; c) asks him, after he has familiarized himself with the criminal investigation material, if he wants to make new claims or supplementary statements.

[11] According to Art 251 of the old Criminal Procedure Code, about complying with the provisions of Art 250, the criminal investigation body draws up an official report on the enforcement of the provisions stipulated in Art 250, also noting the statements, claims and answers of the defendant.

unanimous in considering that it is recommended. Thus, the thesis of overcoming it is acceptable but, because the need to respect the celerity is imperative, we consider that it can be made only for very good reasons.

Preparatory measures and the trial procedure

The new case file is randomly assigned to a panel of judges, by the ECRIS[12] software, without receiving a first term. In this context, the pre-trial judge has certain attributions, specified by Art 344.

According to Para 2, the certified copy of the indictment and, where necessary, an authorized translation of it, shall be communicated to the defendant at his detention place, his residence or at an address chosen for the communication of all procedural documents, together with the specifications referring the object of the procedure in the pre-trial chamber, the right to an attorney and the deadline, within which, from the date of the communication, may submit written requests and exceptions regarding the legality of the evidences and of the documents concluded by the criminal investigation bodies. The deadline established by the Code is of 20 days. The above mentioned measure circumscribes to the warrantees of complying with the procedural rights of the person accused, here being about the right to defense, the documents communicated being analyzed by the defendant alone or together with his lawyer.

If necessary, related to the complexity and particularity of the case, the term established by the judge may exceed 20 days[13].

On the other hand, if the defense is mandatory, according to Art 90 of the new Criminal Procedure Code[14], the pre-trial chamber judge must take measures for appointing a public defender, in this regard submitting a request to the Bar and establishing the term in which requests and exception may be submitted regarding the legality of evidences and of the documents concluded by the criminal investigation bodies, complying with the same term of maximum 20 days.

Subsequent to these terms, all possible requests and exceptions invoked by the defendant or ex officio by the court, shall be communicated to the prosecutor who may answer them within 10 days from communication, text which does not state an obligation for the prosecutor's office to answer to all requests and exceptions. If requests or exceptions are not submitted or invoked, the pre-trial chamber's judge issues a resolution confirming the legality of the indictment, of the evidences presented during the criminal investigation and of the documents concluded in this first part of the criminal trial.

During the criminal trial procedure, a first aspect verified is that regarding the competence of the notified court, otherwise Art 50[15] of the new Criminal Procedure Code becoming incident. After this moment such appreciation cannot be debated anymore, if in first instance was considered that the court notified has jurisdiction in resolving the case. Though, according to Art 421 Point 2 Let b), final row[16], the jurisdiction may be re-discussed in front of the court of judicial review.

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[12] The ECRIS CDMS is a nationally unique software, used by the courts for the electronic management of the case files, namely for their random allocation.

[13] According to Art 344 Para 2 final row of the new Criminal Procedure Code.

[14] According to Art 90 of the new Criminal Procedure Code, judicial assistance is mandatory: a) when the suspect or defendant is minor, held in a detention or education center, when he is confined or arrested even for other offence, when he is held in a medical institution even for other offence, as well as in other situations stated by the law; b) if the judicial body considers that the suspect or defendant could not defend himself; c) for the trial of the cases for which the law states life imprisonment or imprisonment for more than 5 years.

[15] Declining jurisdiction.

[16] According to Art 421 Point 2 Let b) final row of the new Criminal Procedure Code, "the court, resolving the appeal, shall order one of the following solutions (…) 2. Admit the appeal and (…) b) cancel the first instance court's decision and order a re-trial by the court whose decision has been canceled for the reason that the trial was held in the absence of a party who was not legally summoned or who, though legally summoned, could not attend the hearing and could not notify the court about this impossibility, invoked by that party. The re-trial by

As it has been shown by Art 345 Para 2, the pre-trial chamber's judge verifies if the indictment has certain irregularities which should be remedied, analyzing the criminal investigation documentation and the evidences only regarding to their legality and in accordance with Art 102. If irregularities are found within the indictment or violations of the process of collecting the evidences, the judge shall apply Art 280-282 relative to Art 102 Para 3. The nullity of the document ordering to collect evidence or authorizing certain evidence determines the rejection of that evidence.

Regarding the nullity of procedural documents, as it has been mentioned by the Explanatory Memorandum to the draft of the New Criminal Procedure Code, the modifications inserted by the actual code systematizes their specific issues, the provision of the effects of nullity of these procedural documents, as well as that of the subsequent documents, representing a novelty[17].

If the pre-trial chamber's judge applies Art 280-282, he shall communicate the resolution to the prosecutor's office, after that the prosecutor, within 5 days from the notification, must correct the irregularities in the indictment and communicate to the judge if he chooses to support it or not, otherwise requesting the case file to be refunded. If the prosecutor's office supports the indictment and if all the evidences have not been excluded from the criminal investigation the judge shall order the beginning of the trial.

The solutions ordered and the ways of appeal

The solutions to be ordered are stated by Art 347 Para 1-7. After the resolution ordering the initiation of the trial, the criminal case file receives a term for the first hearing, using the ECRIS software.

The pre-trial chamber's judge may order the refund of the case file to the prosecutor's office, according to any of the letters stated by Art 346 Para 3, as he gives the solution for jurisdiction issues mentioned in the case file. Art 346 Para 7 of the new Criminal Procedure Code states that the pre-trial chamber's judge who ordered the initiation of the trial acts in the pending case file. Initially, the legislator's idea was that of the existence of an incompatibility between the two mentioned attributions, for the current version of the new Criminal Procedure Code to remove this incompatibility, one of the reasons being that of limited human resources.

The appeal is dominated by short terms, supporting the celerity in resolving the criminal trial. It shall be submitted within 3 days, both for the prosecutor, as well as for the defendant, and shall begin from the communication of the decision. Thus, no other party in criminal trial, apart from the prosecutor or defendant, may initiate it. The appeal thus submitted to the court in which the pre-trial chamber's judge who ordered the attacked resolution is member, shall be notified for competent resolution to the pre-trial chamber's judge member of the hierarchic court. In the absence of any provision in this regard, the panel of judges of the hierarchic court shall not be collegial, but shall consist of only one judge. If the High Court of Cassation and Justice is notified, the appeal shall be resolved by the competent panel of judges, according to the law. Since it is a mean of attack, the appeal may be withdrawn, according to Art 415. Likewise, according to Art 416, the initiation of the appeal suspends the normal flow of the criminal trial, because until its resolution the judicial investigation cannot be initiated. Also because it is a mean of attack, according to Art 418, the *principle of non reformatio in pejus* is incident, of non-aggravating the situation in his own appeal.

The resolution of the appeal has the same phases as its hearing on the merits of the case, the trial overlapping the same procedural provisions. The pre-trial chamber's judge shall

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the court whose decision has been canceled shall be ordered also in the presence of one of the cases for absolute nullity, except the case of incompetence, when shall be ordered the re-trial by the competent court".

[17] Explanatory Memorandum to the draft of the New Criminal Procedure Code available on www.just.ro p 15.

order, by decision, one of the solutions stated by Art 425[1] Para 7 of the new Criminal Procedure Code, inserted by the G.E.O No 3/2014[18], which is a final and irrevocable decision[19].

Preventive measures during the pre-trial chamber phase

These can also be adopted during the pre-trial chamber procedure. According to Art 348 Para 1, the pre-trial chamber's judge orders, by request or ex officio, regarding the establishment, maintenance, replacement, revocation or termination ipso jure of the preventive measures.

Examining the law leads to the conclusion that all the preventive measures stated in Art 202 Para 4 Let b)-e) of the new Criminal Procedure Code may be ordered also by the pre-trial chamber's judge as also stated by Art 203 Para 2-3. The judicial review and the judicial review on bail, the house arrest and the remand in custody may be ordered by the pre-trial chamber's judge, as an effect of the prosecutor's proposal or ex officio.

Analyzing the preventive measures during the pre-trial chamber phase cannot be performed without mentioning Art 207, referring to the verification of the preventive measures in the pre-trial chamber both for the assignation of the defendant, but also if the preventive measure is ordered, for the first time, by the pre-trial chamber's judge.

For the first situation, the judge must ex officio verify the legality and solidity of the preventive measure, the term recommended by the legislator being of 3 days starting from the registration of the case file, but before the expiration of the period for which the preventive measure has been ordered[20].

In both cases, of maintaining or revoking the preventive measure, the pre-trial chamber's judge shall deliver a motivated resolution, in the council room, which may be appealed within 48 hours from deliverance or notification.

The legality and solidity of the house arrest or the remand in custody measure are periodically reviewed, ex officio, every 30 days, unlike the trial phase in which the term is double. If this review has not been performed, then the preventive measure shall terminate ipso jure, the pre-trial chamber's judge applying Art 241[21].

Bibliography:

- C. Voicu, A. Uzlău, G. Tudor, V. Văduva, *Noul Cod de procedurăpenală. Ghid de aplicare pentru practicieni*, Hamangiu Publ.-house, Bucharest, 2014;
- Government Emergency Ordinance No 3/5 February 2014 for the implementation of the Law No 135/2010 on the new Criminal Procedure Code and ofcertain legislative acts;
- Law No 255/2013 for the implementation of the Law No 135/2010 on the Criminal Procedure Code and for the amendment and supplementation of certain legislative;
- Law No 135/1 July 2010 on the new Criminal Procedure Code;
- Law No 29/1968 on the old Criminal Procedure Code.

[18] G.E.O No 3/5 February 2014 for the implementation of the Law No 135/2010 on the new Criminal Procedure Code and of certain legislative acts, published in the Official Gazette of Romania, No 98/7 February 2014.

[19] The pre-trial chamber's judge of the hierarchic court shall deliver one of the following solutions: 1. Reject the appeal, maintaining the decision appealed: a) when the appeal is tardy or inadmissible; b) when the appeal is indefeasible; 2. Admit the appeal and: a) the cancelation of the decision and solve the case file; b) the cancelation of the appealed decision and order a re-trial of the case file by the judge or panel of judges who or which resolved it, when it is established that the provisions on summoning have not been observed.

[20] According to Art 207 Para 2 of the new Criminal Procedure Code.

[21] According to Art 241 Para 3 of the new Criminal Procedure Code, the pre-trial chamber's judge shall order, by motivated resolution, regarding the termination ipso jure of the preventive measure also in the absence of the defendant, but in his lawyer's and the prosecutor'smandatory presence.

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INTERNATIONAL CRIMINAL PROSSECUTION FROM AD-HOC TO PERMANENT CRIMINAL JURISDICTIONS

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Abstract: *Crimes against humanity committed by dictators obsessed with power have been constant throughout history. The front impunity for the most heinous crimes is something that causes immense social unrest and brings the message that the law does not reach those who are in power. States, begun striving to find mechanisms to punish those guilty of crimes against humanity and establish a permanent international criminal jurisdiction.*

Keywords: **International Criminal Court, Universal Justice**

Introduction - idea of an international criminal justice for crimes against humanity

The necessity of an international jurisdiction for crimes against humanity has revealed a serious conflict between States that do not want assign their national jurisdiction, totally or at least in part, to the trial of crimes against humanity. The legitimizing basis of a jurisdiction going across national borders is given in the so-called principle of universal justice, which is based on the protection of supreme values, such as justice and humanity, regardless the fact that the commission of an offense has been held outside the sovereign territory of one State.

As international community started to confuse the responsibilities of States with the ones of their rulers or citizens in their service, in order to directly reach individuals, started to gradually develop the idea that individuals should also be immediate subject of a "sanctioning" international law, which would not give them rights, but also impose certain obligations or punish different misbehaviours.

Historical evolution of international criminal jurisdictions

The international community intended to impose certain obligations on all individuals, as well as to punish the guilty ones for committing unlawful acts that were so serious that they hit the core values of the human species. Thus, if individuals could not be legally liable based on the general international law, this issue needed to be adressed by the international society which developed the concepts of International Criminal Law and International Criminal Jurisdiction.

The idea of international criminal jurisdiction dates back to 1872 when Gustave Moynier presented at a Conference of the Red Cross, the first formal proposal directed to the establishment of a court with jurisdiction over war crimes, called "*Convention on the Establishment of an International Judicial Board for the Prevention and Punishment of Violations of the Geneva Convention*".

However, it is in the twentieth century that the most important events for the development of international criminal law took place.

Regarding the historical development of the concept of crimes against humanity and international criminal jurisdiction related to their punishment, the first instrument in which such references were made, though not explicit, was the Convention on the customs and laws

of land warfare, signed at The Hague in 1907, which, specifically in the Martens clause, provides: "*Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience*"[1].

The Second World War demonstrated that excesses of dictators could threaten other countries, their people and democracy itself. Thus, international awareness about the need for international criminal tribunals that would ensure the punishment of the greatest crimes against humanity, started to reset, in order to avoid impunity and transmit to dictators the message that nobody is above the law and that the law values the dignity of the human person.

Thus, the need to prosecute those responsible for crimes against humanity was collected for the first time in the Charter of the International Military Tribunal, established on August 8, 1945 by France, the United Kingdom, USA and the USSR, which, mentioning also the concept of crimes against humanity responded to the desire of the Allies to prosecute not only those who had committed war crimes in the traditional sense, but also other types of crimes that were not included in this concept, as those in which the victim was stateless or had the same nationality as the criminal. Subsequently, the crime against humanity concept was also present in the Charter of the International Military Tribunal of Tokyo, signed on January 19, 1946.

However, in spite of the efforts to establish a system of international criminal justice, a break of almost half a century, mainly attributable to the confrontations of the Cold War, limited drastically the efforts to establish such international jurisdictions. It was only in 1993 and 1994, respectively, that this process was resumed, as two criminal courts were established to judge crimes committed in the Former Yugoslavia and Rwanda. Although these four courts were, and the last two still are, ad-hoc instances, i.e limited to prosecute crimes committed in specific conflicts, with their powers restricted to a period of time and determined place, it can be said that international community had merely adopted international treaties calling for respect for human rights, while the effective prosecution of the attackers was left to the States themselves, without there being an international institution that could judge those individuals.

So, based on the needs felt by the international community, at the beginning of the process of globalization and the increase of cross-border criminality and terrorism, for the creation of an international jurisdiction over persons and not with respect to States as such a Court for the States was created by the UN in 1945, namely the International Court of Justice, based in The Hague, but whose major drawback that can only judge States that voluntarily submit to its jurisdiction, a new international court judging individuals was created at The Hague in 1998 and one could say that, to some extent, the ICC would create together with the ICJ a complete kit of international jurisdiction.

Ad-hoc tribunals to judge crimes against humanity created by the UN

The most important *ad-hoc* tribunals constituted in the history of the United Nations, up to date, are the Tribunal for the Former Yugoslavia (1993) and the Tribunal for Rwanda (1994), established by the Security Council, although other similar jurisdictions were created by the Security Council for Cambodja, Sierra Leone and Lebanon.

As international community interpreted the commission in those countries of massacres and other serious violations of international humanitarian law as a major threat to international peace and security, which empowers the Council, under Chapter VII of the UN Charter, to intervene in the internal affairs of a State, it was estimated that these two courts, created during the war, unlike the Nuremberg and Tokyo, that were made p*ost bellum* (after the war) would help to curb violations of international humanitarian law that were being

[1] R.Ticehurst,*The Martens Clause and the Laws of Armed Conflict,* in International Review of the Red Cross, No. 317, 1997 - https://www.icrc.org/eng/resources/documents/misc/57jnhy.htm

committed and also restore peace, although the UN Charter does not expressly provides for the establishment of *ad-hoc* tribunals. However, the reality was that those two tribunals found their legitimity because the States have reached a general consensus on this matter and we may think that the creation of tribunals for the former Yugoslavia and Rwanda was a substitute for other political or armed interventions by the international community, as the Security Council did not reach an agreement regarding the policy to be followed in both crises, and many countries were reluctant to endanger the lives of their soldiers by sending troops. Probably, the coverage of the media on the atrocities and concern and mobilization of public opinion urged to action and contributed to the creation of such jurisdictions.

Anyway, these courts deserve a positive assessment in different aspects, namely:

- their creation fulfilled a symbolic function, reflecting a breakthrough in the commitment of the international community to respect international humanitarian law, in the recognition that certain monstrous crimes threaten all humanity and must not go unpunished. Thus, they have served as a preliminary step and testing for the subsequent adoption in 1998 of the Statute for a permanent International Criminal Court, signed in Rome[2]. Moreover, the administration of justice by an independent institution has contributed, at least partially, in addition to the identification and punishment of the guilty ones, to the elucidation of the historical truth while noting the crimes committed. The knowledge of what happened and overcoming the feeling of impunity are necessary foundations for the post-war rehabilitation and possible reconciliation between belligerants;
- at the same time, the two courts have also played both a repressive role, as to the identification and punishment of those responsible and also a preventive one, because of the possibility of being judged that discouraged many individuals, even partially, to commit new crimes;
- the exclusion of the death penalty, although this may lead to a double standard of punishment, because it is possible that a national court could still apply it, in accordance to own national rules and regulations.

The International Criminal Tribunal for the Former Yugoslavia

The Court is headquartered in The Hague and was created by the UN through the Resolution 827 of 25.05.1993[3] to try those suspected of serious crimes committed in the territory of the former Socialist Federal Republic of Yugoslavia between 1 January 1991 and a date that the Security Council consider once peace restored. As the Council had not given to the jurisdiction of the Court in March 1999, all crimes committed in the Kosovo crisis entered within its jurisdiction, which has led to the indictment of Slobodan Milosevic.

The Council Resolution 827 was based on the aforementioned Chapter VII of the UN Charter, which gives special powers to that body for the maintenance of international peace and security. The Council interpreted that the widespread violations of international humanitarian law, including mass murder and practices of „ethnic cleansing" constituted a threat to international peace and security, and the process of creating such an international criminal jurisdiction, through a Security Council resolution, was considered, at the time as rapid and unattended until that moment, as allowed the court to enter into operation on the first day after the Resolution was issued.

As for the law applicable by the court, the first question to be raised is whether it should apply rules corresponding to international or internal armed conflicts, as, in the former Yugoslavia, there have been conflicts both at domestic and international levels. However, the Security Council implicitly recognized that it was an international conflict and therefore, the Court applies the rules of international humanitarian law. The fact that it this is customary law

[2] D. Donovan, International Criminal Court: Successes and Failures of the Past and Goals for the Future, 2012 -http://www.internationalpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures-of-the-past-and-goals-for-the-future/

[3] http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf

– and therefore source of law, it means that there was no problem posed by the fact that some States originated from the former Republic of Yugoslavia did not accede to the Conventions that are applied by the Tribunal, (the Geneva Conventions of 1949; the Hague Convention IV of 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the Statute of the Nuremberg Tribunal of 1945), allowing the Court to pursue four types of crimes, according to art. 2-5 of the Statute of the Court (grave breaches of the Geneva Conventions of 1949; the violation of the laws or customs of war; genocide and crimes against humanity).

International Criminal Tribunal for Rwanda

Following the massacres that killed nearly half a million of Rwandans in April and May 1994, the Security Council established the Court on 8 November of that year with 13 votes in favour, the opposition of Rwanda (although this State was the one who initially proposed it) and the abstention of China, by Resolution 955[4]. The court is based in Arusha (Tanzania) and the Office of the Prosecutor is in Kigali (Rwanda), its competence applying to acts committed between 1st of January and 31st of December 1994 both in Rwanda and on the territory of neighboring States.

Its constitution was the result of recommendations made to the Secretary General by a Commission composed of independent experts at the request of the Security Council. The Commission concluded that there was evidence that members of the Hutu genocide had been committed to the destruction of the Tutsi group. The experts also recommended that the trials of those suspected of committing serious violations of international humanitarian law, crimes against humanity and acts of genocide should be carried out by an international criminal tribunal.

The peculiarity of the case of Rwanda is that, even though most of the atrocities were committed in the context of an internal conflict, the situation had important international implications for its neighboring countries receiving large waves of refugees, which was interpreted as a serious threat to regional and international peace. Thus, the Statute of the Rwanda Tribunal is essentially the same as the former Yugoslavia and, like it, has jurisdiction over genocide and crimes against humanity. However, the Security Council took into account the fact that the crimes committed in Rwanda were conducted in the framework of a purely internal conflict, so that instead of referring to "*grave breaches of the Geneva Conventions of 1949 and the laws and customs of war*" it referred to "*violations of Article 3 common to the Geneva Conventions and Additional Protocol II*" since both cover internal armed conflicts.

Even though the two courts have represented an evolution in the development of the concept of international criminal jurisdiction, the fact of being *ad-hoc* tribunals created by the Security Council, which is an essentially political body, could be interpreted that the permanent members in the Council Security would never would create *ad-hoc* tribunals on their own territories or in some other States where they have specific interests. Also, the figure of the *ad-hoc* tribunals could lead to comparative grievances and bias the administration of justice by relevant States, and in addition, the two courts may incur an alibi to the passivity of the States and also of the international community, allowing them not to adopt policies or broader military action against violations of human rights committed outside their soils, considering that a justice with two levels of security was established, especially in the case of the Rwanda Tribunal, since it protects the life of the main culprits, it does not consider the death penalty and assures to those culprits better conditions of detention than the ones that are persecuted and convicted by the Rwandan national jurisdiction[5].

International Criminal Court

[4] http://www.unictr.org/Portals/0/English%5CLegal%5CResolutions%5CEnglish%5C955e.pdf

[5] http://ictj.org/news/impact-yugoslav-and-rwanda-tribunals-lessons-international-criminal-court-0, 2009

The International Criminal Court is the jurisdiction created to try individuals responsible for the most serious violations of human rights[6]. It can, specifically, judge four types of crimes: crimes against humanity, war crimes, aggression and genocide.

The International Criminal Court (ICC) is based in The Hague and entered into force on 1st of July 2002, once 60 out of the 120 signatories countries have ratified the Statute adopted in Rome on 17th of July 1998[7]. Its creation represented a major milestone for the development of international criminal law. The most important element to be stressed out here is that ICC is an independent international organization, not belonging to the UN system.

By its creation, the international community decided to give itself its own specific criminal mechanisms, other than those of States, in order to prosecute individuals responsible for such crimes. The emergence of the individual as soft subject of international relations is being confirmed as such by international law, being added to the States and other subjects, with rights but also subject to sanctions. The ICC intends to exercise its jurisdiction directly to individuals, ignoring the shield of State sovereignty.

The achievement of the Statute in the Rome Conference was a remarkable success for the countries that defended this concept, considering that at the beginning of this endeavour pessimism regarding the elements that could be achieved was prevailing. While opposing States constitute a minority, they represented important global or regional powers, such as USA, China, India or Mexico. However, three factors ultimately led to its achievement[8]. First of all, the commitment of some 50 States advocated the creation of the ICC (such as Germany, Canada, Romania, Republic of Korea, Egypt, Italy, Norway, United Kingdom and South Africa, to name a few). Secondly, the pressure exerted from the beginning of the preparatory work by some 130 NGOs, most of them built in the Coalition for an International Criminal Court. And third, the role of those responsible for directing the work at the Conference itself.

Finally, the ICC Statute was adopted by an overwhelming majority. Among the 120 votes in favor included all of the States of the European Union, and in general throughout Europe including Russia and most of the Latin American and some Asian States. However, under the argument of the defense of the principle of State sovereignty, 20 States abstained and seven voted against. The latter include USA, China, India and Israel, countries with huge political weight and implication in international conflicts

Anyhow, the Rome statute is the result of balance and contains a number of commitments and provisions carefully measured to respond to the divergent interests of the various High Contracting Parties. Consequently, it has both pro and cons. Among the most positive features of the Statute we could name the definition of crimes (with the exception of the lack of definition of crimes by use of weapons of mass destruction), the powers granted to the Prosecutor and many elements of the system of complementarity with the international courts. Indeed, the Court may prosecute and punish all major crimes either on the prosecutor's initiative or when internal justice systems are unable or unwilling to exert their repressive functions. By contrast, the main problems of the Court is that it is not allowed to judge war crimes commited during a period of the seven years following the entry into force of the Statute, and that the Security Council United Nations has the power to paralyze the action of the Court[9], as it, in accordance with a resolution adopted pursuant to Chapter VII of the UB

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[6] A.Bogdan, *Drept International Public*, Universitaria Publishing House, Craiova, 2012, pag. 218.

[7] http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283948/RomeStatuteFra1.pdf

[8] Concepcion Escobar Hernandez, *La progresiva institucionalización de la jurisdicción penal internacional: La Corte Penal Internacional* in García Arán, M., y D. López Garrido (coords.), *Crimen internacional y jurisdicción universal*, Tirant lo Blanch, Valencia, 2000.

[9] Art. 123 of the Rome Statute

Charter, can ask the ICC to suspend the investigation or prosecution has started. Such suspension shall not exceed twelve months but can be renewed[10].

The Rome Statute is an international treaty of universal vocation. The Nuremberg and Tokyo Courts were formed on the basis of a decision taken by a small number of States, while the *ad-hoc* tribunals for the former Yugoslavia and Rwanda were settled for two resolutions of the UN Security Council. Neither way was appropriate for the ICC, since those courts were limited both *ratione tempore* and *ratione loci*. The ICC, being an international organization, is binding only for States that accepted its Statute, unlike the *ad-hoc* tribunals, in which the obligation is on all members of the United Nations.

The internal organization of the International Criminal Court, strictly speaking, is not only of a court, as this is a complex of international criminal justice, where several structures, formally regarded as organs of the Court, function together:

- **the Presidency**, consisting of a president and two vice-presidents, that also function as judges of the Court, elected for a three years term by their pairs, are responsible for the administration of all other organs except the prosecution ones
- **the Chambers** (instruction, trial and appeal), consisting of a total of 18 judges, elected for a unique term of nine years and divided into three sections[11]:

• instruction chamber, also called preliminary questions section, whose jurisdiction extends from the decision to allow an investigation into the decision to investigate the complaint;

• judgment chamber, with jurisdiction for the causes that should end with a trial decree of acquittal or conviction of the accused;

• review chamber, responsible to analyze appeals entered against a previous decision.

- **the Prosecutor's office**, headed by the Prosecutor who shall act independently, being responsible for receiving *criminis notitia* and any information about crime within the jurisdiction of the court, for examining them and for conducting investigations and prosecutions before the court. The Prosecutor is assisted by one or more public prosecutors that must serve as fulltime. Both the Prosecutor and the assistants must be of different nationalities, must be fluent in at least one of the working languages of the Court (English or French), and should also be competent to perform the duties and possess extensive practical experience in the process or trial of criminal cases.
- **the Secretariat**, responsible for the non-judicial aspects of the administration and other services, is directed a the Secretary, elected by the judges by absolute majority and by secret ballot. The mandate is for five years, with possibility of being re-elected only once. The Secretary must create a Victims and Witnesses Unit that should provide all agreements and protective security measures needed in order to ensure appropriate help for witnesses or victims and others who appear in court and who are at risk because of their testimony, as, although victims do not *have locus* standi before the ICC, they have the right to submit informations to the prosecutor.

As for the operations referred to the Court, its jurisdiction will be triggered by the Prosecutor following a triple initiative[12]:

- complaint of a State Party referred to the Prosecutor requesting to proceed with the investigation;
- complaint by the Security Council of the United Nations;
- complaint of the Prosecutor himself after finishing his investigations.

As regards penalties for the convicted individuals, the statute provides for imprisonment of up to 30 years or life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted[13]. The prison sentences are served in a State designated on the basis of a list of States which have indicated their willingness to

[10] Art. 16 of the Rome Statute
[11] Art. 39 of the Rome Statute
[12] Art. 13 and 15 of the Rome Statute
[13] Art. 77 of the Rome Statute.

accept convicted criminals. Seclusion may be accompanied by a fine and forfeiture of proceeds, property and assets derived directly or indirectly from that crime.

Conclusion

The ICC came up with an advanced configuration in the sense of not being a temporary court or a court of the victors over the vanquished. In this sense, the know-how achieved from the criticisms of the Nuremberg and Tokio Tribunals and the UN *Ad-Hoc* Tribunals was quite useful, as the International Criminal Court, created to punish international criminals, performs also an important function of conveying a message to the international society that there will be no tolerance or impunity with violators of the major international crimes.

Bibliography

- D. Donovan, *International Criminal Court: Successes and Failures of the Past and Goals for the Future*, 2012;
- Bogdan, *Drept International Public*, Universitaria Publishing House, Craiova, 2012;
- Concepcion Escobar Hernandez, *La progresiva institucionalización de la jurisdicción penal internacional: La Corte Penal Internacional* in García Arán, M., y D. López Garrido (coords.), *Crimen internacional y jurisdicción universal*, Tirant lo Blanch, Valencia, 2000;
- 1998 Rome Statute of the International Criminal Court;
- R.Ticehurst,*The Martens Clause and the Laws of Armed Conflict,* in International Review of the Red Cross, No. 317, 1997;
- 1994 UN Resolution 955 on the International Tribunal for Rwanda;
- 1993 UN Resolution 827 on the International Tribunal for former Yugoslavia.

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ABUSIVE CLAUSES IN INSURANCES DOMAIN

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Abstract:

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

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

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

Introductions

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

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

1. The clause was not directly negotiated with the consumer. It is supposed that it is not negotiated that clause that does not allow the consumer to influence its nature, to change or remove it, as there are pre-created contracts. In the doctrine, it was highlighted that accepting a clause does not mean its negotiation;
2. The rule of good faith is not complied with, rule that implies removing any action or omission that might harm the co-contractor. Law no. 193/2000 refers to good faith in general, reason for which the professional must have acted with the intent to prejudice the consumer, in bad faith. It is considered that it is in unconformity with the good faith the inclusion of a clause that produces an important imbalance not in favour of the consumer;
3. To exist an important, significant imbalance between the rights and responsibilities of the parties. The criterion of assessing this imbalance is a real one, analysed in report to the circumstances corresponding to every contract concluded.

Also from Law no. 193/2000 we conclude that the provisions regarding the abusive clauses are applicable to those juridical reports that take place between consumers and traders. Art.1, paragraph 1 of this law, provides that any contract concluded between traders and

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

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

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

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

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

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

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

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

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

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

Such an abusive clause can be met at the insurance policies for houses sold by certain insurance companies from our country that infringe upon the provisions from the Civil Code. We refer to those contracts concluded by the authorized insurers where, under "exclusions" chapter, there are included also the claims of indemnifications from the husband, wife or relatives of the insured, even if the beneficiaries are not specified in the contract. This fact is not natural if we have in view that fact that the insurance policies for houses cover also serious risks like earthquakes or landslide, events that increase the risk of occurrence of the death of the insured person during their occurrence. In such cases, by applying the clause stipulated in the contract, the insurance company will not pay indemnifications to the family of the insured which deceased, even if the insured paid and the insurance company received the respective insurance premiums. If we consider the provisions of art.2230 Civil Code regarding the insurances for persons, that provide that "in case of the insured death, in case no beneficiary was designated, the insurance indemnity is part of the deceased's estate, returning to the inheritors of the insured", then we can conclude that this clause is abusive, since it limits the right to inherit.

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

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

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

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

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

We consider that these provisions could be associated in the insurances domain with the situation when the insurer, although it concluded a contract of insurance of goods through which it was established a certain value to the insurance premium and to the amount insured, after being produced the insured risk, it decides to decrease the value of the indemnification

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

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

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

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

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

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

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

The court cannot change itself the clauses considered abusive from the contract, but it will be able to force the professional to change all adhesion contracts in development, when there is observed such a clause exists in the contract, as well as to eliminate the abusive

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

clauses from the pre-formulated contracts which are meant for use in the professional activity, as it is provided by art.13 paragraph (1) of the law to which we refer to.

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

Conclusions

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

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

Bibliography

- N. Gheorghe, C. Spasici, D.S. Arjoca, *Consumption Law,* Hamangiu Publishing House, Bucharest, 2012
- M. Tărăbaş., M.Constantin., *Insurances. Juridicary practice compillation,* C.H. Beck Publishing House, Bucharest, 2009
- www.scj.ro

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MARRIAGE AND FAMILY LIFE IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

The article 8 and 12 – European Convention of Human Rights regulate the right to family and private life and, respectively, the right to marriage. These rights have been transposed into the national legislation of the States-members of European Union. The two rights that we are speaking of, which can be found as a constitutional principle and as an ordinary law, tries to reduce the public authorities interference into the private and personal family field. The reality proves that the right to marriage has been broken by the impossibility of the spouses to marry because they can not be divorced. This is the reason why we have two different rights in European Convention: the right to private, family life and the right to marriage.

Many European states still have a limited regulation of the reasons for getting the dissolution of marriage. The European Convention has nothing to do with such cases because does not regulates the right to divorce and it would be an interference into the national law. How can a person be married again if he/she doesn't have the possibility to divorce? In these conditions, can we take the European Convention into consideration as a real instrument of protection for the right to marriage?

The first precedent of ECHR jurisprudences limits the infringement of the right to marriage made by the national Courts because of the lack of regulations or a bad interpretation of it.

Keywords: **ECHR, right to marriage, family life, divorce, separation of the spouses.**

Introduction

From the multitude of laws guaranteeing the right to private and family life and the right to marriage we turn our attention to Articles 8 and 12 of the European Convention on Human Rights.

The way in which these legal texts create the necessary levers of the rights considered here must be subordinated to the incapability of EU rules to interfere with national laws, especially in a matter so fraught with personal and private aspects. Moreover, we believe that these rights are extremely difficult to break into the national legal maze, being a corollary of the principles established in the field of family relationships which are loaded with tradition, morality, religion and social aspects.[1] Standardization of such rules, even when tested by numerous projects in Europe, was not successful, given the opposition from the content of legal texts from national legal systems.

The Scope of Articles 8 and 12 of the European Court of Human Rights

[1] Ioana Nicolae, *Instituţii ale dreptului familiei*, Hamangiu Publishing House, Bucharest, 2009, p. 142 and the others.

A number of international laws govern the right to marry and right to found a family, linking them in the same law. Thus, Article 9 of the Charter of Fundamental Rights of the European Union: "The right to marry and right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights"; Article 16 of the Universal Declaration of Human Rights "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family."; Article 23 § 2 of the International Covenant on Civil and Political Rights of 1966: "The right of men and women of marriageable age to marry and to found a family shall be recognized."; the same effect is the art. 8 European Convention on Human Rights:" Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Commission and the European Court of Human Rights: "Article 12, in fact, provides for the right to marry and to found a family as a single law. (...) [It] actually recognizes the right of men and women, of an age when they consent to start a family and have children. The existence of a couple is fundamental."

The right protected by Article 8 namely the right to private and family life, home and correspondence, is part of the conditional rights, which, relative to other rights under the Convention - such as the right to life or the right not to be subjected to inhuman or degrading treatment - may be subject to limitations.

Thus, after paragraph 1 of Article 8 provides that everyone has the right to respect for their private and family life, home and correspondence, the second paragraph shall determine the limits that may be made to such rights. The conditions are thus listed under which a public authority can intervene as it is necessary for the interference to be stipulated by national law, constitute a necessary measure in a democratic society, for national security, public safety or the economic well-being of the country, prevention of disorder or facts criminal protection of health or morals, or the protection of rights and freedoms of others. These conditions expressly set out in the text of the Convention combine with the jurisprudence of the Court keeping in mind in addition that the interference must be proportionate to the aim pursued.[2]

Determining the application limits of Article 8 we need to consider also the limits imposed by establishing the scope of Article 8, the meaning given notions of "private life", "family", "home" and "correspondence" varying in time and space from state to state and even within the same state from one social group to another.

These texts confirmed by the judgments of the European Court on this topic lead us to the idea that a "cause-purpose" report is determined, in which the cause is the marriage, and the purpose is founding family. Separating the right "to marry" from the right "to start a family" would mean making the former "theoretical and illusory"[3], an end in itself, would mean reducing it to a mere symbol. However, it is unthinkable to tell someone that they have the right to marry, but to start a family. "Marriage without a family purpose is nothing than a private relationship publicly. Family without her support legal marriage no longer contribute to the common good of society, it becomes a simple private good couple."[4]

Article 12 of the European Convention on Human Rights guarantees the right to marry and to found a family within the same fundamental right, indicating: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws

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[2] Sonia Cososchi, *Limitãri ale drepturilor garantate de art. 8 din Convenţia Europeana a Drepturilor Omului*, http://soniacososchi.blogspot.ro/2008/10/limitele-de-aplicare-ale-art-8-din.html

[3] *Airey c. Irlandei*, nr. 6289/73, Decision from 9 October 1979, § 24; *Scoppola c. Italia (nr.2)*, GC, nr. 10249/03, Decision from 17 September 2009, § 104 and desident opinions.

[4] Andreea Popescu, *Dreptul bărbatului şi al femeii de a întemeia o familie*, European Centre for Law and Justice, ECLJ, 2013, p. 6 and the following.

governing the exercise of this right." Likewise, the European Court of Human Rights (ECHR) clearly states that "the right to marry guaranteed by Article 12 refers to the traditional marriage between two persons of different biological sex. This follows from the wording of Article 12, which clearly indicates that it protects marriage as the foundation of the family."[5]

We can see that the texts of conventions and treaties at a European level uniformly enshrines the right to marry and the right to start a family, but following the social realities we can easily distinguish the existence of the family without the existence of marriage. It is possible that the family is actually based on simple relationships, in which the couple can give birth to children. Following the Court jurisprudence we can see that there is a broadening of the notion of "family life" from the relations between spouses to which children are added, and at present they are extended to de facto relationships, where bonds and manifestations of affection render the characteristics of family life, even if it is about a marriage ceremony. In Case X, Z, Y vs. The United Kingdom[6], the Court has presented some of the elements that must be considered when analyzing the existence or not of family life. Thus, members cohabitating over a period of time, a child born to or perhaps adopted by the couple in question, the personal ties between parents and children, all represent such items as "turns" de facto family in a family according to the meaning of the European Court of Human Rights.

What happens when even if these elements are met, a family cannot be acknowledged as such because it is not offered the necessary leverage to respect this legal requirement? Acknowledging a family *de facto*, does not mean you restrict the opportunity for it to be one *de jure*. This situation may arise under the European Convention on Human Rights guarantees the right to divorce, thus limiting the right to marry or, in other words not protecting the right to a first marriage.

In a more specific and general way, the right to respect family life and the right to marry causes the establishment of an obligation within the state related to means.[7] The state must "act to enable the persons concerned to lead a normal family life."[8]

The Limitations of Rights Enshrined in Article 8 and Article 12 of the European Court of Human Rights – The Lack of a Guarantee in the Completion of a New Marriage

Article 12 does not guarantee in any way the right to divorce. The European Court clearly declines to conduct an "evolutionary interpretation" of the Convention to extract a right which was not inserted in it from the beginning and considers that the right to marriage refers to establish the conjugal relations and not to dissolute them. In their common meaning, the words "right to marry" in Article 12 refer to forming conjugal relations and not dissolving them. Moreover, the preparatory work of this article reveals no intention to incorporate a certain guarantee to the right to divorce. The Court would not know how to draw from it, through evolutionary interpretation, a right that has been deliberately omitted from the beginning, if the Convention were interpreted in the context of today. It shows that the Convention must be read as a whole. We can not agree that such a right can result from Article 8, while not resulting from art. 12. Thus the Court rejects a petitioners' claim that they are victims of discrimination which is contrary to Article 14 of the Convention. 8 in combination with Article 8 due to the fact that Irish law may recognize some divorces granted abroad. In its conception, it cannot be considered as similar to the situation of petitioners and that the people who can get this recognition.[9]

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[5] *Sheffield and Horsham vs. Great Britain*, nr. 22985/93 şi 23390/94, Decision from 30 July 1998.

[6] *X.Y.Z. vs. Great Britain*, Decision from 22 April 1997, par. 36, www.echr.coe.int.

[7] Fr. Sudre, *Drept european şi internaţional al drepturilor omului*, Editura Polirom, Bucharest, 2006, p. 336.

[8] *Marckx vs. Belgia*, nr. 6833/74, Decision from 13 June 1979, Strasbourg, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57534#{%22itemid%22:[%22001-57534%22]}

[9] *Johnston and others vs Irland*, nr. 9697/82, Decision from 18 December 1986, http://jurisprudentacedo.com/JOHNSTON-c.-IRLANDEI-Interdictie-constitutionala-a-divortului-in-Irlanda-si-

All these things considered, European case law establishes a right of married couples to live separately if their marriage fails. Supported by positive obligations in relation to Article 8 from the Convention, the European Court building considers, indeed, that the separation of the spouses should get a "legal consecration" and "privacy and family can sometimes require the means to spare the spouses from the obligation of living together."[10]

Moreover, Article 12 is not subject of the specific limitations of the public policy clause, as is the case of Article 8, but entrusts the national legislation with the regulation of the right to marry. Under European law, national law must not restrict or limit this right in a manner that would undermine "its very substance."[11] If the rules of law recognize divorce, the right of a person to remarry should not be limited in this "unreasonable" way.

Such a situation is found in Swiss law which regulates the prohibition to remarry for a period of three years after the divorce imposed on the spouse liable for the divorce (F. vs. Switzerland, 18 December 1987)

A similar situation, a law that unduly restricts the right to marry is found in Bulgaria. In this legal system, divorce was permitted only in two cases, namely when marital relationship break up and divorce by consent of the spouses. In the case here cited[12], after they were married in 1986, as a student, the plaintiff and his wife separated in fact after the latter graduated and returned to her hometown in northern Bulgaria with two children born to the marriage. Relations between the couple cooled considerably, so the wife asked the court for alimony for her two children, the pension was granted.

Upon graduation, the plaintiff moved in with another woman to a town in southern Bulgaria, in 2002, and had another child. Wanting to remarry, the husband filed a divorce action in contradiction with his wife. She argued that the divorce not be granted, however, since she and her husband were married and she is not responsible for their separation in fact, was convinced that reconciliation with her husband was still possible in the interests of the two children; instance court dismissed the application for divorce, given the national legislation at the time. The first instance court held that "dissolution of conjugal life of the couple was due to unacceptable behavior" of her husband. The appeals have pointed out the "disagreements between the couple which hitherto prevented a reconciliation between spouses were not "insurmountable".[13]

Any attempt to divorce by consent of both spouses was vehemently rejected by the wife.

When the case came to the European Court of Human Rights, it invoked the principle of subsidiary, according to which "it cannot substitute national courts in the determination of facts and interpretation of law" (see, to that effect, JH and other 23 vs. France, November 24, 2009, nr. 49637/09). The Court also concluded that national courts have complied with their obligation to properly motivate rulings on divorce proceedings brought by the applicant. The Court noted that although the applicant argued that the relationship with his wife was deeply and irrevocably altered long time since they were separated in fact he has a new girlfriend and they live together and had a child together with national courts note that the only disagreement between spouses was pertaining to establishing a joint residence and therefore surmountable. The responsibility for altering marital relationship between spouses was again laid at the applicant's door and in motivating its decision; the Court answered the applicant's claims with arguments based on evidence in the file.

However, the Court reiterated that neither Article 8 nor Article12 of the Convention guarantees the right to divorce (Johnston and others vs. Ireland), but recognizing the right to

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consecinte-juridice-care-decurg-de-aici-pentru-un-barbat-si-o-femeie-necasatoriti-impreuna-precum-si-pentru-copilul-lor.html

[10] *Ibidem.*

[11] *Christine Goodwin vs. Great Britain*, nr. 28957/95, Decision from 11 July 2002, www.echr.coe.int.

[12] *Ivanov and Petrova vs. Bulgariei*, Decision from 14 June 2011, www.echr.coe.int

[13] Lavinia Cîrciumaru, Ionuţ Militaru, *Dreptul la divorţ* (Article 6, 8 and 12 European Court of Human Rights): Imposibilitatea unei persoane de a se recăsători izvorâtă din refuzul pronunţării divorţului pentru prima căsătorie, JurisClasor CEDO Journal, University Publishing House, Bucharest, 2012, p. 27-30.

divorce is not equivalent to the absence of any conventional protection. The Court has repeatedly addressed the implementation of divorce proceedings, identifying elements that could affect the effectiveness of the right to marry, so that it comes to a situation where, although a right is neither recognized nor guaranteed by the Convention, i.e. the right to divorce), he has a certain protection indirectly.[14]

Firstly, although the law provides for divorce, Article 12 of the Convention guarantees the right of divorced persons to remarry without suffering unreasonable restrictions in the state law that has emerged in the case law of the European Court of Human Rights because of F. vs. Switzerland.[15]

Secondly, by violating the principle of celerity of divorce proceedings may raise the issue of infringement of Article 12 of the Convention[16], but in this case, none of these cases was considered applicable because it was not thought as a temporary restriction to remarry after divorce or of excessive length of proceedings for divorce.

Throughout time, the Court stressed that the Convention cannot be interpreted as granting entitlement for divorce and even less of a favorable outcome in this case.

In this case, the Court ruled that the dismissal of divorce was not based on opposition husband have not come to dissolution of marriage, but without finding a deep and irreversible deterioration of the marital bond. Court noted that national judges felt the "de facto separation of the couple was not an insurmountable obstacle for the spouses and therefore the relations between them were irreparably damaged." The Court also ruled that implications of property and inheritance or restrictions on alienation of common property as a result of maintaining marriage is nothing more than the logical consequences of his rejection of the divorce request that are subject to national regulation on property relations between spouses. At the same time, it was rejected by the Court and the complaint filed by the plaintiff's concubine, who has not invoked the general prohibition to marry, but the impossibility of concluding a civil marriage first applicant on the ground that prevent the marriage of the two plaintiffs was the result of a general prohibition, but stems directly from the rejection of the divorce for good reasons - the application for divorce brought by the plaintiff and the application of the law of the principle of monogamy.

Conclusions

From this analysis of these concrete cases brought before European Court of Human Rights because of violations of Articles 8 and 12 of the Convention, we see the balance that the Court tries to guarantee between the exercise of rights as prescribed by the Convention and limiting all interference that it may have with the national laws of Member States. Even if the right to divorce is not provided in the Convention, along with other items mentioned within it (e.g. Article 6 concerning the right to a fair trial), no more than an indirect protection of this right was managed. Respecting procedural elements and the way national courts have justified their judgments have most often been analyzed. Not recognizing the right to divorce does not equal the absence of any conventional protection.

However, we believe that from case to case, the Court should consider the context in which manner is guaranteed the right to marry and that the limits imposed by the "impossibility of interference" meet certain prerequisites: to be provided by law; to constitute a necessary measure in a democratic society; for national security, public safety or the economic well-being of the country, prevention of disorder or crime, the protection of health or morals, or the protection of rights and freedoms of others; to be proportionate to the aim

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[14] Valérie Gas and Nathalie Dubois vs. France, August 31, 2010, nr. 25951/07, RR vs. Poland, May 26, 2011, nr. 27617/04, http://www.hotararicedo.ro/index.php/news/2011/06/dreptul-la-divort-art.-6-8-i-12-cedo-imposibilitatea-unei-persoane-de-a-se-recasatori-izvorat-din-refuzul-pronuntarii-divortului

[15] Lavinia Cîrciumaru, Ionuţ Militaru, *op. cit*., p. 27-30.

[16] Aresti Charalambous c. Ciprului, 19 July 2007, nr. 43151/04; Wildgruber c. Germaniei, requests nr. 42402/05 and 42423/05.

pursued. However, even though throughout time, the Court jurisprudence was formed in supporting the right to marriage and not its dissolution, we consider this as the only guarantee of a first marriage and the right not to remarry, the latter remains suspended between gaps of laws national and the restrictive interpretation of the text of Articles 8 and 12 from the European Court of Human Rights.

References:

- Popescu, *Dreptul bărbatului şi al femeii de a întemeia o familie*, European Centre for Law and Justice, ECLJ, 2013;
- Lavinia Cîrciumaru, I. Militaru, *Dreptul la divorţ* (Article 6, 8 and 12 European Court of Human Rights): Imposibilitatea unei persoane de a se recăsători izvorâtă din refuzul pronunţării divorţului pentru prima căsătorie, JurisClasor CEDO Journal, University Publishing House, Bucharest, 2012;
- *Ivanov and Petrova vs. Bulgariei*, Decision from 14 June 2011, http://www.hotararicedo.ro/index.php/news/category/hotarari-relevante/10.
- *Wildgruber vs. Germaniei,* requests nr. 42402/05 and 42423/05, http://www.hotararicedo.ro/index.php/news/2011/06/dreptul-la-divort-art.-6-8-i-12-cedo-imposibilitatea-unei-persoane-de-a-se-recasatori-izvorat-din-refuzul-pronuntarii-divortului
- *Valérie Gas and Nathalie Dubois vs. France*, August 31, 2010, nr. 25951/07, RR vs. Poland, May 26, 2011, nr. 27617/04, http://www.hotararicedo.ro/index.php/news/2011/06/dreptul-la-divort-art.-6-8-i-12-cedo-imposibilitatea-unei-persoane-de-a-se-recasatori-izvorat-din-refuzul-pronuntarii-divortului
- Ioana Nicolae, *Instituţii ale dreptului familiei*, Hamangiu Publishing House, Bucharest, 2009;
- Sonia Cososchi, *Limitări ale drepturilor garantate de art. 8 din Convenţia Europeana a Drepturilor Omului*, http://soniacososchi.blogspot.ro/2008/10/limitele-de-aplicare-ale-art-8-din.html;
- *Aresti Charalambous vs. Ciprului*, 19 July 2007, nr. 43151/04, http://www.hotararicedo.ro/index.php/news/2011/06/dreptul-la-divort-art.-6-8-i-12-cedo-imposibilitatea-unei-persoane-de-a-se-recasatori-izvorat-din-refuzul-pronuntarii-divortului;
- Fr. Sudre, *Drept european şi internaţional al drepturilor omului*, Editura Polirom, Bucureşti, 2006;
- *Christine Goodwin vs. Great Britain*, nr. 28957/95, Decision from 11 July 2002, www.echr.coe.int;
- *Sheffield and Horsham vs. Great Britain*, nr. 22985/93 şi 23390/94, Decision from 30 July 1998;
- *X.Y.Z. vs. Great Britain*, Decision from 22 April 1997, par. 36, www.echr.coe.int.;
- *Johnston and others vs Irland*, nr. 9697/82, Decision from 18 December 1986, http://jurisprudentacedo.com/JOHNSTON-c.-IRLANDEI-Interdictie-constitutionala-a-divortului-in-Irlanda-si-consecinte-juridice-care-decurg-de-aici-pentru-un-barbat-si-o-femeie-necasatoriti-impreuna-precum-si-pentru-copilul-lor.html;
- *Airey c. Irlandei*, nr. 6289/73, Decision from 9 October 1979, § 24; *Scoppola c. Italia (nr.2)*, GC, nr. 10249/03, Decision from 17 September 2009, § 104 and desident opinions;
- *Marckx vs. Belgia*, nr. 6833/74, Decision from 13 June 1979, Strasbourg, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57534#{%22itemid%22:[%22001-57534%22]}.

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CURRENT TENDENCIES OF THE EUROPEAN UNION DEVELOPMENTCONSEQUENCES OF THIS DEVELOPMENT ON SHORT AND MEDIUM TERM

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Abstract:

The institutional development of the European Union requires not only a consolidation of European union bodies but also common and coordinated policies, that inevitably imply the obligation of the Member States to give up to a part of their own powers, in other words to give in of their national sovereignty. The matter in question, at least from our point of view, is whether Romania is or not prepared for this kind of constitutional development.

Keywords: **European Union, development, sovereignty.**

The persons who aimed to build the structure of the European Union were aware that the process would be long and difficult. The historical process proved that an initial idea was subsequently completed and then modified till what was practically pursued and aimed at the beginning, became progressively not only a forgotten matter but it was also annulled. And this fact became more and more obvious during this development, as the process of European construction modified both its program and goals. Thus, from an economic association of the three initial communities – European Economic Community (EEC), the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (CEEA - EURATOM) – it progressively passed to a process of union and massive integration of the Union's Member States, a complete integration and to a quite aggressive admission process of new members, including Romania. Thus, from a relatively limited initial number, presently, with few exceptions – out of which some are remarkable – practically, the whole European continent, at least to the west of Romania, became members of this union. Besides, this process has not stopped even if, at least for now, the admission of new members was if not stopped, at least decelerated. Negotiations are still conducted but it cannot be foreseen the day when the accession will be resumed. Anyway, we estimate that at least for now, a massive process of accession is not anticipated on a short and medium term.

It was erected a European "construction" founded on a new form of State association. This association is no longer based on the provisions of some simple association treaties that have a pure political feature, as they have existed along the history. It's about a process way more profoundly, a process more complex and with long-term consequences that imply all Member States of the European Union but also, in general, the international community. We do not refer here to a simple association in order to realize some definite goals – for example, a common economic policy to the end of ensuring competitiveness of our continent compared the United States of America or other Asian States – traditionally, Japan, but also South Korea or, especially China. It is a process of political, economic and social integration, so implicitly, institutional integration of the European Union States. There have also been set up institutions and bodies that no longer represent, in a focused manner, the interests of the Union Member States, but they represent the interests of the new entity which is the European

Union[1]. We refer here to the European Parliament, Council and Commission, as well as to the other community institutions. Our point is that, at the moment, the Union's interest is one of a kind and different from the interests of the EU Member States, representing in the same time both theirs sum and even way above them. And this "something" becomes as the time goes by, more and more important and meaningful. In other words, the common interest does not represent only a mere summarization of Member States' convergent interests, but it represents an expression of a sole will, situated above the Members' interests. Practically, the European Union acts as an autonomous person/subject of law and exclusively compared to the Member States. So it manifests its specific, own will of an independent and sovereign person. Within this process of formation and continuous improvement of mechanisms and institutions of the European Union, the last period of time underlined more processes that also occurred as a consequence of the crisis that influences the world at the moment. First of all, it is about a crisis of financial nature but which has diverse repercussions in the economic and social domains. The excessive crediting, the life based on the act of spending future incomes encouraged by the credits that are practically not limited, favoured by the banking systems of the developed states led to this crisis that influences especially the states with an insufficiently developed economies, and as such prone to immediate "sideslips". Practically, at the moment, it is debated, neither more nor less, only upon the disappearance of the European single currency – Euro – and implicitly of the Eurozone towards which Romania aspires, among other countries, even if the date of accession to this structure becomes more and more remote.

Euro was meant to act as an engine of the European integration and as an instrument that was supposed to generate the unification of markets, of transactions within the policies concerning the liberalisation of the movement of merchandises, of labour force and of capital within the European Union. It goes without saying that it is very important to eliminate the risks of money rate, of the necessity of national currency conversion into the currency of the Partner State, of other advantages that were entailed by the single European currency. The single money market cannot be based only on the existence of the single currency, as the specialists in finance and macroeconomics, respectively financing policies, have clearly stated. This is indeed a necessary element, but not sufficient. It is indisputable that at present we have a central European bank operating in the same time as a bank of issue and which, by means of this mechanism controls the financial market, at least from the point of view of the money supply. But is seems that this single mechanism is not sufficient.

An obvious aspect would be the following: we practically observe all kinds of changes both on the institutional point of view and of the theorists, noticing the necessity of completing this "construction" with other two vital elements in order to insure the further existence of this European structure. It is all about common fiscal and budgetary policies. The purpose of these two policies is easy to be guessed but it is way much harder to achieve it, respectively a common budget and a common fiscal policy. The latter implies only the settlement of some means to establish and collect the taxes on the whole community territory in a unified and synchronized manner. "That is not such a big stuff" would be some tempted to say. But there has to be taken in consideration the premises and the consequences of introducing this kind of measures.

We have previously shown[2] that the current tendencies of the European Union prefigure an institutional and organisational evolution meant to led not only to the occurrence of a new subject of international law but to a true process of change of this union in a federative or confederative state form, even if it is not similar to the ones already known to the human history evolution. These states organized on federative or confederative grounds display two levels of regulation, if we choose to speak on legal terms, namely a federal and

[1] See Ion. P. Filipescu, Augustin Fuerea – "The European Community Institutional Law", edition IV, "Actami" Publishing House, 1999.

[2] Herchi Ştefan – "The European state", Journal of Agora Univeristy, Oradea no. 5/2005.

one of the Member States. The two levels of regulation imply different competences and specific attributions. It is obvious that the federative regulations refer to domains that are overall, of general interest. While the fiscal policies and the budgetary are, in our opinion, this particular kind of domains. As such, a money and budgetary policy, respectively a fiscal one, are necessarily attributions that pertain to the level of federative level, in our case, to the European Union. The validity of this statement is supported by the consolidation of the financial market – including of capital flows – of the labour force market as well as of the liberty of movement for the European citizens – it requires necessarily a unified regulation of the aspects that we analyse in the content of the present paper.

Which exactly is the institutional stage of the European Union Member States from the point of view of political will to adopt this measures not a bit simple and especially, by no means popular, is a topic that should be analyzed compared to the specific constitutional provisions of each and every Member State.

If we study for example, the Romanian Constitution, we will have the following results: article no. 137 paragraph 1 stipulates that the creation, management, use and control of financial state resources are regulated by law. It is obvious we deal with a single and exclusive attribution of the legislative body which is the Romanian Parliament. Similarly, article 138 paragraph 2 of the same constitution stipulates the procedure of drafting the state budget project by the Romanian Government and then its submission in order to be consented by the parliament. Another important provision refers to the fact that the taxes and any other sources of incomes of the state budget are established by law.

Everything that was above stated contravenes to these basic provisions of the Romanian supreme law. The transfer of these attributions obviously means a prejudice caused to the national sovereignty. Why? Because a transfer of these attributions to the community bodies and institutions that will be authorized by union treaties – as a consequence of their amendment - or based on the act of drafting some new union, constitutional-type provisions – see treaties etc – would definitely cause the renouncement to these constitutional provisions, hence their exercise by the Romanian State institutions.

We have to admit that those who thought to create this European structure and, in the case in point, along with the establishment of the European Constitution, they have also considered the aspect of the so called division of competences between the Member States and the European Union[3]. We do not intend to give further details concerning these competences because they do not constitute de object and topic of our paper.

We consider that what is important derives from the political will of the Member States to accept such a transfer of sovereignty. The Romanian legislator has solved these aspects in a form that we find to be extremely ingenious. Thus, to the amendment of Constitution of 1991, amendment performed in 2003, there were adopted new provisions that allow such a transfer of sovereignty. Thus, article 148 paragraph 1 of the Constitution stipulates that the transfer of some attributions to the community institutions and the act of enforcing conjunctly this kind of attributions may be consented by law by the joint chambers of Parliament, with a majority of two thirds. In other words, Romania, in the process of EU integration that is more and more advanced – if we are allowed to use this term, is prepared to give up to a series of prerogatives of national sovereignty and to transfer them to the competent community institutions. As such, for us at least these policies and tendencies do not constitute a surprise but they represent a direction of organizational and institutional development that Romania not only accepts, but also supports it. The result is a co-operation between the community bodies and those of Romania both in what concerns the budgetary policy – drafting and then establishing a national budget project integrated in the community budget, a project which together with the projects of the other Member States shall be consented by the community bodies and then customized on each Member State. Similarly,

[3] Dragomir Claudia Elena – "Sovereignty of the EU Member States", "Refacos G.A." Publishing House, Moreni, 2005, page 39.

the policies concerning taxes and especially their collection methods are to be determined by common mechanisms, to the level of the whole union.

Bibliography:

- Ion P. Filipescu, Augustin Fuerea – "The European Community Institutional Law", edition IV, "Actami" Publishing House, 1999;
- Herchi Ştefan – "The European state", Journal of Agora Univeristy, Oradea no. 5/2005;
- Dragomir Claudia Elena – "Sovereignty of the EU Member States", "Refacos G.A.", Publishing House, Moreni, 2005;
- Marin Voicu – "Community Law. Theory and jurisprudence", Ex Ponto, Constanţa, 2002.

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GOOD FAITH IN DOMESTIC SALES LAW[1]

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Abstract

Good faith is a true principle widely established by the positive law. But how does this principle operate? How is the connection made between an undetermined legal standard, such as good faith, and the practical operations by which contractual obligations are fulfilled? The essay will answer to these questions by providing a comprehensive analysis of how the concept of good faith operates in a variety of national law systems.

Keywords: good faith, sales law, contract law, Romanian law, national legal systems.

Introduction

Lord Mansfield was referring, in the 18th century, to good faith as a general principle applicable to all contracts[2]. The uniform application of the concept of good faith must be based on the idea that good faith is not a moral obligation. It is true that good faith originates from honesty, which is nothing but a sum of virtues, but it can be presumptuous to claim that good faith is the same as morality. In this way, consistency would remain a goal, since morality is a social duty based on cultural norms. Good faith becomes a self-contained concept when it becomes a legal concept, entering the legal field.

Good faith in Romanian law

In most civil legislations, the postulate of good faith is established as a legal relative presumption, which can be overturned by any evidence, including simple presumptions. In this regard, the Romanian Civil Code provides in art. 14 that any natural or legal person shall exercise their rights and perform their civil obligations in good faith, in accordance with the public order and good morals, good faith being presumed until proven otherwise. There was no text in the Civil Code of 1864 that would establish the concept and the presumption of good faith.

The concept of exercising rights and obligations in good faith, in accordance with the public order and good morals represents an element of novelty brought by the Romanian Civil Code which is also consistent with the provisions of the Constitution (art. 57- the constitutional rights and freedoms shall be exercise in good faith, without violating the rights and freedoms of others).

In the Civil Code we can find different applications of the concept of good faith. Good faith is a fundamental principle of the civil law and art. 1170 singularizes this solution in terms of the contract, covering the contractual period in which negotiations are performed, the

[1] This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013.
[2] Pelly v Royal Exchange Assurance Co. [1757] Burr. 341, 347.

mechanism of concluding the contract as well as its performance. Thus, art. 1170 provides that the parties shall act in good faith both in the negotiation and conclusion of the contract, as well as during its performance. They cannot remove or limit this obligation. The general principle of good faith becomes an important governing principle of the contract theory. During the performance of contracts, the imperative of good faith requires an obligation for initiative, cooperation or collaboration, in order to allow an efficient contract performance, and behaviours that affect these aspects are forbidden. However, the obligation of good faith does not require the protection of someone else's interests to the detriment of their own.

Art. 1272 of the Civil Code assimilates fairness with the law, fairness thus becoming an implicit clause in the contract. According to the article in question a lawfully concluded contract requires not only what is expressly stipulated but also all the consequences of the practices established between the parties, customs, law and fairness given to the contract, according to its type. The common contract clauses are understood, although they are not explicitly stipulated.

Regarding the meaning of the concept of good faith in the artificial real estate accession, art. 586 stipulates that the performer of the work is of good faith if it is based either on the content of the land register, in which, at the time of the work, was registered as owner of the property or is in the course of owning it, not subject to registration in the land register if, in both cases, the defect of title did not result from the land register and he did not know about it in any other way. However, the person building by default or by not complying with the licences and permits required by law cannot invoke good faith.

Applications of the concept of good faith are also found in tabular usucaption. According to art. 931 the rights of the person registered, without legitimate cause, in the land register, as the owner of a building or holder of another real property, cannot be challenged when the person registered in good faith owned the property for five years after the time of registration of the application, if its ownership was not vitiated. Good faith is enough at the time the registration of the application is performed and it enters into possession.

In the matter of representation, according to art. 1300 good or bad faith, knowledge or ignorance of certain circumstances is assessed in the presence of the representative. Moreover, the represented party of bad faith can never invoke the good faith of the representative.

Good faith is associated to loyalty in art. 2079, as, in reference to the agency agreement, the agent shall fulfil, personally or by his agents, the obligations arising from the empowerment given to him in good faith and loyalty.

There is no proper penalty when there is no good faith in the negotiation, conclusion or performance of the contract. The liability form shall be outlined in accordance with the characteristics of the legal situation by which good faith was violated: presence of deceit shall entail tort liability (art. 1349), whereas non-performance in bad faith of a contractual obligation may result in the termination of the contract (article 1549).

A special innovative element of the Romanian Civil Code is the provision contained in art. 1183. The parties have the freedom of initiation, performance and termination of negotiations and cannot be held responsible for their failure. The party who undertakes a negotiation is required to comply with the requirements of good faith. The parties cannot agree the limitation or exclusion of this obligation. It is contrary to the requirements of good faith the conduct of a party initiating or continuing negotiations with no intention of concluding the contract. The party who initiates, continues or terminates negotiations contrary to good faith is liable for the damage caused to the other party. To establish this damage the costs incurred in the negotiations, the waiver by either party of the other bids and any similar circumstances shall be taken into account.

From the perspective of art. 1183, which takes into account free negotiation, carried out in the absence of a contractual framework, the pre-contractual negotiations are grouped around two main principles, contractual freedom and good faith. Such a regulation regarding

the negotiations stage could not be found in the Civil Code of 1864, inspired from both the Principles of European Contract Law and the UNIDROIT Principles.

Contractual freedom implies the ability to conduct even parallel discussions and negotiations to compare the various proposals and to choose the most advantageous one, including the ability to terminate the negotiations if the said person considers that they are not relevant to its own interests. This freedom can be achieved only if the parties are not held responsible for the failure of the negotiations or their termination according to their will, the only requirement being that of acting in good faith.

The text of art. 1183 is an application of the more comprehensive principle of good faith, which aims at the exercise of rights and performance of obligations (art. 14) and contractual relationships in general (art. 1170).

The principle of good faith is raised to the level of public order, as the parties cannot agree to limit or exclude it. Due to the imperative character of this principle, a party may invoke violation of good faith in negotiations as prevailing on the agreed terms. In many cases, the parties agree to enter into an agreement to govern their conduct during the negotiations. The principle of good faith may be invoked even when the other party bases its actions on a contractual framework agreed by the parties with respect to the negotiations performance and termination method. Limiting the contractual freedom in such a way creates uncertainty regarding the classification of an action as being compatible or not with good faith, which generates a certain legal uncertainty for the person who must act in good faith[3].

The obligation to act in good faith implies the undertaking of a loyal behaviour between the parties; art. 1183 contains illustrative (but not exhaustive) behaviour contrary to this principle: the case in which a party initiates or continues negotiations with no intention of concluding the contract. To the extent that there is an intention to conclude the contract, but other aspects required by good faith regarding the initiation, continuation or terminations of negotiations are violated, the guilty party may be liable in tort for the caused damage[4].

Good faith remains an open concept, which can be interpreted according to the case. Going forward, the provision contained in art. 1183 should be read in conjunction with both the provisions of the Principles of European Contract Law and the provisions of the UNIDROIT Principles so that a climate of legal certainty can be maintained and thus the principle of contractual freedom established by art. 1183 shall not remain without content.

In Romanian law, good faith is established as a principle for the performance of procedural rights. For this purpose, art. 12 of the Romanian Code of Civil Procedure provide that the procedural rights shall be exercised in good faith, according to the purpose for which they were recognized by law without violating the procedural rights of another party. The party exercising its procedural rights in an abusive manner or fails to fulfil in good faith the procedural obligations is liable for the material and moral damages caused.

The party who diverts the procedural right from the purpose for which it was recognized and exercises it in bad faith or violating the procedural rights of another party commits an abuse of procedural right.

To determine which is the content of good faith from the procedural point of view, we shall start from the definition of good faith in general, and hold those elements of it which are apparent in the exercise of procedural rights, while also keeping in mind the significant differences between the two concepts, on the one hand, in terms of substantive law, and on the other hand, in terms of the procedural law.

Taking into account that in terms of procedural rights good faith is presumed, if a person states bad faith in the exercise of procedural rights, or in order to paralyse its action or, in case of damage, in order to obtain damages, he/she must prove it.

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[3] D. Chirică, *O privire asupra Noului Cod civil. Titlul preliminar*, in P. R. no. 3/2011, pp. 113-138.

[4] F. A. Baias; E. Chelaru; Rodica Constantinovici; I. Macovei, *Noul Cod civil. Comentariu pe articole*, C. H. Beck Publishing House, Bucharest, 2012, p. 1238.

Good faith has different aspects depending on each procedural right because the premises and penalties established by the legislator to sanction the lack of good faith are different.

As a subjective procedural attitude which the subject of the procedural right must have, good faith represents the inner and unmistakable conviction of the party that the exercise of the procedural right in the way it chooses complies with the purpose for which the procedural right was recognized by law, does not damage the opponent in any way and does not affect the procedural rules that govern the entire civil proceedings[5].

In terms of content, good faith, in the procedural sense, has both an objective material aspect, consisting in the exercise of the right within its material, objective limits to create a real benefit to its owner, and a psychological subjective aspect, which refers to the owner not being only after the chicane of the opposing party, its damage by exercising the said procedural right in a certain way or simply for the purpose to deviate the procedural rules governing the civil action[6].

Good faith in French law

The obligation of good faith is laid out very clear in article 1134 of the French Civil Code. This is also the only explicit reference to this principle in the code. Thus, agreements legally formed have the force of law over those who are the makers of them. They cannot be revoked except with their mutual consent, or for causes which the law authorizes. They must be executed with good faith. It is clear from the formulation that it was intended to give an important role to the principle of good faith: once the contracts are formed, they have the force of law that must be executed with good faith. It appears to be a rather strong and somewhat rigid approach that the common law practice would not tolerate. There are certain comments to be made regarding the French formulation of the obligation of good faith. What would be criticizable is that there is no provision on the applicability of the principle of good faith during the performance of the contract. Therefore, the liability rests on tort principles during precontractual negotiations and on contract principles once the contract is formed.

It is true that art. 1134 states that contract must be executed with good faith, but there is no definition on the concept of good faith. According to art. 1135 agreements are binding not only as to what is therein expressed, but also as to all the consequences which equity, usage or statute gives to the obligation according to its nature. But this article brings nothing extra to clarify the concept of good faith. There is no provision wich deal with good faith in case of fraud, error or lesion. Equity is such a comprehensive value, resulting in good faith approach from two perspectives, a subjective one, based on the discretions of parties, and a objective one, where the court's role is to determine whether a contract was performed in good faith[7]. We believe that these limitations can be explained by the fear that a too wide application of good faith can affect the freedom and the certainty of the legal relations.

Similar provision to those in French law can be found in the Swiss Civil Code, which in paragraph 1 of art. 2 states every person is bound to exercise his rights and fulfil his obligations in respect of the principle of good faith. Paragraph 2 of the same article states that the manifest abuse of a right is not protected by law. Hence, the concept of abuse of rights is defined in relation with good faith. The exercise of a right would be considered unfair if is used contrary to its purpose, this meaning contrary to good faith. In Swiss law the limitative

[5] Elena Roşu, *Acţiunea civilă. Condiţii de exercitare. Abuzul de drept*, C. H. Beck Publishing House, Bucharest, 2010, p. 181.

[6] V. M. Ciobanu; M.Nicolae, *Noul Cod de procedura civilă. Comentat şi adnotat,* volumul I, Universul Juridic Publishing House, Bucharest, 2013, p. 32.

[7] A. M. Musy, *The Good Faith Principle in Contract Law and the Precontractual Duty to Disclose: Comparative Analysis of New Differences in Legal Cultures,* Global Jurist Advances.Volume 1, 2001, pp. 1535-1661.

function that one attributes to good faith is assured by the concept of abuse of rights. There is a division of competence between the two notions. The combined structure and the wording of art. 2 point to the necessity of judicial interpretation. Since the constitutive elements of abuse are violations of good faith and the manifest abusive exercise of rights, neither of these elements may be determined otherwise than by judicial interpretation. The implicit necessity of judicial interpretation does not make the determination of abuse contingentupon the allegation of the parties; on the contrary, by raisingit into a question of both law and fact, the determination of abuse becomes the duty of the courts.

The Belgium Civil Code imposes the same requirement, that all contracts to be executed in good faith. Also, the contractual interpretations will be supplemented by good faith, custom and usage. Furthermore, the instances in which good faith applies have been expanded to several situations such as the formation ofcontracts where parties are obliged to act in good faith and the performance of contracts.

It is noted that neither the Belgian Civil Code does not define, even general, the concept of good faith. In this regard, legal literature points out two main applications of the principle of good faith: duty of loyalty and duty of cooperation[8]. Also in Belgium good faith is usually said to have three functions: an interpretative function (fonction interprétative), a supplementing function (fonction complétitive) and a restricting or limiting or mitigating function (fonction restrictive, limitative, modératrice)[9]. Sometimes a fourth function is distinguished that would allow the courts in certain circumstances to change the content of the contract, but this function, just as the imprévision theory, has not been accepted by the majority of authors and the courts[10].

Good faith in German law

The nineteenth century in Germany is marked by the extent and depth of the Roman law studies, of its sources and of the Roman social and political institutions, seen both in their legal aspect and in terms of their historical development. As a result of these studies the concept of good faith developed from the Roman perception of *bona fides*. Subsequently, in the texts of the German Civil Code of 1900 the concept of good faith was introduced.

The German authors suggested for good faith the association of two terms as a unified expression for the concept in question: *Treu und Glauben*, which signifies loyalty and necessary trust in the legal documents and especially in conventions, and *guter Glaube*, which means false, excusable belief, protected as such, equivalent to a right. Good faith in these two forms is based on the loyal and honest intention. Good faith in the form of *guter Glaube* means to not do something illegitimate and is an affective and subjective state of mind[11].

Regarding good faith, the main issue is less about the object of faith (as trust) and more about how and what should be trusted and that the simple fact to be mistaken and believe (*irren und Glauben*) must be subordinated to a less subjective principle of rigorous loyalty, necessarily entailing an analysis full of reflection (*Pflicht der Uberlegung*)[12].

As described, good faith takes the value of an ethical and legal concept, the psychological nature of the content of good faith being highlighted. The essence of good faith is unique and comes from morality[13].

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[8] J. Perilleux, *La bonne foi*, Journées louisianaises de la Nouvelle-Orléans et Baton-Rouge, Paris, 1994, p. 250.
[9] J. Herbots, *International Encyclopaedia of Law – Belgium Law of Contracts*, Kluwer Law and Taxation Publishers, Netherlands, 1993, p. 149.
[10] *Idem*, p. 251.
[11] K. G. von Wächter, *Die bona fides, insbesondere bei der Ersitzung des Eigenthums*, Edelmann, Leipzig, 1871, p. 128.
[12] K. G. Bruns, *Das Wesen der bona fides bei der Ersitzung*, Berlin Puttkammer & Mühlbrecht, Berlin,1872, p. 23.
[13] Fr. Gorphe, *Le principe de la bonne foi*, Dalloz, Paris, 1928, p. 14.

In German law, the concept of good-faith is governed by the German Civil Code (Bürgerliches Gesetzbuch) in art. 242 which states that the debtor has to perform his obligation according to the requirements of good faith. The principle of good faith has the status of a general clause which requires a positive or negative conduct, depending on the particularities of each contract.

German Civil Code it contains no express provision on *culpa in contrahendo* or on *neminem laedere*. In these situations good faith would be applied as a general principle of law. For instance, the German courts have appealed to the principle of good faith when it have been occured a breach of a sales contract, the contractual parties failling to perform their obligations, such as delivery of the goods, conformity of the goods or payment of the price. Generally speaking, in such cases the courts have to make their decisions on the basis of art. 242, but agreeably predictable and rational.

In legal German literature it had been made an effort to specify the theoretical status of art. 242 of German Civil Code[14]. The functions of good faith were assimilated to those which Papinian had attributed to the praetorian law. In a well-known passage Papinian had said: *ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam (...)*[15]. In the same way art. 242 reflects *iuris civilis iuvandi, supplendi* sau *corrigendi gratia*.

Similar to the *ius praetorium*, good faith has three functions:

- die sinngemäße Verwirklichung des gesetzgeberischen Wertungsplanes durch den Richter (*officium iudicis*);
- alle Maximen richterlicher Anforderung an das persönliche rechtsethische Verhalten einer Prozeßpartei (*praeter legem*);
- rechtsethische Durchbrüche durch das Gesetzesrecht (*contra legem*).

This trichtonomy can be found also in Italian law, Dutch law and Belgian law, where good faith has the role to interpret, supplement and correct. In Greek law and Portuguese law good faith does have the same functions, although nowhere in the legal literature of these countries or in their legislation is expressly revealed the functions of good faith. These functions of good faith cad be described as an attempt to understand how the principle of good faith does work in the United Nations Convention on Contracts for the International Sale of Goods (1980) and the UNIDROIT Principles[16]. This trichotomy can be regarded as a common core for European legislations.

Good faith in Italian law

The Italian Civil Code has been drafted after the German Civil Code therefore good faith is clearly defined and has a rather strong basis in the code. Provisions regarding this principle can be found in several articles. Thus, art. 1175 states that the debtors and creditors must behave according to good faith and fair dealing. Art. 1337 provides that parties must behave in good faith during the precontractual bargaining and contractual drafting. According to art. 1366 and art. 1375 contracts must be interpreted and executed in good faith.

These provisions show that the principle of good faith has a large applicability in Italian law, the duty of good faith being extended from the precontractual negotiations phase to the interpretation and performance. In Italian law good faith is similar to an ethical obligation which is an integral part of public policy.

The principle of good faith has a practical purpose, as honesty, fairness and social solidarity, this forcing the contracting parties to recognize the importance of good faith and to

[14] F. Wieacker, *Zur rechtstheoretischen Präzisierung des § 242 BGB*, Tübingen, Recht und Staat, Heft 193/194, 1956.
[15] Papinian, D. 1, 1, 7.
[16] P. Schlechtriem, *Good Faith in German Law and in International Uniform Law*, Centro di studi e ricerche di diritto comparato e straniero, Saggi, conferenze e seminari, 24, Roma, 1997.

act reasonably[17]. In legal literature it is distinguished between a supplementing function (funzione integrativa) and an evaluating function (funzione valutativa) of good faith, both functions being recognized by the courts[18].

Good faith in American law

The doctrine of good faith with regard to contractual relations has a relatively recent history in the United States. The American case is considered an exception among the common law as the USA has a well developed doctrine of good faith, considering how little developed and commonly used is the concept of good faith in contractual relations.

Prior to the adoption of the Uniform Commercial Code (UCC), U.S. courts were slow in recognizing the doctrine of good faith in contractual relations. The doctrine of good faith received a boost when the UCC officially adopted the concept in the 1950's. By late of 1960's, U.S. courts began invoking a general requirement of good faith to afford relief for various forms of bad faith in contractual relations[19].

The Uniform Commercial Code states in art. 1-203 that every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement. The art. 1-201 comes to clarify the definition of good faith stating that good faith means honesty in fact in the conduct or transaction concerned. The doctrine finally came to age in the United States with the Second Restatement of Contracts in 1981. The Second Restatement of Contracts provides in section 205 that every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. Therefore, good faith is defined as faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. Section 205 goes on to state that good faith and fair dealing in the performanceof a contract requires more than mere honesty.

The quoted articles clearly show that the emphasis is put on the performance, the enforcement and the process of negations of a contract appears to remain uncovered. Moreover, the American legal literature has pointed out that these articles do not deal expressly within the scope of good faith in commercial contracts, this leading to another definition of the concept of good faith[20]. Thus, according to art. 2-103 from the Uniform Commercial Code good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

Although the existence of the doctine of good faith in the United States can no longer be questioned, U.S. courts and scholars have mixed opinions about the doctrine. Good faith is a concept which brings chaos in contractual relations. It is difficult to identify the doctrine's precise parameters, this meaning that contractual obligations of the parties may be uncertain. Therefore, good faith sould not be considered as a legal concept[21]. This theory is a groundless one, given that the nature of the concept of good faith depends on the particularities of each contract. The term good faith was not appropriately formulable in terms of some general positive meaning[22]. Instead, good faith was defined by the doctrine's function to exclude many heterogeneous forms of bad faith[23]. The term of good faith also was defined by its

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[17] M. W. Hesselink, *The Concept of Good Faith*, The Hague, Boston & London: Kluwer Law International, 2004, p. 625.

[18] Lina Bigliazzi Geri, *Buona fede nel diritto civile*, Digesto delle discipline privatistische: sezione civile, vol. II, ed. 4, 1988, pp. 171–172.

[19] R. S. Summers, *The General Duty of Good Faith – Its Recognition and Conceptualization*, 67 CORNELL L. REV., 1982, p. 812.

[20] A.E. Farnsworth, *The Concept of "Good Faith" in American Law*, Saggi, Conferenze e Seminari, 1993.

[21] T. J. Dobbins, *Losing faith: extracting the implied covenant of good faith from some contracts*, 84 OR. L. REV. 227, 2005, pp. 228-231.

[22] Summers, *supra* note 14 at pp. 819-820.

[23] E. A. Farnsworth, *Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Convention, and National Laws*, 3 TUL. J. INT'L & COMP. L., 1995, p. 59.

function to limit the exercise of discretion in performance conferred on one party by the contract. Therefore it is bad faith to use discretion to recapture opportunities foregone on contracting, as determined by the other party's expectations or, in other words, to refuse to pay the expected cost of performing[24]. The doctrine of good faith was criticised for being potentially too broad[25]. It was generally agree that the good faith doctrine only comes into play after a contract has been formed[26]. U.S. courts and scholars have generally rejected such a duty in the negotiation phase of the parties contractual. The good faith doctrine does not require good faith in bargaining, good faith in offer and acceptance[27]. U.S. courts do not view it a function of the law to lead in matters of morality[28]. Regarding all this theories, in American legal literature it has been argued the following point of view: if you offer a low price for some good to its owner, you are not obliged to tell him that you think the good is underpriced, that he does not realize its market value and you do. You are not required to be an altruist person. You are permitted to profit from asymmetry of information[29]. This theory is an example of the traditional economic paradox that private vice can be public virtue.

The good faith obligation is to protect the reasonable expectation of the parties. The Uniform Commercial Code does not recognize an independent cause of action for failure to perform or enforce in good faith except in relation to a specific duty or obligation under the contract. Most U.S. courts have likewise refused to find an independent cause of action for breach of the good faith duty absent a breach of a specific contract term[30].

The doctrine of good faith does not apply until after a contract has been formed. The U.S. courts have generally applied the doctrine only with regard to contract performance and enforcement. Therefore, the U.S. conceptualization of the good faith doctrine focuses on its role to ensure that the parties will get the benefit of the bargain under the contract that they negotiated between themselves.

Good faith in Canadian law

Canadian jurisprudence has not produced a comprehensive, authoritative account of when the good faith term will be implied into the relevant contract. Canadian courts have not developed a comprehensive and principled approach to the implication of duties of good faith in commercial contracts. The Supreme Court of Canada in *Wallace vs. United Grain Growers* acknowledged that the obligation of good faith and fair dealing is incapable of precise definition, but that in an employment contract, this requires employers to be reasonable, honest and forthright with their employees and to refrain from engaging in conduct that is unfair or is in bad faith by being, for instance, untruthful or misleading[31]. In an insurance contract, the Supreme Court of Canada, in *Sun Life Assurance Company of Canada vs. Fidler*, decided that the duty of good faith requires an insurer to deal with its insured's claim fairly[32]. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a

[24] S. J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV., 1980, pp. 369-373.
[25] A. Diamond; H. Foss, *Proposed standards for evaluating when the covenant of good faith and fair dealing has been violated: a framework for resolving the mystery*, 47 Hastings L. J., 1996, pp. 590-600.
[26] D. M. Patterson, A *Fable from the Seventh Circuit: Frank Easterbrook on Good Faith*, 76 IOWA L. REV., 1991, pp. 503-522.
[27] Summers, *supra* note 14 at p. 814.
[28] R. A. Posner, *Let Us Never Blame a Contract Breaker*, 107 Michigan L. Revs., 2009, pp. 1349-1357.
[29] Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 Michigan L. Revs., 2009, pp. 1357-1358.
[30] *Don King Productions, Inc. vs. Douglas*, 742 F. Supp. 741, 767 (S.D.N.Y. 1990).
[31] G. England, *Employment Law in Canada*, 4th ed., vol. 2, Markham: Butterworths, 2005, p. 105.
[32] Shannon Kathleen O'Byrne, *The implied term of good faith and fair dealing: recent developments*, The Canadian Bar Review, vol. 86, nr. 2/2007, p. 196.

balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.

By way of contrast, in *Gateway Realty Ltd. vs. Arton Holdings Ltd.*, Court offerd a more generic definition of good faith: parties to a contract must exercise their rights under their agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract. Good faith conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in bad faith, a conduct that is contrary to community standards of honesty, reasonableness or fairness.

Legal Canadian literature has identified several possibilities as to how good faith might be defined[33]. First of all, good faith requires one party to have regard for the other party's legitimate interests. The generality of the definition means that it may not provide sufficient guidance and an uncontextualized abstraction is difficult to apply to any given circumstance.

Secondly, analysing case law, it results that good faith might be defined as a sum of duties:

- the duty to exercise discretionary powers conferred by contract reasonably and for the intended purpose;
- the duty to cooperate in securing performance of the main objects of the contract;
- the duty to refrain from strategic behaviour designed to evade contractual obligations.

This approach of the concept of good faith is a useful one for the contracting parties given that a compilation of principles derived from the common law predicts what the general duty of good faith may mean in any particular circumstance.

There were attempts to define good faith after the doctrine of good faith as is found in the American Uniform Commercial Code. This approach does not capture the richness of common law. Taking a concept which already exists and then applying it to new circumstances can often fail.

Good faith should be regarded as being an excluder of bad faith, because it is easier to define bad faith than it is good faith and that such a focus will therefore make application of the doctrine more straightforward. Bad faith means a conduct that is contrary to community standards of honesty, reasonableness or fairness[34].

Regarding the application of the concept of good faith in commercial contracts, the Ontario Court of Appeal noted, in the case of *Transamerica Life Canada Inc. vs. ING Canada Inc*, that Canadian courts have not developed a comprehensive and principled approach to the implication of duties of good faith in commercial contracts[35]. The implication of a duty of good faith has not gone so far as to create new rights and obligations. Courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties or to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into. It results that the duty of good faith must be tied to the terms of the contract. In *Barclays Bank Plc vs. Metcalfe & Mansfield Alternative Investments* the Court has used the doctrine of good faith to police the bargain the parties have already made and to supervise performance of their contractual obligations[36]. Even where good faith is not pleaded, courts have held that one contracting party owes the other an implied duty to carry out its obligations or to exercise any discretion in the contract

[33] J. McCamus, *The Law of Contracts*, Irwin Law, Toronto, 2005, pp. 804-805.
[34] J. Swan, *Canadian Contract Law*, LexisNexis Butterworths, Markham, 2006, p. 650.
[35] F. P. Morrison; Hovsep Afarian, *Good Faith in Contracts: A Continuing Evolution*, Annual Review of Civil Litigation, Carswell, Toronto, 2004, p. 224.
[36] http://www.lexpert.ca/magazine.

in good faith. Contracts in which performance is dependent upon one party's exercise of discretion are characterized by an implied duty of good faith performance: the discretion must be exercised reasonably and in good faith and in light of the purposes for which it was conferred. The duty of good faith does not preclude self-interested behaviour and that a party under such a duty may be required to temper its self-interest, but not to avoid it. In *Georgian Windpower vs. Stelco* the Court stated that an agreement to negotiate in good faith is unenforceable on the basis that the concept is repugnant to the adversarial position of the parties when involved in negotiations. The Court concluded that an agreement to use best efforts to negotiate, like good faith, is similarly unenforceable. Such an agreement is uncertain and incapable of giving rise to an enforceable obligation. It is also contrary to the rationale behind negotiation that each party seeks to reach the most favourable agreement for them.

It is incontrovertible that good faith has two main sources in Canadian jurisprudence: first, good faith can be implied by operation of law and second, good faith can be implied by virtue of the parties' intentions. It is also clear that Canadian courts have consistently rejected good faith as a generalized term which is automatically implied into all contracts, regardless of context. The Alberta Court of Appeal in *Mesa Operating Ltd. Partnership vs. Amoco Canada Resources Ltd.* noted that one should hold carefully to the distinction between the two sources of rules about contracts, the law and the contract. Sometimes a rule of law imposes a duty upon the parties to a contract despite their agreement. On other occasions the courts impose a rule upon the parties because conclude that this fulfils the agreement. In other words, the duty arises as a matter of interpretation of the agreement. The source of the rule is not the law but the parties. In such a context the term "good faith" in this case might blur that distinction.

Courts impose the good faith standard because the kind of contract being considered brings with it an inherent and therefore a reasonably predictable vulnerability in one party. This vulnerability is present at the time of contract, and this leads the courts to ensure that good faith is implied to balance out the unequal power of the parties. Once implied, the good faith will technically restrain both parties, but practically speaking, only the dominant party's behaviour is likely to be contested[37]. In *Shelanu Inc. vs. Print Three Franchising Corp.*, the Ontario Court of Appeal followed the steps of the Supreme Court of Canada in Wallace's case, and taking into account the same reasons, recognized two kinds of contracts where good faith is implied by operation of law: employment contracts and franchise contracts. The Court imported a good faith term into the franchise contract because franchisee vulnerability set it apart from the ordinary commercial contract. Good faith is imported into these kind of contracts by operation of law not by virtue of the parties' intention.

In our opinion the good faith term should be used by the courts to limit a discretionary contractual power so that it is exercised reasonably and for the intended purpose, to ensure that the parties work to secure performance of the main objects of the contract and to insist that parties not evade contractual obligations.

Good faith in Australian law

The magnitude the concept of good faith took in North America was reflected in Australia, where the obligation of the contracting parties to act reasonably and honestly finds its equivalent in the good faith obligation, as the latter is perceived both in the European legal systems and in the USA.

It is generally thought that the decision in *Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992)* started the development of good faith in contractual performance in Australia[38]. The Minister for Public Works (the Principal) entered into two National Public Works Council contracts with Renard Constructions (ME) Pty Ltd (the

[37] G. H. Treitel, *The Law of Contracts,* 11th ed., Sweet and Maxwell, London, 2003, p. 208.
[38] http://crisplegal.com.au/renard-constructions-me-pty-ltd-v-minister-for-public-works-1992-26-nswlr-234/.

Contractor) for the construction of pumping stations as part of a sewerage project in the Gosford area. After the Contractor commenced work, delays occurred and the Principal gave notice to the Contractor under Clause 44.1 of the contract calling on it to show cause as to why the Principal should not take over the work or cancel the contract. The Contractor responded indicating that the Principal had not yet supplied materials which under the contract it was required to supply and the work would be completed soon after its supply. The Contractor was instructed to proceed and further delays occurred. After concerns that the delays were due to poor workmanship the Superintendent recommended the Contractor be called upon to show cause under Clause 44.1 in respect of both contracts. Clause 44.1 conferred power to take over the whole or any part of the work or to cancel the contract. The Contractor indicated that it was willing and able to complete the contracts with a reasonable time and that it considered the action a repudiation of the contracts. The superintendent, who was not fully informed of the relevant circumstances by the Principal, recommended cancellation of both contracts and the Principal took over the remaining works. The matter was referred to arbitration, the Supreme Court and appealed in the New South Wales Court of Appeal on the grounds that the Principal was unreasonable in exercising its power to take over the work and exclude the Contractor from the site, in breach of an implied condition of the contracts. The Court of Appeal held that Clause 44.1 should be construed as requiring the Principal to act reasonably as well as honestly in forming the opinion that the Contractor had failed to show cause to his satisfaction and thereafter in deciding whether or not to exercise the powers conferred; this derived from the ordinary implication of reasonableness, the provision for the Contractor to be given an opportunity to show cause against the exercise of the power and the provision enabling disputes to be referred to arbitration. The Court of Appeal also considered that the duty of good faith and equitable interference in the exercise of legal rights is relative to considerations of reasonableness. This case stands for the proposition that reasonableness may overlap and be indistinguishable from good faith. Accordingly, in the event of a Contractor's challenge to the reasonableness of a direction by a Principal, it is important to consider both the reasonableness of the Principal's actions and whether the Principal was acting in good faith.

Since *Renard*, good faith is not any more just implicitly used in Australia. Courts had to increasingly rule on the meaning of good faith with the help of an ever-increasing jurisprudence. Good faith has moved well beyond a vague concept of fairness[39]. In *Alcatel Australia Ltd. v Scarcella* the Court noted that a duty of good faith both in performing obligations and exercising rights, may by implication be imposed upon the parties as part of a contract. In *Bond Corporation Pty. Ltd. vs. the Western Australian Planning Commission* the good faith has been given two divergent meanings. The first is a subjective view which requires inquiry into the actual state of mind of the person concerned. The second is a objective one based on the construction of words within a given legislative context. The first meaning as to the state of mind has been viewed as being imprecise and not capable of giving rise to an enforceable obligation. In this respect, in *Elizabeth Bay Developments Pty Ltd vs. Boral Building Services Pty Ltd* the Court noted that it is difficult to regard the parties as having undertaken in 1993 to declare at a future time that they had a commitment to good faith[40]. The concept of a duty to carry on in good faith is inherently repugnant to the adversarial position of the parties. The role of good faith as a state of mind is to indicate what attitude and commitment parties exhibit to each other. Importantly are that actions or attitudes exhibited by one party on which rely the other party to make decisions. The courts should strive to give effect to the expressed agreements and expectations of those engaged in business, notwithstanding that there are areas of uncertainty and notwithstanding that particular terms have been omitted or not fully worked out. The effect of such endeavors is

[39] B. Zeller, *Good Faith - The Scarlet Pimpernel of the CISG*, http://www.cisg.law.pace. edu/cisg/ biblio/ zeller2.html.
[40] *Ibidem.*

that certainty and predictability is maintained. It can be argued that the conduct of parties is determined by their state of mind. It is well established in Australian law that equity regulates the quality of contractual performance and that performance equates to conduct.

This leads to the second meaning of good faith, that good faith is viewed as a legal concept. In *Asia Pacific Resources Pty Ltd v Forestry Tasmania* the concept of good faith as a term in law was rejected because good faith can not be a pure question of law given that good faith is incapable of abstract definition and can only be assessed as being present or absent in relation between contracting parties. In order for a concept to be applicable an abstract definition is not required all the time. Good faith can be applied if the relevant facts are known or capable of being known. As a concept, therefore, good faith is tied to known facts or practical applications. The fact is that good faith does not need to be independently defined or reduced to a rigid rule. It acquires substance from the particular events that take place and to which it is applied. Good faith can be perceived as a general principle, according to which the parties must temper the deliberate pursuit of self-interest in situations where the conscience is bound[41].

Conclusions

In Romanian law, considerable endeavors were vested in aligning Civil Code provisions related to good faith with the Principles of European Contract Law and the UNIDROIT Principles. The Romanian law raises the principle of good faith to the level of public order, to the level of public order, as the parties cannot agree to limit or exclude it. Although the Romanian Civil Code tries to maintain a climate of legal certainty by its innovating elements related to good faith, there is uncertainty in classifying an action as compatible or not with good faith, which generates a certain legal insecurity for the one who must act in good faith.

Good faith remains an open concept which is encompassed by fairness and morality, a norm whose content cannot be established in an abstract way, but which depends on the circumstances of each case. In most legal systems good faith is given a central role, whether we consider the legal or social order. From the theoretical perspective the differences from a legal system to another can be major, but what prevails is the way in which the courts, whether judicial or arbitral, appreciate and apply the concept of good faith.

Bibliography

- V. M. Ciobanu; M. Nicolae, *Noul Cod de procedura civilă. Comentat și adnotat,* volumul I, "Universul Juridic" Publishing House, Bucharest, 2013;
- Ch. Grüneberg, in *Palandt, Bürgerliches Gesetzbuch*, 72th edn, C.H. Beck Publishing House, München, 2013;
- F. A. Baias; E. Chelaru; Rodica Constantinovici; I. Macovei, *Noul Cod civil. Comentariu pe articole*, "C.H. Beck" Publishing House, Bucharest, 2012;
- D. Chirică, *O privire asupra Noului Cod civil. Titlul preliminar*, în P.R. nr. 3/2011;
- Elena Roșu, *Acțiunea civilă. Condiții de exercitare. Abuzul de drept*, "C.H. Beck" Publishing House, Bucharest, 2010;
- Jh, Swan, *Canadian Contract Law*, "LexisNexis Butterworths" Publishing House, Markham, 2006;
- Jh. McCamus, *The Law of Contracts*, "Irwin Law" Publishing House, Toronto, 2005;
- M. W. Hesselink, *The Concept of Good Faith*, "Kluwer Law International" Publishing House, Netherlands, 2004;

[41] Jane Stapleton, *Good faith in Private Law*, Current Legal Problems, Volume 52, 1999, pp. 1-36.

- J. Perilleux, *La bonne foi*, Journées louisianaises de Baton-Rouge et La Nouvelle Orléans, Paris, 1994;
- J. Herbots, *International Encyclopaedia of Law – Belgium Law of Contracts*, "Kluwer Law and Taxation" Publishing House, Netherlands, 1993.

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ROLE OF THE INTERPRETATION RESERVE IN THE CONSTITUTIONALIZATION OF ROMANIAN AND FRENCH CRIMINAL LAW
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Abstract

The interpretation reserve is the only instrument through which the criminal judge becomes an actor in the constitutionalization process of the criminal law, because although he does not rejoice from the competence of rendering decisions the on constitutionality or unconstitutionality of law, the interpretation under reserve directly refers to it, by the compulsoriness of observing the sense granted by the constitutional court.

Keywords: interpretation reserve, constituionalization, criminal law, comparate law.

Introduction

Depending on the instance of occurrence of the interpretative decision with interpretation reserve, the role of the constitutional court is altered: if the interpretation reserve occurs before the entering into force of a law, the constitutional judge is placed between the legislative elaboration of the text and its application by the law court[1]. Accordingly, the constitutional courts have a vocation in choosing and guiding the legislator's criminal policy, the direct outcome being the integration of interpretative decisions in criminal law sources.

In Romania, from the viewpoint of the legal force, the decisions issued with interpretation reserve have the same force, their compulsoriness for the future having as legal grounds Art. 147 of the Romanian Constitution.

By interpretation reserve, in France, one understands the technique through which the Constitutional Council indicates in advance how a legislative provision should be interpreted so as not to violate the Constitution[2]. In Romania, the decisions with interpretation reserve are those decisions of the Constitutional Court by which, without declaring the non-constitutionality, the Court ascertains which is the interpretation that would lead to non-constitutionality and through which one carries out the interpretation compatible with the fundamental Law[3]. Upon the moment of entering into force of the Constitution in 1958, in France, the interpretation reserve used by the constitutional judge is conceived only before the entering into force of the law, but together with the amendment of the Fundamental Law and with the introduction of the *a. posteriori* constitutional control, the technique of interpretation reserve was triggered also in the case of the crucial issue of constitutionality. Hence, the distinctions between the two states have also disappeared regarding the use of the

[1] G. Royer, "La réserve d'interprétation constitutionnelle en droit criminel" in Revue de sciences criminelles, no. 4/2008, p. 829.
[2] Decision 2 DC of June 17, 18 and 24, 1959.
[3] V. M. Ciobanu, „Considerations regarding the decisions that can be pronounced following the exercise of constitutionality control" in Dreptul, no. 5-6/1994, p. 21.

interpretation reserve, thus the Decision no. 2 of the Constitutional Council must be included in the broader sphere of interpretation reserve, in the sense that, by this use, in both types of control, one ensures legal security by discovering the advantage to declare the partial conformity of a criminal provision to the detriment of its elimination from the sphere of the legislative asset. Accordingly, both in Romania and France, there emerges a third mean of expression of the constitutional judge: besides the admission and rejection decision, there emerged the decision under interpretation reserve (the French Constitutional Council very quickly understood the use of this technique in the posterior control, aspect reflected in the 26 decisions with interpretation reserve rendered only from March 2010 to September 2011[4]).

From the perspective of French law, there are three categories of interpretation reserves[5]: neutralizing interpretation reserves, consisting in the confinement of the litigation disposition of any legal effect or in the forbiddance of interpretations that would become unconstitutional; constructive interpretation reserves that assume the addition to a law of some definitions in order to achieve conformity with the rights and freedoms guaranteed by the Constitution; directive interpretation reserves, directly referring to the authorities responsible with the application of the law, indicating the direction that has to be conferred to the legislative provision in question. The Romanian constitutional litigation department acknowledges the same categories of decisions with interpretation reserve endowed with the same final scope, nevertheless preferring a slightly distinct terminology: neutralizing decisions; additive decisions and appeal-decisions[6].

The interpretation reserve is the only instrument through which the criminal judge becomes an actor in the constitutionalization process of the criminal law, because although he does not rejoice from the competence of rendering decisions the on constitutionality or unconstitutionality of a law, the interpretation under reserve directly refers to it, by the compulsoriness of observing the sense granted by the constitutional court. Hence, the criminal judge is the receiver of the decisions issued by the constitutional court, demanding him to guarantee the constitutional application of the provision in question[7].

The interpretation Reserve in Romanian Constitutional Jurisprudence

In the constitutional jurisprudence of Romania, the interpretation reserve is emphasized in the enactment terms of the decision of the Constitutional Court by the formulation "the provisions are unconstitutional to the extent in which …", following that the subsequent part should equally provide the solution for applying in full constitutionality. Consequently, the Constitutional Court becomes an actor in the process of constitutionalization by conditioning constitutionality to a certain interpretative direction.

In the Decision no. 81 of 15 July 1994[8], pertaining to the exception of unconstitutionality of the provisions of Art.200 paragraph (1) of the Romanian Criminal Code, theRomanian Constitutional Court decided that the litigation court has not only the right, but also the obligation to interpret the Constitution in order to erradicate the discrepancy between the internal text and the European text.

Prevailing from the possibility of declaring conformity under interpretation reserve, the Constitutional Court admits in part the exception of unconstitutionality and determines that the provisions of paragraph (1) of Art. 200 Romanian Criminal Code are unconstitutional to the extent in which they to the sexual relations between adults of the same text, with mutual

[4] E. Cartier (dir.), *La QPC, le procès et ses juges. L'impact sur le procès et l'architecture juridictionnelle,* ed. Dalloz, Paris, 2013, p. 309.
[5] *Idem*, pp. 310-311.
[6] B. Selejan-Guțan, *Exception of unconstitutionality,* ed. 2, ed. C. H. Beck, Bucharest, 2010, pp. 231-233.
[7] D. Rebut, „Le juge pénal face aux exigences constitutionnelles" in *Cahiers du Conseil Constitutionnel,* no. 16 (*Dossier: le Conseil Constitutionnel et les divers branches du droit*), June 2004, article consulted on the website www.conseil-constitutionnel.fr, on November 13, 2013.
[8] Published in the Official Gazette no. 14 of January 25, 1995.

consent, which are not performed in public or which do not produce public scandal. Accordingly, the Court indirectly directs, in the enactment terms, the interpretation according to the Constitution, so that Art.200 paragraph (1) should not be fully deprived of effects; thus, on the grounds of the decisions, we admit the interpretation *per a contrario*, according to which any relations with minors or among adults, but by constraint, must be maintained under criminal repression. We considered that the interpretation reserve lead to the constitutionalization of criminal law by reconfiguring the criminal framework of offences against sex life; following this decision, the legislator realized that the interpretation granted by the Court is circumscribed to the definition of rape, so that it exonerated the sexual relations between persons of the same sex.

Through the interpretation reserve expressed in Decision no. 25 of 6 March 1996[9] regarding offences against authorities, one established the sense of application of Art.238 of the Romanian Criminal Code – *Offences against authorities,* with direct reference to the passive subject of the offence. The text of Art.238 of Romanian Criminal Code referred to Art.160 of the Romanian Criminal Code: one punished the offense brought to the detriment of one's honor, threatening, hitting or any violence acts committed in public, against one of the persons provided under Art.160 of the Romanian Criminal Code; in this last article we provide the person fulfilling an important state or public activity.

The alteration of the constitutional regime and the lack of forecast on behalf of the criminal legislator lead to the situation in which the inconsistency between the Fundamental Law and Art.238 by reference to Art.160 of Criminal Law becomes visible, accordingly the notice is grounded. The inconsistency had in view the quality of the passive subject, who was a person fulfilling an important state or public activity. The analysis of the constitutional provisions emphasized the fact that the fundamental law recognizes as social value only the state authority, not the public authority. On these grounds, the Court determined that the provisions of Art.238 of the Romanian Criminal Code remain in force only to the extent in which the incriminated facts refer to a person fulfilling an important state activity. By interpretation reserve, the Court registers in the jurisprudence catalogue a new neutralizing decision, annihilating the effect of the provision which was not updated after the exercise of the original constituent power in 1991.

The Romanian Constitutional Court expressed interpretation reserves either in the decision terms or in the exposition of grounds. An illustration where the interpretation reserve was given to ground a decision is Decision no. 19 of 8 March 1993[10], regarding the settlement of the exception of unconstitutionality of the provisions of Art.902 of Romanian Criminal Code and Art.50 paragraph (1) letter. e) of the Decree no. 244/1978. In order to avoid the lack of regulation and the consequences that could inherently result, the Court considers itself entitled to, until adopting some new regulations in this respect, to grant, to the text which are challenged before it, that interpretation that is harmonized with the Romanian Constitution.

With regard to Art.302 of the Romanian Criminal Code the text incriminates the performance, without authorization, of any acts or actions that, according to the legal provisions, are considered operations of import, export or transit. Consequently, referring to Art.25 letter c) and Art.50 paragraph 1 letter c) of the Decree no. 244/1978, establishing the following as offence: "the selling and buying of precious metals, precious and semi-precious stones, natural stones as well as intermediation of these transactions" and, reporting only to this type of operations with jewelry, to the same extent in which one is obliged to invoke exception of unconstitutionality, the Court reckons that the texts would be unconstitutional if they were interpreted further on in the way that the operations with jewelry – selling, buying, intermediation – can be conducted only by economic agents with state capital.

Thus, the Court interprets the texts in the sense that any economic agent may carry out such operations with jewelry if they are mentioned in the object of activity and the company

[9] Published in the Official Gazette no. 324 of December 4, 1996.
[10] Published in the Official Gazette no. 105 of May 24, 1993.

is licensed – provided this is so – according to law, the above mentioned texts having, under current circumstances, the role to stop those that do not possess such licenses and try to elude the special instituted regime regarding precious metals and stones, as well as other legal provisions such as tax provisions or those regulating the merchants' professional duties.

The amendment of the criminal law in Romania, by recodification, did not absolve the constitutional court to render decisions on certain provisions of the ancient criminal law. An illustration in this respect is the Decision of the Romanian Constitutional Court no. 78/2014[11] pertaining to the exception of unconstitutionality of the provisions of Art.118^2 paragraph (2) letter a) of the Romanian Criminal Code of 1969.

The object of the intimation is the measure of extended confiscation – a standard of material criminal law, which was introduced in the Romanian legislation by Law no. 63/2012 for the amendment and completion of the Romanian Criminal Code and of Law no. 286/2009 regarding the Romanian Criminal Code, published in the Official Journal no. 258/2012, a law transposing in the national legislation Art. 3 of Framework Decision 2005/212/JAI of the Council of 24 February 2005, pertaining to the confiscation of products, means and goods related to offence, published in the Official Journal of the European Union series L 68 of March 15, 2005. The analysis of the Romanian Constitutional Court has as starting point the viewpoints expressed by the authors of the exception, according to which the provisions of Art. 118^2 paragraph (2) letter a) of the Romanian Criminal Code of 1969 affect the principle of applying the more favorable criminal law and equality of citizens before the law, in the sense that it is retroactive, being discriminatingly applicable to the deeds committed under the provisions of the ancient law.

The Romanian Court ascertains that, by its effects, extended confiscation, although not conditioned by criminal responsibility, assumes an indissoluble connection with crime. As a consequence, it appears as a cause of removing a state of danger and of prevention for committing some other criminal act.

Analyzing the content of the entire regulation regarding extended confiscation of the Romanian Criminal Code, the Romanian Court ascertains that the principle of the more favorable criminal law is equally applicable to this institution.

With regard to the principle of equality before the law of the citizens, the Court ascertains that it is possible that a co-author be definitively trialed based on the ancient legislation and, as a consequence, the Court might not order the taking of the safety measure of extended confiscation, while regarding the other co-author who is still under legal proceedings, the court might inflict such a measure. Consequently, in the extent to which the more favorable criminal law would not be opposable, the latter would have discriminated regarding the aspect of the legal treatment without disposing of reasonable and objective grounds as compared to the first. In other words, the provisions regarding extended confiscation are constitutional to the extent in which they apply only to the act committed based on the new legislative solution that intervened from the moment of entering into force of Law no. 63/2012, respectively on 22 April 2012.

Regarding the criminal procedural law, the constitutional court issued an interpretation reserve in Decision no. 67 of 13 February 2003, pertaining to the exception of unconstitutionality of the provisions of Art.40 paragraph 2 of the Romanian Criminal Procedure Code[12]. The object of the exception of unconstitutionality is represented by the provisions of Art.40 paragraph 2 of the Romanian Criminal Procedure Code, which have the following content: "Gaining of quality after committing the crime does not determine the change of competence."

To support the exception of unconstitutionality, its author invoked the violation of the provisions of Art.16 paragraph (1) and of Art.69 paragraph (1) of the Constitution, which

[11] Published in the Official Gazette of Romania no. 273/2014.
[12] Published in the Official Gazetteof Romania no. 178 of March 21, 2003.

have the following content: Art.16 paragraph (1): "The citizens are equal before the law and before public authorities, without privileges and without discrimination."; Art.69 paragraph (1): "The deputy or senator cannot be detained, arrested, searched or sued, criminally or contraventionally without the consent of the Chamber he/she belongs to, after his/her hearing. The judicial competence belongs to the Supreme Court of Justice."

The Romanian Constitutional Court ascertains that the provisions of Art.40 paragraph 2 of the Romanian Criminal Procedure Code are unconstitutional to the extent in which they are understood and applied in the way that senators and deputies will be judged by other courts than the Supreme Court of Justice in the cases in which the apprehension of the court took place before the date of obtaining the mandate of parliamentarian.

The Interpretation Reserve in the French Constitutional Jurisprudence

The French Constitutional Council used the technique of interpretation reserve in criminal law for the first time in the contents of Decision no. 80-127 DC regarding the law of strengthening security and protecting the liberty of persons[13]. Although the constitutional judge does not expressly highlight that the decision also comprises an interpretation reserve, this is obvious since the law in question incriminated the acts of using any means in order to hinder or restrain the traffic of motor vehicles. The French Constitutional Council considered that this incrimination did not regard persons legally exercising the right to strike recognized by the Constitution, even though interruption of their work has the effect of disturbing or suppressing the traffic of motor vehicles. Hence, the constitutional court favorably approves the conformity with the fundamental law but without bringing prejudice to the legal right to strike; the constitutional interpretation has the aim to guarantee the balance of constitutional principles between them.

Before the French Constitutional Council there were raised both issues of the unconstitutionality of the criminal law – special part, as well as from the criminal law – general part. Consequently, Decision no. 2011 – 164 QPC of September 2011[14] has as the object the responsibility of a producer of on-line websites. The criticized provisions stated that "in case one of the offences provided under section IV of the law regarding the freedom of the press are committed by an electronic means of public communication, the manager of the publication or the co-manager will be criminally investigated as main author if the message in question was the object of a prior public communication". In this case, the author of the message will be investigated as an accomplice.

The authors of the intimation consider that the invoked provisions violate the principle of equality before the criminal law, since the manager is responsible as the author of the offence, while the proper editor of the message is considered only the accomplice, sense in which the penalty will be softer. The interpretation reserve enounced by the Constitutional Council has in view the possibility of keeping the anonymity of the one who sent the message on the internet, a case in which the criminal responsibility of the creator or administrator of a public communication website will be retained only if he was aware of the contents of the message before posting it online. Again, the constitutional judge indicates the way in which the challenged provision should be interpreted, making estimations also on the way of its application by retaining the criminal responsibility only if the subjective side of the offence is proved.

[13] Consulted on the website http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1981/80-127-dc/decision-n-80-127-dc-du-20-janvier-1981.7928.html, on April 17, 2014.

[14] Consulted on the website http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2011/2011-164-qpc/decision-n-2011-164-qpc-du-16-septembre-2011.99672.html, on April 17, 2014.

A recent illustration takes into consideration Decision no. 2014-690 DC of 13 March 2014[15], according to which the law regarding consumption was subject to constitutionality verification, via the means of an *a priori* control. From the point of view of the topic subject to analysis, we are interested only in certain provisions subject to control, respectively those referring to Art.130 of the law which amends several articles of the Consumption Code by roughening the criminal sanctions it provides. If the authors of the intimation would that the modification of sanctions has a disproportional character and could endanger the activity of enterprises.

The French Constitutional Council (CCF) assessed that through themselves, criminal sanctions have no disproportional character; however, if an administrative sanction is susceptible of combination with a criminal sanction, the proportionality principle assumes that, irrespectively of the case, all rendered sanctions should not exceed the highest quantum of one of the applied sanctions. This way, it is the competence of related administrative and legal authorities to watch for the observance of these exigencies. Thus, the French constitutional court draw attention on the ways through which the criticized provisions would become unconstitutional. If, in their essence, criminal sanctions do not reveal any reason of unconstitutionality, their application may create a violation of the principle of penalty proportionality.

The interpretation reserve was used by the French constitutional judge equally in the contents of the CCF Decision no. 96-377 DC of 16 July 1996[16], regarding the law of tightening the repressions against terrorism and prejudices of persons acting on behalf of public authorities or with attributions in the sphere of public service similar to those of legal police. The option of the French constitutional council is at least interesting, since it declares that Art.10 does not observe the French Constitution, but if the measure aims for investigations in flagrant cases, then this is the only case when the provision is in conformity with the Fundamental Law.

Article 10 brings changes to Art.706-24 of the French Criminal Procedure Code, in the way that for offences of terrorism searches, visits and monitoring can be carried out even during night time. The nature of such provisions is to prejudice individual freedom, since they do not set out an hourly schedule in which home search should be conducted, for instance. Consequently, the interpretative intervention of the constitutional judge constitutionalizes the provision because he endows it with the possibility of application only in a certain background, respectively that of flagrant.

The CCF Decision no. 2014-693 of 25 March 2014[17], regarding the law referring to geolocalization was a new subject for the constitutional court to render on some aspect of criminal law, using the technique of interpretation reserve.

The text challenged before the French Council provided that the term of 10 days in which the person subject to investigation or the assisted witness can challenge the appeal at the procedure provided under Art.230-40 begins with the date when the contents of the geolocalization operations were made aware, operations carried out as stipulated by the law. Art.230-40 sets out the conditions according to which the judge of rights and freedoms can authorize certain information not to appear in the investigation file related to installation and

[15] Consulted on the website http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2014/2014-690-dc/decision-n-2014-690-dc-du-13-mars-2014.140273.html, on April 15, 2014.

[16] Consulted on the website http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1996/96-377-dc/decision-n-96-377-dc-du-16-juillet-1996.10816.html, on April 15, 2014.

[17] Consulted on the website http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2014/2014-693-dc/decision-n-2014-693-dc-du-25-mars-2014.140345.html, on April 16, 2014.

withdrawal of the technical mean of geolocalization or the recording of localization data and of elements allowing the identification of a person.

Taking into account the complexity of the investigation related to criminality and organized delinquency, the above provisions should be interpreted only as allowing the passing of the term of 10 days before the decision of the judge of rights and liberties be made aware, formally, to the person subject to investigation or to the assisted witness.

Reference decision in the French constitutional jurisprudence, also known as *Integral veil*, decision no. 2010-613 DC[18] envisaged the reconciliation between public order and individual liberty. The articles subject to the constitutionality control provided that "nobody can, in public space, wear an outfit destined to dissimulate the appearance", except the cases in which the outfit is prescribed or authorized by legislative or regulating provisions, if it is justified by reasons of health or professional reasons, or if it is within sport practices, holiday practices or for artistic or traditional manifestations. Violation of these provisions is punished with the fine provided for second class contraventions.

The reserve of the French Constitutional Council refers to the fact that the interdiction of dissimulating appearance in public space is not meant to restrain the exercise of religious freedom in places of worship opened to the public. By this neutralizing interpretation, the Council subscribed its own jurisprudence to the conventional one and, moreover, allowed the reconciliation between the idea of freedom and public space. The constitutionalization of criminal law emerges from the fact that, by observing the decision of CCF, a safety climate is provided which derives from the observance of public order, mainly in the current background of threats of the terrorist type.

Conclusion

The interpretation reserve represents the main way for the constitutionalization of the criminal law. Mainly, because the constitutional judges, by their jurisprudence, are part of the criminal policy as they are in charge with the guidance of this kind of policy. When the interpretation reserve is formulated, the constitutional judge, Romanian or French, shows which is the constitutional sense of the legal text and provides the constitutional limits for for proper framing of the provisions of criminal law.

Bibliography:

- E. Cartier (dir.), *La QPC, le procès et ses juges. L'impact sur le procès et l'architecture juridictionnelle,* ed. Dalloz, Paris, 2013;
- P. Gaïa*, Les grandes décisions du Conseil constitutionnel*, 17e édition, ed. Dalloz, Paris, 2013;
- Bianca Selejan-Guțan, *Exception of unconstitutionality,* ed. 2, ed. C. H. Beck, Bucharest, 2010;
- G. Royer, *"La réserve d'interprétation constitutionnelle en droit criminel"* in Revue de sciences criminelles, no. 4/2008;
- D. Rebut, „Le juge pénal face aux exigences constitutionnelles" in *Cahiers du Conseil Constitutionnel,* no. 16 (*Dossier: le Conseil Constitutionnel et les divers branches du droit*), June 2004, article consulted on the website www.conseil-constitutionnel.fr, on November 13, 2013;
- V. M. Ciobanu, „Considerations regarding the decisions that can be pronounced following the exercise of constitutionality control" in Dreptul, no. 5-6/1994.

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[18] P. Gaïa*, Les grandes décisions du Conseil constitutionnel,* 17e édition, ed. Dalloz, Paris, 2013, pp. 455-461.

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ETHNICAL MINORITIES AND ISSUE OF CHANGING THE STATE TERRITORY

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Abstract:

Although, traditionally, the European Union is associated to the uniformity of the rules imposed, such as common market or unique currency, the challenge for European Union consists in finding the balance between the uniformity of economic rules and diversity involved by the multitude of traditions, cultures, ethnic groups living between its borders, diversity to be enriched more pursuant to the accession of candidate states.

Therefore, even if through time it was brought in discussion countless times, lately the problem of secession has become more and more emphatic, both in states from the European Union – Spain (Catalonia, Basque Country), Belgium (Flanders) or Great Britain (Scotland) and in other European states, like the cases of Kosovo and Crimea.

Keywords: **ethnical minorities, secession, self-determination, Kosovo, Scotland, Crimea.**

Introduction

Despite the fact that Scotland rejected, by referendum, the acquirement of independence, and the Constitutional Court of Spain suspended the effects of law and of Catalan decree related to the referendum on the independence of Catalonia called on 9 November 2014, accepting the recourse presented by the Government from Madrid, opposing to such vote, the issue of ethnical minorities, as well as the issue of modifications of state territory is current, captivating the European separatists. Such secessionist movements, who have gained momentum lately and who we meet more often, are underpinning their independence requirements on the right of self-determination of peoples, a principle that is recognized in a series of international fundamental instruments like the UN Charter, the Declaration on Principles of International Law, the Convention on Civil and Political Rights, the Final Act of Helsinki, The African Charter of Human Rights or the CSCE Charter from Paris for a New Europe; moreover, it was reaffirmed by the ICJ in the Namibia, Western Sahara and Eastern Timor cases, when it was confirmed its erga omnes character that allows people to choose their own political statute and to determine their own economic, social and cultural development.

Minority in the current context from Europe

In the historical evolution of the international law, the issue of minorities started to appear as a distinct field, before complete secularization of social and political life. Moreover, upon the crystallisation of minorities as a group, the first disputes appear – conflict situations and disputes between minorities and majority, within the developing states or between such state entities. This status existed until the incorporation of states, as well as afterwards.

The issue of defining the notion of national minority is controversial and up to present, no unanimously accepted definition was encountered. The expressions related to such definitions are often vague.

The recommendation no. 1134[1] regarding the rights of national minorities, adopted by the Council of Europe Parliamentary Assembly at 1st October 1990, defines the minorities as "distinct or separated groups, well established and defined on the territory of a state, whose members are citizens of that state and have certain religious, linguistic, cultural or other characteristics that separates them from the majority of the population".

In the meaning of recommendation no. 1177[2] regarding the rights of national minorities, adopted by the Council of Europe Parliamentary Assembly from 5th February 1992, national minorities are "citizens that share specific characteristics of cultural, linguistic and religious order" and who "could wish to get recognized and guaranteed their possibility of expressing this characteristics". It is specified that "these are the groups that share this characteristic inside the territory of a state, which are named by the international community, after WWI, minorities, without this name to imply any inferiority in any domain".

Also, within the Report of the CSCE meeting of experts on national minorities affairs, which took place in Geneva on 19th July 1991[3], it is tried a new approach to define the minorities, underlining that "not all ethnic, linguistic or religious differences necessarily lead to the creation of national minorities".

A wide definition, maybe the amplest, is provided within a document draft submitted to the Council of Europe in 1993, as Annex to the Recommendation no. 1201 of the Parliamentarian Meeting of Council[4], respectively the draft of Additional Protocol to the European Convention of Human Rights, concerning the individuals that belong to national minorities: "based on such convention, the expression of national minority designates a group of individuals within a state, who:

- Have the residence on the territory of such state and are its citizens;
- Entertain ancient, solid and durable relations with this state;
- present specific ethnical, cultural, religious or linguistic traits;
- are rather representative, although less numerous than the rest of the population of this state or a region thereof;
- they are animated by the desire to jointly maintain what forms their common identity, mainly their culture, traditions, religion and language"[5].

Some authors have tried to outline factors that make a distinction between the national and ethnical minority. One has claimed the "affective state", "the psychological dimension", "the specific connections", etc. The essential factors of differentiation would be the historical, political, economic, social, cultural and psychical factors. The totality of such factors would have been materialised in the statehood of some communities and the distinction would be that "the nationalities used to have the possibility to organise a state, using its own governing institutions, whereas the ethnical groups had no such chance or capacity".

[1] http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=15168&lang=en.
[2] http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=15211&lang=en.
[3] http://www.osce.org/hcnm/14588?download=true.
[4] http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=15235&lang=en.
[5] C. Jura, *Securitatea statelor. Privire specială asupra minorităților*, "C.H. Beck" Publishing House, Bucharest, 2013, pp. 28-29.

We notice that the "majority of ethnical groups are a consequence of emigration from one part of the world to another. Unlike such minorities, the national communities are a consequence of changing the borders and not of emigration or immigration".

We may make a distinction between the national minorities and ethnical minorities "as there is or not a state different from that where are living the citizens of such minorities and where the individuals of the same national origin constitute a majority. For instance, in Romania, the Hungarians or Germans are national minorities, whereas the gypsies are ethnical minority"[6].

According to the "Declaration of the rights of individuals belonging to national or ethnical, religious and linguistic minorities", the main rights to be enjoyed by the individuals belonging to national minorities are: the right to culture, the right to religion, the right to use the mother tongue, the right to effectively participate to the decision process concerning relevant issues for such minority, the right to incorporate own associations, to maintain contacts with the members of the group, with individuals belonging to other minorities, as well as contacts with citizens of other states to which they are connected by national, ethnical, religious or linguistic affiliation[7].

The rights that national minorities are enjoying are different rights offered to individuals that belong to those minorities and not to ethnic, religious or linguistic groups, considered per se (as such). These rights can be exercised individually, but also in common, but they do not transform in collective rights.

Regarding the minorities' right of establishing and maintaining free and peaceful relations over frontiers with individuals that are legally based in other states, specifically with those who have in common the cultural, ethnic, linguistic or religious identity or the cultural inheritance, does not concede to other states responsibilities to protect the minority groups from another state.

Ethnical diversity of Europe

In Europe, three kinds of ethnical minorities are encountered:

1. Indigenous populations encountered on the current territory of Europe before being populated by successive migrating stages.

Such a group is the *Sami* or Lappish population from Sweden, Norway and Finland, which lived a much more nomad life in the past, being subsequently forced to settle.

In order to support the maintenance of linguistic inheritance, the Scandinavian states have introduced a range of measures to support the educational system in mother tongue.

Another group would be the *Inuits* occupying a small part of Greenland Island.

2. The immigrants, who are groups that decided to leave their country of origin mainly due to political or economic reasons.

On the territory of European Union, there are two kinds of immigrants: citizens of a member state living in another state on EU territory, who, due to free circulation in the Union are not affected by discrimination or prejudices. An interesting example in this respect is Andorra, where the majority population is formed of immigrants, the majority Spanish citizenships, individuals with Andorran citizenship being in quantum of 18.4%.

The second type of immigrants is represented by groups coming from outside the European Union, either from a continent, mainly from Central and South-East Europe or from outside it:

- Turks and Kurds in Germany, Belgium;
- Algerians, Moroccans, Tunisians in France;
- Albanians, Moroccans, Slovenians, Tunisians in Italy;

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[6] V. Catana, *Drepturile aparținând minorităților naționale*, Publication of the Institute of Public Policies, Chișinău, 2002, available on (http://www.ipp.md/lib.php?l=ro&idc=171&year=&page=5).

[7] C. Jura, *op. cit.*, p. 94.

• Vietnamese, Chinese, Indians, Pakistanis in Great Britain (mainly immigrants coming from states members of Commonwealth);

• Turks, Indonesians, Moroccans in Netherlands;

• Moroccans Spain etc.

In most of the cases, such groups, mainly the non-European of Islamic religion, face the prejudices of majority population and discriminatory practices.

Discrimination is manifested by intolerance, abuse, force and a range of restrictive policies.

A special category of immigrants are the refugees. The refugees are involuntary immigrants. They are generally a minority in the country of origin, being persecuted by an oppressive regime due to the affiliation to a certain ethnical, religious, linguistic or political group. The majority of the refugees is encountered in the countries from south Europe and is coming mainly from Africa, Asia Middle East. Recently, thousands of refugees tried to escape from the borders of former Yugoslavia.

The estimated number of refugees in Europe is 2.5 million.

3. The national or historical minorities are groups ethnically different from the majority population, remained on the territory occupied by it by redefinition of borders: Basque in Spain, Hungarians in Romania, Slovakia, Sorbs in Germany, Scots in Great Britain, Germans in Alsace and Lorena (France)[8].

The existence or inexistence of a right to secession in international law

In the notice related to the secession of Quebec, the Supreme Court of Canada considered: "It is clear that international law has not specifically provided to the components of suzerain states the right to be unilaterally separated from the "parent" state. […] Considering the absence of a specific authorisation for unilateral secession, those proposing the existence of such right hold the following arguments:

a) the proposal that unilateral secession is not specifically forbidden and which is not forbidden is implicitly allowed; and

b) implicit obligation of states to acknowledge the legitimacy of secession achieved in exercising the well-determined right on international level of a people to self-determination"[9].

The international law does not include any right to unilateral secession or an express negation of such right, although the negation is implicitly deduced, to a certain extent, from exceptional situations imposed for the secession to be allowed in conformity to the right of people to self-determination, such that the secession is possible in the case of an oppressed or colonial people. However, the international law pays a great importance to territorial integrity of nation states and, in general, leaves to the internal law of the existent state, to which the secessionist entity is still part, the decision related to create or not a new state. Practically, the presumption is that secession is not in conformity to international law, and the conformity situations rely on internal law of such state, or on the right of people to self-determination.

There is no incompatibility between maintaining the territorial integrity of states and the right of a "people" to fully exercise self-determination. Another state with a government completely representing the people or peoples on their territory, on equal bases and without discrimination, and observing the principles of self-determination by internal arrangements, is entitled to protection of territorial integrity in conformity to international law.

The general state of the international law related to the right to self-determination is that this law operates within the general protection awarded to territorial integrity of "parent" state. However, there are certain situations when the right to self-determination of peoples

[8] *Politici privind minoritățile etnice în Europa*, Publicities of the Centre of Resources for Ethno-cultural diversity, available on (http://www.edrc.ro/docs/docs/caietel_minEU-RO.pdf).

[9] *Reference re Secession of Quebec*, Supreme Court of Canada, 1998, available on (http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do?r=AAAAAQAGcXVlYmVjAAAAAAE).

may be "externally" exercised, which, in this context, may be equivalent to secession: the colonial people and those under foreign occupation".

Several authors stated that a secession right would exist in the context of self-determination and in a third circumstance. Although this third circumstance was presented in several manners, the essence of proposal is that, when person is prevented from exercising in a real manner its self-determination, then it has the right, as an ultimate solution, to secession.

The right to secession appears only in conformity to the principle of self-determination of a people, in conformity to the international law, when „a people" is governed as part of a colonial empire; when a "person" is subject of foreign occupation, domination or exploitation; and, possibly, when a "person" is denied the real exercise of the right to self-determination within the state to which it belongs.

Practically, in order to apply secession, as exception to create states, two conditions have to be met:

- firstly, the population for a certain part of such state is subject to some serious breaches of human rights or other forms of oppression, on national level and, thus, it is denied the right to self-determination with the rest of the population of such state; and
- secondly, in such situation, there is no other valid option to settle the issues appeared within such state.

These two conditions are cumulative. However, the analysis of the second condition is necessary only if the first is met.

It is obvious that these circumstances do not apply in the case of minorities, because only the peoples have the right of self-determination. The application of this principle to the national minorities would be extremely dangerous, because this can easily lead to numerous disputes[10].

The difference between minorities and peoples, the sole beneficiaries of self-determination, is made by the territorial factor, which represents an essential element in the process of forming of peoples; the degree of political organization, which is reduced in the case of minorities; the dynamic of the group, which is a distinctive one – in the case of the people, its aspiration for individual existence is essential for its defining and becoming as such; in the case of minorities, the principal aim is to maintain the cultural, linguistic and religious identity within the existent political organization[11].

Therefore, we consider that unilateral secession may be regarded as being legal when: it's regarding peoples from territories which are subject to decolonization; it's allowed by the national legislation of the parent state in question; the secessionists are a people; their parent state has violated flagrantly their human rights; there are no other remedies in international or national law, if these conditions are fulfilled.

Kosovo: unique case or precedent of unilateral secession?

Kosovo is a majority Moslem province, but pro-occidental and weakly developed from an economic perspective. The region represented the centre of Serbian Empire until the middle of XIV century, and the Serbians consider Kosovo the cradle of their civilisation.

During the five centuries of ottoman occupation (after the Battle from Kosovo - Mierlei Field - from 1389, the Serbians were defeated, which represented the start of a new era for the region, that passed under the control of Ottoman Empire), the ethnical profile of province has changed. The Albanians, most of them Moslem, have become the majority.

In 1946, the province of Kosovo was integrated in the Yugoslavian Federation of the communist Iosif Broz Tito. According to the Yugoslavian Constitution from 1974, the status

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[10] C. Jura, *op.cit.*, p. 55.

[11] Irina Niță, *Conflicte etnice și soluții teritoriale. Studiu de caz: Declarația de Independență a Kosovo*, Romanian Journal of International Law, no. 6, "C.H. Beck" Publishing House, Bucharest, 2008, pp. 3-4.

of the Kosovo region was of an autonomous province[12], and in 1989 that status was abolished by Slobodan Milosevic, the former president of Yugoslavia. After the Albanese ethnics from the province have reacted violently towards the withdrawal of the autonomy, Milosevic has sent, in 1990, the Yugoslavian Army in Kosovo and has dissolved the province's parliament. In September 1990, the Albanese ethnics from Kosovo have organized a referendum through which they decided the secession from Serbia and Yugoslavia. Evidently, the results of such a referendum could not be recognized.

Faced with the firm attitude of Yugoslavian authorities (formed, beginning with 1992 from Serbia and Montenegro), the Albanese ethnics have organized a guerilla movement, attacking mostly the Serbian police forces. The tension has grown and the Serbian authorities have reacted again very harsh, forcing the Albanese inhabitants of the province to leave their homes. Albania has contributed to this situation because it has supplied the Albanese ethnic from the province with weapons. At the end of the summer of 1998, the problem of the Albanese ethnics from Kosovo, who named themselves Kosovars, has already become a humanitarian affair which draws the attention of the international community and the application of the provisions of the UN Charter and of the international law.

At the end of 1998 the Serbian authorities have launched an offensive against the Liberation Army of Kosovo (a paramilitary formation of the ethnics), which determined the implication of the international community through the means of Rambouillet talks from 1999, talks that lead to no definite solution. In March 1999, NATO launched a series of aerial bombardments over Serbia, bombardments that had had the effect they hoped, because the Serbian forces retreated from the province in 1999.

The province has been divided in sectors patrolled by the British, American, French, German, Italian and later Russian forces that formed the peacekeeping force named KFOR[13]. The Albanese refugees have begun to return in the province, and Kosovo was placed under the temporary administration of the UN, named UNMIK[14].

The tensions between Albanese ethnics and Serbians have remained high, despite the pacifying efforts from UNMIK. The 2002 elections from the province have led to the establishing of some self-governing organism under the supervision of UNMIK.

On 14th October 2003, the Serbian and Kosovar leaders meet in Vienna for the first discussions after the ending of the conflict from 1998 -1999.

In December, UN establishes a set of standards which Kosovo has to meet so that the negotiations regarding the determination of the final status could be launched in 2005.

In March 2004 are taking place the worst confrontations since the ending of the conflict in 1998 – 1999, following that in June 2004 the Council of Europe would adopt a partnership with Serbia and Montenegro that would include Kosovo. In October, President Rugova is reelected after his democratic league wins the general elections, elections that were boycotted by the Serbians from Kosovo.

In October 2005, the ambassador Kai Eide recommends is his report that the discussions regarding Kosovo should continue.

Afterward, the Secretary General of the UN Kofi Annan names Martti Athissari as a special representative for the coordination of the political process regarding the future of Kosovo province. In the same month, The Council on general matters of the EU, approves the appointment of Stefan Lehne as representative of EU in the matter concerning the Kosovo province. The European Commission publishes its first report regarding Kosovo under the Resolution 1244 of the UN.

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[12] *Cazul Kosovo: Trecut şi Viitor*, Academic Journal, Edition 6, Centre of information and documentation on NATO from Moldova, Chişinău, 2008, p.5, available on (http://nato.md/uploads/Analize%20si%20comentarii/Jurnal%20Academic/JA_nr_6.pdf).

[13] http://www.aco.nato.int/kfor.aspx.

[14] http://www.unmikonline.org/pages/default.aspx.

In February 2006 begin the discussions regarding the status of Kosovo under the auspices of the special representative of the UN, Martti Athissari.

In July 2006, in Vienna, are taking place the discussions at presidential level regarding the future of the Kosovo province, and in August, same year, the Government of Kosovo adopts a plan of action regarding the European Partnership.

On 17th February 2008, the Parliament of Kosovo has adopted a proclamation which declared Kosovo an independent and sovereign state. Also, it is affirmed the intention to respect de process stipulated in the Athissari Plan.

On 8 October 2008, the General Meeting of United Nations voted in favour of the proposal of Serbia concerning the application for a consulting notice of International Court of Justice related to the conformity to the international law of the declaration of independence of Kosovo. 77 states voted in favour of the resolution, and 6 against (Albania, Marshall Islands, Micronesia, Nauru, Palau, and United States of America). 74 states refrained and 35 refused to participate to the vote. Romania voted in favour of the resolution, with the other states members of EU which do not acknowledge the independence of Kosovo (Cyprus, Greece, Slovakia and Spain; the other members refrained). By its notice, the International Court of Justice was going to answer the question: "is the unilateral declaration of independence of provisional institutions of self-governing from Kosovo in conformity to the international law?"

In 2010, along with the consultative opinion, the ICJ concluded that the adoption of the declaration of independence from 17th February 2008, has not violated the international general law, the resolution of the Security Council 1244 (1999) or the Constitutional Frame. Therefore, the adoption of this declaration has not violated any rule of international law.

The issue acquired a new dynamics in July 2010, with the consulting notice of the International Court of Justice which decided that the unilateral declaration of independence does not contravene the norms of international law. Thus, until 13 august 2014, 108 states within ONU acknowledged the independence of Kosovo, becoming member state of IMF and World Bank.

The Occident that supported from the beginning the independence of Kosovo labelled this case as *sui generis*, and we adopt as well this opinion.

Actually, Kosovo represents something completely special, combining a range of special characteristics not held by any other secessionist region in the world:

• Kosovo was under ONU international administration for around 8 years;

• Kosovo possessed during the Constitution period 1974-1989 competences and traits equivalent to those of other federal republics from Yugoslavia; consequently it has the same right as Croatia or Macedonia to substantiate the statehood;

• the independence of Kosovo is supported on several levels by EU and NATO, except for few states from its structure;

• the act of independence of Kosovo was not declared null by the Council of Security of ONU, although some permanent members of it qualified it as illegal (Russia, China);

• there is no other solution, other than the one of independence, considering that the population of the Kosovo province is formed, over 90%, from Albanese ethnics;

• the Kosovar Albanese have become the victims of war crimes, of genocide and of a humanitarian crisis, a fact that was condemned by the international community;

In other words, the international doctrine enables the creation of new state entities when we talk about a humanitarian catastrophe which threatens the international peace and stability.

The Secession of Crimea

On the 6th May 2014, the Parliament of Crimea has adopted the Resolution no. 17-2-6/14 which provided that on 16th March 2014 a referendum regarding the secession of Crimea will take place. Programmed at 10 days from the day the resolution was issued, the referendum was characterized by a complete lack of transparency in what regards the lists of

participants, of local electoral commissions and the lack of impartial international observers. Moreover, the initiative wasn't offering to the electors the option of status quo, letting them with only two possibilities – to join the Russian Federation as a federal subject or to go back to the 1992 Crimean Constitution and to be an integrant part of Ukraine. According to reports, 96.7% of the Crimean citizens have elected to join Russia, thus taking place a unilateral secession. Subsequently, the region declared its independence and asked the Kremlin to join Russia. The referendum was recognized only by some states that have close relations with Russia, some of them even UN members (15 of them), like Armenia, Kazakhstan, Kirgizstan, Afghanistan, North Korea, Venezuela, Uganda, Nicaragua etc., but also by non-UN states like Abkhazia, South Ossetia and Nagorno-Karabakh.

In our opinion, we consider that the secession of Crimea is illegal, because the constitutional frame of Ukraine does not allow secession. In general, all political systems insist upon the legality of the secession through constitutional means. According to the Ukrainian Constitution, "the Autonomous Republic of Crimea is an integrated part of Ukraine and all the problems delegated to its authorities are resolved in the reference frame determined by de Constitution of Ukraine", and any "alteration of the territory of Ukraine shall be resolved by a Ukrainian referendum", not by a territorial one.

Another reason for which we consider illegal the secession of Crimea is that the secessionists (the Russian population of Crimea) cannot be regarded as a "people". As it follows from the Quebec case, a "people" will be governed as a "part of a colonial empire", will be the "subject of foreign subjugation, of exploitation and domination", "will be denied any right to self-determination in the frame of the state which it belongs".

And finally, we consider that there is no proof that the rights of the Russian population of Crimea were subject to a violation of human rights from the Government of Ukraine, which would allow us to be in the situation of Kosovo. The High Commissioner for National Minorities of OSCE has not found any proof of violations of the rights of the Russian speaker population during his visit in Kiev and in Crimea. Therefore, all the claims that the Russian-speaking population is submitted to violence and oppression are groundless.

Situation in Scotland

On 18th September 2014 took place the referendum for the independence of Scotland. The Scottish citizens were asked if they want their country to become independent, leaving the United Kingdom.

The issue of independence was raised in 2007 by the leader of The Scottish National Party (SNP) Alex Salmond. In that year, the SNP won the greatest number of votes, and Salmond was named Prime-Minister of Scotland. Although, he could not keep his promise, his party having won only 47 mandates, when they needed 65 for majority.

This problem was to be reopen in 2011, when SNP had the majority in the Holyrood Parliament with 69 mandates out of 129 after the elections, and the plans to organize a referendum for the independence of Scotland were announced by Salmond in May 2011.

After the insistences of Alex Salmond regarding the organization of a referendum on Scotland's independence, the British prime-minister, David Cameron, finally agrees and so, on 15th October 2012, the British and Scottish Governments sign the Edinburgh Agreement on the terms of the independence referendum, which will take place in the Fall of 2014.

On 21st March 2013, during a session of the Scottish Parliament, Alex Salmond announced the date for the referendum – 18th September 2014; the electors would have to answer to the question "Should Scotland be an independent state?", and the project of independence, forwarded on 21st March, passed in the Scottish Parliament on the 14th November 2014 and received the Royal Notice on 17th December 2013, following that on 24th March 2016 Scotland to be declared officially independent in the case the result of the referendum would be for an independent Scotland.

At the end of the most intense political campaigns ever experienced by Great Britain, the dream of the first Scottish Prime Minister, Alex Salmond, was shattered with the decision of over 55.3% per cent of Scots to be part of the United Kingdom. 2.001.926 (55.3%) Scots voted in favour of maintaining the Kingdom, whereas 1.617.989 (44.7%) voters supported the independence. For victory, 1.852.828 votes were necessary. The referendum from Scotland may be deemed a lesson of democracy given by the politicians of Great Britain to the entire world. 86.4% of the electorate participated to vote, despite the fact that they had to register in advance on voting lists.

The Scottish referendum shows us that the solution of the secession is possible with the abidance of the constitutional frame. Without the approval of Great Britain, Scotland could not secede and could not become an independent state, recognized by the international community. This referendum was possible because the Great Britain has a flexible constitutional frame, which allows it to adopt constitutional laws without modifying a written text of the Constitution, a thing that is impossible in other states of Europe, which have a rigid constitutional frame.

Conclusions:

In extreme cases of massive violations of human rights, unilateral secession, although usually not admitted in international case-law and practice, may be accepted, as was the case in Kosovo. With the recognition of Kosovo's independence, we practically witness the formation of customary law on unilateral secession in certain extreme cases. Even so, we must emphasize that this rule does not operate in favor of minorities. No regulation views the national minorities as possessing the right to self-determination. The Crimean secession is illegal and the referendum on Scottish independence was possible only with the consent of Great Britain.

Bibliography:

- C. Jura, *Securitatea statelor. Privire specială asupra minorităţilor*, "C.H. Beck" Publishing House, Bucharest, 2013;
- Năstase, C. Jura, F. Coman, *14 prelegeri de Drept Internaţional Public*, "C.H. Beck" Publishing House, Bucharest, 2012;
- Simona Galiman, *Dreptul minorităţilor naţionale la identitate etnică*, „ULIM" Publishing House, Chişinău, 2011, p. 13, available on (http://www.cnaa.md/files/theses/2012/21092/simona_galiman_abstract.pdf);
- *Cazul Kosovo: Trecut şi Viitor*, Academic Journal, Edition 6, Centre of information and documentation on NATO from Moldova, Chişinău, 2008, available on (http://nato.md/uploads/Analize%20si%20comentarii/Jurnal%20Academic/JA_nr_6.pdf);
- Irina Niţă, *Conflicte etnice şi soluţii teritoriale. Studiu de caz: Declaraţia de Independenţă a Kosovo*, Romanian Journal of International Law, no. 6, "C.H. Beck" Publishing House, Bucharest, 2008;
- S. Scăunaş, *Drept internaţional public*, Edition 2, "C.H. Beck" Publishing House, Bucharest, 2007;
- C. Jura, *Drepturile omului – drepturile minorităţilor naţionale*, "C.H. Beck" Publishing House, Bucharest, 2006;
- V. Catana, *Drepturile aparţinând minorităţilor naţionale*, Publication of the Institute of Public Policies, Chişinău, 2002, available on (http://www.ipp.md/lib.php?l=ro&idc=171&year=&page=5);
- *Reference re Secession of Quebec*, Supreme Court of Canada, 1998, available on (http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do?r=AAAAAQAGcXVlYmVjAAAAAAE);

- *Politici privind minoritățile etnice în Europa*, Publicities of the Centre of Resources for Ethnocultural diversity, available on http://www.edrc.ro/docs/docs/caietel_minEU-RO.pdf);
- http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=15168&lang=en;
- http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=15211&lang=en;
- http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=15235&lang=en;
- http://www.aco.nato.int/kfor.aspx;
- http://www.osce.org/hcnm/14588?download=true;
- http://www.unmikonline.org/pages/default.aspx.

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THE EXERCISE OF A RIGHT OR THE CARYING OUT OF AN OBLIGATION – JUSTIFIED CAUSES REINTRODUCED INTO THE NEW ROMANIAN CRIMINAL CODE

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Abstract

This study aims to analyze an old concept, namely, the exercise of a right or the performance of an obligation as one of the justified causes, reintroduced into the new Romanian Criminal Code after more than 40 years. Even having a long history of existence within the Romanian criminal codes adopted in 1864 and 1936, during the communist era, once adopted the Romanian Criminal Code in 1968, in force until 1-st of February, 2014, this justified cause had been removed. At the time, the communist legislator considered as being useless to mention it among the other causes which can remove the criminal liability. The doctrine of the time argued that a criminal fact committed when carrying out an order given by the law or the competent authority didn't meet the criteria of being a crime, because it lacks the mental element, mens rea.

The practice of nowadays demonstrated, the question under discussion is not so easy, the lack of mens rea cannot be always raised as a defense and therefore, the legislator realized the necessity of reintroducing the exercise of a right or the performance of an obligation as one of the justified causes.

Keywords: **justified causes, the exercise of a right or the performance of an obligation, the order of the law, legitimate authority, the fact imposed by the law.**

Introduction

1. The new Romanian Criminal Code, came into force since February 1, 2014 contains within the chapter dedicated to the *justified causes*, in addition to *the self-defense* and *the state of emergency* (which had been included also within the content of the previews Romanian Criminal Code, adopted in 1968, and which was in force until the above-mentioned date), there are two new categories of justified causes, *the exercise of a right or the performance of an obligation* and also, *the consent of the victim*. Throughout this article, we decided to do a short analysis of the concept of *exercise of a right or the performance of an obligation* because it has an interesting history, being included among the justified causes of some previous Romanian criminal codes before the communist era, hence the interest of the legislator to reintroduce it within the criminal provisions after more than half a century.

For a specific fact to be deemed as crime, it is necessary to meet all the legal criteria previewed by the criminal law with respect to this crime. So being, when investigating a crime, firstly must be found the elements of the crime, like *actus reus* and *mens rea*, then to analyze the possibility of existing one or more justified causes, like the *order of law and of legitimate authority* which can exclude the criminal liability[1].

[1] L. R. Popoviciu, *Criminal Law. General part (Drept penal. Partea generală)*, Bucharest, Pro Universitaria Publishing House, 2011, page 248.

2. The Romanian Criminal Code of 1864 included the *order of law and of legitimate authority* within the category of *ordered acts*, which were *inter alia*, the justified causes removing the criminal responsibility. In the legal literature of the time, have emerged two points of view on the nature of these causes[2]. Thus, as a first opinion, it was considered that *the order of law* and *the order of legitimate authority* are two distinct elements, independent each of other and therefore, but the essential condition for accused to raise this kind of defense, is to exist both of them at the time of committing the offense. It means that, if any of the two elements is missing, the act is deemed as being unjust and constitutes an offense. This point of view asserted that only these two elements combined constitute a justified cause. Therefore, imposing a law without an order coming from a legitimate authority is not enough. The other point of view appreciated that *the order of law* and *the order of a legitimate authority* are not two indispensable conditions of a single justified cause, but there are two elements supporting independently the same justified cause which thus exists when any of these two elements exists.

The two points of view are not contradicted entirely because there were situations when, to justify an act, which was itself a criminal act, it was necessary in addition to the order of law, an express order given by the legitimate authority (as example was given the fact the executioner cannot perform an execution of a person sentenced to death penalty without a order given by the competent authority and only upon a final judgment of conviction).

The paragraph no. 255 stipulated that "it does not count any crime or offense when the murder, injuries and violence were ordered by the law and ordered by the legitimate authority". Since the law treated this special case, specifically with reference only to the crimes of murder, assault and injury, the application would be restricted to these three offenses, and therefore did not constitute a general justified cause, but special.

As, the order of a legitimate legal authority did justify the offense, the problem was what happens when the superior gave an illegal order to the subordinate? Is the superior order itself enough to defend the subordinate criminal liability which by its execution had committed a crime? In answering to this question, three theories were expressed:

- The theory of *passive obedience*, according to which, the subordinate is bound to obey unconditionally the orders of his superior, having neither the right nor the duty to assess their legality otherwise overturning the discipline. The major disadvantage of this theory was that of encouraging some leaders to become despotic tyrants and that of considering the subordinate as an instrument in the hands of his superior. The subordinate was defended of the penalty, being covered by the superior responsibility;

- The liberal theory or also called *the intelligent bayonets* which asserted that the subordinate has the right and obligation to assess the lawfulness of the order given by the superior and if he found it as illegally, to refuse its fulfillment. So, the superior order does not absolve him of criminal responsibility but contrary, he is going to be responsible together with that superior who gave the order; the disadvantage of this theory is that it may undermine the institutional discipline and also the public order;

- The *intermediate theory* which combined the two previous theories and according to which, the subordinate is bound to execute the orders given by his superiors only after assessing their legality. The right and obligation of the subordinate to censor the legality of the order is three folded: whether the order is given to him by the competent authority, according with his statutory duties; whether the order satisfies the required formality; whether the order is within the subordinate's power and competences to be executed. In the case these three conditions existed, the superior's order protected the subordinate of the criminal liability, the full responsibility for the criminal facts belonging to that person who gave the order. The subordinate executing such an order, is entitled to consider it as legal because he

[2] Traian Pop, *Drept penal comparat. Parte generală*, Publishing House of the Institute of Graphic Arts "Ardealul", Cluj-Napoca, 1923, pag. 505.

knows that is not acting contrary to its obligations. It is estimated that the subordinate's ignorance or error to the legality of the order given by his superior excludes his guilt. The literature of that time distinguished between civilian and military subordinates, for first recognizing a greater capacity to appreciate the nature of orders received, more independence in the line of duty and more possibilities to refuse obedience, while the military lacked the knowledge and training necessary to assess the orders of superiors on the matters of service. However, although the order of a superior defended the military subordinate, it was not deemed as a blind instrument, the subordinate having the obligation to refuse the execution of the superior's order when it is manifestly illegal and is, obviously, aiming to commit an offense[3].

The legitimate authority were deemed the persons vested with public authority, not those exercising domestic authority (e.g. the child's father) so that, the order given by them could not be invoked as a justified cause, the both involved persons being so criminal responsible, with only one exception, when the subjected people are family members and acted following the orders of the heads of families, guardians, curators and the law protected them from liability when committing a punishable act.

3. The Romanian Criminal Code adopted in 1936 and also known as the Criminal Code of the king Charles the 2-end provided within Article no.137 that:

"It shall not be counted as an offense the fact imposed or authorized by the law, if implemented in its terms and also that fact which was committed by the competent authority, by virtue of a legal order, whether the order is given in its legal form, by the competent authority and if it is not clearly illegal.

When the execution of a legal order proved to be a crime, the superior who gave the order is criminal responsible as author of that crime as well as is the subordinate who executed the order.

The subordinate who executed the order is exempt from punishment, if he has not been able to assess the lawfulness of the order".

The term of *"the fact imposed by the law"* in the meaning of the legislature of that time, was understood that act which was ordered by the law (for example, that of a magistrate who, under the law, issues an arrest warrant which, obviously, affects the freedom of a person or of a witness who must testify even though, it might affect the dignity of a person), and the term of *"the fact authorized by the law"* meant an action that the law tolerated under certain conditions (e.g. the therapeutic abortion)[4].

Within the meaning of the above mentioned legal provision, the ability of the subordinate to justify the execution of the superior's order supposed to fulfill three conditions: the order to come from a competent authority; to be issued in the forms required by the law; the order is within the subordinate's powers and competences to be accomplished. It also asked the fulfillment of a negative requirement, that is, the order do not be, clearly, illegal.

As we can see in the last paragraph of the Article 137, the law provision had been previewed a situation of impunity where a manifestly illegal order has been carried out by the subordinate and for some *subjective reasons* (lack of education, information, experience) or some *objective reasons* (the way activity had been organized) could not make possible for him to realize the illegal character of the order or he was not allowed to assess its legality, not being possible so its censoring.

4. The Romanian Criminal Code adopted in 1968, in force until February 1, 2014, rejected the idea of *justified causes* and gave up this classic formula. It introduced a new terminology called *"causes eliminating the criminal nature of the act"* and excluded of which *the order of law* or *of the legitimate authority* and *the consent of the victim*.

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[3] *Ibidem*, pag.559

[4] Ioan Molnar, *Ordinul legii* in "The Criminal Law Review", no. 2/1997, p. 54.

The legislator[5] found that it is not necessary to explicitly enshrine *the order of law or of the order of legitimate authority* as a cause of removing the criminal nature of the act. The reason was, if a fact can be deemed as ordered by the law or through a competent authority into a specific situation, it means that fact is not an act punishable by the criminal law and therefore, no offence and no criminal liability. If the superior's order was deemed as illegal, then the provisions relating to *abuse in office* would be applicable for the person carrying out the order and the *incitement* to *abuse in office* for the person who gave the illegal order[6].

While rejecting the idea of the order of the law or of the legitimate authority as justified causes, the Romanian Criminal Code of 1968 did not mention what is going to happen and what are going to be the consequences when carrying out an illegal order. Since the order of the law had not been included among the *justified causes*, the Decree no. 367/1971 mentioned five legal case situations for using the gunshot by the authorized people and the criminal conduct of the people who did the gunshot had been analyzed according to those five legal case situations. If the *actus reus* of a person investigated for using the gunshot was in compliance with one ore more situations previewed by the Decree no. 367/1971, then he wouldn't be indicted because of the lack of the *mens rea* for that crime[7].

5. As the previews Criminal Code did not have enough legal provisions in this respect, the introduction of the Article 21, regulating the justified causes, among the provisions of the Romanian Criminal Code entered into force on February 1, 2014, proved to be welcomed. It states as following:

"It is justified the act previewed by the criminal law if it consists in the exercise of a legal right or the fulfillment of an obligation imposed by law, subject to the conditions and limitations contained therein.

It is also justified by the criminal law the act consisting in the fulfillment of an obligation imposed by the competent authority, as previewed by the law, unless it is manifestly illegal."

The current Romanian legal doctrine appreciated that the order of the law would mean that *legal provision* through which certain facts are ordered and whose failure attracts criminal liability and the area covered by the concept of *legal provision* is deemed quite broad, including laws, regulations and customary laws.

According to the new regulation above mentioned, we observe that the carrying out of an order imposed by the law can be achieved, legally, in two ways:

1) When the law directly addresses to a person or state agent and the carrying out of the order does not have to be preceded by a lawful order of a superior authority;

2) When the law itself is not enough for taking action, the law enforcement has to be preceded by an order of a higher authority, in duty to do it, and, accordingly, in the case of acting without the consent or the order of the higher authority, the justified cause is not incident and the fact is actually a crime.

Another situation, not expressly previewed by the criminal law can be the excess in carrying out the legitimate order which, normally, attracts the criminal liability of the person who acted. If the enforcement of a law, either directly or after the preliminary order of a legitimate authority, is not itself an offense under the criminal law but it overcomes the legal framework through the excess or the abuse of the person in duty with the law enforcement, committing so an offense under the criminal law, this person can not rely on the *order of law* as a *justified cause*[8].

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5 V. Dongoroz, G. Dărângă and others, *Noul cod penal şi codul penal anterior. Prezentare comparativă*, Political Publishing House, Bucharest,1968, p. 44.

6 Ion Oancea, *Drept penal, partea generală*, Didactic and Pedagogic Publishing House, Bucharest, 1971, p. 274.

7 Viorel Paşca- *Ordinul legii* in "The Criminal Law Review" no. 2/2004, p. 28.

8 Georgeta Gheorghe, *Ordinul legii şi comanda autorităţii legitime* in "The Criminal Law Review" no. 1/1998, p. 34.

The legality of an order implies that between the person ordering and that carrying out the order have to be a relationship of legitimate hierarchical subordination, meaning that there is an obligation for the subordinate to carry out the orders. It is necessary for the act to be committed within the ordered activities of a superior legitimate authority, those activities have to be within the superior's powers to give orders, and the subordinate, before carrying out the order, has to check its legal substantial and formal requirements.

The superior's order may be issued pursuant to a law, but, in some situations, it may be legally given even though is not relied on a specific legal provision. In the latter cases, if the order issued by a legitimate authority has not the legal support and the subordinate commits a crime by carrying out the order and thinking it is fully legal, the subordinate can successfully raise the defense of the order of a competent authority, as a justified cause.

6. Finally, as *the exercise of a legal right or the fulfillment of an obligation imposed by law,* entered into force very recently and the doctrine and the jurisprudence are not yet crystallized, it cannot allows us to asses the impact of its reintroduction in criminal law among the justified cause but the fact it has already its own history in Romanian criminal legislation before the communist era, has a consistent theoretical foundation and there are a lot of similar concepts in the criminal legislation of other states, makes us believe that its reintroduction into the new Romania Criminal Code is welcomed.

Bibliography

- L. R. Popoviciu, *Criminal Law. General part (Drept penal. Partea generală)*, Bucharest, Pro Universitaria Publishing House, 2011;
- V. Paşca*, Ordinul legii* in "The Criminal Law Review" no. 2/2004;
- G. Gheorghe, *Ordinul legii şi comanda autorităţii legitime* in "The Criminal Law Review" no. 1/1998;
- Molnar, *Ordinul legii* in "The Criminal Law Review", no. 2/1997;
- Oancea, *Drept penal,parte generală*, Didactic and Pedagogic Publishing House, Bucureşti, 1971;
- V. Dongoroz, G. Dărângă and others, *Noul cod penal şi codul penal anterior. Prezentare comparativă*, Political Publishing House, Bucureşti,1968;
- T. Pop, *Drept penal comparat. Partea generală*, Publishing House of the Institute of Graphic Arts "Ardealul", Cluj-Napoca, 1923.

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DOCUMENTARY FRAUD AS SEEN BY THE DOCUMENTARY FRAUD BUREAU OF THE DIRECTION OF BORDER POLICE (Part I)

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Abstract

Today, we are witnessing a globalisation and intensification which is unprecedented in the history of migratory flows in our country. These flows are now of a very complex nature as placed under criminal rule.

With this level of organisation, we are not just trying to counter illegal immigration, but fighting against criminality. In this respect, the use of forged documents or documentary fraud in general is a great boon to the activities of the clandestine networks and constitutes an excellent means of introducing illegal immigrants into Western countries.

Keywords: migratory flows, documentary fraud, illegal immigration pathways

Introduction

With respect to immigration or migratory flows, it may be useful to recall that Europe faced a considerable challenge.

Many factors lead us to think that there will be an increase in migratory pressure in the coming years and, in particular, an increase in demographic variations between now and the year 2050, according to the populations division of the UN, together with the further widening of inequalities in richness and development.

However, even if Europe needs such a migratory inflow, it goes without saying that it must ensure it is controlled and must provide itself with a balanced policy with respect to asylum and immigration.

However, this aim runs up against the reality of a significant degree of illegal immigration. It is quite rightly necessary to insist on the significance of organised networks serving illegal immigration.

Indeed, it must be acknowledged that it is not by inspection that numbers of illegals increase, but on the contrary they arise through increasing activity by these smuggling networks and their organisation which is becoming ever more structured and equipped with substantial means which provide significant support to the entry of illegal aliens.

Today, we are witnessing a globalisation and intensification which is unprecedented in the history of migratory flows in our country. These flows are now of a very complex nature as placed under criminal rule.

Since 2009, migratory pressure for illegals towards the United Kingdom has grown exponentially and France is used as a transit country. Globalisation can be measured by the thousands of miles travelled by aliens who journey to countries in which they often have no cultural, linguistic or historical ties.

With this level of organisation, we are not just trying to counter illegal immigration, but fighting against criminality. In this respect, the use of forged documents or documentary fraud in general is a great boon to the activities of the clandestine networks and constitutes an excellent means of introducing illegal immigrants into Western countries.

Thus, the transposition of Mafioso methods to the management of illegal migratory flows poses some substantial problems for the implementation of a relevant response, and means that it is necessary for there to be developments in the state departments which are responsible for providing this response, and the means that are made available to them. This is an activity giving rise to criminal[1] conduct (kidnapping, extortion, even imprisonment, etc.) which is practised with considerable logistical and technical resources.

The phenomenon of documentary fraud

It is not really possible to fully consider the phenomenon of documentary fraud without referring to the context in which it arises, that of migratory flows, and the nature of the pressure on our borders.

Migratory flows.

1.1. The organised trafficking of the population.

Considering that it was necessary, in order to fight illegal immigration networks, to have qualified investigators with national jurisdiction within a single department, the D.C.P.A.F. chose to create, in 2006, the office central pour la répression de l'immigration irrégulière et de l'emploi des étrangers sans titre (Central office against illegal immigration and illegal employment of aliens - acronym O.C.R.I.E.S.T.).

As the only central office which does not form part of the criminal investigation police, this department plays the part of privileged correspondent for the Brigades mobiles de recherche interrégionales (Inter-regional research mobile brigade) (B.M.R.I).

As international clandestine networks have little concern for borders, and put them to their own use, this means it is necessary for reinforced capacities of adaptation which must be shared by the police forces of the various States which are crossed ("source" State, "rebound or target" State).

Mastering control of migratory flows is a priority of the French Government. As a phenomenon which is by very nature international, it requires constant support and a willingness to act on the part of all of the administrative authorities and representatives of France.

- Updated description of illegal immigration networks and the newly identified networks.

Illegal immigration networks are international and in general highly structured. They defy the organisation of our traditional police forces, all the more easily as the risks run are completely out of step with the profits obtained from them. This criminal activity is undoubtedly one of the most lucrative today. It is now in the hands of true mafias. To this activity they add, in addition to the illegal labour of aliens without work permits, other offences such as prostitution, drug smuggling and money laundering.

Immigration is undertaken by the nationals of many countries. This summary, far from being exhaustive, only considers the most worrying flows connected to networks which are very efficient since they are highly structured.

It is based, within the D.C.P.A.F., by the work of the *office central pour la répression de l'immigration irrégulière et de l'emploi des étrangers sans titre* (Central office against illegal immigration and illegal employment of aliens - O.C.R.I.E.S.T.), as relayed locally by 44 research mobile brigades (B.M.R.s).

[1] Ion Suceava, Florian Coman, *Crime and international organizations*, ROMCARTEXIM Publishing, Bucharest, 2007, p. 7.

1.2. The Chinese networks

Chinese-origin immigration arises essentially from three southern provinces (Zhejiang, Fujian and Guangdong) with the destination of the European Union (particularly France), the U.S.A. and Australia.

It is particularly worrying for the French authorities for various reasons:

- it is potentially the most dangerous;
- it is always orchestrated by mafia-like networks, connected to the Triads;
- it is difficult to penetrate, with substantial barriers in language and culture;
- it is violent: the networks use a heavy hand when dealing with candidates for immigration (score-settling between networks and kidnapping of illegals, and the elimination of recalcitrant illegals).

The modus operandi

Many different transit routes have been discovered, covering air, land and sea travel.

By air, the illegals bearing suitable documents attempt direct arrival from Bangkok, sometimes indirectly arriving in the destination country by arriving in a country which is a member of the Schengen area, so as not to draw attention to themselves.

The routes have become more complicated in order to escape excessive border controls. For example, to arrive in Paris from Hong Kong, the networks will obtain a Hong Kong – Paris ticket from a European airport. Transit in these international airports means that the illegal can avoid police controls, and once arrived in Paris, controls are lighter as from a country in the Schengen area.

In general, Chinese illegals wishing to migrate to the West will arrive by plane in an Eastern European country (Czech Republic, Russia) then continue their voyage by land towards countries of the European Union, the United Kingdom in particular.

Since the beginning of 2012, there has been a particular desire amongst Chinese illegals to head for the United States[2]. For that, the networks have the illegals transit through a country in the Schengen area (especially France), and Mexico, to arrive in California over land. Recently, due to intensive American controls along the Californian border, a new route has been put into place to reach the American coast via certain Caribbean islands (the Bahamas, Cuba, and Saint-Martin).

Moreover, over the last few years the African continent has become a springboard towards the Schengen area for the Chinese networks.

Since the beginning of the year, up to 20 July 2013, border police in the airport Paris - Roissy Charles de Gaulle have proceeded with 421 procedures for non-admission for Chinese nationals using, for the majority, forged Korean and Japanese documents. They make use of their transit in France in order to enter the territory. They generally had smugglers waiting for them.

By land, the most commonly-followed route is the one which leads illegals into an Eastern European country (Poland, Russia, or Ukraine) transiting the Czech Republic, then crossing the "green border" between the Czech Republic and Germany. Since the end of 2009, a new route has appeared: Phnom Penh, Kuala Lumpur and Belgrade where the networks benefit from the logistical assistance of their embassy and of the city's Chinatown. This itinerary has been much used, with the Chinese not requiring visas for the Federal Republic of Yugoslavia due to the privileged economic relations between the two countries.

They then attain the Schengen area through countries of the former Soviet bloc, in particular via the Balkans route.

Since the beginning of 2010, it has been observed that Chinese illegals heading for the United Kingdom were increasingly using the services of couriers of other nationalities (Yugoslavs, Italians and Indians) organising grouped crossings of illegals in lorries. The vast

[2] Ioan Hurdubaie, *Guest Interpol global crime threat*, Bulletin of Information and Documentation of the Ministry of Administration and Interior no. 4/2011, p. 71-95

majority of these road trips left the Netherlands, crossed Belgium and then arrived in the UK via Zeebrugge (Belgium) or via Calais. The discovery by British immigration officials in Dover, on 19 June 2011, of 58 Chinese illegals who had died of asphyxiation in a lorry registered in the Netherlands is a tragic illustration of this modus operandi.

Some illegals make long journeys by road via Eastern Europe (Russia, Czech Republic) to countries of the European Union, on board articulated lorries, sometimes even locked in containers.

Finally, Member States of the European Union have been informed, since 2007, of Belgrade role as hub for the Chinese networks having their destination Western Europe, after transiting various Central and Eastern European countries such as Hungary. Thus, a message sent out by Italy in August 2007, via the rapid alert system of the *centre d'information, de réflexion et d'échanges en matière de franchissement des borders et d'immigration* (CIREFI - Centre for information, thought and exchange of information concerning border crossings and immigration), alerted us to the presence of 40 to 50 000 Chinese nationals in the Federal Republic of Yugoslavia who were liable to migrate to the Member States. Since the recent halt to Peking/Belgrade[3] flights, the networks now use Moscow as hub to "springboard" into Western Europe.

By sea, there are mass departures of illegals (mainly from the province of Fujian) travelling in containers, from the coasts of Southern China, heading for Australia, Japan, and the USA.

Since the beginning of 2007, this sea transport has affected the Mediterranean zone: successive landings of illegals in Pouilles, with sea convoys apparently departing from Montenegro; transports of illegal immigrants in inflatable dinghies, departing from Ceuta and Melilla (Spanish territories in Morocco).

Through the various enquiries which have been undertaken, it now appears that the Chinese illegal immigration networks are generally directed from China with the assistance of structures established in the various European countries concerned.

The networks have many accomplices among their countrymen now established in the countries which are crossed. They provide their clients with falsified and forged passports, or passports stolen blank, of nationalities which are not subject to visa requirements for France or other destinations (Japanese, Korean, Singapore). These documents may also be obtained by obliging officials (authentic passports from Senegalese offices delivered to Chinese businessmen, Honduran passports obtained after naturalisation in return for investment in the national economy in the form of payment of a sum of US$ 37,000 into an account opened with the Honduras central bank).

As it is difficult to obtain a visa pour France in Chins, the illegals pass via the diplomatic offices of Turkey or Italy but also of Eastern Europe (Poland, Bulgaria). Moreover, Belgian, Dutch and Austrian visas for the Schengen area which have been stolen blank are used by the networks as a last resort. Finally, the organisers have themselves sent letters of invitation from French companies for business trips as such documents near-systematically facilitate the issuance of visas in good form.

On the arrival of the illegal immigrants on to French territory, the passports are recovered by the network representative, and then returned to China by express courier service such as DHL, in order to recycle them. After being falsified once again, they are provided to new "clients" by the organisation.

These networks adapt very quickly and change their modus operandi as often as necessary. This, when it became difficult to obtain Schengen visas from the Greek consulate in Hong Kong, the new technique consisted in using authentic Chinese passports which had

[3] Organized Crime Investigation - The Enterprise Investigative Approech, Federal Bureau of Investigation, Budapest, 2009, p. 15-199.

been falsified by changing the photograph, to which Schengen visas, stolen blank from various European consular offices (particularly Belgian, Austrian and Greek)[4], were applied.

1.3. – The Iraq/Kurd networks

Illegal Iraqi immigration, which is very substantial in quantity, has the European Union as its final destination. It is motivated by political reasons (essentially connected to the Kurdish problem) and to economic ones.

Even though Germany, the Netherlands, the United Kingdom, and Scandinavia are target countries, France as a preferred transit country is faced with this problem to a substantial degree.

The modus operandi

In general, Iraqi illegal immigrants use the sea route from Istanbul to arrive in Greece and then Italy. Transit across France is made in light vehicles after crossing the Italian border.

Arrival by air is rare (89 non admissions at the Paris Roissy Charles de Gaulle Airport up to 20 July 2011, immediately followed by applications for political asylum).

Depending on the form of transport used, the illegals either have no documents or bear documents which are falsified by substitution of the photograph, often of Greek or Italian origin.

Iraqi immigration concerns people who generally hail from Kurdish ethnicity. It should not be forgotten that Syrians or Turks will claim that they are Kurdish in the hope of benefiting from political asylum.

This is also the case for Turkish or Syrian Kurds, as witnessed in the East Sea affair. The 910 refugees unanimously declared that they were from the region of Mossoul and were victims of the regime of Saddam Hussein. After enquiries, it turned out that only 25% were indeed from Iraq, but that the majority of them were from Syria.

The routes used

The illegals enter France via the land borders with Italy, Germany and Belgium, and arrive in the greater Paris area where the networks have lodgings. The presence of a Kurdish community which is properly and legally established in France allows the smugglers to find assistance (couriers and lodgers) among ideological sympathisers (essentially P.K.K.) or more prosaically from among those fellow countrymen who wish to make a substantial profit from this trade. Arrivals in Italy most often concerns Kurds who cannot legally be deported[5].

In September 2011, a new itinerary was discovered to be used by Kurds from Northern Iraq. Groups of Kurds met in Iran, then crossed the regions controlled by the Taliban to arrive in Libya. From there, they managed to reach Greece and then Italy by boat. After crossing the Italian peninsula, they arrived in Switzerland in order to attain Germany.

Smugglers assist them by providing them with a complete set of western clothes as well as counterfeit or falsified Italian identity documents to present on control.

From Italy, the journey is made by train to Germany. In general, the smugglers supervise the illegal immigrants but travel in separate coaches. In the event of being questioned, the illegals present themselves as applicants for asylum from Kurdistan.

From Iraq, two itineraries have been detected:

1. Iraq ⇨Iran ⇨ Turkey.
2. Iraq ⇨ Syria ⇨ Turkey.

In Turkey, a gathering of illegal immigrants, including both Iraqi Kurds and Turkish Kurds, is undertaken in Istanbul by the organisers. From there, the networks send the Kurdish illegals, whether of Iraqi or Turkish nationality, by normal or illicit sea route to Italy from the Turkish ports of Izmir and Canakkale.

[4] Europol Convention.

[5] Statement of Mr. James N. Purcell Jr., Director General of the International Organization for Migration.

The illegals then cross Italy by rail to reach the French border. They then travel up by all means of transport by one of two routes:

1. Vintimille-Calais (France) in order to reach the United Kingdom,
2. Vintimille-Strasbourg (France) in order to reach Germany.

In the Calais region, the network divides into two distinct branches: one carries Iraqi Kurds, and the other Turkish Kurds.

While the Turkish Kurd network use couriers recruited in Paris or in London from among penniless Europeans, the Iraqi Kurdish network only uses the services of their fellow countrymen.

1.4. The Pakistani networks

Pakistan is both a source country and transit country for the illegal immigration networks, which are always dominantly led by Pakistanis and whose purpose is to ensure the passage of Indians and Pakistanis to the European Union (in particular the United Kingdom) and Canada.

Modus operandi

The Pakistani networks are well structured and equipped with elaborate hosting logistics (notably including property for accommodation). Once in our territory, the illegals also benefit from support in drafting administrative applications for entry, residence or work permits. These are very active networks, but have developed little as regards their modus operandi and their destination. The United Kingdom is still the destination of preference, which will potentially allow them to go to Canada later.

Two great transit routes are to be distinguished:

1/ by the north: by air to Russia (Moscow, Saint Petersburg) or Ukraine (Kiev), then by train to Poland or the Czech Republic. Entry into the Schengen area is made to Germany by car;

2/ by the south: overland (mainly by lorry) to Turkey. From Turkey, the illegals reach Greece, by train or lorry or by sea to the Ionian Islands. Then, from the Greek ports of Patras or Igoumenitsa, they land on the Italian coast and travel up to other countries in the Schengen[6] area.

The latest routes discovered are as follows:

Sea carriage: illegal immigrants are recruited by a travel agency in Karachi (Pakistan) which provides, at a cost, documents of convenience (sailor's pass and passport with consular visa). After a first leg by air to Cairo or Algiers, they then travel to a French port by boat. Once they arrive in France, they leave the ship after remitting their savings and their documents of convenience. According to a SCTIP unit in Karachi, these false sailors come from the mountain regions of Pakistan.

In January 2012, during an investigation undertaken by the PAF (Border Police) for Pyrénées-Orientales, a new itinerary was identified which transits via Tehran, Istanbul and Athens. This network, which also takes on illegal immigrants of other nationalities, apparently then uses the sea route to arrive at the Italian coast. Finally, the railway network allows them to reach Portugal via Milan, Paris, and Barcelona. The entire journey is billed at € 5000 per
illegal immigrant.

During 2012, the Pakistani immigration department investigated a large network which was working in combination with three travel agents in Karachi. This network ferried illegals by a two-legged air route to Europe:

[6] Standard regional anti-trafficking training for police in south-eastern Europe, Edited by ICMPD, Printed by the Austrian Federal Ministry of the Interior, p. 49-52

- first of all as an Afghan, together with authentic passport, the illegal immigrant travelled to the United Arab Emirates using a non-European airline;

- then, under a Pakistani identity together with a Schengen visa which was either stolen or from a batch of documents signalled as having been stolen, the illegal immigrant would travel to Amsterdam by a KLM flight or London on British Airways. This itinerary is billed at approximately 100,000 francs (15,244.90 euros) per illegal immigrant.

The members of the organisations are specialists in the use of falsified administrative documents.

They may come from thefts, either in Pakistan (e.g. theft in Karachi, in March 2012, of 1200 Pakistani passports in the premises of the Pakistani administrative authorities) or in Europe (e.g. theft of a large number of administrative documents, passports, national identity cards, visas, and wet stamps, stolen in December 2011 from the premises of the Netherlands embassy in Luxembourg and signalled on 15 March 2012 by the Dutch police force).

The Pakistani networks therefore obtain supplies of stolen blank European documents and also benefit from the services of document forgery shops in Karachi and Islamabad.

Corruption is one of the characteristic aspects of Pakistani society: it is thus possible to obtain authentic European visas for the equivalent of 7,500 euros, obtained from dishonest consular services employees, through the travel agents.

The SCTIP units in Pakistan (Karachi and Islamabad) have reported numerous cases, since June 2009, of falsification of Schengen and British visas and issued by the consular services which are established in these two cities. These excellent forgeries are undetectable except with the use of expensive equipment which the services in charge of proceeding with checks at the borders rarely have.

Finally, over the last few years the French consulate in Islamabad and the PAF (Border Police) have observed that a number of family regoupment files were constituted on the basis of false payslips of false employment certificates from companies managed by Pakistanis or people of Pakistani origin residing in France. On examining these files, it appeared that a number of companies were fictitious or mere shells[7].

1.5. The Afghan networks

Afghanistan is undoubtedly a source country for illegal immigration. Lacking access to the sea, this enclave is surrounded to the north by Turkmenistan, Uzbekistan and Tadjikistan; to the west by Iran; to the south-east by Pakistan; to the north-east by the autonomous region of Xinjiang in China.

Afghanistan is larger than France (an area of 652,090 km2). Its population, estimated at 24,792,375 (census of 2008) is essentially agricultural, very dispersed and forms a complex ethnic mosaic, accentuated by the persistence of structures on a tribal basis and the permanence of clan organisations. Despite this great diversity, its peoples have their common points: the majority is poor and illiterate.

Since the Soviet invasion in 1979, the country has experienced a veritable haemorrhage with the emigration of some 5 million people. Since that time, Afghanistan has always been at war, by 2014.

As a result, the flow of refugees from the country has only increased. Currently, the United Nations' High Commission for Refugees (H.C.R.) consider that Afghans constitute the largest group of refugees in the world.

Transiting via Pakistan and Iran, they use any and all means to attempt to reach Australia, Cambodia, Cuba or Iceland, and naturally all of the European countries. Among the European countries the United Kingdom, via Calais, is a preferred target as it offers attractive living conditions.

[7] United Nations Protocol against the smuggling (illegal introduction) of migrants by land, sea and air, as an annex to the UN Convention against Transnational Organized Crime, 2010.

The prospect of a better life, legally inaccessible to most of them, is a determining factor in making them attempt illegal immigration. Illegals, who reach Calais, in order to cross to the United Kingdom, stay there the time necessary for their couriers to get them across the channel.

The smuggling networks gravitate around the Sangatte Red Cross centre, in Calais and in its neighbouring region. The local territorial forces of the border police, which have jurisdiction on a local level, regularly bring proceedings against these particularly prosperous networks.

In addition, said centre has become a regular theatre for violent confrontations between Kurdish and Afghani illegal immigrants who make up the majority of the thousand or so people constituting the permanent population.

Finally, the reinforced controls put into place by the sea lines and by the Channel tunnel have not quelled the desire to reach the United Kingdom in the slightest, and has had the perverse effect of increasing the risks taken by the illegals.

On 2 August 2011, 150 Afghanis began a hunger strike in the Sangatte to draw the attention of the media and the UN to their plight.

1.6. Update on Afghan illegal immigration

Since September 2008, there has been strong growth in Afghan-origin illegal immigration. This has been noted through an increase in the number of people questioned in the *département* (county) of Nord-Pas-de-Calais.

According to various sources of information, two types of network leaving from Kabul and Karachi (Pakistan) have been brought to light, each with their own modus operandi and trajectory.

II. Starting from Kabul

This network takes on illegal immigrants in order to lead them to Moscow, by air or overland (generally in lorries). For this, they have Pakistani passports which are falsified by substitution of the photograph.

From the Russian capital, they are then transported by lorry, van or car to the Netherlands where the illegal immigrants are lodged and taken care of by the couriers.

From Amsterdam the couriers, often of Surinamese or Turkish nationality, have the illegals cross via Belgium in order to reach France and attempt to cross by ferry to the United Kingdom, via the port of Calais. For this they use hired utility vehicles in order to transport groups of ten to thirty people. After boarding the ferry, the courier leaves the vehicle while the illegals, lacking any identity documents, mingle with the passengers of the ship.

Once arrived in the United Kingdom, the illegal immigrants demand political asylum under Afghan nationality. It is particularly difficult to establish the identity and nationality of these illegal immigrants, as the British authorities come up against a virtually illiterate population. Most Afghans do not know their date of birth and all claim to be born in Kabul even when they come from rural provinces.

In order to add to the confusion, Pakistani nationals play on their physical similarities in order to pass themselves off as Afghanis, thus hoping to obtain political asylum more easily.

France remains a country of transit for these illegals. To date, no structured network has been identified in France. Those Afghani illegal immigrants who are questioned in France, mostly in Calais, are awaiting passage to the United Kingdom and most of them have come from the Netherlands.

- Leaving from Pakistan (Karachi)

Organised from Karachi in Pakistan, another route is used by Afghanis who take charge of the transport of their fellow countrymen. The modus operandi is more sophisticated and itinerary complex and effective.

The Afghani illegals first undertake the voyage Karachi-Dubai (United Arab Emirates) with an Afghan passport and a return ticket in order not to raise any suspicion during border control.

Once arrived in Dubai, they are contacted by smugglers who provide them with a Pakistani passport bearing a Schengen visa obtained from certain obliging European consular services. Under their new Pakistani identity, the illegals travel to Paris on a return ticket, again not to arouse suspicion.

Once they have arrived in France, bearing a ticket for Paris-Karachi or Islamabad via London, the illegal immigrants continue their voyage and profit from the stopover in London to get rid of all identity documents and demand asylum under their Afghan identity, safe in the knowledge that they will not be deported back to their country.

Nature of the migratory pressure

2. 1. Analysis of the illegal migratory pressure on the borders of France in 2012

A global analysis of the indicators provided by DCPAF for the year 2012 reveals a fall of 5% in illegal migratory pressure on the borders of France compared to 2011. 44,815 aliens were either "not admitted" or "re-admitted" towards third countries compared to 47,002 in 1999.

6. The largest flows come from Iraq (+39.1%), Turkey (+21.4%), Morocco (-8.3%), Yugoslavia (-65.9%), Iran (+195.6%) and China (- 0.6%).

- The non-admission measures taken:

- mainly at the land borders: 30,950 compared to 36,322 (69% compared to 77, 3%);
- then the air borders: 12,540 compared to 8,962 (28% compared to 19, 1%);
- finally the sea borders: 889 compared to 1,228 (2% compared to 2, 6%).

2. 2. Analysis of the phenomenon for the first half of 2013

Despite that, the number of illegal aliens questioned by the Border Police increased substantially, going from 27,293 to 43,508 this year, i.e. a, increase of 59.4%.

Finally, 10,832 aliens found bearing forged documents were also questioned by the Border Police in 2012 compared to 9,462 in 2011, i.e. an increase of 14.5%.

Conclusions

An analysis of the indicators provided by DCPAF for the first half of 2013 reveals a global reduction of 21% in measures applied by it against aliens who did not fulfil the requirements for entry into France.

These flows mainly come from Iraq (+2.8%), Morocco (-33%), China (-1.3%), Turkey (-41%), and Mali (+139%).

On the other hand, the air borders, particularly concerned by this migratory pressure, did not record any fall (increase of 7% in placings in waiting zones).

For the land borders, for over a year now we have been witnessing a strong migratory movement starting in Italy and with the United Kingdom[8] as destination.

For the first half of 2013, 30,478 aliens were questioned, of which 17,931 said they were Afghani and 8,842 Iraqi. If this trend were to continue, the annual total of persons questioned in 2013 could attain 60,000.

Concerning the sea borders, 1,250 illegals were questioned up to the 1st half of 2013, i.e. an increase of 207% for the same reference period.

This trend may be mainly explained by the measures taken following the beaching of the cargo vessel "East Sea", on 17 February 2014.

[8] United Nations Convention against Transnational Organized Crime, 2011.

References:

- Ion Suceava, Florian Coman, *Crime and international organizations*, ROMCARTEXIM Publishing, Bucharest, 2007.
- Ioan Hurdubaie, *Guest Interpol global crime threat*, Bulletin of Information and Documentation of the Ministry of Administration and Interior no. 4/2011.
- Organized Crime Investigation - The Enterprise Investigative Approech, Federal Bureau of Investigation, Budapest, 2009.
- Europol Convention
- Statement of Mr. James N. Purcell Jr., Director General of the International Organization for Migration.
- Standard regional anti-trafficking training for police in south-eastern Europe, Edited by ICMPD, Printed by the Austrian Federal Ministry of the Interior.
- United Nations Protocol against the smuggling (illegal introduction) of migrants by land, sea and air, as an annex to the UN Convention against Transnational Organized Crime, 2010
- United Nations Convention against Transnational Organized Crime, 2011.

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THE RIGHT TO LEGAL ASSISTANCE AND REPRESENTATION – GENERAL ASPECTS

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Abstract:

The current paper wishes to generally analyze the right to legal assistance and representation, a component of the right to be defended and of the right to an equitable trial, which is regulated in internal law as well as in international law, such as the European Convention of Human Rights or the African Charter on Human and Peoples' Rights.

Keywords: legal assistance, legal representation, right to be defended, result obligations, diligence obligations.

Introduction

The right to legal assistance and representation in front of the courts, prosecution, authorities with jurisdictional activity, public notaries and judicial executors, organs of the public administration, institutions and other entities represents an important guarantee for protecting the individuals' rights and legitimate interests. This is the reason why this essential right is largely regulated within the international, European as well as national legislation.

National and international regulation of the right to legal assistance and representation

Legal assistance is obviously an important component of the right to be defended, a fundamental right protected by the Romanian Constitution, which expressly regulates that "the right to be defended is guaranteed"[1], at the same time showing that "throughout the entire trial, the parties have the right to be assisted by a lawyer, appointed by the Bar or chosen by the party"[2].

An essential component of the right to an equitable trail, a right expressly guaranteed by the European Convention on Human Rights means that "any defendant has the right to defend himself or be assisted by a chosen lawyer or, if he doesn't have the necessary means to pay a lawyer, he can be assisted by a lawyer appointed by the Bar for free, when it is in the best interest of justice to do so"[3].

A similar provision is found in the African Charter on Human and People's Rights, which states that "every person has the right to be defended, including the right to be defended by a lawyer of his own choice"[4].

Article 13 of the New Code of Civil Procedure is imperative that the right to defense is guaranteed, showing further that the parties have the right, throughout the trial, to be represented or, where appropriate, assisted according to the law. However, "parties are provided the opportunity to participate in all phases of the trial. They can ascertain the

[1] Article 24, alignment (1) of the *Romanian Constitution.*
[2] Article 24, alignment (2) of the *Romanian Constitution.*
[3] Article 6, point 3, letter c of the *European Convention on Human Rights.*
[4] Article 7, point 1, letter c of the *African Charter on Human and Peoples' Rights.*

contents of the file, propose evidence to make their defense, submit their claims in writing and orally and to exercise legal remedies under the conditions provided by law."[5]

The content of the legal assistance and representation activity

According to the provisions of the Lawyer Profession's Statute, the lawyer has the legal right to ensure assistance and legal representation for his clients in front of the courts, prosecution, authorities with jurisdictional activity, public notaries and judicial executors, organs of the public administration, institutions and other entities in order to protect and represent by specific means the rights and legitimate interest of a person.[6]

A while ago, it was stated that "a new opinion seems to become more and more significant, an opinion according to which it is necessary and even mandatory to distinguish between the activity of **arguing lawyers** (who appear quite often in court) and **consultant lawyers** (who participate in negotiations, transactions, commercial mediation)"[7].

For now, we can state that such a delimitation is somewhat achieved, in addition to a rigorous specialization of lawyers in specific branches of the law.

This delimitation is supported by the phrasing of article 3 first alignment of the Law for organizing and exercising the profession of lawyer, which, in letter a) mentions "consultation and legal complaints" and in letter b) discusses "assistance and legal representation" in front of the court and other organs of the state.

In regard to legal consultation, it was stated that "it represents a business just like any other" and "its essence is that it sells knowledge, know-how, intelligence, experience, information, relations and, most of all, solutions" which are "destined exclusively for the consumers – companies, holdings which look for certain solutions: financial optimization, general performance, certain components or assistance in acquiring other companies"[8].

As it was stated in doctrine "the right to provide legal assistance represents the substance of the lawyer's activity. It has two essential components – assistance and representation in front of the judicial organisms. The brightness of the lawyer's activity can manifest as he exercises his function, since the trial is qualified as "an extraordinary surgical act"[9]. The culminating point of this activity is the lawyer's closing argument[10], which can "provide an exceptional reputation or even fame for a lawyer"[11].

In regard to the closing argument, it was stated that "it is an act of cultural and scientific creation" and "it is conceived and prepared progressively, from the beginning of the trial, throughout the development of the trial and becomes definite around or even at the time it is delivered to the court"; also "it must be rich in content, strong and convincing, appropriate to the cause and within the limits stated by law and professional ethics"[12].

It was also believed that legal representation "is the main form of defending a person in a civil lawsuit […] because the lawyers are experienced in law and thus, they have, the necessary qualification to confront, in the name of the person they defend, all the avatars of the legal duel"; furthermore, it was stated that "lawyers benefit from a real monopoly in regard to one of the main components of the judicial duel"[13].

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[5] Article 13, alignement (3) of the *Romanian Civil Procedure Code.*
[6] See article 91 alignment (1) of the *Lawyer Profession's Statute.*
[7] Cerasela Carp, D. Panainte, *Ghidul avocatului de succes*, "All Beck" Publishing House, Bucharest, 2003, page 119.
[8] *Ibidem*, page 122.
[9] L. Matray, *Comment peut-on être avocat?* in „Avocats d'Europe", "Eugéne Wahle" Publishing House, Liége, 1977, page 13.
[10] I. Leş, *Instituţii judiciare contemporane*, "C.H. Beck" Publishing House, Bucharest, 2007, page 293.
[11] Ibidem, page 265.
[12] O. A. Stoica, *Metode şi mijloace pentru îmbunătăţirea activităţii avocatului* in Romanian Law Magazine no 8/1972, page 98.
[13] C. Murzea, E. Poenaru, *Reprezentarea în dreptul privat*, "C.H. Beck" Publishing House, Bucharest, 2007, page 118 and following.

In exercising his activity of legal assistance and representation, the lawyer will use all the means and operations allowed by law, in order to defend and protect the interest of his client.

Thus, the interest of the client is the most important, being the main reason for the lawyer's activity, which must avoid and remove:

a. the existence of a personal interest or any interest of a person close to him regarding the trial;

b. exercising his activity in order to become more appealing to clients, judges or the audience;

c. exercising the activity for complaisance;

d. the existence of any pressure of not respecting the professional secret"[14].

In regard to the nature of the obligations the lawyer assumes, these are usually diligence obligations or obligations of means, as the lawyer commits to undergo all that is necessary in order to obtain a certain result, without obligating himself to secure that result

In other words, "he must provide – all his legal knowledge, his gift and talent in order to obtain the desired result"[15].

Of course there are certain situations in which the lawyer assumes result obligations, for example when the object of the contract comprises of editing a certain legal document and so on.

Thus, as the provisions of the Lawyer's Statute describe, the lawyer "must advise his client promptly, correctly, diligently and in good faith (...)"[16]. He is basically "a first judge for the trial in which he is required to argue, as he has the obligation to point out – in regard to the specific situation – which are the rights, obligations and liabilities of the person who requires his assistance"[17].

It was stated in doctrine that "there are a series of professional relations between a lawyer and his clients, relations with a very important legal content, relations of professional ethics, thus the lawyer must have a complex role of: confidant, adviser, protector and educator of his client, all these within the limits of certain legal rules and methodologies"[18].

Also, the lawyer must be diligent in defending the liberties, rights and legitimate interests of his client, as he must abstain from exercising his duty if he feels he can't provide competent assistance and representation. However, these is an exception "in certain urgent situations, in order to save and protect the rights and interests of he client, the lawyer can assist and engage the client even if, at the moment, he has no professional competence, if by delaying the trial, the rights and interests of the client would be harmed. In these situations, the lawyer will stick to only what is reasonable necessary according to the circumstances and legal provisions"[19].

The legal assistance contract

According to the current legal provisions "the lawyer who is registered with the Bar, has the right to assist and represent any person or company, based on a contract concluded in writing, a contract which becomes of a clear date as it is registered in the general inventory registry"[20].

The contract is concluded between the lawyer, on one hand and the client or his representative, on the other hand. The necessary clauses of the legal assistance contract are

[14] Article 109, alignment (3) of the *Profession's Statute.*
[15] C. Murzea, E. Poenaru, *op. cit*., page 124 and following.
[16] Article 111 of the *Profession's Statute.*
[17] O. A. Stoica, *op. cit*., page 101.
[18] Ibidem, page 100 and following.
[19] Article 133, alignment (5) of the *Profession's Statute.*
[20] Article 29, alignment (1) of *Law no 51/1995 republished.*

expressly stated in the Profession's Statute[21]. The lawyer and the client can agree that the beneficiary of the services be a third party, provided that he accepts, even tacitly, the conclusion of the contract in the specified terms.

In regard to formal conditions, as stated above, the law states *ad probationem* that the contract is concluded in writing. The legal assistance contract can be concluded verbally as an exception, provided that it is turned into a written contract as soon as possible[22].

As for the means of concluding the contract, the most common is the conclusion of the contract while both parties are present; however we can't leave out the possibility of concluding such a contract by any means of communication if the parties are not present[23].

In the latter situation there is the problem of the date of the contract. The answer is found in the Profession's Statute, which establishes that the date of the contract is that certain date when the parties agreed upon the contract. The law states two presumptions in regard to the moment when the lawyer knew of the conclusion of the contract: the date when the contract arrived, by fax or email, at the professional headquarters of the lawyer and the date the lawyer signed as a confirmation that he received the contract.

As for the first presumption, the lawmaker stated that, if the fax transmission occurs after 19.00 hours, it is considered that the lawyer knew of it the following day.

The legal assistance contract can be concluded in the form of an engaging letter, in which the legal relations between the lawyer and the receiver of the letter will be stated, as well as the lawyer's services and his fee. This letter will be signed by the lawyer and sent to his client. "In case the client signs the letter by expressly mentioning the he accepts the content of the letter, this becomes a contract of legal assistance"[24].

There are certain atypical cases, as is the situation of legal assistance provided by the Bar, where there is no written contract between the lawyer and the client he defends; the lawyer exercises his profession based on the demand of the court, police or organs of public administration, as the lawyer is appointed by the legal assistance service which exists within the Bar where the lawyer is registered"[25].

Within the legal assistance contract, the powers which the client grants his lawyer are strictly stated. Based on this contract, the lawyer will exercise his profession by providing a power of attorney. "In lack of any contrary provisions, the lawyer must perform any act which he believes is necessary in order to achieve the interests of his client"[26].

In regard to the activities clearly stated in the legal assistance contract, this document is, by nature, a special mandate. Based on this, the lawyer has the right to conclude certain acts on behalf of his client: conservation, administration or dispositions acts.

Judicial Assistance

The party that is unable to meet the costs occasioned by supporting a trial, without thereby put in danger his own maintenance and that of his family, he may, under Article 90 of the Code of Civil Procedure, benefit for assistance according to the law on legal aid.

Legal aid includes:

- Granting exemptions, reductions, rescheduling or deferral for payment of court fees prescribed by law;

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[21] According to article 122 alignment (1) of the *Profession's Statute* "The legal assistance contract must contain the following: a) identification information of the lawyer, name, headquarters and the representative; b) identification information of the client: the legal representative, if it should be the case; c) the object of the contract which can be limited to one or more of the activities stated by article 3 of the law or it can have a general character, allowing the lawyer to undergo acts for administration and conservation of the client patrimony; d) the fee; e) certification of the client or his representative's identity; f) ways of solving any litigation between the lawyer and the client; g) signature of both parties".

[22] According to article 121, alignment (5) of the *Profession's Statute.*

[23] Article 121, alignment (2) of the *Profession's Statute.*

[24] Article 121, alignment (3) of the *Profession's Statute.*

[25] Ligia Dănilă, *Organizarea și exercitarea profesiei de avocat, "*C.H. Beck" Publishing House, Bucharest, page 64.

[26] Article 126, alignment (2) of the *Profession's Statute*.

- Defense and free assistance by a lawyer appointed by the Bar;
- Any other means provided by law[27].

With regard to legal persons, they can avail the facilities in the form of discounts, rescheduling or delays to pay court fees due to actions and applications made to the courts, under the special law conditions.

Conclusions

The paper, divided into six subsections, was designed to emphasize the importance of legal assistance and representation both in national legislation as well in the international context.

Following the introductory part, the second section was meant to put into the light the main regulations of the legal assistance and representation, regarded both from the national and international point of view. The third section was dedicated to the content of the legal assistance and representation, which is considered to be the substance of the lawyer's activity.

The fourth section – the legal assistance contract – presents the formal aspects needed to be accomplished when concluded such a contract, as well as issues connected its content.

The fifth section emphasizes the content of the judicial assistance as well as the conditions required for those who benefit of it.

Bibliography:

- European Convention of Human Rights;
- African Charter on Human and Peoples' Rights;
- Romanian Constitution;
- Romanian Civil Procedure Code;
- Law no 51/1995 republished for organizing and exercising the profession of lawyer;
- The Lawyer Profession's Statute;
- Ligia Dănilă, *Organizarea şi exercitarea profesiei de avocat, "*C.H. Beck" Publishing House, Bucharest, 2007;
- Leş, *Instituţii judiciare contemporane*, "C.H. Beck" Publishing House, Bucharest, 2007;
- C. Murzea, E. Poenaru, *Reprezentarea în dreptul privat*, "C.H. Beck" Publishing House, Bucharest, 2007;
- Cerasela Carp, Dragoş Panainte, *Ghidul avocatului de succes*, "All Beck" Publishing House, Bucharest, 2003;
- L. Matray, *Comment peut-on être avocat?*, in „Avocats d'Europe", "Eugéne Wahle" Publishing House, Liége, 1977;
- A. Stoica, Metode şi mijloace pentru îmbunătăţirea activităţii avocatului, in „Romanian Law Magazine" no. 8/1972.

[27] Article 90, alignment (2) of the *Romanian Civil Procedure Code*.

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INVOLVING OLDER PEOPLE AFTER RETIREMENT IN SOCIETY AND FAMILY

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Abstract:

In recent years sociologists believed that for individuals withdraw from active life was an event with exclusively negative consequences, recent research has shown that especially when seniors are in good condition and have adequate income they feel satisfied with the changes of retirement. In some fields (education, medicine) they can continue their work a few years in the private sector.

In the society we live competence should be a key factor that makes people to be open or not to social change and not to age discrimination. Currently, to biological and psychological aging are added social aging that leads the individual to social exclusion, because, unfortunately, old age often came to be associated by others, with the disease, impotence, conservatism, lack of discernment, irritability and dependence on others.

Older people are often treated with contempt and looked that overall they represent a wealth of society.

Often society associated aging with loss of sensory capacity, with changes in mobility and retirement; however, some researchers have shown that for most older people, these changes are not so burdensome, nor so obvious as one might imagine.

Keywords*:* active life, change, discrimination, degree of competence, social aging, retirement, addiction, contempt.

The significance of social problems is neither clear nor obvious to all people living in a country. From this point of view, some individuals may feel that this is a harmful or undesirable condition, but other will appreciate that this is a benefit to society. Such is the paradigm of retirement; it is a recognized social and legal problem but also supports extensive debate on the need for retirement from older age or younger, usefulness of those people or their exclusion from the labor market and their adaptability to new social conditions of family, friends and former coworkers. Interpretation of this social problem, thus involving different perspectives, even conflicting because some consider a solution for reducing unemployment and creating new jobs while others consider it a social problem for both retirees and those who take their place and are deprived of experiences.

The event most often associated with old age is retirement period or period of time when the individual retires from active professional life. Retirement brings many changes in the individual's life some with negative character and other with positive character. For people who have acquired a certain routine of life the effects of retirement can be felt more severely than those who have not activated permanently in the same professional field. No matter how they are perceived in society, retirees still feel useless, stigmatized, discriminated against and removed from society.

Therefore, for a better assessment it should be given the response for two questions:

- Who defines this social problem?

- What criteria are used to define this?

The answer is for both points of view that changes over time as any social problem is subjected to the processes of social change. The answer to the first question related to retirement pathology at the second one concerns the theories of aging.

- **Pathology of retirement**

Always either for women or men, retirement from activity is a turning point in the existence of individual, a stress that can accelerate pre-existing illnesses, generate more and ultimately could damage the individual's mental state, so its defined a pathology of withdrawal, a "disease of retirement"[1], a real morbid entity. There are currently two trends, both pros and cons, first seeks the biological and social potential of the elder and second follows the limit age of retirement, for releasing jobs needed to younger generations.

To view the first trend we can say that people who have had extra-concerns, maintain a better social balance. So for people who are allowed by profession, to continue the activity beyond retirement age (people of culture, art, science). For men the retirement stress is higher, worse than women, having also domestic concerns. Men have often a neurosis retirement, which may include a psychic death[2], professional death. The attitude towards those who are to be retired should be individual because each individual is unique in his own way. Existing reactions are balanced, optimistic and pessimistic, even catastrophic. Retirement signifies loss statuses, roles and personal dignity. The most outstanding female problems before retirement age related, concur with climacteric period.

Other important factors worthy taken into account are profession and urban or rural environment. Therefore in rural areas, the shock is not serious because cessation is not complete and sudden. Very active people, especially those in urban areas, if they do not find other interests and activities, supports hard retirement. This is why preventing pathology of retirement must be made in advance through courses of pre-retirement integration in communities work where persons that will retire will integrate more easily. Psychological preparation is essential because it is essential to combat the feeling of hopelessness. The solutions are:

- Growing physical movement and exercise intellectual
- Organizing free time
- Possibility of integration in community activities, cultural, sports, household, craft.

So the answer to the question of **who defines this social problem?** - After we showed that pathology of retirement leads within each habitat of the retirees because it has different reactions and ways of integration and acceptance of the new status also different. Changes are on two levels:

- **Changes in their family status:**

a. children leaving the house where they lived with their parents;
b. restricting housing conditions, possibly moving house;
c. leaving their home to live with one child;
d. sometimes conflicting relations between generations (misunderstandings own children or grandchildren);
e. conflict situations between partners marital status negatively influences behavior pensioner;
f. death of a partner and loneliness;
g. material reduction in revenue;

[1]Apahideanu Octavian,(2001) Social assistance for elderly people, Publisher Eftimie Murgu, Resita,p.88
[2] Balasa, Ana, Health(1997) - essential component of quality of life of the elderly, Quality of Life, Romanian Academy Publishing House, Bucharest, Year 18, No. 3-4, 2007, page 62.Boudon, Raymond, Treaty of sociology, Humanitas, Bucharest,p.62

h. sometimes obliged to accept a move to a care institution for the elderly.

- **Change in employment status**

- Loss of social position, the financial situation or prestige;
- Lack of motivation to live.

- **Theories of aging:**There are two categories:

A. Genetic theories[3]:

Gene theory argues that the body has one or more genes that become active aging to with age and decrease the survivability of the organism.

Researchers have found two such genes responsible for some period of youth and others that determine functional decline and structural degradation of the genes. This certain types of genes give rise to two theories;

- **The error theory** argues that in time may occur proteins that leads to altered protein dysfunctional cells, i.e with time in DNA synthesis accurs errors that may affect biological function.
- **The theory of planned** or biological clock theory which assumes that there is a specific store genetic information about the life of the cells of the body or the whole body.

B . Non-genetic theories[4]: it is assumed that there are 3 kinds of non-genetic theories:

- **Immunological theory**

Claims that the body has cells that are able to distinguish the self from nonself or otherwise modified by the appearance of the cells, the body's own cells fight modified cells.

The elderly increased frequency of autoimmune diseases: rheumatoid arthritis, thyroiditis and growing infections by lowering the body's resistance.

- **Theory of connective tissue**

Connective tissue containing collagen, elastin and pseudo-elastin. The amount of collagen decreases with age, which plays an important role in tissue elasticity. Due to aging tissue dehydration elastin calcification occurs in the elderly and this calcification may occur in the heart valves, major blood vessels, the epicardium and endocardium. From them appears a series of manifestations of dehydration and calcification:

- skin is less elastic and drier, thus becoming unsightly;
- tendons get dried and may be easily broken, for this reason frequently appears fracture;
- teeth become vulnerable and fall;
- artery walls become less elastic even to stiffness with the risk to tearing, there are so many strokes;
- gastro-intestinal tract leading to loss of elasticity decreased mobility → constipation.

- **The theory of free radicals**

Argues that there is a free radical with a momentary existence and can react with other substances leading to cell destruction that is located in.

The answer to the second question, what criteria are used in this definition? - Depends on the physical and psychological changes specific to third age but are very difficult supported by many young people and older people.

- **Statistics and interpretations in paradigm of retirement**

The data presented in this paper are taken from statistical documents and analyzes of research conducted at the Institute for Quality of Life Research and the National Institute of

[3] Bogdan Constantin,(1992),Elements of geriatric practice, Medical Publishing House, Bucharest, p.104
[4]Idem, p.109

Statistics of ***Romania***[5]***,*** and from Eurobarometer[6] - studies based on data from national surveys organized and published by EUROSTAT.

Studies in this area and the many problems it generates the retirement have led people to move the sample answers that individuals are willing to leave the labor market in old age against speculations that the answers would be totally different. In **Romania**[7] at a rate of **40.3%** respondents **agree to retire later** because it scares them that are inactive socially and revenues are decreasing than that they are going to work at an older age.

In all EU countries the population agreed that approaching retirement is as above and Romania was allied to the countries in the European Union. Although they fear diseases that they will be dependent on a precarious financial situation and of other family members are making individuals to want a later retirement. Obviously is the desire of retirement people to be socially active and independent.

Proposals

By respecting these rights, seniors can remain active for longer in society and benefit from a healthier lifestyle and dignity.

On the other hand, the retired doesn't mean the lack of activity. Many of those who retire take care of others (most often parents, partners or grandchildren) or volunteer - work much less visible, often neglected in our society. We must not forget that the return to simple things, everyone needs to be loved, to find alternatives to inactivity of retirement is part of everyday life.

Develop strategies to promote active aging and solidarity between generations will be intense in the period 2010-2020, remaining one of the main themes work on the EU agenda. In many EU countries already are programs adapted to developed professional skills held by older people[8] to be easily integrated into the labor market or to remain active longer. Perhaps the secret of this active aging is solidarity between generations, as a society with more elderly people should not be a burden but should be seen as a way for young people to build on the capacity, power and useful work experience of older people on one hand and the way to feel active in the society in which they belon

References

1. Romanian Statistical Yearbook, 2010.
2. Apahideanu Octavian, Social assistance for elderly people, Publisher Eftimie Murgu, Resita, 2001
3. Bodog Simona Ioana, Social protection of the elderly, Publisher University Oradea, Oradea, 2009.
4. Bogdan Constantin, Elements of geriatric practice, Medical Publishing House, Bucharest, 1992.
5. Bogdan Constantin, Abuse and violence against older persons in Zamfir, Elena, Badescu, Elijah, Zamfir, Catalin (coordinators), Status Romanian society after 10 years of transition, Expert Publishing House, Bucharest, 2000.

[5] John Mărginean,(2011) "Quality of Life in Romania 2010" Naţiional Institute for Economic Research, Research Institute for Quality of Life, Institute Kiriţescu Costin, p.192

[6] "Social Report IRQL after 20 years: Options for Romania", Romanian Academy, National Institute of Economic Research, Research Institute for Quality of Life, 2010,p.64

[7] National Council for the Elderly, report on its activities in 2010, http://www.cnpv.ro/raport_2010.php, accesed 27.06.2014

[8] "The new European strategy for growth and employment (2020): objectives, instruments for monitoring the implementation, the institutional resources and implementing rules," Romanian European Institute, Project SPOS 2010-Strategy and Policy Studies, p.33

6. Balasa, Ana, Health - essential component of quality of life of the elderly, Quality of Life, Romanian Academy Publishing House, Bucharest, Year 18, No. 3-4, 2007, page 62. Boudon, Raymond, Treaty of sociology, Humanitas, Bucharest, 1997.

7. Catalin Zamfir, Simona Stanescu, Cosmin Briciu "Social inclusion policies in the economic crisis", Edtura Expert;

8. "Green Paper - Towards European pension systems adequate, sustainable and safe", European Commission, Brussels, 7.7.2010COM (2010) 365final

9. Cernescu, trailers, Sociology silver, Beladi Publishing House, Craiova, 2004.

10. Ciocodeica, Basil, Demography and Sociology population, Universitas Publishing House, Petrosani, 2007.

11. Cojocaru, Stefan, Drafting, Publishing Expert Projects, Iaşi, 2003

12. European Commission Report Active Ageing, September - November 2011 Published: January 2012 Special Eurobarometer 378.

13. European Commission, A Statistical portrait of the European Union in 2012, Active aging and Solidarity Between Generations, Eurostat - Edition 2012.

14. National Council for the Elderly, report on its activities in 2010, http://www.cnpv.ro/raport_2010.php

15. "Coordinates of living in România. Incoms and consumption, 2009," National Institute of Statistics, 2010;

16. "The living conditions of the population in Romania, 2009," National Institute of Statistics, 2010;

17. Cosmina-Elena Pop, "The health of the population of Romania in the European context, an approach in terms of quality of life" Quality of Life Magazine nr.3-4 / 2010, Romanian Academy Research Institute for Quality of Life;

18. "Dimensions of social inclusion in Romania", National Institute of Statistics, 2010;

19. Dragomir, Manuela, Ghelase, Mugurel, Dinescu, Sorin, S n Public Dad: demographic and epidemiological Publishing medical university Craiova, 2005.

20. Dumitra S, Hannibal, Human Development, Publishing Foundation tert take Axis, MUNICIPALITY, 2006.

21. Durkheim, Emile, (translated by Dan Lungu) The rules of sociological method, Polirom, MUNICIPALITY, 2002

22. "EPC-SPC Joint Report on Pensions - Country profiles", Council of the European Union, Brussels, 11 November 2010

23. "Expectations of European Citizens regarding the social reality in 20 years' time", Analytical Report, May, 2008, Flash Eurobarometer 227 - The Gallup Organization;

24. Girleanu AND oitu, Daniela, V Third Age Publishing European Institute, MUNICIPALITY, 2006.

25. Bridging Ghe u, Basil, Demographic decline and the future population tert take Rom nia, an overview of the population in 2007 ţ take Rom nia i n the 21st century, Alpha Publishing CDM Buz U, 2007.

26. Ghetau Vasile, How many retired person could have ROMANIA in 2030 ?, Review

27. SOCIAL ASSISTANCE year X, no. 3/2011, p. 115-136.

28. "Health at a Glance - Europe 2010", Organisation for Economic Cooperation and Development (OECD);

29. "Health and Long-Term Care in the European Union" registration period: May - June 2007 publication: December 2007 Special Eurobarometer 283 / Wave 67.3, requested by the Directorate-General for Employment, Social Policy and E Galician Opportunities and coordinated by Directorate General for Communication

30. John Mărginean, "Quality of Life in Romania 2010" Naţiional Institute for Economic Research, Research Institute for Quality of Life, Institute Kirițescu Costin, 2011;

31. LUCUTA, Gregory, Radulescu, Sorin, Quality of life and social indicators: Theory, method, research Luminales Publishing, Bucharest, 2000.

32. Marina, Lucian, Staying in society EMIA, Deva, 2003.

33. "Maintaining prosperity in year aging society", Policy Brief, Organisation for Economic Co-operation and Development (OECD);

34. "Mortality, 2009", National Institute of Statistics, 2010;

35. "The new European strategy for growth and employment (2020): objectives, instruments for monitoring the implementation, the institutional resources and implementing rules," Romanian European Institute, Project SPOS 2010-Strategy and Policy Studies;

36. "Romania's population at July 1, 2010", National Institute of Statistics, 2010;

37. "Report on social inclusion in Romania, General, 2009," Ministry of Work, Family and Social Protection Social Inclusion Programs -Direction;

38. "Social Report IRQL after 20 years: Options for Romania", Romanian Academy, National Institute of Economic Research, Research Institute for Quality of Life, 2010;

39. Radulescu, Sorin M, sociology social problems of the elderly, Lumina Lex, Bucharest, 1999 Schemes and pension projections in the EU-27 Member States, 2008-2060 ", Economic Policy Committee and the Directorate General for Employment, Policy Galicia's Social and Opportunities;

40. "Life expectancy in Romania, in 2009", National Institute of Statistics, 2010;

41. "The 2009 Ageing Report: Economic and Budgetary projections for the EU-27 Member States (2008-2060)," Economic and Financial Affairs, Directorate General, European Commission;

42. "Vieillir outstanding actif en-Cadre d'orientation" Contribution de l'Organisation of Sant é world è à Deux me the world's elements, é des Nations Unies sur le Vieillissement, Madrid, Espagne, 2002;

43. http://translate.google.ro/translate?hl=ro&sl=en&tl=ro&u=http%3A%2F%2Fen.wikipedia.org%2Fwiki%2F&anno=2 - For GDP per capita, expressed in comparable prices relative to the EU average (EU-27);

44. http://esa.un.org/unpp- projection data on population by sex and age and projected life expectancy by gender, the European Union, during 2020-2050;

45. http: // www.cnpas.org - Single num ber of pensioners and the pensions, the retirement category;

46. http://www.2010againstpoverty.eu/about/topicofmonth.html?langid=en - for chapter protection social roduction;

47. http://www.cadranpolitic.ro/?p=168 -for pension tax

48. http://ec.europa.eu/employment_social/missoc/db/public/compareTables.do?year=20090701&lang=en - Minimum pension for the limit of V RST

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ELECTORAL OFFENCES AFTER THE ENTRANCE INTO FORCE OF THE NEW CRIMINAL CODE

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Abstract

The entrance into force of the new Criminal Code – namely of the Law No 286/2009 – on the 1st of February 2014 has brought a series of modifications in the constitutive content of the offences stated by the old Criminal Code, also introducing some new ones. Also, this new legislative document took over a series of offences stated, until its entrance into force, by many special laws, grouping them in its content. Under this scope was registered the introduction in the new Criminal Code of the electoral offences – offences which until the 1st of February 2014 were stated by the special laws to which we shall refer in this paper.

Keywords: offence, criminal code, electorate, elections.

Introduction

The new Criminal Code (Law No 286/2009[1]) states in 7 articles of its Title 9 of the special part, the electoral offences. Due to the fact that the offences stated by the new Criminal Code were found, under the former legislation, in several special laws, the actual transposition complies with the conception of the Romanian legislator to, first of all, group them, institutionally, in the same legislative document, an organic law, and second of all, in his intent to remove the references to texts, which were by themselves offences, to others, also offences, but which contributed to the firsts' constitutive content, and third, to remove certain discrepancies emphasized by jurisprudence and literature (mentioning here the offence of corrupting the voters stated by Art 386 of the new Criminal Code - instant offence by definition, to which the previous legislation sanctioned the attempt). Grouping the electoral offences within the same title of the special part of the new Criminal Code was made considering their judicial object, given by the social relations protected by the law with the occasion of different elections or referendums, whose result must reflect the public trust in these procedures.

The analysis of electoral offences

According to the existent legislation under the empire of the old Criminal Code[2], the electoral offences were stated by special laws, namely the Law No 67/2004[3] for the election of

[1] Published in the Official Gazette of Romania, Part 1, No 510/24 July 2009.
[2] Republished in the Official Gazette of Romania, Part 1, No 65/16 April 1997.

local public administration authorities, Law No 3/2000[4]concerning the Organization of the Referendum, Law No 35/2008[5]for the election of the Chamber of Deputies and the Senate and for the modification and amendment of the Law No 67/2004 for the election of local public administration authorities, of the Law No 215/2001[6] of local public administration and of the Law No 393/2004 on the Statute of local elected officials, which repealed the Law No 373/2004 for the election of the Chamber of Deputies and the Senate (Art 76 of the Law No 35/2008), Law No 370/3004[7] for the election of the Romanian President.

Though it was intended the removal of all parallelisms existent within the legislation, as mentioned by the Explanatory Memorandum to the draft of the New Criminal Code[8], this was not completely achieved, while, as an example, Art. 57-62 of the Law No 370/2004 on the election of the President of Romania, state the actions considered by the legislator as offences to this normative document. Prior to the entrance into force of the new Criminal Code, Art. 27 of the Law No 370/2004, in its older form, made references to the incriminatory texts of the law for the election of the Chamber of Deputies and the Senate, as the latter one existed in 2004[9].

In fact, a simple analysis of the texts reveal that these offences are exactly the ones stated by Art. 385-391 of the new Criminal Code, except the offence stated by Art. 388, namely the electronic vote fraud. From this point of view, by the fact that the updated text of the Law No. 370/2004 is in force starting with 13 February 2014, the non-inclusion in this normative act of the electronic vote fraud could lead to the conclusion that this offence could not be performed during the election of the Romanian President, which would be totally wrong. Anyway, this gap in the legislature, if we look at it this way, is supplied by the new Criminal Code's provision which incriminates as such the printing and use of false access data, the fraudulent access of the electronic vote system or for falsification by any means of the electronic ballots.

Taken together, the actions, alternative in some cases, that represent the material elements of different electoral offences, cover the large area of the offences which may occur during the electoral procedures. It is the mean by which the Romanian legislator aimed to ensure a higher stability of the texts inserted as offences in the organic law, represented here by the new Criminal Code, and a more appropriate systematization of them in this area, the authors of the Explanatory Memorandum to the draft of the New Criminal Code mentioning a restructuration of certain incriminations from the previous legislation, in order to achieve a fairer legal individualization.

Although it was subjected to a public debate since 2010, the draft of the Electoral Code formed by the Permanent Electoral Authority, to sketch a draft law in this meaning, did not succeed. Eventually, the model desired by the Ministry of Justice to create a unitary electoral legislation within the new Criminal Code, which stated the electoral offencesprevailed.

Despite the fact that numerous critics in this area, starting from the realities ascertained and communicated to the media by the Electoral Authority, claimed the need for tougher sanctions for electoral offences by increasing the penalties, the actual regulation of the new Criminal Code respects the policy of the bearings of the punishment amounts for the purpose of providing easier penalties than the ones stated by the old regulations. Though the

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[3] Republished in the Official Gazette of Romania, Part 1, No 333/17 May 2007, updated based on the modifying normative acts, published in the Official Gazette of Romania, Part 1, until 24 June 2011, by the substantial modification inserted by Law No 35/2008.

[4] Normative act updated based on the modifying normative acts published in the Official Gazette of Romania, Part 1, until 23 August 2012.

[5] Published in the Official Gazette of Romania, Part 1, No 196/13 March 2008.

[6] Republished in the Official Gazette of Romania, Part 1, No 123/20 February 2007.

[7] Republished in the Official Gazette of Romania, Part 1, No 650/12 February 2011.

[8] As it is displayed on the website www.just.ro.

[9] Law No 373/2004 repealed by Art 76 of the Law No 38/2008.

general bearing of sanctioning is from 6 month to 3 years, certain electoral offences are punished more severely, by increasing the special minimum to 1 year, but also by stating another bearing, that from 2 to 7 years, by the latter one the legislator aiming to inform the participants in different electoral proceedings about how important the incriminated norm is for the social relations under protection.

Exempli gratia, the offences of hindering the right to perform the electoral rights and of falsifying electoral documents and recordings have aggravated forms punished by imprisonment from 2 to 7 years. So is the *assault, by any means, of the polling station and the introduction or usage of software altering the recording or summing up of the results from the polling stations or determines the allocation of mandates outside the law*.

Revealing the importance of the social relations protected by these offences, the Romanian legislator stated, for most of them, the accessory and complementary penalty of prohibition of certain rights. Thus, the offences of *hindering the right to perform the electoral rights*, stated by Art 385, of *corrupting the voters*, stated by Art. 386, of *vote fraud*, stated by Art. 387, of *violating the confidentiality of the vote*, stated by Art. 389, of *non-complying with the regime of the ballot box*, stated by Art. 390 and of *falsifying electoral documents and recordings*, stated by Art. 391, state in their simple formor in different aggravated forms the penalty of the *prohibition of certain rights*, which must be ordered for the active subjects of these electoral offences.

Also, with references to the sanctioning regime, Title IX of the new Criminal Code states two situations which are punishable by fine, as the simple form of the offence of violating the confidentiality of the ballot box, or that of the alteration of the fine with imprisonment, as mentioned by Art. 387 of the new Criminal Code, the offence of vote fraud.

We were previously referring to the fact that the attempt to electoral offences is punishable. Title IX knows only one exception, a single offence, for which the legislator did not sanctioned the attempt. We are talking about the offence of corrupting the voters, stated by Art. 386 of the new Criminal Code. According to this, the material element of the offence is achieved by an alternative action of offering money, different goods or favors, with the well determined purpose of corrupting the voter to vote or not with a certain candidate, according to his inner will. In the initial form of the new Criminal Code's project, the text included, as material element, the action to promise money, goods or favors to those who voted according to the active subject's interest. This aspect was also found in Art. 109 Para 1 of the Law No. 67/2004, which, unlike the fact that it specifically referred to the "promise" it determined, in time, the period in which the offence was achievable, namely during the campaign, and, due to the fact that it was a special law, it also mentioned the positions ran.

The legislator preferred to remove from the constitutive content of the offence also the "promise" of the things mentioned, as well as it removed the period of time, being limited only to the action of offering. From this point of view it is noticed that the attempt to this offence becomes impossible, since the offence itself is instantaneous, with an anticipated consumption, not being susceptible of this form of the offence.

Also regarding the constitutive content of this offence, there have been and shall be pertinent analysis and comments, amended by the jurisprudence, concerning the second paragraph of the offence of *corrupting the voters*. This is because the judicial area has proved that the offence stated by Art. 386 of the new Criminal Code is widely spread during elections. We must mention here that the text states that are out of the category of goods listed by Art. 1 symbolic goods, emblazoned with the insignia of a political group. The authors of the new Criminal Code's project chose to maintain the same wording and not to simply enumerate such goods that shall exceed the enforcement of the criminal law on the ground that such process would be impossible, a possible list being unable to include all the symbolic goods.

Different political groups have requested the Central Electoral Office, in the time of the old Criminal Code, to interfere in the meaning of clarifying the wording stated by the

judicial norm, to identify the goods to be offered for voters without considering them *electoral bribe*. This was possible due to the fact that Law No. 35/2008 for the election of the Chamber of Deputies and the Senate and for the modification of the Law No. 67/2004 for the election of local public administration authorities, of the Law No. 215/2001 on local public administration and of the Law No. 393/2004 concerning the statute of the local elected officials did not "explicitly" defined the symbolic goods left outside the area of those considered to be electoral bribe.

Of course that at the request to specifically and exclusively enumerate these goods, as well as to point the maximum value that each of them must have, the Central Electoral Office considered that it could not proceed in this respect, being limited to make a specific reference to the law. Then, when faced with specific case files, it is the attribution of the judicial bodies to interpret the legislator's will, and, depending on the case, to appreciate if the goods used by different candidates fall within the notion of symbolic goods or exceed it.

Equally true is the fact that, during campaigns, the Central Electoral Office has faced different requests to interpret the criminal law, submitted by the territorial electoral offices, but referred to certain categories of goods.

Also, a specific analysis, in a case which invests the judicial bodies in this regard, can be made by considering Art. 55 Para 4-5 of the Law No. 35/2008, as were stated prior to the entry into force of the new Criminal Code, inserted by a Government ordinance. Thus, Para 4 stated the fact that were not included in the category of goods stated by Para 1, which could fall under the incidence of the criminal law,*propaganda materials and objects, such as posters, flyers, postcards, calendars, writing books, clutch pencils, lighters, matches, insignias, badges, DVDs, pennants, flags, mugs, bags, t-shirts, caps, scarves, vests, fezzes, gloves, capes, jackets imprinted with the electoral insignia of political groups or candidates in elections*. Also, Para 5 mentioned that are excepted by Para 1 *other propaganda objects, imprinted with the electoral insignia of political groups or candidates in elections, whose value does not exceed 10 lei excluding VAT for each piece, without these goods to be food, alcoholic or non-alcoholic drinks or tobacco products*.

Relevant aspects were brought in by the new Criminal Code regarding the creation of different forms, with different sanctions, within the same judicial norm, with the purpose of revealing an obvious difference of danger. We are talking about the *violation of confidentiality of the vote*, widely spread during the voting process, stated by Art. 389 of the new Criminal Code. Thus, Para 1, which states only the fine as penalty, refers to the violation of the secrecy of voting by any person and by any means. Quite different is the case of Para 2, the aggravated form of the offence, where the active subject is qualified, being about a member of the electoral office of the polling station, for whom the legislator has stated the penalty by imprisonment from 6 months to 3 years, alternative by fine, but with the accessory or complementary penalty of prohibition of certain rights from those stated by Art. 66 of the new Criminal Code.

A special attention was offered to the offence of non-complying with the regime of the ballot box, considering its judicial regime, as well as its special importance during the voting process, because in many cases the use of the ballot box was made beyond the limits of the law. Though the penalties stated are a little bit diminished by the new Criminal Code, the legislator choose to incriminate in the same article the action of opening the ballot box during the electoral process, as it has considered that must be sanctioned both the entrusting of the custody of the special ballot box to persons other than the members of the electoral office of the polling station, as well as the transportation of the special ballot box by other persons than the ones authorized or in other conditions than the ones mentioned by the law. It is obvious that between the two paragraphs of Art. 390 of the new Criminal Code, the first one states a penalty whose limits are higher, however both of them referring to the prohibition of certain rights.

Also concerning the reduction of the duration of imprisonment we can mention Art. 388 of the new Criminal Code, stating the *electronic vote fraud*. Unlike the provisions of the old Criminal Code, the active subjects print and use false access data, fraudulent accessing the electronic vote system or falsify the electronic ballots risk imprisonment from 1 to 5 years, while until the entrance into force of the new Criminal Code, the penalty was from 2 to 7 years of imprisonment.

Novelty elements are brought in by Title IX of the new Criminal Code regarding certain offences which previously were not stated by the legislation. We are talking about Art. 391 stating the falsification of the electoral documents and recordings. After mentioning in Para 1 and 2 that are criminally sanctioned the falsification by any means of the electoral offices' recordings, as well as the false registration in the copy of the permanent or complementary electoral list of persons who are not present in the original document, the Romanian legislator inserts Para 3 incriminating the usage of software with different bugs to alter the recording orsumming up of the results from the polling stations or influencing the allocation of mandates outside the law. To reveal the special importance of this norm, the new Criminal Code states for the active subject(s) the penalty of imprisonment from 2 to 7 years and the prohibition of certain rights. Together with Para 2 of Art. 385 which states the assault, by any means, of the polling station, this is the second legal text, within Title IX of the new Criminal Code, where the legislator's will was present as an incremented penalty, namely imprisonment from 2 to 7 years.

Conclusions

Lastly, concluding the above statements, Art. 392 of the new Criminal Code refers to the fact that the legal texts stated by Art. 385-391 of the new Criminal Code are applicable, where appropriate, for the offences committed during a referendum. This latter aspect represents another attempt of the legislator to remove the legal parallelisms, with a greater or a lower success for each case.

Bibliography:

- Law 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part 1, No 510/24 July 2009;
- Law No 35/2008 for the election of the Chamber of Deputies and the Senate, modifying and amending Law No 67/2004 for the election of the local public administration authorities;
- Law No 67/2004 for the election of local public administration authorities;
- Law No 393/2004 on theStatute of local elected officials;
- Law No 370/2004 on the election of the President of Romania;
- Law No 215/2001 on the local public administration;
- Law No 3/2000 concerning the Organization of the Referendum;
- Criminal Code published in the Official Gazette of Romania, Part 1, No 65/16 April 1997.

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"STATUS CIVITATIS" IN THE ROMANIAN SIBIU ASSEMBLY OF 1864

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Abstract*:*

Status civitatis configured by the laws of the first Romanian Assembly held in Sibiu between 1863 and 1864 reflects a change of essence of the constitutional regime of Transylvania, by enacting, for the very first time in Romania, a principle of liberal democracy, that of representing the citizen in the chosen institutions of the state.

Keywords: *constitutional regime, fundamental right, doctrine, system, democracy*

Starting from the antique Aristotle's' axiom according to which "man is by nature a social individual and if one individual can't or doesn't want to accommodate himself in society because he is self sufficient, than he is either not a member of the state or a god"[1].

The Assembly, which worked in Sibiu according to the emperor's edict passed by the king of Austria, was based on the principle of proportional representation, a fact which enlightened a fundamental right of the citizen, namely that of choosing and of being chosen; the only problem is that this principle was mystified in practice, according to the statistical data which showed that the 44 Hungarian representative were representing a population of 568172 inhabitants, thus one person represented 12973 inhabitants; the 33 elected Saxon representatives had a number of 10441 inhabitants, thus one person was representing 6370 people; the 48 Romanian elected representatives had a number of 1309913 inhabitants, meaning 1 representative for each 26280 people[2].

Given all these, there was a sensible mutation in regard to the nature of constitutional law in Transylvania, as it passed from the basic historic law "to national law" thus transforming the people in a nation, where the citizen was the supreme value of society.

Romanian judicial doctrine states, for the very first time, the idea according to which citizenship is a bilateral contract in which there are rights and obligations for both parties, as the parties are in a relative state of equilibrium. George Bariţiu stated, around the time the Sibiu Assembly works, that "Our language and nationality is not ensured and, without personal freedom, the freedom of speech, of the media, of the assemblies, without the security of domicile, all our rights basically become a "fictio iuris"[3].

Thus, what we may call a new right starts to appear in Romanian doctrine, the right "to be a citizen", a right which, at least on a constitutional level, expresses another judicial meaning excluded at those times by the doctrine of historic law.

From a legal point of view, another axiom appeared according to which "no one can be arbitrarily deprived of his citizenship, an inherent right of the person, which refers to natural right". According to this opinion, citizenship is the fundamental right of a person, according to which citizens can exercise all their rights in accordance with their own will.

[1] Aristotel, Politics by El.Bezdechi, Bucharest, 1924, p. 17.
[2] Cf. S. Retegan,The Romanian Transylvania Assembly, Dacia Publishing House, Cluj Napoca, 1979, p. 42.
[3] Cf. C. Murzea, The reform of state and law in the modern ages, Sitech Publishing House, Craiova, 2013, p. 147.

By using these arguments in the Romanian judicial ideology from Transylvania, the premises of an important change were created, that of changing the constitutional order of the Austrian Empire, which was based on discrimination and inequity, as the people's public rights were restricted during those times.

Thus, the promises for the autonomy of Transylvania, made by the 1860 - 1861[4] emperor of Vienna will be partly materialized in the activity of the Transylvania Assembly, which existed between the years 1863-1864, also known as the Sibiu Assembly, composed of 125 chosen representatives and 40 named representatives. The feudal system of forming an assembly was let go, a system "whose centerpiece was the group of royalists, the representatives named by the emperor", thus a modern system was applied in regard to elections, that of representatives, even if it was partly infringed, as shown above[5]. However, from this date, starting from the principle of proportional representation, a national aspect was considered rather than the social one which presented its advantages for the Romanian nation in regard to exercising the right to vote. This was made possible by the fact that Romanians were represented in the assembly as a nation and even became the majority by obstructing the rights of the Hungarian representatives, who refused to take part in this legislative game, which was abut to create the necessary frame for unifying all Romanian territories, namely the United Principalities.

In this context, on June 15th 1863, "in the presence of all Romanian and Saxon deputies and only three of the Hungarian ones, the Sibiu Assembly began, also known as the Romanian Assembly"[6].

Thus, a new stage had begun, one that placed the citizens' equal rights at the center of the legislative policy, regardless of the citizen's nationality. The preoccupation for promoting and protecting the citizen's rights and freedoms crossed traditional boundaries, as a natural consequence of the historical course. The legislative activity of the assembly would follow these coordinates and it would become an important moment in defining and promoting man's fundamental rights and public liberties. All these from the statute of the citizen in the age of the atlantics revolutions of the 19th century which will become a century of nationalities by expressing a new type of state with modified functions and competences, a state which was about to represent a turning point for the future modern state entities. A new vision on individual and collective legitimate rights was configured, one that was meant to emancipate the nation by using sovereign state entities.

The legislative activity of the Sibiu Assembly was accentuated in regard to the formal content and the elements of judicial technique by new texts of law which affirmed the fundamental rights and liberties of man from the perspective of the configurative factors of the 19th century law. Thus, we mention the Law for equal rights of the Romanian citizens and the law for the use of three languages in official public communication[7].

Thus, the principle of equality of all citizens was reaffirmed in the constitutional system of law regardless of whether they were Romanian, Greek-catholic, Greek-oriental, as all these religions are acknowledged by law just like the other nations and "the three languages, Hungarian, Saxon and Romanian are equally used in all public official communication"[8].

The press of those times[9] stated that, for the first time, the Romanian nation was given back what was taken from her, namely the judicial status according to which Romanian citizens were equal in rights to the other nationalities and known religions, thus abolishing the feudal discriminatory laws established in 1437.

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[4] xxx, The history of the Romanian state and law, Academic Publishing House, RSR, Bucharest, 1987, p. 145.
[5] Ibidem.
[6] Th. Păcătean, The Golden Book or the national politcal struggles of the Romanian people under the Hungarian Crown, vol. II, Society's Printery, Sibiu, 1908, p. 54.
[7] Ibidem, p. 146.
[8] Ibidem.
[9] Cf. "Foaie" no. 6 of 8 January 1861, p. 44.

A constitutional desire phrased by the 1848 Romanian revolutionaries from Transylvania was transformed to reality, as it was the pile of support and the judicial principle which would configure the entire legislative work of the Sibiu Assembly, works which were about to set the objective frame in order to start the procedures for the legislative unifying of the territories on one side and on the other side of the Carpathian Mountains even before the national united Romanian state was created.

Thus, Ion Ratiu, the front man of the Ardeal national move, stated that within a Romanian Assembly in which the majority of representatives were Romanian, a legal inequity was not liquidated in order to be replaced with another inequity, but the principle of equality of all nations was legislated; further more "the different names of certain parts of the country do not provide political rights based solely on the name of that region"[10]. A modern principle of constitutional rights and freedoms was legislated, according to which the free and consensual use of the Romanian language in justice, administration or educational system, represented the basis of the citizen's status in a free liberal regime along with the natural rights of any other nationalities to a similar regime.

If we were to analyze the entire activity of the Sibiu Assembly from the perspective of logic and judicial technique, we will see that the principle of full equity of "nationalities" is the stability factor around which the future laws were configured, acts which pointed out the entire process of achieving the people's rights from the perspective of the active role the citizen must play in a democratic state; this statement was based on the fact that the personal rights of a citizen are inherent from the moment the person acquires full capacity of exercise.

The front men of the Romanian nation chosen as representatives in the Sibiu Assembly understood the primordial truth of the modern society, the fact that the state is obliged to not discriminate between its citizen for reasons of nationality, thus the members of the majority group and those belonging to minority groups must all live together in full legal equity by respecting the principle and fundamental rights of man which inevitably leads to the guarantee and affirmation of human dignity.

Following this line of reasoning, no law must be based on national or religious discrimination, thus reaffirming a new state of "the citizen" seen as the beneficiary of the activity of applying the law under the influence of factors which help configure the laws, as the feudal society was abolished in favor of the modern one.

It is confirmed that "the citizen's state" is a fundamental right, practically accomplished by the exercise of the right to choose and to be hosen, to express freely, regardless of nationality or religion, to use the national language in an equal manner along with other minority groups in administration, justice, education, essentially having the same rights and political freedoms as all members of society.

Conclusions

This path led to realizing a favorable judicial and political frame for defining "the citizen's state" in the process of affirming the future national united Romanian state, as prefigured by the national ideology of the Transylvanian Romanians who saw in the Sibiu Assembly's activity an opportunity to acknowledge the historic legitimate rights of the Romanian nation.

Bibliography:

- C. Murzea, Reforma statului şi dreptului în epoca modernă, Sitech Publishing House, Craiova, 2013;
- xxx, Istoria statului şi dreptului românesc, Academic Publishing House, RSR, Bucharest, 1987;

[10] Ibidem.

- S. Retegan, Dieta românească a Transilvaniei, Dacia Publishing House, Cluj Napoca, 1979;
- Aristotel, Politica, by El. Bezdechi, Bucharest, 1924;
- Th. Păcătean, Cartea de aur sau luptele politice naţionale sub Coroana Ungariei, vol. II, Society's Printery, Sibiu, 1908;
- "Foaie" no. 6 from 8 January 1861.

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THE JUDICIAL REGIME OF ANNULMENT OF MARRIAGE AND THE EFFECTS OF MARRIAGE ANNULMENT

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Abstract:

We have chosen to put together this study with the intent of examining the judicial regime of marriage annulment and the effects of marriage annulment. Such action involves researching the rules which govern absolute annulment or relative annulment of marriage, who can invoke annulment, the term in which it can be invoked, if annulment can or can't be reclaimed. The second part of the study discusses the effects of the annulment of marriage.

Keywords: absolute annulment, relative annulment, limitation, fictional marriage, putative marriage

Introduction

Even though the lawmaker[1] did not define the notion of "marriage annulment", it is easily understandable that annulment is the sanction which is applied for the disrespect of formal conditions stated by law for the valid conclusion of marriage, with the consequence of the dissolution of the marriage"[2]. Thus, the main effect of absolute and relative annulment is the same: the dissolution, in regard to the future and the past, of the marriage. In detail, we are about to analyze putative marriage, the situation of children born within an annulled marriage, the opposability of the court's decision to acknowledge the annulment or the court's decision to annul the marriage.

The judicial regime of the absolute annulment of marriage

Before analyzing the regulations which govern the judicial regime of absolute annulment, we will list the cases of absolute annulment[3], as they are pointed out by the lawmaker, in articles 293-295 of the Civil Code:

- marriage between people of the same sex (article 293 alignment 1 corroborated with article 271 first thesis of the Civil Code);

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[1] Marriage ann ulment is regulated, in Romanian law, in Chapter IV (Marriage annulment) of the Second Title (Marriage) of Book II (About family) of the Civil Code passed by Law no. 287/2009, specificallt articles 293-306. In regard to the enforcement in time of the provisions which regulate marriage annulment, article 25 of Law no. 71/2011 states that: "(1) The validity of marriage concluded betwenn the coming into force of the new Civil Code is etablished according to the provisions of the law which was in force at the time when the marriage was concluded.

(2) However, if, after the comuing into force of the new Civil Code, a fact that covers annulment occurs, the marriage can no longer be dissolute after the coming into force of the Civil Code.

(3) In case the event that covers annulment involves a certain term, the marrige can't be annuled after that term passes from the time the Civil Code came into firce".

[2] C. Mareş, *Marriage annulment in the regulation of the new Civil Code*, in „Law" no. 9/2012, p. 61.

[3] For a comparative view with the previous legislation see also R. Matefi "Cases of annulment", Bulletin of Transilvania University of Brasov,Vol. 14(49), Series B ISSN-1223-964X, Transilvania University Publishing House, 2007.

- the lack of free and personal consent from the future spouses (article 293 alignment 1 corroborated with article 271 second thesis of the Civil Code);
- bigamy – an already married person who enters into another marriage (article 293 alignment 1 corroborated with article 273 of the Civil Code), with the mention provided by article 293 second alignment of the Civil Code - "In case the spouse of a person declared as dead remarries and, after this, the decision by which the spouse is declared dead is annulled, the new marriage is still valid, if the spouse of the person declared dead was of good faith. The first marriage is considered to be dissolute at the date the second marriage was concluded";
- marriage between direct relatives or collateral relatives to the fourth degree included (article 293 alignment 1 corroborated with article 274 of the Civil Code);
- marriage between the person who is mentally ill, regardless of whether that person is placed under judicial interdiction[4], as this is a biological and social impediment, even if the conclusion of marriage occurred in a rare moment of lucidity[5] (article 293 alignment 1 corroborated with article 276 of the Civil Code);
- marriage without consent from the spouses or without the presence of at least two witnesses, at the City Hall, in front of the general registry office (article 293 alignment 1 corroborated with article 287 alignment 1 of the Civil Code);
- entering into marriage by the minor who is under the age of 16 (article 294 alignment 1 of the Civil Code);
- entering into marriage with any other purpose than to start a family - fictional marriage[6] (article 295 alignment 1 of the Civil Code).

The people who can invoke absolute annulment: under this marginal name, article 296 of the Civil Code states that: "any person who is interested can file a complaint for the absolute annulment of marriage. Given all these, the prosecutor can not file this complaint after the marriage is dissolute, except for the case in which he would act for the protection of the rights of minor children or people placed under interdiction".

Thus, the people who can file a complaint for the absolute annulment are the people who can prove an interest in the matter, namely any of the spouses. In regard to article 1247 alignment 3 of the Civil Code, which describes the general rules in the matter of annulment, the court is forced to invoke absolute annulment by its own will.

The term in which annulment can be invoked: there is no specific term in which such a complaint can be filed. We have reached this conclusion by way of interpretation[7] because the special text who regulates this matter - article 296 of the Civil Code states no specific term, thus common law is to be applied – article 1249 alignment 1 of the Civil Code: "If the law does not state otherwise, absolute annulment can be invoked at anytime, by filing a complaint or by exception".

The possibility of covering by confirmation: It is generally acknowledged that absolute annulment can not be confirmed. However, in the matter of marriage, the Civil Code states two cases in which absolute annulment can be confirmed:

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[4] For more aspects regarding the judicial interdiction see also Roxana Matefi – Protecting the judicial interdiction under the regulations of the New Civil Code**,** in Bulletin of the Transilvania University of Brasov, Series VII: Social Sciences and Law, 2066-7701; 2066-771X (CD), 2012, p. 75-78.

[5] Bistrita Nasaud County court, civil section, decision no 74/A/6 June 2012 *apud* Gabriela Cristina Frentiu, *Family law. Judicial practice according to the new Civil Code. ECHR jurisprudence.* Hamangiu Publishing House, 201, p. 7.

[6] The essence of fictional marriage is "the simulated, fake character of the will expressed in order not to start a family, but ot obtain certain benefits for one or both spouses", states specialty doctrine in the comments made about this cause -see Emese Florian, Comment (on article 295 Civil Code) in The New Civil Code. Comments by articles. Article 1-2664, coordinators Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, C.H. Beck Publishing House, 2012, p.300.

[7] Emese Florian, Comment (on article 296 of the Civil Code), in The New Civil Code. Comments by articles. Article 1-2664, coordinators Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, C.H. Beck Publishing House, 2012, p. 301.

- the marriage of the minor, for the facts stated in article 249 alignment 2 of the Civil Code as follows: "Given all these, marriage annulment is covered if, by the time the court decision is final, both spouses have turned 18 or if the wife gave birth or got pregnant". We can observe[8] that "in the old as well as in the new regulation, the non fulfillment of demands regarding matrimonial age is based on the disappearance of the cause who determined it and the lawmaker's preoccupation is to satisfy the child's right to live with his parents and his natural family";
- fictional marriage, when one of the conditions stated in article 295 alignment 2 of the Civil Code is fulfilled, as follows: "However, marriage annulment is covered if, by the time the court's decision is final, the spouses have been living together, the wife gave birth or got pregnant or at least two years have passed since the marriage was concluded".

The judicial regime of the relative annulment of marriage

As we have done before when analyzing the judicial regime of absolute annulment of marriage, we have chosen to first point out the causes of relative annulment of marriage:

- entering into marriage without the authorizations stated in article 272 alignment 2 and 4 (article 297 alignment 1 of the Civil Code);
- a vice of consent of one of the spouses by error in regard to the identity of the future spouse or by violence or devious ways (article 298 of the Civil Code);
- entering into marriage by the person who is temporarily unable to give consent (article 299 of the Civil Code);
- marriage between a legal guardian and the minor placed in his care (article 300 of the Civil Code).

The people who can invoke relative annulment: the rule is that such a complaint is a personal matter (as is the marginal name of article 302 of the Civil Code) which states: "The right to file such a complain is not passed on to the heirs. Given all these, if the complaint was filed by one of the spouses, it can be continued by any of his heirs".

Starting from the principle according to which the complaint for the annulment of marriage can be filed by the person protected by the regulation of the law, judicial doctrine[9] describes the following categories of people who can file such a complaint:

- the person or the authority which was supposed to provide consent for entering into marriage by the minor who is 16 years of age – article 297 of the Civil Code: "annulment can be invoked only by the person whose authorization was required";
- the prosecutor called on by the tutelage authority, in case the tutelage authority did not provide authorization for marriage, although it should have;
- the spouse whose consent was vitiated by error, violence or devious ways;
- the person who, at the time of entering into marriage, was temporarily unable to give consent;
- the minor placed under tutelage.

The term in which this type of annulment can be invoked: article 31 alignment 1 of the Civil Code states that annulment can be filed within 6 months. The time from which those 6 months are calculated is different, depending on the cause of relative annulment which is invoked in the matter, as follows:

- in case there is no legal authorization, the term is calculated from the date when the people whose authorization was required found out about the marriage (article 301 alignment 2 of the Civil Code);
- in case of annulment for vices of consent or for the lack of consent, the legal term is calculated from the date when the violence stopped or, from the date when the person who

[8] T. Bocoaşcă *Opinions regarding marriage annulment in the regulation of the new Civil Code,* in „Law" no 1/2010, p.19.
[9] C. Mareş, *Op. Cit.*, page 73.

proves interest, knew the error or the temporary lack of the ability to give consent (article 301 alignment 3 of the Civil Code);

- in case of marriage concluded between the legal guardian and the minor placed in his care, the term is calculated from the date the marriage was concluded (article 301 alignment 4 of the Civil Code).

The possibility to cover by confirmation: relative annulment can't be covered.

Thus, the lawmaker chose to regulate general causes of covering by confirmations which are to be applied in all cases of relative annulment. According to article 303 alignments 3 of the Civil Code, these are: both spouses turn 18, when the wife gave birth or got pregnant or some special causes[10], as stated by article 303, alignments 1-2 of the Civil Code as follows:

- in case authorization is required from the legal guardian or the tutelage authority, the relative annulment is covered if all authorization was provided before the court's decision to dissolute the marriage is final;
- in case consent is affected by any vice, the relative annulment is covered if the spouses have lived together for 6 months since the time the violence stopped or the error was discovered;
- in case there is no consent, the relative annulment of marriage is covered if the spouses have lived together for 6 months since the temporary lack of consent was discovered.

The effects of marriage annulment

Marriage annulment causes retroactive effects, thus meaning that the personal and patrimonial rights and obligations of the spouses have never existed[11].

The consequences of the fact that the spouses are considered to never have been married were listed by specialty literature[12], as follows:

- the spouses had no obligations deriving from their statute of married persons;
- the spouses will have the name they had before marriage;
- the term in which they were entitled to file a complaint for annulment of marriage did not start to pass, unless the spouses were in fact separated;
- the loss of exercise of all rights if the marriage is found to be void or annulled before the spouse turned 18
- the matrimonial regime did not exist;
- the obligation to provide between spouses did not exist;
- the surviving spouse s right to inheritance does not operate.

In regard to the retroactive effect of marriage annulment, the Civil Code regulates one exception in article 304, that of putative marriage; this means that the retroactive effect of marriage annulment "is produced in regard to both spouses, only when neither of them was of good faith when entering the annulled marriage, meaning that neither of them knew the cause for annulment"[13].

According to article 304 of the Civil Code: "(1) The spouse of good faith when entering into a void or annulled marriage maintains the status of a spouse from a valid marriage until the court's decision is final.
(2) In the situation listed above, the patrimonial relations between spouses are subjected, by resemblance, to the provisions regarding divorce".

Starting from this legal text, doctrine[14] defined putative marriage as "that marriage which, although void or annulled, produces some effects in the relations between spouses considering the fact that at least one of those spouses was of good faith". Good faith is based on two subjective elements: error and the belief that the legal act is valid, thus not knowing the

[10] C. Mareş, *Op. Cit.*, pages 73-74.
[11] Marieta Avram, *Civil law. Family*, Hamangiu Publishing House, 2013, p. 101.
[12] C. Mareş, *Op. Cit.*, page 74.
[13] Marieta Avram, *Op. Cit.,* page 101.
[14] Emese Florian, *Family law. Fourth edition*, C.H. Beck Publishing House, 2011, p. 67.

annulment causes which affect it[15]. Good faith, as a *sine qua non* condition must exist at the time the marriage is concluded[16] and it is believed that that person who challenges good faith must prove otherwise.

The effects of putative marriage are analyzed in specialty literature[17], from a double perspective:

- that of good faith of both spouses in which case the court's decision to dissolute the marriage produces effects only for the future;
- that of the good faith of one spouse, a situation in which the court's decision produces effects for the future and for the past.

Also, absolute annulment does not produce retroactive effects in regard to the relations between parents and children, a normal solution if we consider the principle of protecting the child s best interest; the child has the status of a child inside a marriage and his inheritance rights regarding his parents are maintained. This fact is regulated in article 305 of the Civil Code: "(1) Marriage annulment has no effects in regard to children, who maintain their status of children from inside a marriage.
(2) In regard to the rights and obligations between parents and children, the provisions regarding divorce will be applied".

This means that, much like in case of divorce, as the marriage is annulled, the courts decides, in accordance with the provisions of article 396 alignment 1 of the Civil Code, on the relations between divorced parents and their minor children, taking into account the best interest of the child, the psychological and social report and the parent s agreement, should it be the case. The matters which will comprise a court's decision will regard the exercising of parental authority, establishing the location of the minor child, the right of the separated parent to have personal relations with the minor and to supervise his education and professional training[18].

Also, the child born or conceived during a dissolute marriage for the mother has, as a father, the mother's husband so the paternity presumption works in this case.

After having analyzed the effect of annulment in regard to the relations between children and parents, we must direct our attention to the effects of the court's decision to annul the marriage in regard to third parties.

Relevant in this matter are the provisions of article 306 of the Civil Code which state that: "(1) The courts decision to annul the marriage is opposable to third parties under the provisions of law. The dispositions of article 291, 334 and 335 will be applied accordingly.
(2) Marriage annulment can't be opposable to third parties in regard to an act conclude by one of the spouses before entering into marriage, except when the publicity formalities stated by law were fulfilled or when the third party knows the cause for annulment of the marriage. The provisions of article 291, 334 and 335 will be applied accordingly to publicity for annulment of marriage".

By this legal text, the opposability of the court decision regarding the person civil state[19] is reaffirmed as it is regulated by article 99 third alignment of the Civil Code. From the interpretation of article 306 of the Civil Code we can deduce[20] that "based on the definitive decision to annul the marriage communicated to the general registry by the court (article 101 second thesis of the Civil Code) the general registry office is obliged, by article 271 of the Civil Code to communicate a copy of the general registry act to the Matrimonial Regimes

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[15] Emese Florian, *Op. Cit*., page 67.
[16] *Idem.*
[17] C. Mareş, *Op. Cit.*, page 75.
[18] *Idem.*
[19] For further aspects regarding the person civil state, see also T. Prescure, R. Matefi, Civil law. Backgrounds. The persons, Hamangiu Publishing House, Bucharest, 2012, p. 280.
[20] Emese Florian, Comment (on article 306 of the Civil Code), in The New Civil Code. Comments by articles. Article 1-2664, coordinators Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, C.H. Beck Publishing House, 2012, p. 314-315.

Registry (article 334 alignment 1 of the Civil Code), as well as to the public notary who authenticated the matrimonial convention when that is the case, in order to fulfill all publicity formalities for opposability to third parties. The general registry officer's obligation to communicate a copy of the act of marriage to the Matrimonial Regime Register is general, regardless of whether the spouses had a matrimonial convention or not and is doubled, in case such a convention existed, by the obligation to send a copy to the public notary who authenticated the convention".

Conclusions

By examining the judicial regime of marriage annulment in general we can conclude that these are a few "compromises" made by the Romanian lawmaker, exceptional situations. This, given the absolute character of marriage annulment, reclaiming is possible in certain cases which are strictly regulated by the Civil Code. These provisions can be explained by the preoccupation of the new lawmaker to adopt measures in order to maintain marriage and protect family.

In regard to the other plan of our analysis - the effects of the annulment of marriage, we have noticed the orientation of legal text towards protecting the spouse of good faith who had no knowledge of the annulment causes which affected the marriage, hence the regulation of putative marriage, but also normal solutions in regard to the status of the children who are protected as they are not a subject of their parents annulled marriage.

Bibliography:

- Marieta Avram, *Civil law. Family*, Hamangiu Publishing House, 2013;
- Bistrita Nasaud County court, civil section, decision no 74/A/6 June 2012 *apud* Gabriela Cristina Frentiu, *Family law. Judicial practice according to the new Civil Code. ECHR jurisprudence.* Hamangiu Publishing House, 2013;
- *The new Civil Code, Comments by articles. Articles 1-2664* coordinators Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, C.H. Beck Publishing House, 2012;
- C. Mares, *Marriage annulment in the regulation of the new Civil Code*, in "Law" no. 9/2012.
- Emese Florian, *Family law. Fourth edition*, C.H. Beck Publishing House, 2011;
- R. Matefi, "Cases of annulment", Bulletin of Transilvania University of Brasov,Vol. 14(49), Series B ISSN-1223-964X, Transilvania University Publishing House, 2007;
- Roxana Matefi – Protecting the judicial interdiction under the regulations of the New Civil Code**,** in Bulletin of the Transilvania University of Brasov, Series VII: Social Sciences and Law, 2066-7701; 2066-771X (CD), 2012;
- T. Bocoasca, *Opinions regarding marriage annulment in the regulation of the new Civil Code,* in "Law" no. 1/2010;
- T. Prescure, R. Matefi, Civil law. Backgrounds. The persons, Hamangiu Publishing House, Bucharest, 2012.

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PLEA BARGAINING: A PANACEA TOWARDS PRISON DECONGESTION IN NIGERIA

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Abstract

Against the panoramic view of the criminal justice reform agenda in Nigeria, the plea bargaining procedure is yet to be fully recognized as a major intervention strategy to deal with the problems in the Nigerian criminal justice administration. This paper therefore conceptualized the concept of plea bargaining. The legal basis for plea, the justifications for plea as well as the merits and demerits of the plea are discussed. The paper also highlights the major problems afflicting criminal justice administration and examines the steps being taken to deal with the problems. The emphasis is on strengthening arguments for a mutual acceptance of plea bargaining as a credible exist strategy by both the state and an alleged offender. The way forward in form of recommendations for the expansion and institutionalization of the practice is also discussed.

Keywords: Plea Bargaining, A Panacea, Prison Decongestion

Introduction

The Nigerian criminal justice administration system is no doubt characterized, among other features, by delay in the administration of cases, either due to lack of facilities for the speedy discharge of judicial functions, lack of research lawyers to assist judicial officers in the determination of cases and specifically in the preparation of judgments and rulings, long adjournment of cases owing to congestion of court diaries, non specialization in the legal profession leading to difficulty to swiftly acquire quality expertise that a litigation lawyer needs to superbly handle cases and provide guidance to the court, stalling criminal prosecution by investigating police officer who fail to produce witnesses to the Director of Public Prosecution for testimonies during trials.[1]

The excruciating torment and hopelessness that an accused person standing trial, and who thereby is incarcerated, is subjected to is better imagined than experienced. Worrisome is the constitutional provision that an accused person is still presumed innocent until proved otherwise regardless of the seriousness or graveness of the offence alleged against him, which in most cases lacks factual or legal basis notwithstanding the upholding of any conviction and sentence.[2]

The view generally adopted by the prosecution, which is the judicial view is that all the prosecution needs to allege is the commission of an offence and call witnesses in support of the commission of the offence. The onus is on the accused to prove that he had not committed

[1] Ogunye, J *The Imperative of Plea Bargaining* (Lagos; Lawyers' League for Human Rights, 2005) p. iv
[2] Ibid.

the offence alleged. Undoubtedly, this provision negates the constitutional presumption of innocence and the requirement that the prosecution establishes the guilt of the accused beyond reasonable doubt. It is conceded that all the accused needs do is to lead evidence to establish his innocence.[3]

It is the contention of the Writers that, the detention of an accused person, albeit pursuant to an order of remand of a trial court in prison, for a long time without a quick determination of the charge against him or her is a breach of the right of the accused person to liberty, and other plenitude of rights.[4] Sometimes, when an accused person standing trial dies in prison, due to adverse health conditions, the right of the person to life is grossly violated.[5]

It is the observation of the Writers that, the Nigerian criminal justice community has been tackling the problem of delay in criminal justice administration through reforms initiatives. The reform debates and actions are observably geared towards ensuring that the institutions that work together in criminal justice administration i. e the Police, the Attorney General, the Judiciary, and the Prison are better placed to perform their duties in order to bring about a faster and more efficient criminal justice dispensation; hence, the motivation for the 'plea bargaining project' which this paper discusses.

Brief Overview of the Divergent Views on Plea Bargaining

Plea bargaining is a practice whereby the accused forgoes his right to plead not guilty and demand a full trial and instead uses a right to bargain for a benefit[6]. This concept has its pros and coins, merits and demerits. While it is being hailed by some, yet others condemned it[7]and some are pessimistic about its legality in the international criminal tribunal[8]. Those argued in favour of it based their arguments on the benefits both the state and the accused person derive from its operation. One of the benefit is that plea bargaining facilitates speedy determination of cases at a lesser cost for prosecution; faster trial saves prolonged adjudicatory time.[9]

The opponents however argued that plea bargaining amounts to a sacrifice of criminal justice system on the altar of economic management of public prosecution. It lets off criminals offenders with lighter punishment than those, which the crimes they actually commit attract under the law. Plea bargaining is criticized for being solely motivated by case load management concern. It is argued that the plea bargaining system operates to decongest the prison and that it is a response to the pressure posed by the inadequacy of fund to cover public criminal prosecution.

It also contended that, plea bargaining amounts to the breach of the principles of separation of powers, in that it is somewhat a dictation by the executive arm of government to the judiciary. It submitted that it lets off criminal with light punishment which may not serve as a sufficient deterrent in the circumstances. In most cases, the plea bargaining agreement it is being employed for political and economic reasons by the ruling elites in favour of political

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[3] Gardiner, 'The Purpose of Criminal Punishment' (1958) 21 M.C.R P. 117.

[4] Cap IV of the 1999 Constitution of the Federal Republic of Nigeria (as amended) on Fundamental Human Rights.

[5] Ibid at p.V.

[6] A.O. Alubo "Plea Bargaining Imperative in Nigeria" *Ife Juris Review*, 2014, p. 501.

[7] Amongst those that have worked on the legal effect of plea bargaining on criminal judicial system in Europe are, Petre Buned "Admision of Guilt in The Criminal Trial" http://wwwjuridicaljournal.Univagora.ro/downloadpdf/s=2010-8-ADMISSIONin-of-GUIL pdf, accessed 13/1/14, A Uzlar" Plea Bargaining-A New Criminal Procedure Institution"AGORA International journal of Juridical Sciences Vol. 4 (2013)pp.239-247. In their works, both authors examined the new principle, benefit and its essence on the Romania Criminal Judicial System. WhileTimithy L "The Case Against Plea Bargaining" outlined the anger in allowing plea bargaining in criminal justice.

[8] See Alexandra L "Is the Plea Agreement Practice of the International Criminal Tribunals a Pathway to Negotiated justice with National Jurisdictions" *Law Review* Vol. IIII issue 2 July-Dec 2013.

[9] Ogunye, J op. cit p. 190.

stalwarts, than for the benefit of the poor and ordinary criminal offenders it was meant to profit.[10]

Challenges Facing the Nigeria Criminal Justice System.

Criminal procedure is the method laid down by law for bringing a person who is alleged to have committed a crime before a court of law for trial. It encompasses also the methods that are adopted by the court of trial, the powers of the court of trial, the right of appeal of a person convicted of a crime, and the rules of court governing the procedure of criminal appeals in appellate courts.[11] This procedural frame work consists chiefly, of the right to fair hearing or trial; a right which in broad terms comprises the common law principle that a man may be punished only in accordance with the law and that he cannot be convicted of an unwritten offence[12].

This frame work was also guaranteed under key international instrument and charters, for instance, Universal Declaration of Human rights, 1945; the African Charter on Human and Peoples' Rights, 2004, International Covenant on Civil and Political Rights, 1966 and a host of others, which generally guarantees the right to fair hearing. There are other criminal procedure principles which extend the right to fair hearing in the constitution. In Nigeria, these principles are contained in two principal penal statutes operating in Nigeria, i. e the Penal Code and the Criminal Code, the Criminal Procedure Code and the Criminal Procedure Act.

There are host of others manuals that deals with pre-trial rights and rights at the trial. These rights are essentially in case of pre-trials: right to liberty; right of person in custody to information; right to legal counsel before trial; rights of a detained person to the outside world; right to challenge the lawfulness of detention; right to trial within a reasonable time or be released from detention; right to adequate time to prepare a defence; right to humane detention and freedom from torture. [13]

Rights at trial includes; right to a fair trial by a competent, independent, and impartial tribunal; right to equality before the law and court; right to a public hearing; presumption of innocence; right not to be compelled to testify or confess guilt; exclusion of evidence elicited as a result of torture or other compulsion; prohibition of retroactive application of criminal laws and of double jeopardy; right to be present at trial and appeal; right to call and examine witnesses; right to an interpreter and translation; right to obtain judgment and appeal; and right to be punished according to the law. [14]

The existence of a fair trial frame work within a given criminal justice system does not per se guarantee that the right of those standing trial to fair hearing is in all cases observed and enforced, neither does it signify that the penal system is fair or equitable. In the view of the Writers, a host of other factors undermines a country's penal system that determines whether it is fair to an accused person.

According to Ogunye,[15]the economic relations in and socio-political arrangement of a society determine to a very large extent its law and other profile, particularly the crime rate. The Nigeria socio-economic arrangements and political system, no matter the way it is, may be viewed as largely as unfair to the majority of the people. Economic and political factors that inspire criminal activities are enormous. Majority of the people live in abject poverty; the per capital income is below ₦125.00 (about $1 US Dollar),[16] unemployment rate is unbelievable high, with well over four million graduates of tertiary institutions not gainfully

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[10] Ibid.
[11] Doherty, O *Criminal Procedure in Nigeria* (London; Blackstone Press Ltd, 1990) p. 2.
[12] As firmly held in the case of *Aoko vs. Fagbemi* (1961) ALL NLR 400.
[13] See Olokooba S.M and Oyedokun W. Alli "An Overview of the Rights of Prisoners Under the Nigerian Law" *Confluence Journal of Jurisprudence and International Law*, 136. For the enforceability of these rights, see Olokooba S.M, Olatoke J.O and NOA Ijaiya "A Diagnostic Appraisal of the Clogs in the enforceability of Prisoners' Rights in Nigeria Under the Nigerian Law " *Journal of the Public Law and Constitutional Procedure* Vol. 4 No 2, 2012, 102-114, see also ibid.
[14] 'The Right to Fair Trial Manual' Amnesty International 1998.
[15] Ogunye, O. op. cit p. 12
[16] Ibid.

employed;[17] no social security or welfare programme for the vast majority of Nigerians who are in want; official corruption is high, with a lion portion of the oil wealth of the country stolen by political power pirates and hidden overseas. Anyone who has been to all part of the country will readily agreed that 10 million of the estimated 80 million people in Nigerian are living in abject poor conditions and no less than 60 million of them are actively starving[18].

Furthermore, these problems are complicated by low level of human rights awareness and ignorance of legal rights and wrongs is prevalent. This subsisting situation inevitably breeds criminality. In many instances, therefore, both the perpetrators and victims of crimes are by- products of an unjust and iniquitous social, economic, and political relations in the country. The point being made here is that, the fair trial principle is not fully, faithfully and satisfactorily adhered to by the criminal justice system. The system is dysfunctional, resulting in many unfair trials to the accused, to the state, victims of crimes and the society in general.[19] In nutshell, the whole system is corrupt. Not surprising, the National Judicial Council in 2013 recommended for the compulsory retirement of the judges for an alleged misconduct[20].

Issues and Reasons for Prison Congestion in Nigeria

While prison congestion is an issue that constantly attracts attention in Nigeria's criminal justice discourse, little or no attention is paid to the congestion of police cells and the ways and manner in which the police deal with congestion. Largely, cell congestion is an urban problem.[21] It should be pointed out that one cause of congestion of cells is arbitrary arrests and detention. Due to poor crime intelligence gathering, arrests are not made when investigation is at an advance stage; rather arrests are made at the beginning of investigation. The slow pace of police investigation is yet another cause of congestion in cells. In spite of the 48 hours deadline constitutional provision, it takes the police an average of two weeks to charge a suspect to court after arrest.

While it is equally true that the police are enable by the Constitution, the Police Act and the Criminal Procedure Code/Act, to arrest on the basis of reasonable suspicion that a person is about to commit or has committed a crime, it must stated that pre-arrest intelligence can help in limiting the number of days in which a criminal suspects are kept in police custody, with the attendant congestion of police cells.[22]

In practice, when an investigating police officer has to visit another state for investigation, the suspect who is in detention is compelled to pay for the boarding and accommodation of the police team. Whether money is provided by the state for this type of investigation is not clear. What is clear is that the suspect is made to bear the financial brunt of investigation. There are cases when suspects languish in police custodies simply because they fail to provide the financial means to conduct investigation into an allegation leveled against them.[23]

Another growing ugly incident is the practice by the police whereby creditors use the police as their debt collectors in cases that have no criminal connotation. When debtors are arrested, they are detained and made to enter an undertaking as to schedules of repayment of debt. Commission ranging from 10%-20% of the amount recovered is charged as the recovery fee. Anytime the debtor defaults, he is rearrested and kept in custody; and if he tries to be smart by engaging the services of a legal practitioner, he is charged to court for fraud and obtaining property by false pretences instead. This practice remains rife in spite of the warning

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[17] Ibid.
[18] Nnamdi Aduba J "Prisoners Rights in Nigeria: A Critique" citing Obafemi A, *A Path to Freedom* (Greatness, Fourth Dimension Publisher, 1981), 77, also available on line at http;//dspace.unijos.edu.ng/bitstream/10485/202/1/37/PRISONER.pdf, accessed on 26/12/2012
[19] Ogunye, O. *op. cit* p. 12.
[20] The Nation Newspaper, 26/2/2013 pp. 29-30.
[21] *Ibid* at p. 29.
[22] *Ibid*.
[23] *Ibid*.

by the Court of Appeal in the case of *Afribank Nigeria plc vs. Onyima*[24] that the police force is not a debt recovery agency. And that arrest, detention and release without charge may make the police liable to damages for the tort of false imprisonment or for the unlawfulness or unconstitutionality of the act of detention[25].

The state of prisons and the treatment of prisoners in Nigeria is another critical aspect of the malfunction of the Nigeria criminal justice system. Although, among the many theories of punishment, retribution is regarded as the basic of object of criminal law, however, in recent times, the utilitarian object of punishment which is deterrence is now generally regarded as the main focus of the penal system. Rehabilitation which is also an aim of criminal punishment emphasizes reformation of the accused person.[26]

Based on the utilitarian perspective, the prison system ought to be hinged on a general philosophy of reformation and rehabilitation. Convicts, who are imprisoned are not just expected to serve punishment for the crimes committed, they are in addition supposed to be reformed while serving the terms and be rehabilitated before being sent back to the society. This is mooted on the understanding, that prisons to a large extent are occupied by victims of socio-economic policies, i. e those who have not gained a means of livelihood for themselves, neither a position of earning, employment, security, and social acceptance.[27]

The problem with sentencing policy in Nigeria is that, the law enforcement agents hardly consider the aim, the trial court may have intended to achieve by imposing a particular punishment. The effect is that the convicted accused person is neither taken care of in the sense that he is not considered as being that would return to the society for the purpose of leading a normal life.[28]in order words, the basis for awarding a particular sentence can hardly be discovered from the judgment of the trial judge. The law enforcement agents are thus left to guess what might have been the intention of the court in awarding the sentence.[29]

Furthermore, there is hardly any provision that takes care of a criminal after he must have served his term of imprisonment. Many of them instantly become recidivist. This omission is of great consequences on the lives and security of the citizens.[30] Unfortunately, the facilities in Nigeria prison system cannot perform the task of reformation and rehabilitation. Worst of all, is the dehumanizing nature of the conditions in the prisons that destroys the health of inmates. Their right to dignity of human person is already being breached by the horrible living conditions in our prisons.

Between April 10-14th 2004 in Kirikiri Prison in Lagos state, 1,178 out of the 1,361 inmates awaiting trials had spent between six months to seven years in prison. [31] There were two attempts at jailbreak by the 1, 708 inmates of the Kirikiri maximum prison in Lagos. Three prisoners were killed, and many including prison warders, were wounded in the process of arresting the uprising. The uprising was eventually put down by a combined team of prison, navy and police personnel[32].

Furthermore, the gross inadequacy of available vehicles to convey detainees to court for their trials is another problem confronting the prison system. This has led to long period of incarceration of awaiting trial inmates before the commencement and determination of the

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[24] (2004) 2 NWLR PT. 858 p.654 at 680 PARA. A.

[25] As laid down in *Oyakhire vs.Obaseki* (1986) 1 NWLR PT. 19 p. 735 and *Commissioner of Police Ondo state vs. Obolo* (1989) 5 NWLR PT. 120 p.130. See also section 35(6) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

[26] Weihofen, H "Retribution is Obsolence" National Probation and Parole Association News xxxix (1960) p. 14

[27] Okonkwo and Naish Criminal Law in Nigeria (London; sweet & Maxwell, 1982) p. 28-37.

[28] Alamika, E, E, "Challenges and Prospect of Reform and Improved services in Nigeria Prisons" paper presented at the Stakeholder Workshop on Prison Reforms Organized by the Provincial office of the Catholic Health Justice Development and Peace Commission on April 22, 2005, p. 4.

[29] Yakubu, Op. cit at p. 37.

[30] Neubawer, D. W American Court and the Criminal Justice System 4th ed. (New York; Pacific Grove, 1992 at p. 79.

[31] The Punch Newspaper Thursday February, 12th 2004, p. 9.

[32] *Ibid.*

charges against them, thereby compounding the already problem of congestion. In the statement of the erstwhile Comptroller General of Nigerian Prisons, Mr. Abraham Akpe, 12 vehicles out 81 Black Maria vans inherited from the Nigeria Police were serviceable, and these were the ones being used to convey over 25,000 inmates awaiting trials to court nationwide.[33]

Health services for prisoners are at best dutiful, but in all cases not intensive; thus prisoners die often due to unavailability of appropriate treatment. Diseases in prisons can easily be diagnosed, and are treatable and curable, but usually lead to death if neglected, by not giving adequate treatment due to poor prison condition. This is a violation of the prisoners' right to life. [34] Warder's brutality and intra inmates' violence are yet other factors to be considered as critical manifestation of the malfunction of the prisons system on inmates occasionally leading to death. In a report, on August 23, 2003, one Shedrack Uzigwe an awaiting trial inmate in connection with an armed robbery charges, was stabbed to death by fellow inmates in Enugu Prison.[35] While warders' brutality and inmates, violence, may not be pronounced as a counting for much deaths recorded in prisons, they nonetheless, constitute a disturbing feature of prison system in Nigeria.

Efforts in the Direction of Prison Decongestion in Nigeria

One spectacular feature of past military administrations, were drastic steps taken to deal with the problem of prison congestion associated with long period of detention. For instance, in 1989, the Federal Military Government promulgated the 'Minor Offences (Miscellaneous Provisions) Decree,[36] which abolished wandering as an offence and provided that a simple offence shall not attract detention. The Decree in its Section 1 provides that, as from the commencement of the Decree, notwithstanding anything to the contrary in the Criminal Code, the Penal Code, Criminal Procedure Code, Criminal Procedure Act, or any other enactment or law, a person shall not be accused of or charged with: i) the offence of wandering by whatever name called, ii) any other offence by reason only of his being found wandering, and that accordingly, any person accused or being charged with such offence, shall be released from custody or discharged, as the case may be, forthwith, and that a person who is accused of simple offence shall not, by reason only of being accused of being, be detained in police or prison custody.[37]

This Decree was promulgated to deal with the mischief of overcrowding of prisons brought about by unwarranted arrests, detention, and preferment of charges by policemen, who maximally used the law of wandering to extort money from innocent citizens, and railroad them into detentions, if and when their monetary demands were not met.

However, this may appear to be good law, but the fact still remains those fifteen years after the promulgation of this law, the prison system is still grappling with the problem of overcrowding, congestion, and long period of detention without trials; this shows lack of effectiveness of the law.

Due to the inability of this Decree to solve the problem of prison congestion, the Federal Military Government also fourteen years later, revisited the problem of prison congestion by promulgating the 'Prisons Decongestion Decree'[38]. This Decree established a Task Force for the decongestion of prisons in Nigeria with a deadline of 30th April, 1993 to carry out of its functions of prison decongestion after which it will be disbanded. Section 2(4) of the empowered the Task Force to

a) visit the prisons existing in Nigeria and carry out on the spot check and release of prisoners awaiting trial involved in cases of: i) stealing, where the accused had spent three months and

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[33] *Ibid.*
[34] The Punch Newspaper of Tuesday, August 12, 2003 p. 6.
[35] The Punch Newspaper of Monday September 8, 2003. P.15.
[36] Decree No. 29 of 1989.
[37] *Ibid.*
[38] Decree Nos. 18 of 1993.

above in custody; ii) cases of robbery where the accused had spent three months and above in custody; iii) cases of assault where the accused person up to one month and above in custody; and iv) other category of offenders other than armed robbery, murder and rape.[39]
b) to look into all other cases, not mentioned above, and where release was necessary, make recommendations to that effect; and c) make comprehensive reports of its findings and make appropriate recommendations to the Federal Military Government. The Task Force was mandated by the Decree to keep proper inventory and render account of all prisoners released to the President at such intervals as may from time to time direct. The Decree, also created offences relating to interference with the work of the Task Force, and ousted the jurisdiction of the court to entertain any criminal matter or civil proceedings in respect of exercise of its powers.[40] In addition, no criminal or civil proceedings shall lie or be instituted in any court of law for the or on account of or in respect of any act, matter or thing done by the Task Force or any of its members under the Decree, and if any such proceedings have been instituted before or after the making of the Decree, such proceedings shall be abated, discharged, and made void.

By 1998, the Nigeria Law Reform Commission submitted a report on prison reforms to the Federal Military Government, and by 1999 when General Abdulsalam Abubakar (rtd) became the Commander in Chief of the Armed Forces; he acted upon the report by releasing about 7,000 prisoners mainly awaiting trials from the various prisons across the country. General Olusegun Obasanjo's Administration also follow suit by releasing about 1,503 based on the recommendations of the Task Force.[41]

The Judiciary and the Criminal Justice System in Nigeria

Since the judiciary dispenses criminal justice, its performance or lack of performance has implications on the entire criminal justice system. The constitutional obligation of the judiciary is to dispense criminal justice freely and fairly. Adjudication of criminal cases cannot be free if the judiciary is not independent of the executive arm of government which prosecutes alleged criminal offenders, nor can it be free if the judiciary is manipulated by the executive or any person to secure a determination of a criminal trial in favour of the prosecution.[42]

The structure of the Nigeria judiciary contributes to the elongation of the average time for the determination of criminal trials and appeals.[43]This is so because the non-existence of trial by jury system contributes to the delay in the administration of criminal justice. A criminal trial judge sits alone without a jury over a case, thereby discharging the burden of finding of facts and applying the law.

The nature of criminal trials also contributes significantly to delay in the dispensation of criminal justice. Criminal trials are usually, if not always keenly contested. Criminal cases are essentially adversarial. Needless to say that, every intra-trial ruling delivered by the trial judge, especially in cases that carries long term sentence, life imprisonment and capital punishment, which is against the defence may be appealed against while the substantive trial is pending at the appellate court and backed up with application for stay of proceedings of the trial court, pending the determination of the appeal. If a stay of proceedings is granted, then the trial will be truncated. Also, if, at anytime during the trial, the judge is transferred, or retired or removed from office or dies, the case shall start de-novo before a new judge.[44]

Finally, the judgment may be contested on appeal. All these incidences of criminal trial makes it plain that even criminal trials may take sometime to go through the entire gamut of

[39] *Ibid.*
[40] *Ibid* Sections 4 & 5.
[41] Ogunye, J *op. cit* p. 175.
[42] Ogunye, *op. cit* p. 41.
[43] *Ibid.*
[44] *Ibid.*

the judiciary of societies like Nigeria; where the structures of justice administration are not very strong leading to long detention of suspects on awaiting trial.[45]

The Plea Bargaining Option

Plea bargaining is a feature of the criminal justice system of common law countries.[46] Essentially, plea bargaining has been an essential part of the criminal justice system in the United States of America, which though is not included under the fair trial principle in the Bill of Right enshrined in the Sixth Amendment to the Constitution, has been repeatedly held by American courts to be constitutional.[47] The vast majority of felony criminal cases in urban areas of the United States are determined on the plea bargaining rather than by a jury trial[48].

In Nigeria, due to the fact that, several initiatives and interventions by civil societies and state actors for the reform of the Nigerian criminal justice system administration has not produced any significant result, there was clamor for alternative to imprisonment, or non custodial/institutional treatment of accused persons, hence, the plea bargain option which reared its head in the Nigerian criminal justice administration in 2004. Since then, the concept has been used effectively with astonishing results by the Economic and Financial Crimes Commission relying on section 14(2) of the EFCC Act.

A plea bargaining is an agreement between the state (Prosecution) and an accused person in a criminal case, whereby the accused person accepts to plead guilty and often furnishes allocution to a less severe offence than the one originally charged; or to a smaller number of offences than the one originally charged.[49] It is more or less a negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence or to one of multiple charges in exchange for some forms of concession by the prosecution usually a more lenient sentence or a dismissal of the other charges.[50] According to Blacks' Law Dictionary, it is variously called plea agreement, negotiated plea, sentence bargain and charge bargain in which the prosecutor agrees to drop some of the counts or reduce the charge to a less serious offence in exchange for a plea of either guilty or no contest from the defendant.[51]

By its nature, plea bargaining is an activity undertaken within the context of prosecutorial discretion whereby the prosecutor in order to save time or cost, or avoid the difficulty in certain cases, of having to strive to prove certain facts required to establish certain offences, decides to offer certain concessions to the accused in exchange for specific charges or proposed to be charged.[52]There is polarity of contemporary reactions to this practice. Nevertheless, most participants in the plea bargaining process find the practice as a panacea in the administration of criminal justice.

Among the numerous benefits of incorporating the plea bargaining procedure into the Nigerian criminal procedure law is that, it has the potential of bringing about a downward incidence of delay justice in Nigeria. It will also mark a departure from the old style of capital punishment, to a consequential of life or longer term of imprisonment. On other words, an

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[45] Alemika, E 'Pre-Trial Detention of Prison Decongestion in Nigeria' Vol. 3 University of Jos Law Journal (1986-1990).

[46] Fisher, G '*Plea Bargaining's Triumph: A History of Plea bargaining in America'* (USA; Standford University Press, 2000).

[47] Andrew, H *Doing Justice: The Choice of Punishment* (New York; Hill and Wing, 1979).

[48] A Clear example was the celebrated case of John Walker Lindh (an American Soldier), who in 2001, fought with the Talibans in Afghanistan against the United States, and was captured. John Walker Lindh pleaded in court on Monday, July 15, 2002 to charges that could keep him in prison for twenty years in fulfillment of terms of an agreement with the United States' attorneys. See also Alschuler, A, 'The Judicial Business of the United States Court' annual Report of the Director of the Justice Department 2000.

[49] Ogunye, J. *op cit* p. 186.

[50] Lamer, L. L The Criminal Courts: Structures, personnel, and Processes (New York: McGraw-Hill, 1991) p. 22

[51] Garner, B *Blacks' Law Dictionary* (USA; West Point Publishers Ltd, 1997) p. 1190. See also Adebayo, O *Nigeria Police Structure, Powers and Function in Nigeria*: *Essays in Administrative Law in Nigeria* (Ibadan, Pitman press Ltd, 2003).

[52]Azinge, E 'Conviction to Compromise: The Plea Bargain Option' available @http;//www.nials.nigeria.org/round-table accessed 3/1/2014.

accused person who enters into a plea agreement with the prosecution to plead guilty to a charge attracting a capital punishment saves the prosecution's time and the rigour of prosecution.[53] Since the globe is gradually departing form death sentence, the adoption of a plea bargain in Nigeria may therefore, serve as a veritable platform for circumventing the death penalty, and indeed create a social consciousness for its abrogation.[54] Luckily, Nigeria has a law reform commission, a federal agency which can utilize the opportunity provided by the democratization process to push for a comprehensive reform of Nigeria's criminal procedure.[55]

Conclusion

While much is being said about the criminal justice and penal reforms in Nigeria by government, little is being done about it. The incorporation of plea bargaining into our criminal procedure law is the only solution to the problem bedeviling criminal justice system administration in Nigeria. Thus, what is being contemplated by the writers is that the adoption of the plea bargaining procedure though may not be a water compartment of the Nigeria impaired criminal justice system, but as a reform package. It has become imperative for the Nigerian justice administration system to open up itself to new ideas.[56] It is the belief of the Writers that, if plea bargaining procedure is made part of our criminal justice system, and offenders allowed to plea bargain and admit to the commission of crimes in order to obtain a downward departure from punishment, persons standing criminal trials and their attorneys will be less inclined to legal technicalities in order to frustrate the prosecution of trials. This will save time, resources and delays associated with criminal justice system in Nigeria. Most importantly, the issue of congestion in our prisons occasioned by delay in criminal trials and long period of suspects awaiting trial in detention will be greatly reduced; as prisoners/suspects will embrace the plea bargaining procedure and accept lesser charges and lesser punishments for the offence which they know they actually committed, and move on in life. Against the foregoing, this paper recommends:

1) Plea bargaining should be viewed from a holistic angle of both restoration and retributive models of justice to avoid giving the impression of immunity from punishment, freedom from guilt and escape punishment. This will also reduce the chances of making a mockery of the criminal justice system.

2) Prosecutors should have the ability to recognize and predict the outcome of true adjudication at a lower cost when opting for plea bargain. Cost and benefit analysis should be considered in order to save time and avoid unnecessary public trials and protect innocent victims of crime from going through trial process by ordeals which could endangered their privacy and expose them to unnecessary risks.

3) Periodic review of status of prison inmates by judicial officers for accelerated judgment, for parole and recommendation for amnesty and pardon. Similarly, there is the need for the construction of modern day prison centers that will be adequate for an envisage prison population.

4) Existing infrastructure in the prisons and remand homes should be revamped to provide basic facilities and utilities for human living even in confinement. Many of the present prisons were built during the colonial era, and are now in varying states of disrepair. There is need for long term projections

5) Though, plea bargaining was never really part of the history of the Nigeria legal system, but its provisions clustered around specific legislations like Section 14(2) of the Economic and Finance Crime Commission Act, 2004; Section 76 of the repealed Criminal Justice Law of Lagos State, 2007; Section 76 of the Administration of the Criminal Justice

[53] *Ibid* at p. 238.
[54] *Ibid* at p. 241.
[55] The Punch Newspaper of Thursday November 13th, 2003 p. 9.
[56] Reunice, K. O 'Corruption in Nigeria: An Appraisal' Journal of Law Policy and Globalization Vol. 19 2013.available@http://www.iiste.org accessed 3/1/2014.

Repeal and Re-enactment Law, 2011; and Section 248(2) of the Administration of Criminal Justice Bill, 2005. These sections should be reinforced with the desired vigour and give a constitutional backing.

Bibliography

- Adebayo, O Nigeria Police Structure, Powers and Function in Nigeria. Essays in administrative Law in Nigeria (Ibadan, Pitman press Ltd, 2003;
- Andrew, H Doing Justice: The Choice of Punishment (New York; Hill and Wing, 1979);
- Alschuler, A 'The Judicial Business of the United States Court' annual Report of the Director of the Justice Department 2000;
- Alamika, E, E, "Challenges and Prospect of Reform and Improved services in Nigeria Prisons" paper presented at the Stakeholder Workshop on Prison Reforms Organized by the Provincial office of the Catholic Health Justice Development and Peace Commission on April 22, 2005;
- Alemika, E 'Pre-Trial Detention of Prison Decongestion in Nigeria' Vol. 3 University of Jos Law Journal (1986-1990);
- Azinge, E 'Conviction to Compromise: The Plea Bargain Option' available @http;//www.nials.nigeria.org/round-table accessed 3/1/2014;
- Cap IV of the 1999 Constitution of the Federal Republic of Nigeria (as amended) on Fundamental Human Rights;
- Doherty, O Criminal Procedure in Nigeria (London; Blackstone Press Ltd, 1990);
- Fisher, G 'Plea Bargaining's Triumph: A History of Plea bargaining in America' (USA; Standford University Press, 2000);
- Garner, B Blacks Law Dictionary (USA; West Point Publishers Ltd, 1997);
- Lamer, L. L The Criminal Courts: Structures, personnel, and Processes (New York: McGraw-Hill, 1991);
- Neubawer, D. W American Court and the Criminal Justice System 4th ed. (New York; Pacific Grove, 1992;
- Ogunye, J The Imperative of Plea Bargaining (Lagos; Lawyers' League for Human Rights, 2005);
- Okonkwo and Naish Criminal Law in Nigeria (London; sweet & Maxwell, 1982);
- Reunice, K. O 'Corruption in Nigeria: An Appraisal' Journal of Law Policy and Globalization Vol. 19 2013.available@http://www.iiste.org accessed 3/1/2014;
- This Day Newspaper of Friday, August 20, 2004;
- The Guardian Newspaper, Sunday, 26th October, 2003;
- The Guardian Newspaper of Thursday February 19, 2004;
- The Punch Newspaper Thursday February, 12th 2004;
- The Punch Newspaper of Tuesday, August 12, 2003;
- Weihofen, H "Retribution is Obsolence" National Probation and Parole Association News xxxix (1960);
- Yakubu, A "Some Problems Associated with Law Enforcement in Nigeria" cited In Yakubu, A Administration of Justice in Nigeria: Essays in Honour of Ho. JusticeUwais (Lagos;malthouse Press Ltd, 2002).

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OFFENSE - THE ONLY GROUND FOR CRIMINAL LIABILITY
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Abstract

This study aims to examine the offence as the only ground for criminal liability. Article 15, paragraph 2 of the Criminal code provides that: "offences are the only grounds for criminal liability", which implies the existence of an act, which is detected by the bodies empowered under the law in the form required by law, and also this principle comes as a guarantee of the person's freedom because, without committing an act provided for by the law as an offense, the criminal liability cannot exist.

The criminal liability is one of the fundamental institutions of the criminal law, together with the institution of the offence and of the sanction, set in the various provisions of the Criminal code.

As shown in the Criminal code, in Title II regarding the offence, there is a close interdependence among the three fundamental institutions. The offence, as a dangerous act prohibited by the criminal rule, attracts, by committing it, the criminal liability, and the criminal liability without a sanction would lack the object. It obliges the person who committed an offence to be held accountable for it in front of the judicial bodies, to bide the sanctions provided for by the law, and to execute the sanction that was applied.

The correlation is also vice-versa, meaning that the sanction, its implementation, cannot be justified only by the existence of the perpetrator's criminal liability, and the criminal liability may not be based only on committing an offence.

The criminal liability is a form of the judicial liability and it represents the consequence of non-complying with the provision of the criminal rule. Indeed, the achievement of the rule of law, in general, and also the rule of the criminal law implies, from all the law's recipients, a conduct according to the provisions of the law, for the normal evolution of the social relations.

Keywords: **criminal liability, offence, criminal law sanction, rule of law**

Introduction

The achievement of the rule of criminal law takes place by complience by the majority of the criminal law's recipients with its provisions, in the conformation relations. For those who don't comply with their conducts with the dispositions of the criminal rule committing forbidden acts, the recuperation of the broken rule of law and the achievement of the rule of law can take place through the coercion in a criminal judicial relation of conflict.

The criminal liability appears, in other words, as the judicial relation of conflict, of coercion, a complex judicial relation with rights and obligations specific for the participant subjects[1].

On the same line, the criminal liability is defined, in the present criminal doctrine, as "the judicial criminal relation of coercion, that appears as a consequence after committing an offence between the state, on one hand, and the perpetrator, on the other hand, a complex

[1] I. Oancea, *Criminal law. General part, (Drept penal. Partea generală)*, Bucharest, Didactic and Pedagogic Publishing House, 1971, p. 419.

relation whose content is formed by the state's law, as a representative of the society, to bring the perpetrator to account, to apply him/her the sanction provided for the committed offence, to coerce the perpetrator to execute it, and also the perpetrator's obligation to account for his/her act and to bide the applied sanction, to restore the rule of law and to restore the law's authority"[2].

The criminal liability, in all times, was based on the committment of an offence, of a prohibited act. The criminal liability, being linked by the conception which people had about the notion of offence, it normally carried the print of the meaning given to this notion.

The way the individual behaves is reported to the freedom in thinking and acting, and the way in which the individual freedom is reflected in the committed act, either permitted, or not.

The Criminal Law incriminates the human actions which constitute an infraction/offence (lat. infractio - destruction), actions committed with guilt, provided for by the criminal law, unjustified and imputable, and also the criminal sanctions which are applied to persons who committed these actions.

To establish the actions that are going to be prohibited, the legislator starts from the observation that these actions were once committed in reality, and there is a fear that they could be repeated.

The rules and the institutions of the criminal law govern and determine the criminal rule which will be applied to the action incriminated as an offence, and the sanction as a coercion measure and a way to reeducate the perpetrator. In fact, the basic institutions of the criminal law are: offence, criminal liability and criminal sanctions. Among these three institutions there is a close link and interdependence in the sence that the offence generates the criminal liability which manifests itself by applying a criminal sanction.

The offence, as provided for by the Criminal code in paragraph 2 of the Article 15, represents the only ground for criminal liability, being appreciated in the doctrine as "the headstone" of any system of criminal law.

It is the one which determines the other two fundamental institutions of the criminal law, the criminal liability and the criminal sanctions.

The institution of the offence is consecrated in Title II of the Criminal Code's General Part, being structured in 5 Chapters:

- Chapter I. General provisions
- Chapter II. Justifying causes
- Chapter III. Non-imputability (imputable character) causes
- Chapter IV. Attempt
- Chapter V. Unity and plurality of offences
- Chapter VI. Author and participants

The institution of the criminal liability is governed by expres provisions:

- in Article 15 paragraph 2 according to which an offence is the only ground for crimiinal liability;

- by the dispositions provided for by Title VII of the Criminal code's General Part where the causes, that remove criminal liability, are.

The institution of the criminal sanctions presents the characteristic that is formed of three categories of sanctions:

- Punishments
- Educative measures
- Safety measures

A criminal rule is usually followed by the majority of the recipients who adopt the conduct provided for by the criminal law.

However, there are situations when the complying conduct of the society's members is infringed by them as a result of committing crimes which are actions or inactions whom the

[2] C. Bulai, *Criminal law (Drept penal)*, Volume III, pages 14-17.

criminal rule incriminates as offences. This constitutes the condition of the appearance of the criminal law relation.

In conclusion, the criminal relation is the link which arises between the state and the perpetrator as a result of having committed an action provided for by the criminal law, within existing correlative rights and obligations consisting in the applying and biding the criminal sanctions in order to defend Romania and its rule of law[3].

In the Criminal code in force, the notion of the offence, in general, has received, in the content of the criminal ruule (Article 15), a precise statement in which the material, social, human, moral and judicial aspects of the offence is reflected.

The disposition of Article 15 provides that the offence is "the deed stipulated by the criminal law committed with guilt, unjustified and imputable to the person who committed it".

In the most general sense of the term, the offence is a deed of the human, an act his exterior conduct, prohibited by the law under a specific, repressive sanction, which is the punishment[4].

As regarding the judicial concept of the offence, the Romanian criminal law defines it both from the point of view of the theoreticians and doctrinaires, and from the point of view of the legislator because the systematic and scientific regulations of the relations of social defence cannot be reduced to the elaboration of the special criminal rules which provide the prohibited deeds as offences and appropriate sanctions.

The offence that was commited represents the typical form of the offence described by the criminal rule.

In certain conditions, there are incriminated even the actions that reached the stage of committing the offence, and in some very special cases even those that are preparing the offence[5].

Sometimes, the material activity in execution is stopped or the consequence or the desired result does not occur, for reasons beyond the pepetrator's will.

It is certain that the human activity, to have the quality of an offence, should be expressed objectively (physically), real by the execution or abstention (omission) from the execution of what criminal rule imposes[6].

Human conduct, under a subjective aspect, represents the support of the way of thought, decision and execution of the criminal objective deed, being at the base of its actual commission, involving the adoption of an individual attitude of the perpetrator towards the deed and its result manifesting social peril[7].

Pursuant to the exterior manifestation of the perpetrator by committing the offence, the criminal liability appears, the most severe form of the judicial liability, because through the offence as a negative action, the most important social values are broken.

The Criminal code in force stipulates in paragraph 2 of the Article 15 the principle that "offences are the only grounds for criminal liability."

So, criminal liability constitutes the immediate judicial consequence of committing an offence; only the person who committed an offence will be accountable for his/her action (the personality principle of criminal liability).

This consequence falls, under the law, on the perpetrator right at the moment of committing the deed, and not from the moment when he/she is actually held accountable for his/her action.

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[3] M. Basarab, *Criminal law. General part (Drept penal. Partea generală)*, Volume I, Bucharest, Lumina Lex Publishing House, 1997, page 34.

[4] A. Boroi, *Criminal law. General part. According to the New Criminal Code (Drept penal. Partea generală. Conform Noului Cod penal)*, Bucharest, C. H. Beck Publishing House, 2010, page 99.

[5] L. R. Popoviciu, *Criminal Law. General part (Drept penal. Partea generală)*, Bucharest, Pro Universitaria Publishing House, 2011, page 25.

[6] I. Tănăsescu, C. Tănăsescu, G. Tănăsescu, *General criminal law (Drept penal general),* Bucharest, All Beck Publishing House, 2002, page 151.

[7] I. Tănăsescu, C. Tănăsescu, G. Tănăsescu, quoted work, page 160.

The offence is the cause of the criminal liability, and the resort to sanctions of criminal law (punishment or safety measure) is a consequence of the criminal liability.

The criminal sanction, representing the only form of sanctioning offences, accomplishes the social reformation of the perpetrator and it maintains the social order by the force of the law.

The concept of criminal liability, in as far as it relates to the achievement of the order of the criminal law only by coercion, it refers, firstly, to the situation, when the rule is not respected by the individual will, the commission of the offence represents an opposition to the legislator's will, having as consequence the criminal liability of the perpetrator and his/her sanctioning[8].

The liability, in general, appears as a social fact representing the society's reaction towards an action or inaction considered at the place and time of its commission to be condemnable[9].

The reaction of the society towards an action being different in relation to the place and time of its commission, the liability has a historic character and a local particularity, but, beyond all these particularities, there are elemets of continuity deriving from the universality of some socialvalues protected by social rules and the character of the broken social rules[10].

Liability is not specific exclusively to the positive law, but, regardless of the form in which it manifests itself, it has at its basis an obligation – a duty to be accountable for the consequences of breaking a social rule of conduct[11].

Usually, society's members conform themselves willingly to the conduct expected by the rules of the criminal law.

There are also some persons who does not comply themselves to the criminal law's requirements and they commit offences. In this case, achieving the order of the criminal law is possible only by coercion, by applying sanctions provided for by the broken rules to those who committed deeds prohibited by the accusatorial rules[12].

Breaking the precept of the judicial rules atracts judicial liability: disciplinary, civil, administrative, criminal, and so on.

Judicial liability, in general, is a judicial relation of coercion whose object being the sanction[13].

As a judicial relation, the judicial liability represents a complex of connected rights and obligations that, according to the law, appear as a consequence of committing a crime and that constitute the framework of achieving the state's coercion, by applying judicial sanctions[14].

Breaking the precepts of the criminal law attracts, as a form of civil liability, the criminal liability.

Achieving the order of the criminal law by coercion takes place in the framework of the criminal judicial relation of conflict as a consequence of committing the offence, by transforming the judicial relation of conformation that precedes it. In this judicial relation, takes place the accountability of the perpetrator, the judegement and, if the perpetrator is found guilty of committing the offence, the perpetrator's sanction, according to the law, and also the execution of the applied sanction. That is why the criminal judicial relation of conflict

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[8] I. Tănăsescu, C. Tănăsescu, G. Tănăsescu, quoted work, page 635.

[9] M. Eliescu, *Delict civil liability (Răspunderea civilă delictuală),* Academiei R.S.R. Publishing House, Bucharest, 1972, page 5.

[10] V. Paşca, *Course of criminal law. General part (Curs de drept penal. Partea* generală), 2nd Edition in accordance with the modifications of the New Criminal code, Bucharest, Judicial Universe Publishing House, 2012, page 358.

[11] Gh. Mihai, *Law's bases. The theory of judicial liability (Fundamentele dreptului. Teoria răspunderii juridice).* C H. Beck Publishing House, Bucharest, 2006, pages 63-64, V. Paşca, quoted work, page 358.

[12] C. Bulai, quoted work, page 310.

[13] Gh. Boboş, *Law's general theory (Teoria generală a dreptului),* Dacia Publishing House, Cluj-Napoca, 1994, page 259.

[14] M. Costin, *Judicial liability in the law of R.S.R. (Răspunderea juridică în dreptul R.S.R.),* Dacia Publishing House, Cluj-Napoca, 1974, pages 31-32, V. Paşca, quoted work, page 358.

may also be called the judicial relation of criminal liability, as a way of achieving the order of the criminal law[15].

The criminal liability reflects the immediate reaction of the society towards the perpetrator.

As a judicial phenomenon, it expresses the link between the criminal phenomenon and the person who realized that phenomenon, giving a content specific to tthe relation between the state and that person and determining the incidence of the sanction or the educative measure[16].

The criminal liability, as a way of achieving the rule of law by coercion, to be more efficient, has to intervene promptly, as close as possible to the moment of committing the offence[17]. Thus, both special prevention and general prevention are realized, the feeling of security of the social values is created, the broken rule of law is recovered, and the trust in the law's authority is consolidated[18].

When the criminal liability intervenes later, after committing the offence, its efficiency is diminished, and the resonance of the offence decreases gradually.

The promptitude in the activity of finding the perpetrators, of applying and executing the criminal sanctions, has educative valences different in relation to those who are called to account (to criminal liability).

This promptitude has a positive echo in the conscience of the public oppinion in two senses:

- first, those who were the victims of offences find a satisfaction in the promptitude in which the guilty ones have been punished,

- the potential victims see in this promptitude a strenghening of the feeling of security[19].

For those inclined to commit offences, the promptitude in the activity of bringing someone to criminal account, and also the inevitability of this liability represents a strong way of discouragement.

As for the perpetrator, being during this time under the threat of criminal liability and sanction, the perpetrator could correct himself, and, thus, there is no longer needed a limitation in time of the criminal liability and its removal through prescription[20].

As a form of judicial liability, the criminal liability implies, on one hand, the pre-existence of an accusatorial rule which prohibits, under the criminal sanction, a certain action or inaction, and, on the other hand, it implies the commission by a person to which it falls the obligation of conformation, of prohibited deed in the conditions in which the deed is an offence[21].

The criminal liability implies the commision of an illicit act. What is specific to it, in the case of the criminal liability, is that it has to be a penal illicit, an offence.

It is necessary that the deed prohibited by the criminal law to meet all the legal requirements to be an offence, because only the offence can generate the criminal liability. Article 15 paragraph 1 in the Criminal code in force with the marginal name "*The essential features of the offence*" provides that the offence is the deed stipulated by the criminal law committed with guilt, unjustified and imputable to the person that committed it.

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[15] C. Bulai, B. Bulai, *Handbook of Criminal law. General part (Manual de Drept penal. Partea generală),* Bucharest, Judicial Universe Publishing House, 2007, page 327.
[16] C. Bulai, B. Bulai, quoted work, page 329.
[17] A. Boroi, quoted work, page 339.
[18] A. Boroi, quoted work, page 339.
[19] Idem.
[20] A. Boroi, quoted work, page 339.
[21] C. Bulai, B. Bulai, quoted work, page 329.

Thus, i tis considered[22] that, according to Article 15 paragraph 1 in the Criminal code, the offence has undoubtedly 4 eseential features, as:

a) the provision of the deed in the criminal law;

b) the commision of the deed with guilt;

c) the committed deed to be unjustified;

d) the deed to be imputable to the person who committed it.

The provision of the deed in the criminal law is imposed by the principle of the incrimination lawfulness provided for in Article 1 in the Criminal code, according to which "the law provides which deeds are offences…."

Anti-juridicity, as a specific feature of the offence, was also noted by Traian Pop in his work, but this concept was not developed later in the Romanian criminal doctrine. Anti-juridicity implies that the committed deed is not allowed by the judicial order, excluding the existence of some justifying causes[23].

The imputability (imputable character) must be examined from the material point of view (*objective imputability*), in the sense that there is a link between the deed and its author *(imputauo facti)*[24].

In the criminal doctrine there is a distinction between guilt as an essential feature of the offence and guilt as an element of the offence's content. The guilt as an essential feature is expressed in the forms and ways provided for in Article 16 in the Criminal code and it exist sat any time when the completion of one of these way is determined, and, as an element of te offence's content, the guilt will exist only when the material element of the offence was committed with the form of guilt required by the law[25].

The distinction is necessary because the existence of guilt as an essential feature of the offence does not always imply the existence of guilt as an element of the offeence's content.

Even if in our legislation is less obvious this double sense of the guilt, one related to the generic concept of the crime and the other related to its content, as provided by the law, in the *common law* legal systems, there are certain types of offenses for which it is not necessary to prove any kind of guilt in order to attract a criminal responsibility, that is, the so-called *strict liability*[26]. In these cases, even if, as principle, no person has to be criminal responsible unless having a *mens rea* element, it should not be proved this element, but is sufficient to prove the *actus reus* element[27].

The criminal liability is the consequence of the offence which constitutes its premises and its basis, and, in its turn, the determined liability constitutes the premises and the basis of the infliction of criminal sanctions.

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[22] G. Antoniu, *Preliminary explanations of the new Criminal code (Explicaţii preliminare ale noului Cod penal),* Bucharest, Judicial Universe Publishing House, 2010, pages 129-148.

[23] V. Paşca, quoted work, page 128.

[24] V. Paşca, quoted work, page 128.

[25] C-tin Mitrache, C. Mitrache, *Romanian criminal law, general part (Drept penal român, partea generală)*, Bucharest, Judicial Universe Publishing House, 2006, page 112.

[26] Within the common law systems, the term of *strict liability* (absolute liability) means a standard of liability encountered both in civil law and in criminal law. According to it, a person can be held responsible for the damages caused by his act, regardless of the guilt he had at the time when the offense has been committed. The *strict liability* standard is often applied in the field of traffic offenses and misdemeanors. For example, if exceeding the legal speed in the traffic, the defendant will be responsible regardless of whether he did or did not know about the speed limit posted on the road sign. For the judicial authority is enough to prove that the defendant drove with a speed greater than that provided on the road sign. See in this regard, L.A. Lascu, *Modalităţi de comitere a crimelor date în competenţa instanţelor penale internaţionale,* Hamangiu Publishing House, Bucharest, 2013, page 247.

[27] The *strict liability* standard can be determined by studying the intention that the legislature has had on the regulation of certain crimes or misdemeanors, meaning that if the legislator, intentionally, omitted to provide a certain type of *mens rea* for a specific offense, it is assumed that the legislature has provided the *strict liability* standard for such offenses. See, in this regard, C. *Lee, A. Harris, Criminal Law Cases and Materials*, Thomson & West Publishing House, Berkeley, 2009, page 219-221 and 989.

In criminal matters, mediation, by Law 192/2006 on mediation and the organization of the mediator profession, as well as Article 10, letter h and Article 16, index 1 of the Law 202/2010, which is applied in criminal cases regarding offenses in which criminal liability is removed, according to the law, by the withdrawal of the complaint, the reconciliation of parties, or conclusion of a mediation agreement, in the following offenses: hitting or other forms of violence, bodily harm, bodily harm by negligence, threat, rape[28], etc.

Due to this double link which situates the institution of criminal liability between the institution of offence and criminal law sanctions, the regulation of the criminal liability was split in the content of the Criminal code in force.

In the title referring to offence, the object of regulation is the problem if the criminal liability exists or not, inseparably linked to the problem if the offence exists or not.

The rules of this regulation refer to the causes that remove the existence of the offence, and, consequently, they exclude from the start the criminal liability.

Conclusions

The criminal liability is the consequence of the offence which constitutes its premises and its basis, and, in its turn, the determined liability constitutes the premises and the basis of the infliction of criminal sanctions.

The Criminal code in force provides in paragraph 2 of the Article 15 the principle that "offences are the only grounds for criminal liability".

Răspunderea penală constituie, deci, consecinţa juridică imediată a săvârşirii unei infracţiuni; numai cine a săvârşit o infracţiune răspunde penal (principiul personalităţii răspunderii penale).

The criminal liability constitutes the immediate judicial consequence of commiting an offence; only the person who committed an offence will be accountable for his/her action (the personality principle of criminal liability).

This consequence falls, under the law, on the perpetrator right at the moment of committing the deed, and not from the moment when he/she is actually held accountable for his/her action.

Bibliography

- L. A. Lascu, *Modalităţi de comitere a crimelor date în competenţa instanţelor penale internaţionale,* Hamangiu Publishing House, Bucharest, 2013;
- L. D. Rath-Boşca, *Resolving conflicts from the mediation point of view*, in AIJJS no. 1/2013;
- V. Paşca, *Course of criminal law. General part (Curs de drept penal. Partea* generală), 2nd Edition in accordance with the modifications of the New Criminal code, Bucharest, Judicial Universe Publishing House, 2012;
- L. R. Popoviciu, *Criminal Law. General part (Drept penal. Partea generală)*, Bucharest, Pro Universitaria Publishing House, 2011;
- Boroi, *Criminal law. General part. According to the New Criminal Code (Drept penal. Partea generală. Conform Noului Cod penal)*, Bucharest, C. H. Beck Publishing House, 2010;
- G. Antoniu, *Preliminary explanations of the new Criminal code (Explicaţii preliminare ale noului Cod penal),* Bucharest, Judicial Universe Publishing House, 2010;
- C. *Lee, A. Harris, Criminal Law Cases and Materials*, Thomson & West Publishing House, Berkeley, 2009;
- C. Bulai, B. Bulai, *Handbook of Criminal law. General part (Manual de Drept penal. Partea generală),* Bucharest, Judicial Universe Publishing House, 2007;

[28] L. D. Rath-Boşca, *Resolving conflicts from the mediation point of view*, in AIJJS no. 1/2013, page 167.

- C-tin Mitrache, C. Mitrache, *Romanian criminal law, general part (Drept penal român, partea generală)*, Bucharest, Judicial Universe Publishing House, 2006;
- Gh. Mihai, *Law's bases. The theory of judicial liability (Fundamentele dreptului. Teoria răspunderii juridice).* C H. Beck Publishing House, Bucharest, 2006;
- Tănăsescu, C. Tănăsescu, G. Tănăsescu, *General criminal law (Drept penal general),* Bucharest, All Beck Publishing House, 2002;
- M. Basarab, *Criminal law. General part (Drept penal. Partea generală)*, Volume I, Bucharest, Lumina Lex Publishing House, 1997;
- Gh. Boboş, *Law's general theory (Teoria generală a dreptului),* Dacia Publishing House, Cluj-Napoca, 1994;
- C. Bulai, *Criminal law (Drept penal)*, Volume III;
- M. Costin, *Judicial liability in the law of R.S.R. (Răspunderea juridică în dreptul R.S.R.),* Dacia Publishing House, Cluj-Napoca, 1974;
- M. Eliescu, *Delict civil liability (Răspunderea civilă delictuală),* Academiei R.S.R. Publishing House, Bucharest, 1972;
- Oancea, *Criminal law. General part, (Drept penal. Partea generală)*, Bucharest, Didactic and Pedagogic Publishing House, 1971.

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VALIDITY CONDITIONS OF THE JURIDICAL ACT

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Abstract

The legislative act is the subjects` will to create, modify or extinguish a juridical relation of Civil Law. Hence the fundamental elements of the existence of civil juridical act, namely:

1.*the subjects` manifestation of will*

1.*intention to produce, modify or extinguish civil juridical relations*

1.*the juridical effects whose induction is aimed by parties*

Consent is an essential prerequisite of validity for any juridical act and it is defined as the parties` decision to complete the juridical act. The consent must meet the following conditions to acquire legal value and to be considered valid:

1.*to be issued by a judicial person*

1.*the intension of closing a legislative act should be known by all parties;*

1.*the consent should be clear in terms of obligations and rights resulting from such an act;*

1.*should not be affected by error vice of consent, mistake, fraud, violence or damage.*

Keywords: juridical act, consent, mistake, fraud, violence, damage.

Introduction

Along the ability of any natural and legal entity to contract, which is a prerequisite for the validity of a civil juridical act, the parties` consent to close the

juridical act is also of great importance. Parties should assume the legal consequences that it produces[1].

The Provisions of the New Civil Code on the vice of consent

The New Civil Code stipulates that the juridical institution of consent provides that consent can be considered vice, when it is subjected to error[2], closed by means of fraud, violence or damage. Both New and Old Civil Codes refer to the institutions of error, fraud, cunningness and damage as vice of consent committed by natural and legal entities that give their consent to the closure of juridical acts irrespective of these vices.

Lack of vice would cause the subjects` refusal to close the juridical act and the juridical relation that results from provision of rights and obligations arising from the act would not be materialised

1.) Error vice of consent

Mistake or false representation of reality in the consciousness of one of the parties closing the contract is represented by that vice which determines a party to close a juridical act because it wouldn`t have been closed under other circumstances. Error as vice of consent has been handled by the Old Civil Code, too,[3]and it stipulated that only damage brought to the object of a contract can make it null and void. According to the same code, if error was the object of one of the parties but it didn`t have determining effects upon the contract, the juridical act cannot be considered null and void. In the old civil law, the institution of error was classified according to the consequences it produces. Thus, there were three distinctive categories, namely: error obstacle, error vice of consent (also called severe error) and indifferent error.[4] The New Civil Code analyses the institution of error vice of consent referring to parties closing a juridical act. The Code states that the party which finds itself in an essential error at the moment of closing the act can demand the invalidation of the contract if proven that the other party knew or should have known about the error and its importance in the closure of the act[5].

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[1] See also Petru Tărchilă, Drept civil.Partea generală şi Persoanele,Editura Gutenberg,Arad 2008,pag.272

[2] See art. 1206 of the New Civil Code.

[3] See the provisions of art.954 of the Old Civil Code.

[4] See Petru Tărchilă ,op.cit.pag.126 .

[5] see the provisions of art 1207 of the New Civil Code

The new Civil Code develops and handles the institution of error referring to its main forms[6]. They are common especially in civil jurisprudence and can be classified in: essential error, unpardonable error, assumed error, calculation error and error of communication and transmission.

According to the new provisions of civil law, error is essential when it bears on the nature or object of the contract and when it bears on the identity of the object, on the performance or on one of its qualities or circumstances considered essential by both parties without which the contract would not have been closed.

Unpardonable error is in the new civil law a fact or a circumstance which generates confusion and which could be easily admitted by both contracting parties through reasonable diligence.

Moreover, the New Civil Law stipulates that Error of Law cannot be claimed in cases of accessible and predictable legal provisions. Referring to the institution of assumed error, the new legislation considers it an element, fact or circumstance which presents a certain error risk, which has been assumed by all contracting parties or should have been assumed by them.[7]

Referring to calculation error, the new civil legislation stipulates that calculation error does not make the contract void but it claims its amendment.

Still, when calculation error had as object the quality of services provided by the legal act and the quality was essential for the closure of the contract, thus lack of quality would have led to the rejection of contract closure, the contract can be voided at the request of either parties. Error of communication and transmission applies when the will of one of the parties was misunderstood or the declaration was inaccurately transmitted by means of a third party or distance communication means.

2.) Fraud as Vice of Consent

The New Civil Code regulates the juridical institution of fraud (or cunningness) stipulating that such vice of consent takes place when one party fraudulently mislead the other party by using false evidence (cunning and deceitful) or a party fraudulently omitted to inform the contracting party about certain circumstances that ought to have been revealed[8]. Thus, fraud is a vice of consent which consists of misleading a person through deceitful (cunning) means in order to determine the party to close a juridical act. Lack of such deceitful means would have undoubtedly led to the rejection of the contract. In other words, fraud is a caused error (not spontaneous as the error itself).

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[6] See the provisions of art 1208 to 1211 of the New Civil Code.

[7] See Beleiu G.,*Drept civil român, introducere în dreptul civil ,Subiectele dreptului civil*,Ed.Şansa ,Bucureşti 2010,p. 244.

[8] See the provisions of art.1214 of the New Code.

The party whose consent was corrupted by fraud can claim the contract as null and void even if the error made is not considered essential. Moreover, the new civil legislation stipulates that a legal act becomes null and void when the fraud is committed by the representative or guarantor for the business of the other party, thus noting that fraud should be proven through evidence and not inferred. Fraud has two structural elements, namely:

– a subjective, intentional element represented by the intention of one contracting party to mislead the other party and determine it to close the contract.

– a objective, material element represented by the use of one contracting party of deceptive manufactures created for the purpose of misleading the other party. They can be documents, evidence, exhibits, etc. either fake or intentionally forged with the purpose of convincing the other party to close the contract. If such cunning evidence had not been used, the party whose consent was vice (deceived party) would not have closed the contract.

One fact should be reminded here, namely that the new Civil Code stipulates the cumulative existence of both parties for enforcement of fraud as vice of consent. Material elements cannot be represented by moral constraints and threats. Fraud should fulfil two cumulative conditions to be considered vice of consent by one contracting party:

- to be the essential and determining element of contract closure. Lack of fraud should undoubtedly lead to rejection and refusal of contract closure by the deceived party.
- fraud should emerge from the other contracting party and not from a third party. The deceived party can claim the cancellation of the contract on grounds of its vitiation only if it can prove that the other party has used or has known about the use of deceptive means.

3.) Violence as vice of consent

The consent of one contracting party can be vice by violence when the person is threatened either physically or patrimonial, so that the person accepted to close a contract which would not have been closed under regular circumstances. The person closes the contract only to avoid an imminent and severe danger.

The structure of violence

Violence as vice of consent has a complex structure, which contains two distinctive elements:

an exterior element consisting of physical or patrimonial threat upon one of the contracting parties. The threat must be so powerful that the party under such fear would

believe that without its consent, the life, health and goods of his close relatives and himself are in jeopardy.

a psychological element turned into a strong feeling of fear for one`s life, physical integrity and goods belonging to him or to close relatives. This strong feeling should determine a person to close a juridical act that otherwise would not have been closed.

The legal doctrine has established that violence can be classified in two major categories according to the object of threat or the legitimacy of threat. According to the object of threat, violence can be:

- physical violence, aiming at the physical integrity of a person, its goods and patrimonial values;
- moral violence, threatening the honour and dignity of an individual;

Classified according to legitimacy of threat, violence as vice of consent can be: legitimate or illegitimate, namely just or unjust.

It should be noted that a just threat cannot determine the cancellation of a contract, while an unjust threat can determine its cancellation.

For violence to be considered vice of consent, it should meet *three requirements*, namely:

1.) –the threat must be so powerful that it would become determining for the closure of the contract, which otherwise would not have been closed;

2.) –the threat should not have a legal ground, namely it should be unjust and illegitimate;

3.) –in bilateral or multilateral legal acts, threat should come from the other contracting party or, if it comes from a third party, the contractor knew or should have known the act of violence performed by the third party.

4.) Damage as vice of consent

The institution of damage as vice of consent defines the material damage (prejudice) suffered by one of the contracting parties, following the closure of a juridical act.[9] The New Civil Code refers to the legal institution of damage as vice of consent and stipulates that it is the consequence of value disproportion between two mutual performances. The disproportion exists from the moment the contract is closed. Damage can also exist when an underage child assumes an excessive obligation in relation to the heritage, to the advantages it obtains by closing the contract or to the overall circumstances. The party whose consent has been corrupted by damage can demand the cancellation of the contract or the reduction of its obligations as compensation for the damage – interests it is entitled to. The action for annulment is

[9] See the provisions of art.1221 of the New Civil Code.

admitted only if the damages exceed half of the value the service performed by the injured party had at the time the contract was closed. The disproportion should subsist until the registration of the cancelation action.In all cases, the court can maintain the contract valid if the other contracting party offers a reduction or, if the case, an increase of its own obligations. It should be remembered that cancelation and reduction of damage obligations prescribe after 2 years from the date the contract was closed. The following types of contracts cannot be cancelled for reasons of damage: random contracts, transactions as well as other contracts stipulated by law.

Conclusions

Along the ability of any natural and legal entity to contract, which is a prerequisite for the validity of a civil juridical act, the parties` consent to close the juridical act is also of great importance. Parties should assume the legal consequences that it produces.

Consent is an essential prerequisite of validity for any juridical act and it is defined as the parties` decision to complete the juridical act. The consent must meet the following conditions to acquire legal value and to be considered valid:

1.to be issued by a judicial person

1.the intension of closing a legislative act should be known by all parties;

1.the consent should be clear in terms of obligations and rights resulting from such an act;

1.should not be affected by error vice of consent, mistake, fraud, violence or damage.

Bibliography

- Legea nr.287/2009,de promovare a Noului cod civil (publicată în Monitorul Oficial al României nr.511 din 24.07.2009.)
- P.Tărchilă ,*Drept civil.Partea generală şi Persoanele* , Editura, Gutenberg,Arad 2008.
- L. Pop ,*Tratat de drept civil*, Editura Cordial Lex,Cluj,2011.
- Ungureanu , *Drept civil, Introducere* , Editura Rosetti,Bucureşti 2009.
- G. Beleiu, *Drept civil,* Editura Şansa, Bucureşti 2010.

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THE STRUCTURE OF EXECUTIVE POWER. THE STRUCTURE'S EVOLUTION OF THE EXECUTIVE POWER IN ROMANIA
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Abstract*: The monist or dualist character of the executive, a character determined by the structure of the executive, must not be mistaken for the monist or dualist character of the parliamentary regime, in which case the government is still at "the center of attention" but from a different perspective.*

Keywords: **executive power, structure, monocratic, dualist, evolution**

Introduction

The appearance of the parliamentary regime determined the need for a second organ of executive power[1], namely Govern, who is politically liable in front of the parliament, unlike the head of the state - be it monarch or president - who is irresponsible from this point of view. Thus, in regard to structure, we can distinguish between the monocratic or monist [2] executive and the dualist or bicephalous[3] or bifurcate[4] executive.

The monist parliamentary regime was specific to the classical from and considered "the double necessity of the cabinet to have the trust of the parliament and the head of the state" because, in essence, the classic parliamentary regime meant the powers were separated. This was translated by the constant collaboration between the head of the state and the parliament through the government. Unlike the monocratic system, the dualist one, specific to modern parliamentary regime meant the government had the Parliament's trust[5].

Monocratic executive

Doctrine[6] appreciates that the executive is monocratic or monist when the executive function is entrusted to a single state entity. It is also stated[7] that this form of the executive can be seen when the decision is focused in the hands of a single organism. Thus, we can talk about a monocratic or monist executive when a single public authority of the state exercises executive power.

Starting from this statement, we can see that such an executive structure was specific to absolute monarchies where there was no separation of powers. Thus, the one who had

[1] T. Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, vol. II, "Lumina Lex" Publishing House, Bucharest, 2000, p. 308.
[2] See I. Vida, *Puterea executivă şi administraţia publică*, Regia Autonomă "Monitorul Oficial" Publishing House, Bucharest, 1994, p. 31 and following.
[3] See A. Hauriou, *Droit constitutionnel et institutions politiques*, "Montchrestien" Publishing House, Paris, 1972, p. 653.
[4] T. Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, vol. II, "Lumina Lex" Publishing House, Bucharest, 2000, p. 308.
[5] See A. Hauriou, *Droit constitutionnel et institutions politiques*, "Montchrestien" Publishing House, Paris, 1972, p. 209.
[6] I. Vida, *Puterea executivă şi administraţia publică*, Regia Autonomă "Monitorul Oficial" Publishing House, Bucharest, 1994, p. 31.
[7] D.C. Dănişor, *Drept constituţional şi instituţii politice. Exerciţiul puterii în stat*, vol. II, "Europa" Publishing House, Craiova, 1996, p. 99.

power, namely the monarch, regardless of the title - king, lord, emperor, prince, emir and so on exercised power in al its aspects, passing laws, administering and acting as a judge. The advisers, ministers[8] or workers who assisted the monarch were not all a part of a collegial body similar to the present government as they were not considered to be a distinctive authority in the state with own duties and prerogatives. On the other hand, their role was that of advising the monarch, sometimes even discussing his orders and dispositions. The word "monarchy" represents the from of organization, of governing of a state in which "executive power is entrusted...to a single person"[9]; the origin of this word is Greek, as "monos" means "alone" and "arhi" - "reign".

As is the case of absolute monarchies, in case of dictatorship regimes, the mixing of powers has determined that the power holder, thus the holder of executive power, to be one organism, be it unipersonal or collegial.

In regard to these mentions and starting from the assumption that all current monarchies are thought to have a more symbolic character, we feel that it is necessary to state if parliamentary monarchies, especially those from the European continent, still have a monocratic executive or if it was replaced by the dualist executive or if it became more particular.

In the United Kingdom, the symbolic character of the monarchy is maybe the most visible, as, at least in theory, the holder of executive power is the monarch; in practice "her majesty's ministers" are the ones who exercise power, led by the prime-minister who will answer to the Parliament[10]; however, there are constitutional regulations of other states, such as Denmark, Holland, Belgium, countries which can impose contrary opinions.

Thus, for example, section 12 of Denmark's Constitution[11] clearly states that the King, with limitations stated by the Constitution, has supreme authority in regard to all the kingdom's affairs and will exercise supreme authority through ministers who are, according to section 14, named and revoked by the monarch, including the prime-minister. All their tasks will be established by the monarch. Sections 17 and 18 of the same legal act regulate two organisms, the State Council formed of the ministers - holders of ministerial bodies, the Heir to the Throne ruled on by the King and the Minister's Council, who is formed of the ministers and presided by the prime-minster. The Distinction between these two organisms is not only in regard to their component and the person who presides it as section 17 alignment (2) corroborated with section 18 establishes a rule of priority for the State Council, namely all projects of law and all important government measures will be discussed by the council only if the King was prevented from calling de State Council, thus subjecting these to the debate of the Minister's Council. Furthermore, the same section 18 states that, after the Minister's Council reaches a decision, the prime-minster is obliged to inform the king who will decide whether to embrace the recommendations of the Minister's Council or to bring that specific problem to the attention of the State's Council. Unlike the Danish constitutional regulations, the Dutch ones stated that the King is part of the Government, along with the ministers [article 42 alignment (1)]. However, according to the provisions of article 45 alignments (1) - (3) the ministers along with the prime-minister from the Council of Ministers, who is presided by the prime-minister, the person who decides on governmental policy and who will ensure and promote its coherence. However, in the Dutch constitutional system, according to article 43, the prime-minister and the ministers are named and revoked by the king, through regal decree.

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[8] The term "minster" is used to designate the advisers of the monarch. This word no longer has the same significance nowadays, that of dutiful, servant.

[9] P. Negulescu, *Curs de drept constituţional român*, published by Alex. Th. Doicescu, Bucharest, 1928, p. 413.

[10] Also see Elena Simina Tănăsescu, N. Pavel (coordinators), Actele constituţionale ale Regatului Unit al Marii Britanii şi Irlandei de Nord, in the Collection "Constitutions of the States of the World, All Beck Publishing House, Bucharest, 2003, pp. 5 and following.

[11] Similar provisions to those of the Danish Constitution are found in the Norwegian Constitution. See the provisions of articles 12-13.

In regard to these two constitutional examples, we will point out that the Danish executive, by the fact that it provides the monarch a considerable power of decision which is not to be found in the provisions of Holland's Constitution, is significantly closer to the real monocratic executive. On the contrary, the Dutch executive can only formally be monocratic, as it seems to be more a dualist executive, as is the case of most contemporary monarchies, in our opinion.

The evolution from absolute monarchy to parliamentary monarchy or contemporary republics, as well as the influence of the principle of separation and equilibrium of powers in the state will determine, most times, the abandonment of the monocratic executive in favor of the dualist one.

Given all these, the monocratic executive model was assumed by states with a presidential regime, where the holder of the executive power is the president of the republic. The most eloquent example is that of the president of the United States of America[12] who, by the provisions of article 2 paragraph 1 point 1 of the Constitution, is granted all executive power.

The American presidential regime overstepped the boundaries of the state where the 1787 Constitution was born, but each of the states[13] that used it as a model, brought upon an "institutional innovation"[14], namely the Government, who along with the President - head of the state, form executive power. This "alteration" of the presidential regime did not affect the nature of the regime, an aspect pointed out by doctrine[15] and by the constitutional regulations, especially those regarding the functions and attributions of the President.

The dualist executive

Unlike the monocratic executive, the dualist one entails the exercising of executive power by two distinctive bodies, one of those being unipersonal - the head of the state - and usually called de president and the other a collegial body with specific attributions, by name of government - the most common and used name, ministerial cabinet or minister's council.

The appearance of the dualist executive was determined, as we have mentioned previously, by the appearance and spreading of the of the parliamentary regime, in which the constant collaboration of powers, of the head of state with the parliament, called for the creation of this organ who, initially, was supposed to benefit from the trust of the head of state, as well as the parliament.

The evolution in time of the parliamentary regime will force the collegial body to only benefit from the confidence of the parliament. On the other hand, this evolution will determine several particularities for each state, sometimes even within the same state, particularities regarding the parliamentary regime and the executive in general, with priority given to the collegial body.

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[12] We must point out that although the United States' Constitution did not regulated a collegial body to exercise executive power along with the President, some presidents, like Alexander Hamilton or Thomas Jefferson tried to reunite the leaders of the federal executive departments in order to easily coordinate them. Their existence is stated by article 2 paragraph 2 point 1 of the Constitution. Their attempt failed as it was later pointed out by the political-constitutional American reality. For details – see J.Q. Wilson, *American Government. Institutions and Policies*, Harvard University and University of California, Los Angeles, 1986, p. 330.

[13] Such examples are Argentina or the Russian Federation. In both cases, although executive power is entrusted to the president, the constitutional regulation of a collegial body – the Government – an exponent of the executive, makes us think that is an exaggeration to describe these systems as moncratic, at least on a formal level. The executive was dualist and the President had a favorable position. See I. Vida, *Puterea executivă şi administraţia publică*, Regia Autonomă "Monitorul Oficial" Publishing House, Bucharest, 1994, p. 34; J. P. Jacqué, *Droit constitutionnel et institutions politiques*, "Dalloz" Publishing House, Paris, 2003; V. Duculescu, Constanţa Călinoiu, G. Duculescu, *Constituţia României - comentată şi adnotată*, "Lumina Lex" Publishing House, Bucharest, 1997, pp. 572, 580-586.

[14] I. Vida, *Puterea executivă şi administraţia publică*, Regia Autonomă "Monitorul Oficial" Publishing House, Bucharest, 1994, p. 34.

[15] Ibidem.

In regard to the reports within the dualist executive system, we can notice that in these modern parliamentary regimes, the role of the head of the state - president or monarch - is increasingly similar to the symbolic role of the monarch, as the task of exercising the executive power is given to the government.

A particular situation is seen in case of semi presidential or parliamentary republics, as they are characterized by part of the doctrine. Especially the relations between the president and the prime minister will be significantly influenced by the evolution of the political scene, but also by the personality of those who temporarily hold these dignities. Thus, although constitutional lawmakers who chose to organize the powers of a state by following the rules of a such a regime as the French one, have reconfigured the role of the president, by letting go of his symbolic character; there was no transformation of the president in the head of the executive power and the elimination of the prime-minister or his transformation in a "puppet" of the first one. So, even though we can appreciate that the source of inspiration of the institution of president of the state is the Orleans[16] parliamentary regime, we can't say that the institution of the president is a copy of it. We must also point out that one of the aspects which bring it close to the Orleans parliamentary regime is that of giving significant attributions to the president, even own attributions (like the one to dissolve the legislative or one of the rooms of the legislative, the right to exercise some attributions and elaborate decrees without the signature of the prime-minister) without benefiting from theoretical rights which are, in fact, exercised by the responsible ministers. We can even state that in a semi presidential regime, the president doesn't have the effective power to govern, as he is not a substitute for the government or the prime minister. His role is strictly centered on the quality of referee[17], a statement which is all the more correct in case of semi presidential regimes in an extenuating from or in case of semi parliamentary regimes, as it is out current constitutional regime.

The relations between the president and the government, namely the prime-minister, within a semi presidential regime are of collaboration similar with those of a parliamentary regime. However, these relations can suffer in a semi presidential regime when the president is not also the chief of parliamentary majority, as he is forced "to coexist" with it, but most of all, with its leader - the prime-minister, in which case none of his constitutional duties allow him "to paralyze the activity of the government or the parliament"[18], by allowing him to exercise his veto rights when there is a joint decision[19] to be made by him and the prime-minster. In these times, we can talk about the functioning of a "cabinet government" similar to the British one, by mentioning that the prerogatives of the president are not merely symbolic, as representation of the honorific presiding of some state organisms.

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[16] The Orleans parliamentary regime represented an intermediary phase between limited monarchy and modern parliamentary regimes and appeared in France when the Chart of 1830 was applied as interpreted by King Louis-Philippe off the dynasty d' Orleans (hence the name of this regime). This involved the existence of a dualist executive in which the head of the state had important powers, but was separate from the collegial Government, who was liable to the Parliament. The constitutional reform of 1962 even if inspired from this from of parliamentary regime „deformed" it not towards a presidential regime, but towards parliamentary one. See M. Duverger, *Les constitutions de la France*, „P.U.F." Publishing House, Paris, 1987, pp. 63-65, 106-107.

[17] M. Duverger, *Les constitutions de la France*, „P.U.F." Publishing House, Paris, 1987, pp. 106-107.

[18] Idem, p. 117.

[19] Such duties can be found in the French Constitution or even in the Portuguese one. We mention duties like: signing ordinances and decrees of the Minister's Council (French Constitution – art. 13 alignment 1), the passing of laws, law-decrees, regulatory decrees, signing the resolutions of the Republic's Assembly of acknowledging international agreements, as well as other Government's Decrees (Portuguese Constitution – art. 137 letter b) or the possibility of the President to organize a referendum by request of the Government, any law regarding the domains stated in article 11 alignment (1) of the French Constitution, namely relevant national issues which must be subject of referendum under the conditions stated by article 137 letter c) corroborated with article 118 of the Portuguese Constitution. The possibility of exercising the veto right by the President, in both examples, is translated by his refusal to act according to the constitution.

We can't ignore the fact that even within the government, there is a tendency of growth[20] of the prime minister's role in the detriment of the other ministers, given that the majority of constitutions[21], in order "to avoid the risk of an authoritarian prime minister to replace a minister by imposing a certain political trace and not the political line of the program which is accepted by the parliament"[22], states that he coordinates the activity of the ministers, by respecting the specific attributions of each and every one of them. However, the prime minister's attempt to turn his primus inter pares positions from the government to that of primus inter partes is more and more visible.

The evolution of the executive's structure in Romania

The regulations of the Developing Statute of the 7/19 august 1958 Convention, especially those of article I corroborated with those of articles II, III and V, according to which The Lord was entrusted will all public powers, while the legislative power was exercised by the Lord together with the two Legislative Assemblies, describe a monocratic or monist executive.

Subsequently, by passing the 1866 Constitution, the parliamentary regime[23] was introduced, as well as monarchy as a form of government. In regard of the structure, the Constitution itself provides a clue, by stating in article 35 the fact that executive power is entrusted to the King who will exercise it by its own regulations. Thus, we are in the presence of a monocratic or monist executive system, the unipersonal body which was entrusted with exercising this power being originally called "the Lord", while, later on, following the 1881 proclamation of the Kingdom of Romania, it became known as "The King".

The 1923 Constitution will maintain, among other previous constitutional regulations, the provisions of article 36 of the 1866 Constitution, which are to be found in article 39. As opposed to this, this fundamental law will set out the Government by pointing out, in article 92, that the Government exercises legislative power in name of the King in the way established by the Constitution. This attention given by the lawmaker to the Government or Minister's Council did not transform the Romanian executive of that time from a monocratic one to a dualist one[24]. The same point of view is found in inter war doctrine[25] and it is based on the fact that the rule was to entrust executive power to one organism which was unipersonal[26], but also on the fact that the holder of sovereignty - the nation - by organizing

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[20] Such an example is the Lithuanian Constitution (passed by the Lithuanian legislative on October 25th, 1992, acknowledged by the President of the Supreme Council of the Republic of Lithuania 15 days since it was passed by referendum) which, in article 96, states that the ministers lead „the spheres" of administration which were entrusted to them, but they are under the direct supervision of the prime-minister.

[21] Thus, article 65 of the Fundamental Law of the Federal Republic of Germany states that the political guidelines are set by the Federal Chancellor and each federal minister leads his own department independently and responsibly. A similar provision can be found in the Slovenian Constitution (this constitution was passed on December 23rd, 1991, being subsequently revised three times, in 1997, 2000 and 2003), thus, article 114 alignment (1) mentions that he president of the Government is responsible for ensuring the unity of political and administrative leadership of the Government by coordinating the activity of the ministers.

[22] M. Constantinescu, A. Iorgovan, I. Muraru, Simina Elena Tănăsescu, *Constituţia României revizuită – comentarii şi explicaţii*, „All Beck" Publishing House, Bucharest, 2004, p. 181.

[23] C. Ionescu, *Tratat de drept constituţional contemporan*, „All Beck" Publishing House, Bucharest, 2003, p. 491

[24] According to a contrary opinion, executive power was exercised by the Government in the name of the King. The Government held the real decision-making power through the prime-minister. C. Ionescu, *Contemporary constitutional law treaty*, op. cit., page 509. An argument in favor of this statement could be that although the King had the right to legislative initiative, King Ferdinand never exercised this right, as the government was the one that elaborated projects of law which ere then presented to the king through a Journal of the Minister's Council. Acknowledging a formal monocratic executive doesn't seem plausible for those times, especially since, at that time in history, Europe's monarchs play a significant role in history.

[25] See P. Negulescu, *Curs de drept constituţional român*, published by Alex. Th. Doicescu, Bucharest, 1928, pp. 413 and following.

[26] Exceptions from this rule: the French Directorate of the 1875 Constitution, The Swiss Federal Council regulated by the 1874 Swiss Constitution, the regal lieutenancy, regency and the Minister's Council, regulated by article 81 of the Constitution.

the way sovereignty was about to be exercised, established by constitution that one of its attributes be exercised by an organ of the state, called The King[27].

Thus, it was pointed out that executive power is not the property of the person who exercises it, a valid statement in our opinion, regardless of whether the executive is a monocratic one or a dualist one. The way executive power will be exercised is established by constitutional regulations.

The 1938 Constitution will maintain a monocratic executive, as the executive power was entrusted to the King, a unipersonal body, which, according to article 32, will exercise it by its own Government.

By the passing of constitutional law of September 1940[28], the new regulations abolished the dictatorship of King Carol the Second, but this will not affect the structure of the Romanian executive, as it will still be a monocratic one regardless of whether it is the new king or the Field Marshall Ion Antonescu who will exercise executive power.

Thus, the prerogatives of the new King - Mihai the First, will be reduced until he will only hold honorary titles as: head of the armed forces, awarding decorations[29], as all the other powers of the state were entrusted to the Minister's Council, which had "full powers to lead the State"[30] thus becoming the "pivot of the entire Romanian public life"[31].

The time between 1944 and 1948 was marked by numerous social -political controversies and constitutional transformations. This will all put a serious mark on the executive's structure making it the more difficult to appreciate the monist or dualist character of the executive, even if by Decree no 1626 of August 31st, 1944, the provisions of the 1923 Constitution will be partly reinstated. Our point of view is based on the fact that although monarchy is maintained, the Minister's Council is transformed into "a supreme organ of the state, which had all state power"[32]. Subsequently, by Law no. 363 of December 30th, 1947 for the forming of the popular republic or Romania[33], the task of exercising executive power will be granted to a collegial body - The Presidium of the People's Republic of Romania - which will have the Government as a subordinate. Thus, the executive can be qualified as being a monist one.

The following Romanian Constitutions, namely those of 1948 and 1952 establish a monist executive, represented by a collegial body, namely the Presidium of the National Legislative Assembly[34], the Government or the Minister's Council, who only performed administrative duties.

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[27] See P. Negulescu, *Curs de drept constituţional român*, published by Alex. Th. Doicescu, Bucharest, 1928, p. 415.

[28] Royal Decree no 3051 of September 5th, 1940 published in the Official Gazette of Romania, part I, no 205 of September 5th, 1940; Royal Decree no 3052 of September 5th, 1940 published in the Official Gazette of Romania, part I, no 205 of September 5th, 1940; Royal Decree no 3053 of September 5th, 1940 published in the Official Gazette of Romania, part I, no 205 of September 5th, 1940; Royal Decree no 3064 of September 6th, 1940 published in the Official Gazette of Romania, part I, no 206 bis of September 6th, 1940; Royal Decree no 3067 of September 6th, 1940 published in the Official Gazette of Romania, part I, no 206 bis of September 6th, 1940; Royal Decree no 3072 of September 8th, 1940.

[29] P. Negulescu, G. Alexianu, *Tratat de drept public*, Tomul I, „Casa Şcoalelor" Publishing House, 1942, p. 232

[30] Ibidem.

[31] Ibidem. Current doctrine states the fact that in passing governing acts - law-decrees - the Field Marshall Ion Antonescu associated with King Mihai (See C. Ionescu, *Tratat de drept constituţional contemporan*, „All Beck" Publishing House, Bucharest, 2003, p. 518). However, the executive is dualist only in appearance as "the fundamental principle is that or leading, of an authoritarian leadership exercised by a single person - the Head of the State" (P. Negulescu, G. Alexianu, *Tratat de drept public*, Tomul I, "Casa Şcoalelor" Publishing House, 1942, p. 236).

[32] I. Muraru, Simina Elena Tănăsescu, *Drept constituţional şi instituţii politice*, "All Beck" Publishing House, Bucharest, 2001, p. 110.

[33] Published in the Official Gazette of Romania, part I, no. 300 bis of December 30th, 1947.

[34] Neither of these laws state, expresis verbis, those stated above, the only explanation refers to the abolition of the principle if separation of powers in state and the equilibrium of powers in state and the replacing of this principle with that of the confusion of powers. However, the logical and systematic interpretation of the

The constitutional development of Romania after the events of 16-22nd December 1989 can be characterized by three stages: the stage of revolutionary power, the stage of revolutionary powers organized under from of the Legislative Assembly and the stage of legalizing the Revolution.

By the National Salvation's Front statement, published in the Romanian Official Gazette no 1 of December 22nd, 1989, the only central organs which were maintained were the ministries. By concentrating all legislative power in the hands of one collegial body that came from the Council of the National Salvation Front, the governing of the country was equivalent to "a factual governing performed by a group of people who undertook this responsibility all by themselves and acted according to the specific needs of those times"[35]. Because of this, it is nearly impossible to distinguish between organisms and state authorities in the sense of the separation of power theory, especially since the dualist of monist character of the executive can't be established.

Defined as a "revolutionary mini-constitution"[36], the law-decree no. 2 of 1989 regarding the forming, organizing and functioning of the National Salvation Front and the territorial councils of the National Salvation Front formed a new body - the Council of the National Salvation Front, whose president had specific duties similar to those of a head of the state[37]. The same newly created Council will have as a duty, according to the provisions of article 2 alignment (1) letter b) the naming and revoking of the prime minister. By giving these duties to the Council of the National Salvation's Front, the new regime can be characterized as one "of assembly" in which "executive power comes from the legislative power who can revoke it at any time"[38]. As for the structure, the executive is a dualist one, represented by the President of the Republic and the Government[39]; however, placing the Government as a subordinate and granting the President the possibility to dissolve the legislative deprives the executive of the possibility to keep "its profile and the true power in state"[40].

By the Law-Decree not 92/1990 for choosing the Parliament and the President of Romania a new political and judicial institution was created - the President of Romania, who exercised executive power along with the Government, headed by the prime-minister. Thus, the dualist structure of the executive was confirmed.

The dualist structure of the executive was maintained by the lawmaker of 1991, as well as following the 2003 revision of the Constitution, as a unipersonal body - head of the state and a collegial body - the Government. The Government will be supported in exercising its duties by the public administration which it will lead. This activity must not be understood in a restrictive way which would eventually translate by attributes of command and control as the relations between the Government and the pubic administration are those of subordination, collaboration and administrative tutelage[41]; the nature of the relations between the

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constitutional provisions, as well as appreciating the duties of this Presidium, stated by article 44 of the 1948 Constitution, article 37 of the 1952 Constitution will allow the support of this statement.

[35] T. Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, vol. I, „Lumina Lex" Publishing House, Bucharest, 2000, p. 392.

[36] Ibidem. This Law-Decree was published in the Official Gazette of Romania no 4 of December 27th, 1989.

[37] According to article 5 of the Law-Decree, the President of the National Salvation Front's council had specific duties similar to those of a head of the state who exercises his function of representation: for example, representing the country in international relations, concluding international treaties, naming ambassadors. However, as doctrine pointed out, (See T. Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, vol. I, "Lumina Lex" Publishing House, Bucharest, 2000, p 393) the duties are reduced as opposed to those of the president of a presidential republic, even a parliamentary one.

[38] T. Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, vol. I, "Lumina Lex" Publishing House, Bucharest, 2000, pp. 274-276 and p. 393.

[39] By the Law-decree no 10 of 1989 regarding the forming, organizing and functioning of the Romanian Government, a supreme organ of state administration will be formed, namely the Romanian Government.

[40] T. Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, vol. I, "Lumina Lex" Publishing House, Bucharest, 2000, p. 276.

[41] See Dana Apostol Tofan, *Drept administrativ*, vol. I, "C.H. Beck" Publishing House, Bucharest, 2008, p. 150; A. Iorgovan, *Tratat de drept administrativ*, vol.I, "All Beck" Publishing House, Bucharest, 2005, p. 364

Government and authorities and organs of the central public administration are identified by the fundamental law[42].

Conclusion

Hence, at present times, identifying an executive as being monocratic, monist or dualist can be somewhat difficult, as there are constitutional systems in which it is difficult to appreciate an executive as having one form or another. The more or less formal prepotency of the head of state - monarch or president - in exercising executive power and its reports to the collegial body - the other component of the executive, these all influence these identification.

On the other hand, to describe an executive as being monocratic does not mean that the body, the authority who exercises executive power is a unipersonal one; it can also be a collegial body. In regard to the number of members of the monist collegial executive, there are several forms[43]: duumvirate[44] – the executive is formed of two equal members, triumvirate[45] - the executive is formed of three people and the diarchy[46] - the executive is formed from more than two members but it is no longer necessary for them to be on equal positions.

Within this dualist executive, the nature of the political regime established by the Constitution and which is influenced by the parliamentary one, the duties are split between a head of the state, represented by the President of the Republic, chose by universal and direct vote and a Government named by the President following the trust vote granted by the Parliament, to which it is accountable.

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[42] Thus, for example, distinguishing between ministerial administration and extra ministerial one, article 116 of the republished Constitution, specifies the existence of subordination relations between the government and the ministries or other specialty bolides, as well as collaboration relations with autonomous administrative authorities. The same article mentions the existence of similar relations between the first ministries and specialty bodies which can be organized; alignments (1) and (2) of article 123 establishes other types of relations between the Government and the prefect, as well as the relations between the prefect and public services ad other organs of central public administration. However, article 123 alignment (4) will exclude any such relations between the prefect and authorities of the local public administration, as the mayor, local council, county council and the president of the county council. For the distinction between ministerial administration and extra ministerial administration, also see Dana Apostol Tofan, *Drept administrativ*, vol. I, "C.H. Beck" Publishing House, Bucharest, 2008, p. 150, or I. Vida, *Puterea executivă şi administraţia publică*, Regia Autonomă "Monitorul Oficial" Publishing House, Bucharest, 1994, pp. 127-128.

[43] D. C. Dănişor, *Drept constituţional şi instituţii politice. Exerciţiul puterii în stat*, vol.II, "Europa" Publishing House, Craiova, 1996, pp. 100-101.

[44] Such an example can be found in the time of the Roman Republic (509 BC. – 27 BC.) when the King's role in leading the state was taken over by two consuls, whose duties will be limited throughout this regime by creating new magistracies. Their powers were limited because they were chosen for a year, subsequently becoming simple citizens who could be called in front of the people to answer for the acts passed while they were in function. See E. Molcuţ, D. Oancea, *Drept roman*, "Şansa" Publishing House and Univers Publishing House, 1993, p. 31.

[45] Such a form the monist collegial executive was regulated by the VIIIth year Constitution of France when, according to article 39, Bonaparte and Cambacérès were appointed consuls for a period of 5 years. Both of them, but especially Bonaparte had all the executive power. See M. Morabito, D. Bourmaud, *Histoire constitutionnelle et politique de la France (1789-1958)*, „Montchrestien" Publishing House, Paris, 1996, pp. 133-134. A special form of the triumvirate can be seen is Bosnia-Herzegovina where, in an attempt to prevent interracial conflicts, article V stated that the presidency of this state must be formed of three members: a Croatian one and a Bosnian one, both chosen from the Federal territory and a Serbian one chosen from the territory of the Serbian Republic. This collegial body is close, in structure, to the Swiss one because, according to article V paragraph 2 letter b) of Bosnia-Herzegovina's constitution, the three members of the presidency will name one as the President. The one who received the largest number of votes was chosen for the first time; subsequently they all took turns or were chosen by the Parliamentary Assembly.

[46] The French constitution of year III (of August 22nd, 1795) entrusted executive power to a Directorate – a collegial body formed of 5 directors who were chosen by the legislative bodies. M. Morabito, D. Bourmaud, *Histoire constitutionnelle et politique de la France (1789-1958)*, „Montchrestien" Publishing House, Paris, 1996, pp. 113 and following.

Bibliography

- Dana Apostol Tofan, *Drept administrativ*, vol. I, "C.H. Beck" Publishing House, Bucharest, 2008;
- Iorgovan, *Tratat de drept administrativ*, vol.I, "All Beck" Publishing House, Bucharest, 2005;
- M. Constantinescu, A. Iorgovan, I. Muraru, Simina Elena Tănăsescu, *Constituţia României revizuită – comentarii şi explicaţii*, "All Beck" Publishing House, Bucharest, 2004;
- Ionescu, *Tratat de drept constituţional contemporan*, "All Beck" Publishing House, Bucharest, 2003;
- J. P. Jacqué, *Droit constitutionnel et institutions politiques*, "Dalloz" Publishing House, Paris, 2003;
- Elena Simina Tănăsescu, N. Pavel (coordinators), *Actele constituţionale ale Regatului Unit al Marii Britanii şi Irlandei de Nord*, All Beck Publishing House, Bucharest, 2003;
- I. Muraru, Simina Elena Tănăsescu, *Drept constituţional şi instituţii politice*, „All Beck" Publishing House, Bucharest, 2001;
- T. Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, vol. I, "Lumina Lex" Publishing House, Bucharest, 2000;
- T. Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, vol. II, "Lumina Lex" Publishing House, Bucharest, 2000;
- V. Duculescu, Constanţa Călinoiu, G. Duculescu, *Constituţia României - comentată şi adnotată*, "Lumina Lex" Publishing House, Bucharest, 1997;
- D.C. Dănişor, *Drept constituţional şi instituţii politice. Exerciţiul puterii în stat*, vol.II, "Europa" Publishing House, Craiova, 1996;
- M. Morabito, D. Bourmaud, *Histoire constitutionnelle et politique de la France (1789-1958)*, "Montchrestien" Publishing House, Paris, 1996;
- I. Vida, *Puterea executivă şi administraţia publică*, Regia Autonomă "Monitorul Oficial" Publishing House, Bucharest, 1994;
- E. Molcuţ, D. Oancea, *Drept roman*, "Şansa" Publishing House and Univers Publishing House, 1993;
- M. Duverger, *Les constitutions de la France*, "P.U.F." Publishing House, Paris, 1987;
- J.Q. Wilson, *American Government. Institutions and Policies*, Harvard University and University of California, Los Angeles, 1986;
- A. Hauriou, *Droit constitutionnel et institutions politiques*, "Montchrestien" Publishing House, Paris, 1972;
- P. Negulescu, G. Alexianu, *Tratat de drept public*, Tomul I, "Casa Şcoalelor" Publishing House, 1942;
- P. Negulescu, *Curs de drept constituţional român*, published by Alex. Th. Doicescu, Bucharest, 1928.

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THE COUNCIL OF EUROPE AND ITS CONSECRATION REGULATIONS AND PROTECTION OF HUMAN RIGHTS

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Abstract: *The Council of Europe is the main international organization with vocation intergovernmental regional/European which has the fundamental objective consecration and protection of human rights. The Organization shall constitute the institutional framework in which had been initiated and developed, under the aspect its rules and mechanisms, the best international system in human rights domain, European system consecration and protection of human rights.*

Main conventional legal instruments in the promotion and protection of human rights domain at the European level, adopted within the framework of the Council of Europe, on the basis of which have been created and the institutions and mechanisms specific to this field are: the Convention for the protection of human rights and fundamental freedoms, European Social Charter and the European Convention on indefeasibility war crimes and crimes against humanity, European Convention for the prevention of torture and inhuman or degrading treatment or, framework Convention for the protection of ethnic minorities national, and so on.

Keywords: **The Council of Europe, human rights, consecration, protection, European Conventional tools.**

Introduction

European system for the protection of human rights is currently the most effective and efficient system of protection and guarantee, through specific mechanisms, human rights and its fundamental[1] freedoms. This was done, in the main, within the institutional framework of the Council of Europe, in close liaison with the United Nations, afterwards being developed and at the European Union level and the Organization for Security and Cooperation in Europe.

European States, members of the Council of Europe, support and promote through their national laws the consecrated values and protected by European legal instruments in the human rights domain.

The Council of Europe is currently main intergovernmental international organization at European level which has the consecration main missions and defense of human rights. Setting up of the National Council of Europe the surrounding with the attainment of united Europe under institutional aspect, through the creation of European organizations covering political and economic integration of the states in the region.

The organization has been set up in London on 5 May 1949, by the representatives of ten European[2] countries that have signed the Council of Europe[3]. Creating organization has been determined by the need for expressed by the Member States to preserve "moral values

[1] Scăunaş Stelian, *International law of human rights. University Course*, All. Beck Publishing House, Bucharest, 2003, p.54; Tănăsescu Tudor, *International law of human rights. University Course*, Sitech Publishing House, Craiova, 2013, p. 59.
[2] Belgium, Denmark, France, Ireland, Italy, Luxembourg, The Netherlands, Great Britain, Norway and Sweden.
[3] The text of the Statutes in the Official Gazette, Part I, no. 238 of 4 October 1993.

and spiritual which constitute both common heritages of the peoples as well as their true source of individual freedom, political freedom and the rule of law".

The aim of the Council of Europe is to achieve a greater unity among its members for safeguarding and promoting ideas and principles which are their common heritage and facilitating their economic and social[4] progress.

The members of the Council of Europe are European states which recognize the Status organization and who fulfill the following conditions:

- supports principles of the rule of law;

- *supports principle whereby each person under his jurisdiction should enjoy fundamental human rights and freedoms*;

- undertake to cooperate sincerely and effectively, to achieve the aim of the organization.

They are members of the Council of Europe 47 European[5] States.

The main conventional rules adopted by the Council of Europe consecration and protection of human rights are the Convention for the protection of human rights and fundamental freedoms, its done at Rome on 4 November 1950 and European Social Charter, which was adopted on 18 October 1961 and revised in the year 1996. Also, on the basis of these treated, subsequently, have been adopted and other legal instruments which affects concerns of the protection of human rights domain.

Consideration of conventional tools consecration and protection of human rights adopted and established under the aegis of the Council of Europe

A. European Convention for the protection of human rights and fundamental freedoms and its Protocols additions.

European Convention for the protection of human rights and fundamental freedoms (also called the European Convention of Human Rights) is the main regulations adopted in conventional protection of human rights domain at the European level, within the framework of the Council of Europe. On the basis of the document has been created, in addition to the regime of rights and legal institutions and mechanisms necessary its implementation. The Convention was adopted in Rome on 4 November 1950 and entered into force on 3 September 1953[6].

This document has been designed as a means of collective guarantee, international human rights and not as a procedure to replace national systems for the protection of human rights[7].

The Convention lays down that the *aim of the Council of Europe is to achieve a greater unity between its members and that one of the means to achieve this purpose is the protection and development of human rights and fundamental freedoms*[8]. The document has been adopted by asserting by participating States of their commitment to these fundamental freedoms which forms the basis of justice and peace in the world and whose compliance is based on a political regime truly democratic, on the one hand, and, on the other hand, on a common approaches and a respect of human rights which they recognize[9].

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[4] Ibidem, art.1 letter b).

[5] Romania has been received in the year 1993 and has been subject to monitoring up to the year 1997.

[6] The text in Vida Ioan, *Human rights in international regulations*, Lumina Lex Publishing House, Bucharest 1999, p. 287-310.

[7] Beşteliu Raluca Miga and colab., *International protection of human rights. Courses Notes*, Edition IV reviewed, Universul Juridic Publishing House, Bucharest, 2008, p. 64; Tănăsescu Tudor, *International law of human rights. University Course*, Sitech Publishing House, Craiova, 2013, op. cit., p.60; Niciu I. Marţian, *Public international law*, Servosat Publishing House, Arad, 2004, p. 222.

[8] Vida Ion, op.cit., preamble.

[9] Ibidem, preamble.

In its original form, Title I of the Convention, consecrate and guarantees the rights and freedoms:

- the right to life (Article 2);
- the right not to be subjected to torture or other treatments or inhuman punishments or degrading treatment (Article 3);
- the right to not be held in slavery or in terms of obedience and not be forced to perform forced labor (Article 4);
- the right to freedom and safety (Article 5);
- the right to a fair trial carried out within a reasonable time, in an independent court established by law (Article 6);
- the right to not be convicted of an act or omission which, at the time it was committed, did not constitute a criminal offense and shall not apply to a more severe punishment than that which was applicable at the time (Article 7);
- the right to respect of privacy, family, of residence and mail (Article 8);
- the right to freedom of thought, conscience and religion (Article 9);
- the right to freedom of expression (Article 10);
- the right to freedom of association and peaceful assembly (Article 11);
- the right to marry and to found a family (Article 12);
- the right to appeal (Article 13).

The Convention also contains a clause non-discriminatory basis (Article 14), in accordance with which states parties are *obliged to provide exercise of the rights and freedoms recognized* by it, without distinction based, in particular, on sex, color, language, religion, political or any other opinion, national or social origin, membership of a national minority, property, birth or any other situation.

The document provides for a *derogation clause*, according to which, in the event of war or other public danger, which threaten life nation, any state member may take measures derogating from the provisions of the Convention, but they are not in conflict with the obligations arising from international law (Article 15). The Convention also allows any restriction placed on political activity of aliens with regard to freedom of peaceful assembly and freedom of association.

But there are some fundamental rights and freedoms of the Convention does not accept no derogation. They are:

a) the right of every person to life, except in the case of death arising as a result of unacceptable acts of war;

b) the right not to be subjected to torture or to punishment or inhuman treatment or degrading;

c) the right not to be held in slavery or in terms of obedience;

d) *the right not to be convicted of an act or omission which, at the time it was committed, did not constitute a criminal offense* and shall not apply to a more severe punishment than that applicable to the offense committed.

♦ *Title II* of the Convention *has been established the mechanism for the implementation of its provisions which, initially, consisted in creating European Commission of Human Rights and the European Court of Human Rights.* This mechanism, consecrated by the Convention, *has been reconfigured by adopting Protocol No. 11 of 11 May 1994*[10]*, within the meaning of that*, of the two bodies there *has been created a unique court*, *respectively European Court for Human Rights*. This means the institution international the most performance in the protect human rights domain.

Titles III and IV of the European Convention of Human Rights governing problematic organization and functioning of the two bodies which compose the mechanism for the implementation of its provisions, i.e. the Commission for Human Rights and European Court of Human Rights. Title V of the document includes final provisions relating to certain

[10] It has entered into force in 1998.

obligations of the States Parties, the interpretation of its provisions, settlement of disputes, its entry into force, and so on.

The Convention for the protection of human rights and fundamental freedoms, *was amended and supplemented by 14 additional*[11] *protocols*, regarding the initial text update recording with the developments at the level of countries or in interstate relations in Europe.

Additional Protocol No. 1 of the Convention was adopted in Paris on 20 March 1952 and in addition to the catalog of rights and fundamental freedoms provided for by the Convention, the following:

- the right to respect property;
- the right to education; and
- the right to free elections.

Additional Protocol No. 2, shall be adopted in the year 1963, in Strasbourg, supplement the Convention by allocating European Court for Human Rights jurisdiction to give advisory opinions on legal issues concerning the interpretation of the Convention and the related Protocols.

Additional Protocol No. 3, adopted in the year 1970, in Rome, changed the text of that Article 30 of the Convention in 1950, regarding the mode for the adoption of decisions of the European Commission of Human Rights. At present the Protocol is inapplicable whereas it has carried out its dissolution Commission concerned.

Additional Protocol No. 4, has been adopted in the year 1963 in Strasbourg and governing certain rights and freedoms, other than those which are proclaimed by the Convention and the Protocol. It is a case of:

a) the right of a person not to be deprived of freedom for the sole reason that he is not in a position to perform a contractual obligation;
b) the right to freedom of movement, a free choice residence and to leave any country, including its own;
c) the individual right not to be expelled from the territory of the State of which he is a citizen;
d) the individual right to enter the territory of the State of which he is a citizen;
e) the prohibition on collective expulsions by foreigners.

Additional Protocol No. 5, adopted in the year 1971, in Rome, changed the Article 40 of the Convention in 1950, governing the procedure for the election of the members of European Court of Human Rights.

Additional Protocol No. 6, adopted in 1983, in Strasbourg, regulate abolish death penalty, with the exception of acts committed in time of war or imminent danger of war.

Additional Protocol No. 7, has been adopted in the year 1984, in Strasbourg. This document complements the Convention by recognition of new rights, such as:

a) the right to procedural guarantees for foreign citizens, before being expelled from the country where they are resident;
b) the right to appeal in criminal cases;
c) the right not to be pursued or punished for an offense for which he or she has already been paid or sentenced by a final judgment;
d) the right to compensation in the event of miscarriage;
e) the husbands equality before the law and their responsibilities with civil character, among themselves, in their relations with their children, in respect of the marriage.

Additional Protocol No. 8, has been adopted in the year 1990 at Strasbourg, makes some changes to the procedural rules, established by the Convention, in particular with regard

[11] Romania has ratified the Convention by Law No. 30 of 18 May 1994, published in the Official Gazette No. 135 of 31 May 1994. By the same law was ratified its Additional Protocols 1-10. Protocol No. 11 was ratified in August 1995, the Protocol No. 13 has been ratified on January 9 2003 and the Protocol No.14 by the Law No. 39 of 22 March 2005. All the Member States of the Council of Europe (46) are parties to the Convention.

to the creation of rooms within the Commission to improve its activity. At present such amendments are no longer applicable since the Commission has been dissolved.

Additional Protocol No. 9, has been adopted in Rome on 6 November 1990, and has been carried out amend of certain provisions relating to the procedures of the Commission and Court, as well as individuals' access to the European Court of Human Rights (in particular their quality recognition) and non-governmental organizations and individuals.

Additional Protocol No. 10, it has also been adopted in Strasbourg on 25 March 1992, and by amending the procedure by the Committee of Ministers as regards its competence in the line monitoring respect for human rights by the States Party to the Convention. Its provisions have been repealed after two years as a result of the adoption of Protocol No. 11.

Additional Protocol No. 11, as adopted in Strasbourg on 11 May 1994, carried out reform control mechanism established by the European Convention of Human Rights, by replacing Commission and the Court with a new court, unique and permanent in human rights protection domain - European Court of Human Rights.

Additional Protocol No. 12, was adopted in Rome on 4 November 2000, proclaimed principle of non-discrimination no matter what criteria or reasons would be able to do that.

Additional Protocol No. 13, it has also been adopted in Vilnius on 3 May 2002 and devote abolish death penalty in any circumstance. It shall complete the provisions of the additional Protocol No. 6.

Additional Protocol No. 14 adopted in Strasbourg on 13 May 2004 stipulates amend of the control system set up by the Convention for the protection of human rights and fundamental freedoms adopted in Rome on 4 November 1950, in order to maintain and strengthen its long-term effectiveness of the control system aimed at implementation of the provisions of this Convention.

B. European Social Charter

European Social Charter was adopted in Torino, within the framework of the Council of Europe, on 18 October 1961 and entered into force on 26 February 1965[12]. The Charter is designed to supplement the Convention provisions for the protection of human rights and fundamental freedoms (which includes mainly civil and political rights), with a catalog of economic, civil and cultural rights. *In the contents are set out seven Charter social rights,* supereminent*, which forms the core of the document,* namely*: the right to work, the right to organise in trade unions, the right to collective bargaining, the right to social security, the right to social and medical assistance, family right to social protection, legal and economic and the right of workers and their families to protection and assistance.*

The Particularity Charter adopted in Torino consists in the possibility of partial acceptance of its provisions in the context of signing it. Therefore, in order to become a party to the Charter, a member state must accept at least 10 items (out of the 19) or 45 subparagraphs (of the 72 paragraphs of the articles of the Charter numbering) provided that supported among the provisions to be contained in 5 articles of the 7 which form the core of hard rights stipulated by the Charter.

The Charter was subsequently supplemented by 3 protocols: Additional Protocol of 5 May 1988, which entered into force on 4 September 1992, to develop category economic and social[13] rights, the Protocol for the amendment to the Charter on 21 October 1991 aimed at changes in the mechanism of supervising the application of the Charter and additional Protocol to the European Social Charter 9 November 1995, entered into force on 1 July 1998, which set up a system of collective complaints.

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[12] On 13 March 2007, a number of 27 states were parties to European Social Charter.

[13] The Protocol stipulates and ensures effective exercise of the following rights: the right to opportunities and equal treatment in matters of employment and occupation; employees' rights to information and consultation; workers' right to participate in the establishment and improvement of the conditions of employment and the right of aged persons to social protection.

C. In the year 1996 was adopted ***European Social Charter Revised***, which entered into force on 1 July 1992[14].

European Social Charter Revised acknowledges the following social and economic rights:

1. the right to work (Article 1);
2. right to fair conditions of employment (Article 2);
3. the right to safety and hygiene of work (Article 3);
4. the right to equitable remuneration (Article 4);
5. the syndicate right (Article 5);
6. the right to collective bargaining (Article 6);
7. the right of children and young persons to protection (Article 7);
8. the right to the protection workers maternity (Article 8);
9. the right to vocational guidance (Article 9);
10. the right to vocational training (Article 10);
11. the right to protection of health (Article 11);
12. the right to social security (Article 12);
13. the right to social and medical assistance (Article 13);
14. the right to benefit from social services (Article 14);
15. the right of the disabled to autonomy, social integration and participation in the life of the Community (Article 15);
16. the family right to social protection, legal and economic (Article 16);
17. the right of children and young people in social protection, legal and economic (Article 17);
18. the right to pursue a gainful occupation in the territory of the other party (Article 18);
19. the right of migrant workers and their families to protection and assistance (Article 19);
20. the right to equality of opportunity and treatment in respect of employment and occupation, without discrimination on the basis of sex (Article 20);
21. the right to information and consultation (Article 21);
22. the right to take part in the determination and improvement of the conditions of employment and the working environment (Article 22);
23. the right of aged persons to social protection (Article 23);
24. the right to protection in the event of dismissal (Article 24);
25. the right of workers to protect their own claims in the event of the insolvency of their employer (Article 25);
26. the right to dignity at work (Article 26);
27. the right work with family responsibilities of equality of opportunities and treatment (Article 27);
28. the right of workers' representatives to protection for the undertaking and to their facilities (Article 28);
29. the right to information and consultation procedures in collective redundancies (Article 29);
30. the right to protection against poverty and social exclusion (Article 30);
31. the right to a home (Article 31).

European Social Charter Revised added to the list of rights which form the core of resistance social rights, the children's rights and the young to protection (Article 6) and the right of equality of opportunity and treatment in respect of employment and occupation without discrimination on the basis of sex (Article 20).

By the law of ratification of European Social Charter Revised, Romania has stated that: "In accordance with the provisions of Article A paragraph 1 of Part III of the European Social

[14] On 1 March 2008 were parties to the Charter 24 Member States of the Council of Europe. Romania has ratified the Charter on 3 May 1999 by Law No. 74, published in the Official Gazette No.193/ 4 May 1999.

Charter Revised, Romania supports Part I of this Charter, a statement which determine objectives to be carried out will follow by all means useful and shall be regarded as lawful by the provisions of Article 1, Article 4-9, Article 11,12, 16,17, 20,21, 24,25, 28 and 29, as well as in addition to the provisions of Article 2, paragraphs 1, 2, 4-7, Article 3, paragraphs 1-3, Article 13 paragraphs 1-3, Article 15 paragraphs 1 and 2, Article 18 paragraphs 3 and 4 and Article 19 paragraphs 7 and 8 and Article 27 paragraph 2[15]".

European Social Charter Revised replaced by the States which become part of it, European Social Charter and its Protocols.

Additional Protocol in the year 1995, which shall provide for a system of collective complaints continued to be applied to European Charter Reviewed as additional protocol.

♦ *For the purpose of compliance by the States Party to European Social Charter provisions, respectively, the European Social Charter Revised was set up a mechanism for monitoring, which involves two procedures of control*: control procedure carried out on the basis of reports and collective complaints procedure.

Control procedure carried out on the basis of reports

By the protocol for the amendment to the Charter of 1991 is hereby established a committee of independent experts (which replaced, at the request of Ministers Committee, the Committee of Experts) consisting of 9 members, chosen the Parliamentary Assembly of the Council of Europe for a period of 6 years from a list of experts nominated by the States Parties. Members shall exercise the mandate in their individual capacities with complete independence. *The test procedure involves an obligation on Member parties to submit half-yearly report on application of the provisions of the Charter* (Part II) which they have accepted. In addition, *Member Parties to an agreement may submit to Secretary General of the Council of Europe at certain intervals and at the request of Ministers Committee reports on charter provisions which they have not accepted no when ratifying and no later*. The state reports are examined by the Committee of Independent Experts. After the examination, reports together with the observations made by the Committee of Independent Experts, are sent to a government Committee created based on the Protocol amendment to the Charter, a body that replaces Subcommittee Government Social Committee. The Committee governmental, Composed of one representative of each of the States parties (the European Social Charter Revised), on the basis of the reports, observations of the Committee of Independent Experts, as well as the comments of observers invited, prepares resolutions and recommendations of the Committee of Ministers of the Council of Europe in respect of situations recorded in practice of the member, including related breaches of obligations entered into by them.

At present the Committee of Independent Experts shall be called the European Committee of Social Rights[16].

Collective complaints procedure

It was introduced by Additional Protocol to European Social Charter of 1995, which entered into force in 1998.

According to Article 1 of the Protocol of 1995, *have the right to make collective complaints* concerning breach of certain provisions of European Social Charter and the Protocol of 1995, the European Social Charter Revised, *these features*:

a. international organizations of employers and employed persons invited to meetings of the Committee governmental;

b. other international non-governmental organizations with consultative status in addition to the Council of Europe;

c. *national organizations representing employers and employees.*

Procedure has two stages, the admissibility of the exam complaint, reflected by a decision on the admissibility, and step examination as to substance.

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[15] In accordance with Article 2 of Law No. 74/199 for the ratification European Social Charter Revised.

[16] See Miga-Beşteliu Raluca and collab., op. cit., p.273

The complaint must be made in writing and shall contain information necessary for identification of the possible incorrect application of the Charter. The complaint submitted by Secretary General of the Council of Europe will be sent the Committee of Independent Experts.

The state party against whom it is directed the complaint will be informed of this.

If the complaint is admissible, the Committee shall inform the States party to the Charter and ask the Member State concerned and applicant organization's comments on the fund.

On the fund complaint pronounced the Committee of Independent Experts by means of a report in which he/she shall submit its conclusions; the report is sent to the Committee of Ministers and shall be served on the applicant and the member parties, without leaving their possibility to publish it.

On the basis of the report the Committee, the Committee of Ministers has adopted a resolution or, a recommendation in the event of incorrect application of the Charter. This document of the Committee of Ministers together with the report of the Committee of Independent Experts can be made available to the public by Parliamentary Assembly.

D. Other treaties on human rights adopted by the Council of Europe

Other category of treaties made in the area of human rights at the European level are:

a) *European Convention on the legal status of migrant worker* adopted on 24 November 1977[17]. This covers legal situation of migrant workers who are nationals of the Member States of the Council of Europe, in order to ensure, as far as possible, a treatment no less favorable than that enjoyed by those workers who are nationals of that State, connected with the living and working conditions;

b) *European Convention for the prevention of being tortured and punished or inhuman treatment and degrading,* done at Strasbourg on 26 November 1987[18].

It has been drawn up with the aim of developing opportunities of persons considered victims of torture and inhuman or degrading treatment to benefit from assistance and out of a desire to enhance the protection of private persons freedom in this respect by the creation of a mechanism of preventive extra-judicial nature, based on visits;

c) *European Charter of regional and minority languages*. It was adopted on 5 November 1992 aiming at protecting and promoting regional and minority languages, procedure to order strictly cultural. The purpose of this Regulation is to ensure, as far as possible, using regional and minority languages in education, media, legal and administrative and economic, social and cultural fields;

d) The framework *Convention* for protection of national[19] minorities. It was adopted on 1 February 1995;

The Convention lays down the obligations for the protection of national minorities and the rights of the persons belonging to them within the framework of the rule-of-law state, with due regard to the rules, The territorial integrity and national sovereignty;

e) The Convention on children's rights opened for signature[20] in 1996 and entered into force on 1 July 2000.

Conclusions

The Council of Europe shall constitute the institutional framework in which it has been initiated and developed, under the aspect its rules and mechanisms, the most efficient

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[17] It entered into force on 01.05.1983. Romania has not signed.

[18] It entered into force on 1 February 1989. Romania has ratified the Convention by Law No. 80 of 30 September 1994, published in the Official Gazette no. 285/1994.

[19] Romania has ratified the Convention-frame by Law No. 33 of 29 April 1995, published in the Official Gazette, Part I No. 82 of 4 May 1995; See Tanasescu Tudor, *Minorities. Legislative and institutional marks*, Sitech Publishing House, Craiova, 2006, p. 52-59.

[20] Romania has ratified the Convention on 11 May 1995.

international system in the human rights, the European system of consecration and protection of human rights.

The conventional legal instruments of the European system for the promotion and guarantee of human rights adopted under the aegis Council of Europe, belong to the category of those with regional vocation and are developed in close connection with those of the United Nations.

The main Conventional legal regulations in the promotion and protection of human rights adopted within the framework of the Council of Europe on the basis of which they have been created institutions and mechanisms specific to this area have been: the Convention for the protection of human rights and fundamental freedoms, European Social Charter and the European Convention on indefeasibility war crimes and crimes against humanity and the European Convention for the prevention of torture and punishments and inhuman treatment or degrading, framework Convention for the protection of ethnic minorities national, and so on.

The protection and guarantee of human rights legal instruments established by conventional initiated and adopted by the Council of Europe shall be carried out through the mechanisms established by that organization on its regulations, by: the European Court on Human Rights (judicial mechanism) designed by the European Convention of human rights, and monitoring conventional mechanisms nonjurisdictionale, as well as periodic reporting system and that of collective complaints used by the European Committee of social rights, created on the basis European Social Charter or preventive supervision on the basis of surveys carried out by the European Committee for the prevention of torture and other punishment or inhuman or degrading treatment replaced by the European Convention for the prevention of torture.

Also, we notice some extra-conventional mechanisms, such as: the European Commission against Racism and Intolerance or Commissioner for Human Rights of the Council of Europe.

Bibliography:

- Tănăsescu Tudor, *International law of human rights. University Course*, Sitech Publishing House, Craiova, 2013;
- Tănăsescu Tudor, *Public international law. University Course*, Second edition revised and added, Sitech Publishing House, Craiova 2013;
- Beşteliu Raluca Miga and colab., *International protection of human rights. Courses Notes*, Universul juridic Publishing House, Bucharest, 2008;
- Selejan-Guţan Bianca, *European Protection of Human Rights. Master*, Ed. C.H. Beck Publishing House, Bucharest, 2008;
- Tanasescu Tudor, *Minorities. Legislative and institutional marks*, Sitech Publishing House, Craiova, 2006;
- Niciu I. Marţian, *Public international law*, Servosat Publishing House, Arad, 2004;
- Scăunaş Stelian*, International law of human rights. University Course*, All. Beck Publishing House, Bucharest, 2003;
- Vida Ioan, *Human rights in international regulations*, Lumina Lex Publishing House, Bucharest 1999;
- Marcu Viorel, *International mechanisms to guarantee the human rights*, Sigma Plus, Deva, 1998;
- Năstase Adrian, *Human rights, religion at the end of the century,* I.R.D.O., Bucharest, 1992.

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ROLE OF CUSTOMS AND BORDER COOPERATION IN FIGHTING THE TERRORISM FINANCING AND FUNDING PROLIFERATION

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Abstract: *In the context in which strategic objectives for of the customs union concerns, first of all, protecting the EU, international cooperation is in itself a strategy within the EU customs policy. This study seeks to identify concrete solutions that can restrict the financing acts of terrorism and crime in terms of economic and financial trade by reducing fraud and tax frontier. The involvement of international organizations specialized in trade facilitation and simplification of customs as well as development and implementation of international standards in security, can prioritize and identify timely the activities inconsistent with international agreements in combating the financing of terorsim and proliferation financing.*

Keywords*:* **cooperation, funding, terrorism, crime, fraud**

Introduction

Through program documents, European Union, World Trade Organization and the World Customs Organization support international cooperation, but it is estimated that States Parties may intervene to prevent crime and adapting national legislation so that these do not host reprehensible deeds committed in their territories or outside their.

But the EU is more concerned with the supply chain for the safety of and combating fraud, identifying dual-use goods, intellectual property rights, the proper interpretation of rules of origin, but believes that the customs authorities and those competent for this phenomenon must have clear procedures and effective transmission and execution of requests for information or other ways of joint assistance[1].

In the past decade there have been made substantial efforts to combat terrorist financing within the EU borders. There have been adopted, in a dynamic steady, legal instruments to enhance the capacity to identify funding sources, but they are not sufficient, efforts were directed further to new forms of cross-border cooperation.

The essence is that the border customs authorities must have at its disposal efficient mechanisms and channels for timely execution of all possible measures to prevent and counter any preparatory act for border crossing of goods likely to contribute to untaxed profits that can fund criminal acts.

Strategy for development of the Customs Union

Supervision and control of goods transiting the EU external borders is provided by the customs authority which grants released to free circulation or export. Customs Border is a leading provider of services to society through fiscal role that it has, but also for business, fulfilling a number of operational objectives.

[1] See Article 19 of the International Convention for the Suppression of Terrorism adopted in New York on 9 December 1999, ratified by Law 623 of November 19, 2002 published in the Official Gazette of Romania, Part I, no. 852 of 26 November 2002.

In recent years, customs have increased competences to protect the safety and security of the EU, as guarantors of the numerous international agreements involving the trade flows of the EU and the Convention for the Suppression of Financing of terrorism and proliferation of weapons or the international acts to combat money laundering.

Several government agencies are based on the results of carrying out the formalities and control of goods, of application of common trade policy customs border, including in the areas such as agriculture, environment[2], public health and consumer protection, drug precursors[3], intellectual property rights[4], etc. Through Community Customs Code and Customs tariffs is offered a solid legal basis for enforcement and compliance in the areas mentioned above.

The Customs Union has also competencies for achieving internal security[5] and border security, in fact essential to the area of free movement. Goods entering the European area are subject to a risk analysis on the basis of common standards risk having priority to identify potentially dangerous goods. More recently, the system is based also on complementary tools of work, such as anticipated trade information of trade operations of economic operators.

Strategy for development of the Customs Union[6] has held as priority objectives of the customs union: protecting EU and support EU competitiveness. These strategic goals can be achieved only by applying a uniform and by effective control and closer cooperation with other government authorities, with the business community and with international partners.

For the implementation of the mentioned is justified, however, better governance customs union which involves, first of all, better operational running of the 27 Customs administrations whereas these, although they have to apply a common but with national peculiarities, especially human and financial resources available in the various customs administrations, they must behave as if are one.

Preventive measures to combat terrorist financing and proliferation financing

External environment exerts a permanent pressure on the performance of the customs union. Trade flows are steadily growing in the last decade, business schemes are becoming increasingly complexand whith new logistics and competitive market pressures make increasingly more difficult to apply the EU common commercial policy.

Regarding internal securityand even foreign, customs authorities and other government agencies are facing in Europe, with significant legal reforms and whith increased pressure from unexpected tasks, the need for new competences backed by the economic crisis which put pressure on resources, makes it an vulnerable to subsist as long as the international supply chain risks have increased due to the globalization of crime and terrorist activities.

It is well known that there are conceptual differences regarding the management of customs risk and control measures at the EU customs administrations. For better protection of EU financial interests is required additional risk management measures and the approaches must target also the component regarding the cross-border cooperation with the nonUE states states, but who affirmed their international support to combat acts of terrorism and stop, in any way, the financing of terrorism and proliferation of weapons of mass destruction.

In another context, each Member State is obliged to publicly reaffirm and to criminalize terrorist financing under the Convention on financing terrorism, through criminal codes. Financing terrorist organizations and terrorist individuals must have a correspondent between crimes.

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[2] See Regulation (EC) no. 338/97 on the protection of species of wild fauna and flora by regulating trade therein.

[3] http://ec.europa.eu/enterprise/sectors/chemicals/documents/specific-chemicals/precursors/

[4] Council Regulation (EC) No. 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights.

[5] See, eg, Communication from the Commission to the European Parliament and the Council of 22 November 2010 - The EU Internal Security Strategy in Action: Five steps towards a more secure Europe [COM (2010) 673 final - Not published in the Official Journal].

[6] COM (2008) 169 final.

Rules on penalties should be in accordance with the resolutions of the Security Council of the United Nations for preventing and combating terrorism and terrorist acts. Resolutions oblige states to block immediately the funds or any asset, so that, directly or indirectly, they are not for the benefit of anyone suspected of possible terrorist acts[7].

Member States should ensure that financial institutions legislation does not conflict with the recommendations of the Financial Action Task Force (FATF)[8].

Financial institutions should not invoke secrecy or confidentiality of the transaction and should take measures to identify the identity of customers when carrying out occasional transactions above the limit set (15.000 USD / EUR); there is suspicion of money laundering or terrorist financing; there are serious doubts about the veracity or adequacy of previously obtained customer identification data.

Conclusions

Regarding the international dimension of the Customs Union's priority is to secure the supply chain by developing international standards and trade facilitation amid the fight against fiscal fraud that can stop, and in this case, the financing of terrorism.

Member States must take decisive action to implement the Vienna Convention, 1988; United Nations International Convention for the Suppression of the Financing of Terrorism, 1999; Inter-American Convention against Terrorism, 2002 and Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the crime and on the financing of terrorism in 2005.

In terms of mutual legal assistance, are required new rules to intensify cross-border and international cooperation, including the creation of a system for case management.

It requires the initiation of another adequate legal framework for mutual legal assistance in customs matters / tax, a official mechanism for criminal investigation, civil and administrative, exchange of indictments, other mechanisms to strengthen cooperation in the field of investigations and judicial proceedings relating to the financing terrorism, terrorist acts and terrorist organizations.

References:

- International Convention for the Suppression of Terrorism adopted in New York on 9 December 1999, ratified by Law 623 of November 19, 2002 published in the Official Gazette of Romania, Part I, no. 852 of 26 November 2002;
- Regulation (EC) no. 338/97 on the protection of species of wild fauna and flora by regulating trade therein;
- Council Regulation (EC) No. 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights;
- Communication from the Commission to the European Parliament and the Council of 22 November 2010 - The EU Internal Security Strategy in Action: Five steps towards a more secure Europe [COM (2010) 673 final - Not published in the Official Journal];
- Communication from the Commision to the Council, the European Parliament and the European Economic and Social Committee COM(2008) 169 final;
- UN Charter of 26 June 1945 issued by the UN published in the Official Gazette from June 26, 1945.

[7] For details, the UN Security Council, under Chapter VII of the UN Charter, including, in accordance with resolution 1267 (1999) and subsequent resolutions; or designated by that country under the resolution 1373 (2001).

[8] The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

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THE INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN THE NEW TYPES OF ARMED CONFLICTS

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Abstract:

The international humanitarian law applicable in armed conflicts has evolved continuously since antiquity until today, its doctrinal writings pointing out during the modern period the influence that the progress of the concepts and the practices of war has had on the development of the normative conventions, especially the first and second world war, resulting in texts that are applicable even today.

Keywords: international humanitarian law, international relations, peace, cooperation

Introduction

A careful look at the reality of the international life at the beginning of the 21st century will easily reveal the accelerated dynamic of the changes that have occurred in the process of using armed force in order to achieve some specific interests of the various international, supra state, state and intrastate actors, with all the humanitarian consequences, beneficial or disastrous, that have resulted from these practices.

With the aim of improving the human condition during an armed conflict, the international humanitarian law drawn up until the end of the 20th century seems no longer able to handle the challenges arising from the transformations occurring in the modalities of using organized armed violence. The continuation of politics by other means, as Carl von Clausewitz characterized it, the war remains for many a painful necessity even nowadays, modifying his peculiarities in a chameleonic way, exactly for which it is required, more and more insistently, the adaptation of the international humanitarian law with the new types of armed conflicts; increasingly, there are being reported in the specialty literature the references to discrepancies between the international traditional law, the classic law of war and the rapid developments of the modern means and methods of fighting at a strategic and tactical level, more and more unconventional and without explicit legal regulations in the legislative acts in the field.

On the other hand, there are highlighted the slower normative developments of humanitarian international law after the great encoding achieved in 1977, so that it has not been able to keep up with the developments of the conflicting practices of international relations. The explanation proposed by a great Romanian specialist in this field is that „experience shows that any new and progressive norm, in international relations, makes its way with difficulty, encountering numerous obstacles" [1]; indeed, concrete life and work at the international level are evolving faster than their legal regulations, being needed sustained efforts at institutional, jurisprudential and doctrinaire level in order to react to the new threats and risks to the international peace and security, after which, new threats arise again, which

[1] D. Mazilu, *Dreptul păcii*, Academica Publishing House, Bucharest, 1983, p. 31.

humanity must face and solve, this being in fact the history of humanity's progress to the ideal of peace and well-being. In consensus with the optimistic vision of the future, we consider that the new rules of international humanitarian law (IHL) penetrate more and more the very different fields of the international relations during armed conflict, hereby contributing to the perfecting of the good global governance that benefits the entire global civil society of the people of the world.

In this context, the international humanitarian law applicable in "the new types of armed conflict" appears to us as being an issue of the ratio between law and international relations which they regulate and includes both continuities and discontinuities, humanistic traditions and revolutionary innovations in order to promote ideals and progressive human values, being, at the same time, a matter of will of the public legislative, executive and judicial authorities, from different levels of governing, to apply in their letter and spirit the principles and the rules of the positive international humanitarian law until the development of new normative documents that would eliminate the possibility of humanitarian disasters caused by war. Scientific research on this subject will start from the fundamental hypothesis that between international humanitarian law and international relations during an armed conflict there is a dialectic report from "law" to its object of regulation, hypothesis based on certain premises that must be demonstrated and developed in an elaborate mode, such as the issue of conventional developments always merging with the customary ones, or the issue according to which the conventional progress in this field is facilitated by jurisprudential interpretations, or the one referring to the contribution of the doctrine in the reiteration and the adaptation of the specific law to the current and possibly future practices of the international use of military force. Such a complex analysis necessarily involves, from a methodological perspective, an interdisciplinary approach of the phenomenon, in an attempt to bring unique contributions to the stage or research already carried out on the big humanitarian problems of the third millennium.

The general theory of law, starting from the acknowledgement that "law starts from the facts" so that each society has its own legislation[2], reaches the encyclopedic conclusion in accordance with which the juridical defines a component part of the social reality which reflects it in the normative plan[3], so that, as far as he is concerned, the international public law (to which also belongs the international humanitarian law), has as its object of regulation the international relations that manifest themselves both in the form of cooperation that involves peace and in the form of confrontation that involves war[4]. Even if in antiquity it was thought that "***inter arma silent leges"***, since then it also remains the phrase,,*ubi societas ibi jus"*, which means that the contemporary international humanitarian law governs the relations between states and other subjects of international law in times of armed conflicts, both international and non-international.[5] Specialists in the field emphasize that what forms the object of the international humanitarian law are the relations between the parts of an armed conflict, with or without international character referring to the carrying out of the military operations, the use of means and methods of war, the treatment of victims of war and of the civilian population as well as the relations between the belligerent parties and those which remains outside the armed conflict.[6]

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[2]M. Djuvara, *Teoria generală a dreptului*, Socec & Co Publishing House, Bucharest, 1930, vol II, p. 358-361.

[3] N. Popa, *Teoria generală a dreptului*, Europa Nova Publishing House, Bucharest, 1995, p. 28.

[4]G. Geamănu, *Drept internaţional public*, Didactică şi Pedagogică Publishing House Bucharest, 1981, vol. I, p. 51.

[5]I. Closca, I. Suceava *Treaty of international humanitarian law*, Bucharest, 2000, page 49-50. The authors carry forth that not all relations in the period of armed conflict are governed exclusively by international humanitarian law some falling within the general scope of public international law or international criminal law, in the law of diplomatic or international law of human rights.

[6]See also F. de Mulinen*, Manuel sur le droit de la guerre pour les forces armées*, Comité international de la Croix-Rouge (CICR), Geneve, 1989, p. 2 şi A.P.V. Rogers, P. Malherbe, *Fight it right!, Model Manual on the law of armed conflict for armed forces*, International Committee of the Red Cross, Geneva, 1999, p. 17-18.

Regardless of its actual military branch (the Hague law) or of its humanitarian one (the Geneva law), the international humanitarian law applicable in armed conflicts has evolved continuously since antiquity until today, its doctrinal writings pointing out during the modern period the influence that the progress of the concepts and the practices of war has had on the development of the normative conventions, especially the first and second world war, resulting in texts that are applicable even today.[7] Studies conducted under the auspices of the Police Academy „Alexandru Ioan Cuza", show us that, despite the hopes of the disappearance of war by banning it in the Charter of the United Nations as an instrument of national policy of States, armed conflicts continued to manifest themselves in the form of international crimes of aggression or as a reaction of the global and regional governance against these crimes or as self-defense of the sovereign states, so the international law applicable in armed conflicts has always been reaffirmed and developed even in the post-war period until today[8].

Researching the sources of the humanitarian law applicable to international armed violence there can be observed that in its regulatory objectives they highlight the existence of four types of armed conflicts governed by them: a) international armed conflict between states, governed by the Hague conventions and referred to in the art. 2, which is common to the four Geneva Conventions of 1949, and art. 1 paragraph 3 of the Ist Protocol of 1977; b) the wars of liberation from under colonial domination, foreign occupation and racist regimes, referred to in art. 1 paragraph 4 of the Ist Protocol; c) non-international armed conflicts stipulated by art. 3 common to the four Geneva Conventions of 1949 and d) non-international armed conflicts referred to in art. 1 of IInd Protocol of 1977. We could also add to this „formalized" typology the guerrilla or partisan wars, which can be both internal and international, resulting from art. 44, paragraph 3, which, taking into account that there are situations in armed conflicts, when as a result of hostilities a combatant cannot be distinguished from civilians, he retains the status provided that in such cases he should wear guns in plain sight for the duration of each military action and during the time he is exposed to the opponent's vision when the takes part in a military deployment preceding the attack. Unlike the classic law of war, this new typology of international armed violence, characterized by the concept of „armed conflict", does not necessarily imply the formal recognition by the belligerents of the state of war, so that the term „international armed conflict" may include any armed struggle between two or more entities with recognized international personality (states, national liberation movements, organized populations, etc.), while that of „non-international armed conflict" refers to the armed confrontation inside the territory of a state carried out between government armed forces and dissident armed groups or those organized under a responsible command able to control part of the territory of a state and to carry out continues and concerted armed operations on the basis of compliance with international humanitarian law. However, beyond this object of the international humanitarian law clearly defined by international conventions, there are social relations in time of armed violence which are not governed by the international humanitarian law, such as those from internal turmoil and unrest times or sporadic and isolated acts of violence, which come under the auspices of the national law or under those of international law of human rights.

It is more than obvious that the typology of the earlier mentioned armed conflict, which are included in the subject of the international humanitarian law, may not reflect the full complexity of the global reality in which is today armed force used. First of all, we see on the military operation theatres, belligerents fighting under the flag of some international organizations (UN, NATO, EU etc.) which are not parties to the Hague and Geneva Conventions, claiming for a long time that the respect for international humanitarian law is ensured by the commitments assumed by the member states of those organizations; however,

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[7] More details in J. Pictet, *Développement et principes du droit international humanitaire*, Institut Henry Dunand, Geneve, Editions A. Pedone, Paris, 1983, p. 11-72. See also I. Dragoman, *Drept internaţional umanitar*, Andrei Şaguna Fondation Publishing House, Constanţa 1999, p. 22-26.

[8] More details in I. Dragoman, D. Ungureanu, V. Velişcu, C. Stănculescu, *Manual de drept internaţional umanitar pentru forţele de ordine şi siguranţă publică*, Sitech Publishing House, Craiova 2011, p. 64.

as the crystallization of regional and global governance and in response to the pressure from public opinion, international security organizations with military attributions have adopted their own tools for the application of international humanitarian law, such as the UN Secretary-General's Bulletin since 1999, the OSCE Code of conduct since 1995, the Standardization Agreement (STANAG) of NATO of 2004 for the training in the law of armed conflict or the EU Guide since 1995 on the promotion of international humanitarian law. We could match this new attitude of politico-strategic bodies of the international organizations to the IHL with the EU's accession to the European Convention of Human Rights and Fundamental Freedoms achieved through the Lisbon Treaty entered into force in 2009. Secondly, the concept of "armed groups" used by the IInd additional Protocol for the defining of civil wars can be interpreted in multiple ways[9], these being able to act on the territory of several states or asking for the support of some international actors, which complicates things even more, leading even to "deconstructed conflicts", "asymmetric conflicts" and "global war on terrorism", in which the violations of the international humanitarian law are intertwined with those of human rights.

There is therefore no surprise that, since the last decade of the 20th century and so far, an entire literature devoted to new types of war has proliferated, starting precisely from the acknowledgement that, in the new millennium, we will not be faced with the classical forms of armed conflict, but with new risks and threats to human security, national, regional and global. That is why, the Millennium Declaration elaborated under the auspices of the United Nations, NATO's New Strategic Concept adopted in 2010 at their summit meeting in Lisbon, the EU's Security Strategy of 2003 as well as the national strategies of Romania of 2007 and 2008[10], have described as global challenges and key threats the terrorism, the proliferation of weapons of mass destruction, the regional conflicts, violent or dormant, the failure of the state governing and cross-border organized crime. That is why that if in the classical theory of international relations there was talk of limited war or total war, of war waged by the entire population or against the whole population or of the mechanization of war and total domination[11], in the more recent literature of "human security" it is resorted, to better describe the world of the 21st century, to notions such as: global war on terrorism, imaginary war, permanent war, identity war, ethnic conflict, humanitarian conflict, conflict, protecting intervention, cultural war[12]; it is also speculated, with the terms used before the prohibition of war as an aggressive instrument of national policy, as a religious war, as a just war, preventive war or war in advance or preemptive war[13]. As one author explains, the diverse terminology of armed conflict was born during the 1980s and 1990s, when there evolved a new type of organized violence, especially in Africa and in Eastern Europe, as an aspect of the globalised era, described as a "new war", different from the "old" wars that took place in Europe from the late XVIIIth century until to the middle of the XXth century[14].

Although the concept of "war" is more widely used, to emphasize the political nature of both types of armed conflict, the new armed craft involves a mitigation of differences between war (usually defined as a military action between states or organized political groups, having political motivations), organized crime (the terrorist violence of private groups, pursuing especially financial earnings) and the systematic and widespread violations of human rights (committed with violence by the means of force of both states and political groups against individuals). It is said that the new wars are "post modern", meaning that instead of expecting cases like foolish dictators such as Saddam Hussein and Muhamed Gaddafi to fight against us in the style of classic warfare, it would be more plausible to expect a chemical,

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[9] This is the reason why an entire publication of *The International Review of The Red Cross* in 2011 was dedicated to this subject, *International Review of Red Cross,* Volume 98, No. 882, June 2011.
[10] Publicity in Official Monitor of Romanian no. 799/2008.
[11] Hans J. Morgentau, *Politica între naţiuni*, Polirom Publishing House, Bucharest 2007, p. 393.
[12] Mary Kaldar, *Securitatea umană*, C.A. Publishing, Cluj Napoca, 2010, p. 12.
[13] Mircea Maliţa, *Jocuri pe scena lumii*, CH Beek Publishing House, Bucharest, 2007, p. 51.
[14] Mary Kaldar, *Războaie vechi şi noi*, Antet Publishing House, p. 9-10.

biological or even a nuclear correspondent of Pearl Harbor; indeed the 9.11 attacks from New York and Washington, and those from Madrid and London have shown that the power of suicidal terrorists and cyber-criminals is "post-modern", being asymmetric not only as operational goals, but also as rules and systems of values on which it is based and which must be respected. On the other hand, it would be possible, that as future crises will manifest themselves more violent and inhumane, to realize that the world is not "modern" or "post modern" but a continuation of the ancient world which, despite various technological means, we must face it with constructive realism[15].

Polemology analyzes the typology of armed conflicts based on the idea that "if you want peace you must know the war", thus trying to decipher its forms.[16] In this framework we include legal science studies which show that in the past there were offensive and defensive wars, of a self or collective defense nature, local and global, terrestrial, aerial, maritime, civil and interstate, conventional and popular or guerrilla, high or low intensity and nuclear.[17] New types of wars, however, require a new polemology in order to understand why wars and armed conflicts have emerged from their classical forms, beating the previous boundaries and giving birth to new hybrid and indecisive forms, with the emergence of new state and supra-state actors, new weapons and new technologies as well as new ideological representations (in both military weak and strong ones). We believe that a new polemology might explain not only why the progressive democratization of humanity and the ideal of an international order insured by a global governance have limited the occurrence of classical armed conflict but also how could existing humanitarian law may apply in the case of new wars of our time.[18]

Also Irenology, as the science of peace, is concerned with the typology of armed conflicts, analyzing in particular the prohibition of aggression warfare, war propaganda and preparations, and also the condemnation of war usage for international disputes, as well as constituent elements of the right to peace.[19] We can ascertain, in fact, a comprehensive interdisciplinary effort that has been carried out in recent years, for thorough scientific research of the war-peace dynamics in security policies, studies being directed not only at the current conflict but also at the predictable future.[20]

Important vectors of scientific investigation in this field exist also in the doctrinal developments of the relationship between international humanitarian law and international relations in time of armed conflict, which includes not only legal issues but also political and strategic goals. In the Romanian scientific framework, the first analyses of the phenomenon appeared in the Romanian Journal of Humanitarian Law[21] so as, after the year 2000,

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[15] Robert D. Kaplan, *Politici de război*, Polirom, Bucharest, 2002, p. 30.

[16] Vasile Secăreş, *Poleomologia şi problemele păcii*, Politică Publishing House, Bucharest 1976, p. 19. See also Corneliu Soare, *Gândirea militară*, Antet Publishing House, 1999, p. 3.

[17] *Tipologia conflictelor armate contemporane*, Militară Publishing House, Bucharest, p. 65-70. T. Grozea, *Implicaţii ale factorului militar în viaţa internaţională*, Politică Publishing House, Bucharest 1987, p. 235-263.

[18] François-Bernard Huyghe, *L'impurité de la guerre*, in Revue Internationale de la Croix-Rouge (RICR), volume 91, Sélection française, 2009, p. 23-24.

[19] D. Mazilu, *Tratat privind dreptul păcii*, Lumina Lex Publishing House, Bucharest 2006, p. 64 and next. See also: I. Pâlşoiu, *Dreptul păcii şi al războiului*, Universitară Publishing House, Craiova, 2007; I. Cândea, *Războiul şi pacea*, Militară Publishing House, Bucharest, 206.

[20] Of interdisciplinary research on new armed conflicts we mention: Alvin and Heidi Toffler, *Război şi antirăzboi*, Antet Publishing House, 1995; Samuel P. Hungtinton, *Ciocnirea civilizaţiilor şi refacerea ordinii mondiale*, Antet Publishing House, 1997; J. Adams, *Următorul-ultimul război mondial, arme inteligente şi front pretutindeni*, Antet Publishing House, 1998; *G. Arădăvoaice, V. Stancu*, *Războaie de azi şi de mâine, aprecieri neconvenţionale*, Militară Publishing House, Bucharest 1999; G. Achcar, *Noul război rece*, Corint Publishing House, Bucharest, 2002; M. Mureşan, G Toma, *Provocările începutului de mileniu, Convenţionale, neconvenţionale şi asimetrice*, Universităţii Naţionale de Apărare Publishing House, Bucharest 2003; T. Frunzeti, E. Bădălan, *Asimetrie şi idiosincronie în acţiunile militare*, CTEA Publishing House, Bucharest, 2004; M. Mureşan, G. Văduva, *Războiul viitorului, viitorul războiului*, Universităţii Naţionale de Apărare Publishing House, Bucharest 2004; Steve Tsang, *Serviciile de informaţii şi drepturile omului în era terorismului global*, Univers Enciclopedic Publishing House, Bucharest 2008.

[21] *The Romanian Journal of Humanitarian Law* no. 15/1997 and 44/2003 addressing deconstructed conflicts and new types of war.

systematic collections of the IHL doctrine undergone editing, first reserved to Romanian authors[22] in 2003 and then including studies of both Romanian and foreign authors[23] in 2006.Thus the work "International Humanitarian Law at the beginning of the 21st century" emerges from the radiography of the IHL's status in which the development of legal norms has slowed down being replaced with the interpretation of the existing norms which, added to the reservations expressed by States in international conventions has led to the creation of a justice parallel of the conventional law; and the fact that there were still gaps in IHL and sometimes States applied it chaotically through manuals and instructions of their own, raised the hardship in understanding the application of IHL in new types of armed conflict.[24] In turn, "Great humanitarian issues in the debates of scientists" contains remarkable ideas relating to the need to adapt international humanitarian law to its current object of regulation, among which we mention as examples: new conflicts that have stimulated large-scale development of the IHL following the end of the Cold War[25]; Elimination of semantic confusion embodied in the phrase "war against terrorism", the fight against terrorism and the denunciation of this method being essential to maintaining a minimum of humanity during armed conflict[26]; finding convincing solutions for the applicability of international law in non-international conflicts and an increase in the importance of human rights in military operations.[27] Also, foreign expert literature, in particular the Western doctrine of IHL, contributed to the attempt to adapt the conventional humanitarian law to the new realities of international relations in time of armed conflict in these troubled times we live in. Thus, the editor-in-chief of the International Red Cross Journal epitomizes this problem in that "first you must determine if a situation is equivalent to an armed conflict and, if so, if it enters into the IHL object of regulation", adding however that „this situation is the Achilles heel in IHL because even the sole existence of an armed conflict is often negated by the States either to minimize confrontations or to prevent rebels from obtaining any legitimacy".[28] Things being as suchis evidenced by the fact that the vast majority of current wars are taking place on the territory of the same State, which constitutes a further evolution in relation with international armed conflicts that marked the first half of the twentieth century; In addition, new phenomena emerged, especially the propagation of internal chaos and armed violence in the absence of effective State control, characterized by good governance, so broad-based confrontations of " failed States" intolerably spread to neighbors, affecting international peace and security in which even the supra-national Governmentseems to no longer possess sufficient authority, as is the case with suicidal terrorism totally asymmetric betweenstate military powers and the capacity to act globally of non-state groups. From this new internal, regional and worldwide situation, follows the contempt of the traditional distinction between international conflicts and those without international profile, the current wars being more of transnational, internal internationalized conflicts, not included in the classical object of international humanitarian law, although States are sometimes tempted to use humanitarian conventions to combat them instead of respecting human rights laid down in peace, that would involve more restrictions on the use of armed force.

As a solution to this new state of affairs, Prof Peter Walensteen, founder of the program on the development of information regarding the conflicts, is proposing the inclusion

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[22] The Romanian Association of Humanitarian Law, *Dreptul internaţional umanitar la începutul secolului XXI*, Bucharest, 2003.

[23] *Mari probleme umanitare în dezbaterile oamenilor de ştiinţă*, The Romanian Association of Humanitarian Law, VIS Print Publishing House, Bucharest, 2006.

[24] I. Cloşcă, I. Suceavă, *op. cit*., p. 11-12.

[25] See in this regard D. Schindler, in *Greats Humanitarian Issues in The Scientists Debates*, The Romanian Association of Humanitarian Law, VIS Print Publishing House, Bucharest 2006, p. 91-98.

[26] See in this regard Y. Sandoz, in *Greats Humanitarian Issues in The Scientists Debates*, The Romanian Association of Humanitarian Law, VIS Print Publishing House, Bucharest 2006, p. 141.

[27] See in this regard D. Fleck, in *Greats Humanitarian Issues in The Scientists Debates*, The Romanian Association of Humanitarian Law, VIS Print Publishing House, Bucharest 2006, p. 321.

[28] Toni Pfanner, Editorial, in RICR, volume 91, Sélection française, 2009, p. 7.

in this programme of three types of conflicts in order to better systematize the situation, namely the armed conflicts carried out as political disputes of a specific gravity between one state and another international actor (state and international organisation), non-state conflicts between non-state actors (the most conclusive example being Somalia) and unilateral violence targeting specific not managed populations through the use of terrorism and genocide, carried out by a state or anon-state actor (like Al-Qaeda) no matter where the operations are carried out.[29] In turn, another researcher of the phenomenon[30] is putting into question new concepts of warfare resulting from the "revolution in military affairs" or „transformation of the armed forces"; such is the case with "the war of the three blocks" in which the military should, in approximately about the same time, in a distance of only three buildings in a municipality, to carry out both measures of humanitarian assistance and peacekeeping operations as well as true lethal battles of medium intensity. Such is the case with the doctrine of "networking warfare", involving the decentralization of command and operational control of the armed forces down to the smallest military structures, somewhat modeled on the decentralization of terrorist networks, and also the "fourth generation warfare" (the first generation being that of the armies on the battlefield organized in lines and columns, the second being characterized by the increased firepower, especially on the machine-gun and aviation, and the third onthe "blitzkrieg" capacity of maneuver from the World War II[31]) which would correspond to the informational revolution, but withmobilization of whole populations,with anincreased antagonism in all areas (political, economic, social, cultural) and having as an objective the psychological and organizational system of the individual.

Although examples of explanations over new typologies of contemporary armed conflicts could continue, we will evoke only two more authors. The first[32] starts from the just observation that although the IHL aims to limit the destructive effects of wars, it does not contain the complete definition of such situations that generate its material margin of application, the legal framework of international and non-international conflicts being still ambiguous although they are not identical[33]; also tensions and internal strife are not even covered by the international humanitarian law but by the human rights law and the international law; highlighting that the armed-conflictual reality is more complex thanthe model described by IHL, he proposes the permanent adaptation of thepresent legal categories, taking as an example the foreign intervention in a civil war that could be an Internationalization through support given to one of the countries, a peacekeeping operation, a non-international conflict exported across the territory of several statesthereby becoming cross-border and even a global war against terrorism. The second author[34] shows us that modern armed forces are engaged in a wide range of operations, ranging from fighting social upheaval in times of peace up to international wars. Due to the lack of clarity (inherent) of justice and also political factors that influence the decision-making process in a general way, it's not always easy to clarify the various situations in order to determine the appropriate conventions and laws, military officers at different hierarchical levels hardly copingwith this lack of legal clarifications; the solution could be that the persons targeted by the conventions

[29] In the same volume 91 of CICR, previously cited, p. 9-22.
[30] François-Bernard Huyghe, *op. cit*., p. 32-35.
[31] The classification reminds of A. Toffler's, corresponding to the three waves of civilization and war, based on the agricultural, industrial and informational revolutions.
[32] Sylvain Vité, T*ypologie des conflits armés en droit international humanitair: concepts juridiques et réalités*, in *The International Review of The Red Cross* volume 91, 2009, p. 37 and the following.
[33] For this reason, the International Institute of Humanitarian Law in San Remo, after developing in 1995 the *Application guide for armed maritime conflicts*, it developed in 2001 the *Code of conduct for military operations in non-international armed conflicts*, doctrinal work to update humanitarian values and rules, although not imposing enforcement obligations to the states, but which they can use as a source of inspiration for military handbooks.
[34] Andrew J. Carswell, *Classification des conflits: le dilemme du soldat*, in RICR, volume 91, 2009, p.65 and following.

and humanitarian laws, both civilians and soldiers, to actually benefit from the rights and protection as provided by Martens Clause.

An important contribution to the deciphering of the relationship between IHL and new international realities during armed conflict, was and is still broughtby national and international jurisprudence which, according to the powers of law interpretation has often clarified complex situations of war practices. Such was the case with the civil war in Nicaragua between the Government and the rebel forces of the "contras", which were aided by the United States. In "Military and paramilitary activities in Nicaragua and against it" from 1986, the International Court of Justice ruled, in the paragraph 219 according to its powers, that while armed conflict between the Government troops and the "contras" was a non-international armed conflict, and thus governed by the law applicable as such,U.S. actions in the war, and against Nicaragua must be analysed from the perspective of an international armed conflict; outside this overlapping of the law applicable to the same case, the ICJ said that, anyway, the basic humanitarian aspects are considered to be, since 1949 in the matter "Corfu", as a requirement for any belligerent no matter the nature of the conflict.[35] Another court with duties and contributions on legal clarification concerning international realities is the European Court of Human Rights, whose Court Room developed on July 7, 2011 two decisions in the cases of Al-Jedda (from 2008) and Al-Skeini (from 2007) against Great Britain in respect of the behaviour of the British armed forces in Iraq, underlining the relationship between the applicability of theEuropean Convention on Human Rights to military operations in the context of international humanitarian law and of the resolutions of the UN Security Council; these decisions clarify the link between IHL and the European Convention on Human Rights meaning that article 2 of the latter (on the protection of the right to life) must be interpreted in the light of the General principles of public international law, especially in cases of military occupation.[36]

Much more conclusive and edifying in what interests us are the sentences of the international criminal courts. To refer to just one example, famous in the international jurisdiction, which has inspired many other verdicts and courts, the International Criminal Court for the former Yugoslavia in the Tadici case from 1997 decided that wars that have engulfed the country since 1991 could be qualified as international armed conflicts and also non-international, internal internationalized conflict, international conflict replaced later by one or more internal conflicts or any combination of these situations. In the judgement of the Court, the existence of military discipline was essential because it would have allowed the application of relevant humanitarian conventions and punishment for those guilty of serious violations. In a particularly applied way, in the paragraphs 96 and 97 of the judgment, it is mentioned specifically the relationship between IHL and state of fact: "the logic of the IHL is not based on formal principles... Rather, the international humanitarian law is a realist branch of law, grounded in the idea of effectiveness and inspired by the objective that looks for discouraging deviations from its standards as much as possible. It follows that, among other things, the humanitarian law is holding accountable not only those who have a formal position of authority, but also those who have de facto powers, as well as those who exercise controll over those who have committed serious breaches of the humanitarian law [...]. However, it is necessary to specify what level of authority or control must to be exercised by another state on the armed forces fighting on its part to transform the *prima facie* conflict in an international one. Indeed, the legal consequences arising from the qualification of the conflict as international or domestic are extremely important. If the conflict is described as international, it would mean that that state could, in certain circumstances, be held accountable for violations of the international humanitarian law committed by armed groups acting on its part".[37]

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[35] A. Sassoli, A.`A. Bouvier, *How does law protect in war*, ICRC, Geneva, p. 909.

[36] F. Noert, *The European Court of Human Rights, Ai-Jedda and Al-Skeini judgements, in Military Law and the Law of War Review*, No. 50/3-4 (2011), p. 309.

[37]Quoted after Beatrice Onica Jarka, *Drept internaţional umanitar*, Universul Juridic Publishing House, Bucharest, 2011, p. 32-33.

Of the many cases of internal jurisprudence, related to the relationship between IHL and the reality that it attempts to regulate, we bring into question only two with an impact on the qualification of war against the terrorism. In June 2006, The Supreme Court of the United States in the case of Hamdam vs. Rumsfeld has decided that in the situation of the sentences to Guantanamo by the military courts established by the President of the U.S.A, it is violated the art. 3, common to all of the Geneva's Conventions applicable in the non-international armed conflicts, embedded in the U.S.A law, because these committees do not give the possibility of minimum judicial guarantees recognized as indispensable by the civilized people and, in addition, the offence of terrorist conspiracy does not constitutes a breach of the right of war; the American Supreme Court rejects this way the government's position that it would be involved in an international war with Al-Qaeda despite the records that a civil war is always internal, thus being wrongly interpreted the relevant institutions involved. In such an approach, in December 2006, the Israel's Supreme Court's decision in the matter of "Targeted Killing" has considered that the methodology used by the Israeli army to assassinate punctually, especially in Gaza, the ones responsible for terrorist attacks against the civilian population of Israel could be legal with the fallowing of some restrictions from the perspective of human rights, namely: the verification and the proving of the information referring to the identity and the activity of terrorists; the investigation of the circumstances of the terrorist attacks; trying to apply rather the legal process of arrest and penalties than the use of lethal force; proportionality in the attack of the terrorists responsible for killing unarmed Israeli civilians. These imposed restrictions are based on the idea taken into consideration by the Supreme Court that Israel is engaged in an international armed conflict with the Palestinian terrorist organizations because the occupation transforms a civil war into an international one. Both cases demonstrate the high degree of conceptual confusion produced within the traditional IHL by the growing involvement of non-state actors able to act cross-border without restrictions[38]. To be noted contextually that Romania lacks at the moment a relevant jurisprudence in the reviewed field and the new Criminal Code[39] contains five war crimes that can be committed „in an armed conflict with or without an international character" (art. 440-444). As a result of the above, it is evident that only a court will be able to interpret the factual reality for the application of these criminal dispositions, but not in a dogmatic way but in a creative and proper one.

Considering this status of the international humanitarian law in relation to the deeply provocative new typology of the conflicts in the early 21st century, it has been proposed, somewhat pleonastic, "the humanization of the humanitarian law"[40]. In reality, the normative framework of the situations in which armed force is used in internal or international relations has evolved continuously, an example in this regard being the new protocols adopted in the Convention of 1980 on the prohibition or the restriction of the use of certain conventional weapons which have indiscriminate effects or cause excessive traumatic effects. We believe, however, that unlike the arms race, which refers both to the means and methods of warfare, conventional rules will never be fully in line with the strategic objectives and politico-military tactics of the belligerents of the future as demonstrated by the impossibility of adopting thus far of a specific tool of a total and general ban of nuclear weapons with a devastating destructive potential to the existence of life on Earth; in spite of the increasingly insistent demands of the public opinion, of some governmental and non-governmental organizations as well as some specialists in international public law and humanitarian law, not even the International Court of Justice could decide on the issue, its advisory opinion in 1996 stating that "it cannot, however, be concluded definitively that the threat or use of nuclear weapons

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[38] Marco Milanovic*, Lessons for human rights and humanitarian law in the war on terror: comparing Hamdam and the Israeli Targeted Killings*, in RICR, volume 89, No. 866, iune 2007, p. 373.
[39] Publicity in Official Monitor of Romanian no. 510/2009.
[40] Valentin Bădescu, *Umanizarea dreptului umanitar*, CH Beck Publishing House, Bucharest, 2007.

would be lawful or unlawful in an extreme circumstance of self-defense, in which it would be put into question the very survival of a state"[41].

However, this state of affairs does not alter the fact that we are still in a binary conceptual understanding involving both the international conflicts as well as the non-international ones, due to historical reasons and reasons of positive law, the international law arising only from the political-legal will of the States. As demonstrated by the introduction of civil wars in the subject of regulation of IHL in 1949, reaffirmed and expanded in 1977, the paradox of the relationship between the international humanitarian law and the new typology of armed conflicts could be solved through the will of the states to specify expressly the broaden application of the art. 2 common to the Geneva's Conventions of 1949, already extended by the 1st Protocol of 1977. In support of this proposal comes also the already famous Martens clause, already reiterated in most humanitarian instruments, in accordance with which „in the conventional unforeseen cases, the civilians and the belligerents remain under the protection and authority of the principles of the international law, as it results from the usages established, from the principles of humanity and the requirements of public conscience". The recourse to the customary humanitarian law, more adaptable and more dynamic than the conventional one, even if its existence is more difficult to prove, could be a solution for the solving of the security dilemma in which humanity stands, against the new threats to peace and its existence.

We can conclude that we are not standing in the face of a fatality because the fundamental humanitarian guarantees are solidly anchored in the IHL, both in the international conflicts as well as in the non-international ones and the human rights must be respected in a worldwide society based on democracy and on a good governance in all circumstances of armed violence. Alongside with the majority of the mankind we believe, with all our strength of conviction resulted from the knowledge of the evolution of humanitarian instruments, that the express introduction of new armed conflicts in the regulatory subject of the international humanitarian law can be solved via a new reaffirmation and development of the IHL, similar to that of 1977, thus dispelling uncertainties and confusion that still persist nowadays. Specialty studies may bring a thorough and valuable contribution to the crystallization of the political will of the governmental decisional elements in this direction, contributing to the creation and the exploitation of the spirit and of the culture, specific to the promoting of the human rights in any situation of armed conflict[42].

BIBLIOGRAPHY:

- Dragoman, D. Ungureanu, V. Velişcu, C. Stănculescu, *Manual de drept internaţional umanitar pentru forţele de ordine şi siguranţă publică*, Sitech publishing house, Craiova 2011;
- Beatrice Onica Jarka, *Drept internaţional umanitar*, Universul Juridic publishing house, Bucharest, 2011;
- Eugen E. Popescu, *Drept internaţional umanitar*, Universul Juridic publishing house, Bucharest 2011;
- Nicolae Lupulescu, *Drept internaţional umanitar*, C.H. Beck publishing house, Bucharest 2009;
- *International Review of the Red Cross*, volume 88, no. 864-891.

[41] C. Poenaru, *Legalitatea armelor nucleare în dreptul internaţional umanitar*, in *The Romanian Journal of Humanitarian Law* no. 17/1997, p. 41.

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CONSIDERATIONS REGARDING THE COMPLIANCE OF ROMANIAN LEGISLATION WITH THE DIRECTIVE (EU) NO. 42/2014 REGARDING THE FREEZING AND CONFISCATION OF THE INSTRUMENTS AND PRODUCTS OF CRIMES COMMITTED IN THE EUROPEAN UNION

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Abstract

The work analyzes the compliance of domestic legislation with the Directive (EU) nr. 42 of April 3, 2014 for the freezing and confiscation of the instruments and products of crimes committed in the European Union, in anticipation of the need to adapt it until the deadline laid down by it, namely October 4, 2016.

Keywords: special confiscation, extended confiscation, the new Criminal Code, the new Code of Criminal Procedure

Introduction

The study analyzes the compliance of domestic legislation with the Directive (EU) nr. 42 of April 3, 2014 for the freezing and confiscation of the instruments and products of crimes committed in the European Union, in anticipation of the need to adapt it until the deadline laid down by it, namely October 4, 2016.

The analysis is carried out both from the perspective of criminal law and criminal procedure law, and that is structured around the main themes arising from the presentation of this subject, namely the presentation of the Directive, special confiscation, extended confiscation, confiscation of the equivalent expanded into money, confiscation from third persons, specific guarantees in matters of precautionary measures. The study aims to analyze the institution, in order to facilitate the understanding and deepening of the provisions of the Directive to be transposed into our internal legislation.

Presentation of the Directive

The purpose of the Directive (EU) no. 42 of April 3, 2014 for the freezing and confiscation of the instruments and products of crimes committed in the European Union[1] was strengthening the harmonization of freezing and confiscation of the Member States and to facilitate, in this way, the confidence-building and cross-border cooperation. The time limit

[1] Published in the Official Journal of the European Union no. L 127 of 29 April 2014, in force since May 19, 2014.

within which the measures provided by the Directive should be transposed into Romanian legislation is October 4, 2016.

In this sense, the preamble of the directive indicates that organized criminal groups activity is not limited by borders, these groups acquiring more and more goods in Member States other than those in which they are established, as well as in third countries. Therefore, the competent authorities should be provided with the means to identify, freeze, seize and manage products resulted from the committing of offences of this kind.

The directive aims at reviewing and extending the provisions of framework decision 2001/500/JHA of money laundering Council, the identification, tracing, freezing, seizing and confiscation of instrumentalities and products of the crime and the proceeds of framework decision 2005/212/JHA of confiscation of the instrumentalities and property in connection with the crime Council.

By issuing this directive it is aimed to achieve the following specific objectives:

-increasing harmonization of the rules allowing confiscation of products from committing offences, with respect for fundamental rights;

- development of harmonized minimum rules to allow Member States to freeze or seize products from committing crimes in order to subsequent confiscation in accordance with fundamental rights;

- facilitating the seizing, freezing, and cross-border confiscation of goods by Member States;

- increase of instruments that allow freezing and confiscation by the authorities of the Member States, studies showing that, although covered by Union legislation and provided by national legislation, the procedures for confiscation remain insufficiently used.

The directive lays down minimum standards for Member States with regard to the freezing and confiscation of assets deriving from committing crimes by applying direct confiscation, confiscation of the equivalent value, extended confiscation, confiscation which does not rely on a sentence of condemnation and confiscation from third parties (the confiscation from third part).

As regards the direct confiscation, the directive provides that Member States shall take the necessary measures to enable the confiscation, in whole or in part, of the instruments and of the products or goods, the value of which corresponds to such instruments or products, conditioned by the existence of a definitive conviction for an offence which may result in the following of proceedings *in absentia* [article 4 para. (1)], and, if the confiscation pursuant to paragraph 1 is not possible, at least when such impossibility is the result of disease or of the circumvention of the person suspected or blamed, Member States should take the necessary measures to enable the confiscation of the instruments and in cases where criminal proceedings have been initiated with respect to an offence which is liable to give rise to, directly or indirectly, the economic benefits of such a procedure could result in a judgment of conviction if the person suspected or blamed could appear to the Court [art. 4 paragraph (2)].

However, in cases of sickness or circumvention, the existence of *in absentia* procedures in the Member States would be sufficient to comply with this obligation (point 15 of the preamble).

Regarding the extended confiscation, the provisions relating to this measure have been consolidated to ensure an unique minimum standard, which may not be lower than the limit laid down in the framework Decision 2005/212/JHA. Framework Decision 2005/212/JHA provide that Member States may choose between three sets of minimum requirements for application of extended confiscation. As a result, in the process of transposition of the framework decision, Member States have chosen different options that have led to conceptual differences as regards the extended confiscation within national jurisdictions. Precisely these differences of interpretation affect cross-border cooperation in cases of confiscation. Therefore, it is necessary a further harmonization of the provisions relating to extended confiscation through the establishment of an unique minimum standard.

With regard to the confiscation from third parties, in the preamble of the directive (paragraph 24) it is showed that "the practice whereby a person suspected or blamed transfers goods to a third party aware, in order to avoid confiscation, is common and increasingly more widespread. The current EU legislative framework does not contain binding rules concerning confiscation of property transferred to third parties. Therefore, the need to enable the confiscation of property transferred to third parties or purchased by them is becoming ever more marked. The acquisition by a third party refers to situations where, for example, the goods were acquired, directly or indirectly, for example through an intermediary, by the third party from a person suspected or blamed, including when the crime was committed on his behalf or for his benefit, where the person blamed has no assets that can be seized. Such seizure should be possible at least in cases where third parties knew or should have known that the purpose of the transfer or acquisition was to avoid forfeiture, on the basis of facts and specific circumstances, including the fact that the transfer took place free of charge or in return for a sum of money, significantly shorter than the market value of the goods. Rules concerning confiscation applied to third parties should regard to both individuals and legal entities. In any case, it should not prejudice the rights of third parties in good faith."

The directive proposes, in the same time, that, without injuring the different legal systems and framework Decision 2003/577/JHA, to harmonize some aspects of national systems for the freeze with the purpose of confiscation. In this sense, the preamble of the directive indicates that persons suspected or blamed hide assets throughout the entire criminal proceeding. Thus, decisions of confiscation cannot be executed, the persons who are the subject of the decisions of confiscation following to benefit from their belongings after the execution of the penalty. Therefore, it is necessary to be able to determine the exact size of the assets to be covered by the measure of confiscation, even after delivery of a judgment of conviction for an offence, in order to allow full implementation of the decisions of seizure when initially were not identified goods or goods have been found insufficient and judgment of confiscation remains unfulfilled. Assets frozen in a possible subsequent confiscation should be managed properly in order not to lose the economic value. Member States should take the necessary measures, including the ability to sell or transfer the goods to reduce these losses. Member States should take appropriate measures such as, for example, the establishment of national centralized offices to manage property or the establishment of specialized offices or equivalent mechanisms to manage effectively assets frozen prior to confiscation and to preserve their value, pending a decision of the Court (section 32).

The directive provides for specific guarantees and possibilities of appeal in matters of seizure, to ensure an equivalent level of protection and respect of fundamental rights (article 8). These include the right to be informed of the procedures, the right to be represented by an attorney, an obligation to communicate as soon as possible any decision likely to affect property rights and effective opportunity to challenge such a decision. These specific paths are not provided only to persons accused or suspected of committing crimes, but also for other people, in the context of the seizure applied to third parties. The purpose of the freezing of assets is, *inter alia*, to allow the person affected to challenge the order. Therefore, such a communication should indicate, at least briefly, the reason or reasons of the order concerned, such an indication being possible to be very brief.

Analysis of conformity of national legislation with the directive

As a legal instrument chosen, the directive leaves Member States the liberty to choose the means of implementing the provisions of the Community act in question.

The directive lays down minimum standards for Member States regarding the application of the direct confiscation, equivalent value confiscation, extended seizure, confiscation which is not based on a sentence of condemnation and confiscation from third parties (the confiscation from third part).

The Romanian penal code, approved by law No. 286/2009, with subsequent amendments and additions, entered into force on February 1, 2014, covers as safety measures the direct confiscation, confiscation of the equivalent value, extended confiscation, as well as some cases of confiscation from third parties.

Direct confiscation

As regards the direct confiscation, the directive provides that such measure can be ordered with the condition to be a definitive conviction for an offence which may result following some proceedings *in absentia*. The criminal procedure code provides for the possibility of conviction of a person who fails to appear at trial.

In paragraph 15 of the preamble of the directive it is indicated that, if the confiscation is not possible on the basis of a final judgment of conviction, it should be possible, under certain conditions, the confiscation of the instruments and products, at least in cases of sickness or circumvention of the person suspected or blamed. However, in cases of sickness or circumvention, the existence of *in absentia* procedures in the Member States would be sufficient for compliance with this obligation.

Unlike the previous criminal code, the new penal code allows for all classes of goods indicated in art. 112 paragraph (1) to be subject to special confiscation if an unjustified act provided for in the criminal law has been committed, even if it is not attributable to the person. In the previous penal code, special confiscation was not possible in the case of goods that have been used in committing a criminal act if it did not constitute an offence [art. 118 para. (1) let. b)]. The same situation was for the goods produced, modified or adapted for the purpose of committing any criminal offences [art. 118 para. (1) let. c)].

An absolute novelty for our law system is the arrangement of the confiscation measure, although in the process it has not been pronounced a judgment of conviction, whereas the person suspected or blamed is ill.

Even if from the text of the directive it follows that, if the confiscation is possible, in the laws of the Member States, on the basis of a final judgment of conviction, handed down in absentia, it is no longer necessary for Member States to adopt measures to enable the confiscation in the situation where, although criminal proceedings have been initiated it is not the case, however, for the delivery of a judgment of conviction as the person suspected or blamed is ill, it appears, however, that the rule of the penal code which allows the judgment in absentia does not apply also where the criminal trial cannot proceed on the ground that the person investigated suffers from a disease that prevents him from taking part in the proceedings.

Thus, according to art. 312 para. (1) of the new Code of criminal procedure, in cases where it is found by a forensic investigation that the suspect or the defendant is suffering from a serious illness, which prevents him from taking part in criminal proceedings, the criminal investigation body shall submit its proposals to the Prosecutor together with the file, in order to suspend the prosecution.

In these conditions, until the cessation of the cause that led to the suspension of the prosecution, it cannot be disposed the sending to Court in order to arrive at a conviction.

It should be noted, however, that although prosecution is suspended, this measure is temporary, and the length of it does not enter into the calculation of the limitation period for criminal liability.

Similar measures are laid down for the judgment period. Thus, according to art. 367 para. (1) of the new Code of criminal procedure, „when it is ascertained on the basis of forensic expertise that the defendant suffers from a serious illness, which prevents him from participating in the judgment, the Court orders, through the closing, the suspension of judgment until the state of health of the accused will allow him to participate to the trial".

From the above considerations it follows that in a situation where the prosecution or judgment is suspended, at the end of the case which has resulted in taking this measure, the criminal proceedings should be resumed from the phase in which it was suspended, and if it is

found that there are conditions of existence of an offence and it was committed by the defendant, there will be pronounced a judgment of conviction.

Having in regard the irrevocability of the confiscation, and the fact that the ground under which prosecution will be suspended is an objective one that cannot be attributed to the accused, the suspension having a fixed-term, we appreciate that in these circumstances there is no need for a regulatory intervention.

However, it is found that the in the current rules of the Code of criminal procedure it is not regulated the possibility of continuing criminal trial under the assumption of the death of the accused, not even for special or extended confiscation.

Confiscation of the equivalent in money

In this respect, the provisions of the directive converge with the current concept of Romanian legislator regarding confiscation based on a sentence of condemnation. With reference to this aspect, in the preamble of the directive is showed that the Member States are free to define the confiscation of assets of equivalent value as an ancillary or alternative direct confiscation, where appropriate, in accordance with national law.

According to the article. 112 paragraph (5) of the new Criminal Code, „if the goods subject to confiscation pursuant to paragraph (1) let. b)-(e) are not found, it shall be forfeited money and goods up to their value, instead". At the same time, paragraph (3) of the same article establishes that „in cases referred to in paragraph (1) let. b) and c), if assets cannot be seized, because they do not belong to the offender and the person to whom they belong to has not known the purpose of their use, it will forfeit their equivalent in money (...). „

Extended confiscation

Extended confiscation is forced and free passage in State ownership of certain things, which belong to the person who has committed a crime, because of their origin from the criminal activities of the same nature, carried out by that person, constantly, over a certain period of time, prior to the offence for which the person is sentenced.[2]

This institution has been incorporated into Romanian legislation by Law no. 63/2012 for the modification and completion of the Penal Code of Romania and of the Law no. 286/2009 relating to the Penal Code, law which transposed into national legislation the article. 3 of framework Decision 2005/212/JHA of 24 February 2005 on confiscation of the products, instrumentalities and goods in connection with the crime.

a) In terms of the length in time for the analysis of the meeting of requirements laid down by national legislation for the implementation of extended confiscation, it should be noted that framework Decision 2005/212/JHA provides that Member States may choose between three sets of minimum requirements for application of extended confiscation, as referred to in art. 3 paragraphs (2) let. a), b) and c). Letter (a) relates to goods that come from activities performed in a period prior to conviction, while letter (b) relates to goods coming from „similar" activities. With regard to letter (c), it is about the disproportion between the amount/value of the goods and the level of legal income of the person convicted.

The Romanian legislator has opted for the combination of the criteria referred to in letters a) and c). Thus, according to art. 112^1 para. (2) let. a) and b) of the new Criminal Code, extended confiscation shall be ordered „if the value of the property acquired by the person convicted, over a period of 5 years before and, if necessary, after the committal of the crime, until the date of issue of the document instituting the proceedings, clearly exceeds the income on legitimate basis" and „the Court strongly believes that the goods in question come from the criminal activities of the nature of those referred to in paragraph (1)".

The Directive simplifies the existing system of options in the field of extended confiscation, by providing a common minimum standard, being eliminated one of the criteria

[2] N.E. Buzatu, A. Uzlău, *Novelties in Security Measures – the Extended Seizure*, AGORA International Journal of Juridical Sciences no 3/2013, AGORA University Press, Oradea, p. 19.

under which goods could be seized, namely the condition that the goods concerned to come from "similar" activities.

It appears, therefore, that by conditioning by the Romanian legislator the enforcement of the safety measure of confiscation by the cumulative performance of the two criteria mentioned above, the regulatory requirements imposed by the Directive 42/2014 regarding freezing and confiscation of the instruments and products of the crimes committed in the European Union are fulfilled.

b) As regards the goods covered by the extended confiscation, it is found that the Romanian legislator did not apply the extended confiscation measure conditional on fulfillment of the requirement that it should come from similar activities, but the Court must be convinced that the goods in question come from the criminal activities of the nature referred to in art. 112^1 para. (1).

In the text of articles. 112^1 para. (2) of the new criminal code it is not imposed the condition that the goods come from similar criminal activities for which he was convicted.

c) In terms of the types of offences for which it may order the confiscation, the difference between regulating the institution of the extended confiscation of the Romanian penal code and the institution in the Directive refers to the fact that the rules of the Romanian Penal Code makes the application of the safety measures conditional on a cumulative performance both of the requirements relating to the classification of the crime committed in relation with offences specifically mentioned in the art. 112^1 and of the minimum limit of the penalty prescribed by law for the criminal acts in question.

However, this double conditionality is not found in the table of contents of the directive, art. 5 where are the subject categories of offences for which you can apply extended confiscation measure using two methods to determine, respectively, to list those categories of offences for which confiscation applies to instrumentalities and the establishment of a minimum punishment for a series of offences referred to in more directives and framework decisions, except the case when the tool does not contain a threshold for punishment, where the reference is made to the penalties laid down by national law.

In our opinion, in conjunction of the provision of art. 3 with those of art. 5 of the directive, it follows that, for the crimes mentioned in article 5 para. (2) let. a)-d), the condition regarding the minimum punishment provided by the law should be deleted, this following to be maintained for the offences referred to in letter e) 1st thesis of the same article, if they do not overlap as indictment.

It is therefore necessary to amend the provisions of this article. 112^1 para. (1) of the new Criminal Code under which they are regulated the conditions that must be met in order to be able to order extended confiscation.

Confiscation from third parties

With regard to confiscation from third parties, it is found that, in the directive, this measure is based on a particular position of the third parties, under the subjective aspect, to the goods or products concerned (notion of bad faith), bearing in mind that taking this action is conditioned by the fact that they know or ought to know that the purpose of the transfer or acquisition was to avoid confiscation, conclusion inferred from a number of elements of fact and factual circumstances.

In this regard, according to art. 6 paragraph (1) of the directive, „Member States shall take the measures necessary to enable the confiscation of goods or other property whose value corresponds to the products that, directly or indirectly, have been transferred by a person suspected or blamed to third parties, or which have been acquired by third parties from a person suspected or blamed, at least in cases in which the parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of elements of fact and factual circumstances, including the fact that the transfer or acquisition took place free of charge or in return for a sum of money, significantly shorter than the market value of the goods."

a) The Romanian Penal Code (new Penal Code) provides two cases of special confiscation applied to third parties, however, by reference to the definition of the offence provided by the directive in article 2 point 1, it is found that they are different from the situations covered by the directive.

Thus, according to art. 112 paragraph (3) let. b) and c) of the new Criminal Code, there can be subject of special confiscation the goods that have been used, in any manner, or intended to be used in committing a criminal act referred to in penal law, if, belonging to another person, he knew the purpose of their use, namely the goods used, immediately after committing the act, in order to ensure the perpetrator escape or to keep the product obtained, if, belonging to another person, he knew the purpose of their use. The indication of this hypothesis, about the third party who knew the purpose of good's use, covers the situation where, although complicit in perpetrating the deed, the person whose property is the good cannot be criminally accused.[3]

However, under art. 2 paragraph 1 of the directive, product shall mean any economic advantage obtained, directly or indirectly, from committing a crime; it may consist of any type of good, and includes any rollover or transformation of direct products, as well as any valuable benefits.

Therefore, it is about goods produced by committing the offence provided by criminal law and property acquired through perpetration of the offence provided by the criminal law.[4]

The technical solution for the transposition of the directive's provisions governing the confiscation from the third person is the settlement of the cases referred to in articles. 112 let. a) and e) similarly to those referred to in let. b) and c) of the same paragraph and taking account of the factual elements referred to in the directive from which it can be inferred the subjective position of the third party.

b)Taking advantage of the resumption of the discussion of extended confiscation when adopting normative act by which the directive should be transposed, we appreciate that it should be expressly provided that this measure may be applied towards a family member (ascendants and descendants, brothers and sisters, their children, as well as those made through adoption, according to the law, such relatives, the husband and the people who like those established relationships between spouses or between parents and children, where cohabit - art. 177 of the Penal Code) or a legal person to which the condemned person has control. The provision of this possibility would make the safety measure of extended confiscation not to be devoid of content, and thus turn into an illusory measure, by the alienation of the goods concerned by the confiscation.[5]

In legal doctrine, these provisions have received different interpretations, appreciating that also in the situation when the article 249 para. (4) of the Criminal Procedure Code provides that safety measures for the special confiscation or the extended confiscation can be ordered for assets of the suspect or the accused or other persons in whose possession or property the goods to be seized are, however "taking the measure of extended confiscation cannot be disposed against persons other than the person convicted, who did not commit crimes, regardless of the relationship between these and the person of the offender, because criminal law sanctions apply only to persons who have disregarded the rules of criminal law provisions and are also executed by them. Beyond legal considerations, the personality of sanctions principle of criminal law is very important for any system of law, whereas it is

[3] Corina Voicu, Andreea Simona Uzlău, Georgiana Tudor, V. Văduva, *Noul Cod penal. Ghid de aplicare pentru practicieni*, Hamangiu Publishing House, Bucharest, 2014, p. 187.

[4] In national law, in certain circumstances, receiving, acquiring, transforming an asset or facilitate its recovery, a person who either knew or foresaw in concrete circumstances that it stems from the offences provided for in committing a criminal act constitutes the crime of concealment provided by art. 270 of the new penal code.

[5] I. Pascu, Andreea Simona Uzlău, *Drept penal. Partea generală*, ediţia a III-a, Hamangiu Publishing House, Bucharest, 2013, p. 492.

unnatural as a criminal penalty to be ordered towards people who have had no involvement in committing a crime".[6]

Therefore, art. 112^1 should be supplemented by a new paragraph, which should expressly provide for the possibility of extended confiscation and disposal against a family member or a legal person to which the condemned person is in control, to which the person sentenced or, where appropriate, a third party has transferred goods.

Specific guarantees in matters of precautionary measures

a) In terms of specific guarantees and possibilities of challenging acts of seizure, respectively confiscation of products and instruments of crimes, it is found that the provisions of the Code of criminal procedure correspond, in a great extent, to the provisions of the directive.

From the Code of penal procedure, it appears that the suspect, defendant or any other person concerned is informed of the precautionary measures to be taken, is entitled to appeal against the precautionary measure taken by the Prosecutor or the bringing to fulfillment of it, the right to be assisted by a lawyer and the right to appeal against the way of bringing to fulfillment the precautionary measure taken during preliminary Chamber or judgment. These specific paths are not provided only for persons accused or suspected of committing crimes, but also for other people, in the context of the confiscation applied to third parties.

Thus, art. 250 paragraph (1) of the code of criminal procedure establishes that "against the precautionary measure taken by Prosecutor or against the bringing to fulfillment of it, the suspect or the defendant or any other interested person may make opposition, within 3 days from the date of communication of the Ordinance making the measure or from the date of fulfilling it, at the judge of the rights and freedoms of the Court to which it would return power to judge the cause".

At the same time, according to the provisions of paragraph (6) of the same article, "against the way of bringing to fulfillment the precautionary measure taken by the judge of preliminary Chamber or by the Court, the Prosecutor, the suspect or the defendant or any other interested person may make this opposition at this judge or this Court, within three days from the date of the enforcement of the measure."

In accordance with article 250 paragraph (7) of the Code of criminal procedure, the opposition is solved, in open court, by reasoned closing, with the attendance of the parties, within five days of its registration.

It appears, therefore, that the penal law does not recognize the possibility of contesting the taking precautionary measures during the preliminary Chamber procedure or during judgment.

Thus, if in the course of the prosecution, the suspect, the accused or any other interested person may challenge both taking precautionary measure and the way of bringing it to fulfillment, if the precautionary measure is taken during the procedure of preliminary Chamber or during judgment, the notice of opposition may be just on the way of bringing to fulfillment the precautionary measures.[7]

Precautionary measures may be taken including during the appeal, in which case the closings and judgment handed down are final. Therefore, it is necessary to regulate the possibility to contest separately these closings, as well as possibility to contest precautionary measures taken by the judge of the preliminary Chamber.

b) In terms of the requirement to respect the right to a fair trial, it is found that the present provisions of the Code of criminal procedure governing the procedure on the basis of

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[6] M. A. Hotca, *Neconstituţionalitatea şi inutilitatea dispoziţiilor care reglementează confiscarea extinsă*, http://www.juridice.ro.

[7] Corina Voicu, Andreea Simona Uzlău, Georgiana Tudor, V. Văduva, *Noul Cod de procedură penală. Ghid de aplicare pentru practicieni*, Hamangiu Publishing House, Bucharest, 2014, p. 287.

which the confiscation shall be ordered, largely ensures compliance with the provisions of the directive, including in cases where there is confiscation from third parties.

Thus, after the article. 8 para. (6) of the directive establishes that the Member States must adopt the necessary measures to ensure that persons affected by the measures provided for in this directive have the right to an effective remedy and to a fair trial, for the exercise of their rights, in the paragraphs (5) to (7) there are provided certain assurances, as follows: reasons for judgment of confiscation, its communication to the person affected by taking this measure, provision for the effective possibility of the person against whom seizure is willing to attack the decision of seizure before a Court [para. (6)], regulation for people whose goods are affected by a decision of confiscation, of the right to be assisted by a lawyer, for the entire duration of the procedure of confiscation related to determining the products and tools, in order to be able to exercise his rights [para. (7)].

In the new Code of criminal procedure, this measure may be ordered only by a judge, by a reasoned closing, where the Prosecutor has ordered closure or waiving the prosecution and noticed the preliminary Chamber judge for taking this safety measures (art. 549^1) or by a decision in first instance. Both the closing referred to in art. 549^1, and judgment by which the cause was solved may be challenged, namely by opposition [art. 549^1 para. (4)] or appeal, ensuring, thus, the compliance with the provisions of the directive, in terms of the requirement to motivate the act ordering the confiscation and the possibility of challenging it.

Rules of the Code of criminal procedure ensures also the respect of other guarantees of a fair trial including the case of confiscation from third parties, namely the possibility of actual participation in the process, including ensuring the right to defense on the basis of the probation material in the file.

a) Under the procedure of confiscation provided for cases of closure or waiving the prosecution, governed by art. 549^1 of the Criminal Procedure Code, it is stipulated that the judge of the preliminary Chamber informs the persons whose rights or legitimate interests may be affected with a copy of the order of the public prosecutor's Office, putting them in consideration that within 10 days from receipt of the communication they may submit written notes [paragraph (2)].

b) The provisions of the Code of criminal procedure governing the first instance judgment shall provide the opportunity for third parties who have in property or possession the goods covered by the confiscation measure, to participate in this process phase and to benefit from the guarantees of the right to defense, including the right to be assisted by a lawyer. In this regard, according to art. 366 para. (3) of the new Code of criminal procedure, „people whose goods are subject to seizure may be represented by attorney and may formulate demands, raise exceptions and provide closings with respect to confiscation".

c) This right is recognized also at the appeal hearing, art. 409 para. (1) let. f) of the Code of criminal procedure providing that the appeal may be also declared by any legal or natural person whose legitimate rights have been directly injured by a measure or by an act of the Court in respect of provisions that have caused such damage. At the same time, according to paragraph (2) of the same article it is provided that „for persons referred to in paragraph (1) let. b)-f), the appeal may be declared by the legal representative or by an attorney, and for the culprit, by his husband."

Regulating these issues is likely to ensure the compliance of the provisions of the Criminal Procedure Code with article. 8 para. (8) of the directive providing that, in proceedings referred to in article 5 (extended confiscation, covering also a segment of the confiscation from third parties), the person affected must have the actual opportunity to challenge the circumstances of the case, including the elements of fact and the evidence available on the basis of which the goods in question are treated as goods derived from criminal activities.

Therefore, it is not necessary the intervention of the legislator to regulate a modified procedure for the participation of third parties in the criminal trial, in which to be met the

guarantees of a fair trial. However, in order to ensure the effectiveness of transposing the provisions of the directive in the Romanian law it might be regulated the obligation of quoting people whose goods are likely to be confiscated, even since the beginning of the trial in first instance.

At the same time, being given the complexity of the probation material to be administered for extended confiscation order, as well as the necessity to meet requirements of fair process, it follows to be assessed whether it would not be useful to establish the possibility of disjunction the cause under this aspect and resolution of the case in relation to the confiscation subsequently the settlement on the defendant's guilt, in order to avoid the fulfillment of the limitation period for criminal liability.

Conclusions

The study analyzes the compliance of domestic legislation with the Directive (EU) no. 42 of April 3, 2014 for the freezing and confiscation of the instruments and products of crimes committed in the European Union, in anticipation of the need to adapt it until the deadline laid down by it, namely October 4, 2016.

The analysis is carried out both from the perspective of criminal law and criminal procedure law. The subject is of current interest both for theoreticians, but especially for law practitioners, being aware of the many problems arising in this matter, in the jurisprudence of the Courts.

Without issuing the claim that through our intercession the theme has been addressed fully, we appreciate that through advanced theoretical considerations we have managed to bring into focus the main issues which will follow from the application of the institutions and to identify possible preferable legislative solutions.

Bibliography

- Corina Voicu, Andreea Simona Uzlău, Georgiana Tudor, V. Văduva, *Noul Cod penal. Ghid de aplicare pentru practicieni*, Hamangiu Publishing House, Bucharest, 2014;
- Corina Voicu, Andreea Simona Uzlău, Georgiana Tudor, V. Văduva, *Noul Cod de procedură penală. Ghid de aplicare pentru practicieni*, Hamangiu Publishing House, Bucharest, 2014;
- N.E. Buzatu, A. Uzlău, *Novelties in Security Measures – the Extended Seizure*, AGORA International Journal of Juridical Sciences no 3/2013, AGORA University Press, Oradea;
- I. Pascu, Andreea Simona Uzlău, *Drept penal. Partea generală, ediţia a III-a*, Hamangiu Publishing House, Bucharest, 2013;
- M. A. Hotca, *Neconstituţionalitatea şi inutilitatea dispoziţiilor care reglementează confiscarea extinsă*, http://www.juridice.ro.[8]

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THE ARBITRAL DECISION PRONOUNCED IN AD-HOC DOMESTIC-LAW ARBITRATION IN THE REGULATION OF THE NEW ROMANIAN CODE OF CIVIL PROCEDURE

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Abstract

The need to relieve the Romanian judicial system from the large number of cases, coupled with the assignment of specific prerogatives to certain people, bodies or institutions regarding the settlement of certain disputes, has resulted in the extension of arbitration as a significant way of settling litigations of a private nature.

This article presents some issues referring to arbitration in Romania, and then analyze, from the perspective of the New Romanian Code of Civil Procedure, the features of a settlement pronounced as a result of ad-hoc domestic-law arbitration, called arbitral decision, stressing elements of novelty and essential changes brought to it.

Key words: *litigation, arbitral tribunal, arbitral decision*

Introduction

Arbitration is one of the alternative paths[1] made available to parties by both the old and the New Romanian Code of Civil Procedure for the cessation of disputes between them.

In legal doctrine, arbitration has been defined as "a conventional jurisdiction of private law for the settlement of certain litigations by one or several people, as part of a procedure based on the autonomy of will of the parties and in compliance with public order, mores and the imperative stipulations of the law"[2].

In arbitral matters the settlement pronounced on the litigation between the parties bears the name of arbitral decision.

1. General issues referring to arbitration and arbitral decision

The current regulation of arbitration is found in Book IV of the New Romanian Code of Civil Procedure, which can be regarded as common law in arbitral matters. In addition to

[1] For efficient arbitration, mediation and legal action in settling disputes, see C. Ş. Georgia, *Despre mediere şi arbitraj în societatea civilă românească*, in *Fiat Iustitia,* no. 1/2012, p. 94.
[2] In the same vein, H. Motulsky, *Écrits. Études et notes sur l'arbitrage*, Dalloz Publishing House, 1974, préface Goldman, Ph. Fouchard , apud I. Deleanu, *Tratat de procedură civilă*, vol. II, Universul Juridic Publishing House, Bucharest, 2013, p. 442, footnote no. 1; G. Mihai, *Arbitrajul internaţional şi efectele hotărârilor arbitrale străine*, Universul Juridic Publishing House, Bucharest, 2013, p. 33; for the definition of international arbitration in international private law, see D. Berlingher, *Drept internaţional privat,* Cordial Lex Publishing House, Cluj-Napoca, 2012, p. 227.

these stipulations, incidental in the matter, with regard to certain forms of arbitration, are normative documents of internal law, such as the Law of Chambers of Commerce in Romania no. 335/2007[3], which governs institutionalized arbitration, as well as international documents, such as: the European Convention on International Commercial Arbitration (1961) and the Arbitration Rules of the United Nations Commission on International Trade Law – UNCITRAL (1976), as amended on 6 December 2010.

The forms which arbitration can take are diverse and differ in relation to the criterion[4] applied in classification. Thus, depending on how it is organized, distinction can be made between occasional arbitration, also called ad-hoc arbitration, conducted on the initiative and through the will of the litigating parties[5], and institutionalized arbitration, which is introduced by the provisions of the New Romanian Code of Civil Procedure, is exercised uninterruptedly, and is organized by permanent arbitration institutions or by chambers of commerce. In relation to the criterion of the legal framework in which arbitration is conducted, distinction is made between domestic-law arbitration, which targets legal relations without a foreign element, and international arbitration, which refers to a litigation that is derived from a relation of international private law or international trade law.

Regardless of the form taken by arbitration, the settlement pronounced on the litigation between the parties will be an arbitral decision. This is governed by the provisions of art. 601-615 of the New Romanian Code of Civil Procedure.

In the legal doctrine, arbitral decision[6] is defined as the act by which, based on prerogatives conferred by the arbitration convention, arbiters settle litigious matters brought before them by the parties[7].

While this definition is broadly assimilated in the literature, controversies exist with regard to the legal nature of this procedural act. Thus, while some authors[8] embrace the thesis of the dualistic legal nature of the arbitral decision, determined by its conventional and jurisdictional facet, other authors[9], whose opinion we share, adopt the thesis of jurisdictional nature of this procedural act. The argumentation of this opinion is based on the legal stipulations enshrining the arbitral decision as an enforcement order and states that its enforcement is made "exactly like a judicial decision" (art. 615 of the New Romanian Code of Civil Procedure).

The text of art. 601 of the Romanian civil procedural law enshrines the principle of settling litigations between the parties based on the main contract and the applicable legal

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[3] Law no. 335/2007 was published in the Official Gazette of Romania, Part I, no. 836 of 6 December 2007, was updated and supplemented by Law no. 39/2011 published in the Official Gazette of Romania, Part I, no. 224 of 31 March 2011.

[4] D. Lupaşcu, D. Ungureanu, *Drept internaţional privat*, Universul Juridic Publishing House, Bucharest, 2012, p. 315.

[5] For the capacity required for individuals to be professionals, see M. N. Stoicu, *Conditions governing the exercise of commercial activities by professionals*, in *Studia Universitatis Vasile Goldiş, Arad Economics Series*, Vol. 22 Issue 2/2012, p. 96-97.

[6] For the concept of foreign arbitral decision in international private law, see D. Berlingher, *op. cit.*, 2012, p. 234.

[7] M.- C. Rondeau-Rivier, *Arbitrage. La sentence arbitrale*, in Juris-Classeur, 1996, fasc. 1042, nr. 1, p. 2, apud I. Deleanu, *op. cit.*, vol. II, p. 579.

[8] S. Zilberstein, I. Băcanu, *Desfiinţarea hotărârii arbitrale*, in *Dreptul*, no. 10/1996, p. 29-31; M. N. Costin, S. Deleanu, *Dreptul comerţului internaţional*, vol. I, Lumina Lex Publishing House, Bucharest, 1994, p. 217.

[9] Gh. Beleiu, *Hotărârea arbitrală şi desfiinţarea ei*, in *Revista de drept comercial*, no. 6/1993, p. 14-15; I. Deleanu, *op. cit.*, vol. II, p. 578-579.

norms [10], but, at the same time, also allows the settlement of the litigation according to equity rules, subject to the existence of the express agreement of the parties.

It can be seen that the decision is deliberated in secret, and adopted with a majority of votes. The pronouncement is passed as established by the arbitral convention or, in its absence, by the arbitral tribunal, and can be postponed by at most 21 days, but only subject to meeting the term of arbitration (6 months of the date of establishment of the arbitral tribunal – our emphasis). Under such conditions, assigning a value that, in our opinion, is excessive to the principle of autonomy of will of the parties, the pronouncement of the decision is left at the discretion of the parties by arbitral convention, and only in its absence, to the discretion of the arbiters who settled the litigation. The result of deliberation shall be summarized into minutes, which will have to briefly comprise the content of the operative part of the decision and, when applicable, the minority opinion.

The arbitral decision is adopted following the debates, and must be drafted in writing. In relation to its content, stated in the provisions of art. 603 of the New Romanian Code of Civil Procedure, which almost identically reiterates those of ex-art. 361 in the old Romanian civil procedural regulation, the existence, with certain particularities, of the same elements that any judicial decision must comprise is remarked:

a) the nominal composition of the arbitral tribunal, the place and date of the pronouncement of the decision;

b) the name and surname of the parties, their domicile or residence or, as applicable, the name and location, the name and surname of the representatives of the parties, as well as of the other people who participated in the debate on the litigation;

c) the mention of the arbitral convention based on which the arbitration proceeded;

d) the object of the litigation and the brief arguments of the parties;

e) the *de facto* and *de jure* reasons of the decision, and in the case of arbitration in equity, the reasons on which the settlement is based under this aspect;

f) the operative part;

g) the signatures of all arbiters, subject to art. 602 para. (3) and, if applicable, the signature of the arbitral assistant.

As regards the operative part of the arbitral decision, it should be noted that it must comprise the solution of admission or rejection of the demand for arbitration.

The Romanian procedural norms establish that it is the task of the arbiter who had a different opinion to draft and sign the separate opinion, mentioning the considerations on which it is based [art. 603 para. (2) of the New Romanian Code of Civil Procedure]. This rule operates correspondingly also in the case of expressing the concurring opinion. Certain clarifications demand expressions of separate opinion and concurring opinion. The separate opinion signifies the lack of agreement of its author with the settlement pronounced by the other arbiters. The concurring opinion involves the author's full agreement with it, but the

[10] The Annex to the Decision no. 1/2014 for the approval of the Rules of arbitral procedure of the Court of International Trade Arbitration attached to the Chamber of Commerce and Industry of Romania (published in the "Official Gazette of Romania", Part I, no. 613 of 19 August 2014) states that, when settling the litigation, if applicable, the arbitral tribunal must take into consideration trade customs and the general principles of law [art. 63 para. (1)].

consideration that the reasons on which it is based are other than those established by the majority of arbiters[11].

In the same vein are the stipulations of para. (3) of art. 603 in the New Romanian Code of Civil Procedure which state that: "In case the arbitral decision refers to a litigation connected to the transfer of ownership rights and/or the establishment of another right *in rem* on an immovable asset, the arbitral decision shall be presented to the judicial court or to a notary public to obtain a judicial decision or, as applicable, an authentic notarial act. After verification of compliance by the judicial court or by the notary public, and after the fulfillment of procedures required by the law and the payment of the ownership transfer fee by the paties, registration will be made into the land register, whereas ownership will be transferred and/or another right *in rem* will be established on that immovable asset." These stipulations are contradictory[12] in the entirety of regulations in the matter, which state that the arbitral decision is an "enforcement order and is enforced exactly like a judicial decision" (art. 615 of the new Romanian civil procedural law), and that the arbitral decision is "final and binding" (art. 606 of the new Romanian civil procedural law), disregarding these provisions and inappropriately adding the fulfillment of an insufficiently regulated procedure for its application. The regulation of the procedure is lacking because it does not stipulate the elements that the judicial decision and the notarial act must comprise. Likewise, it can be seen that they assign to the notary public prerogatives that exceed his competence[13].

The arbitral decision must also comprise aspects regarding the expenses[14] occasioned by the organization and conduct of arbitration. In this sense, by exemption from common law and by valorization of the principle of autonomy of will of the parties, the New Romanian Code of Civil Procedure establishes that these expenses, as well as the arbiters' fees, evidence administration expenses, travelling expenses for the parties, arbiters, experts, witnesses, etc. are paid according to the agreement of the parties. If there is no convention on arbitral expenses, they "are incurred by the losing party, in full if the arbitration request is fully approved, or proportionally to what was granted, if the request is partly approved" [art. 595 para. (2) of the new Romanian procedural law].

The procedural norms also foresee the possibility of the litigating parties requesting the clarification, completion and correction of errors in the arbitral decision (art. 604 of the New Romanian Code of Civil Procedure). However, a novelty element brought by the new procedural regulation is the establishment of the possibility of the parties to request the clarification of the decision, the other procedures being also found in the previous procedural regulation (ex-art. 362). The clarification of the operative part or the removal of contrary provisions can be requested by any of the parties to arbitration, if they have doubts regarding the meaning, scope or application of the operative part of the decision, or if it comprises contrary provisions. The completion of the decision can be requested if, in the pronounced decision, the arbitral tribunal failed to pronounce itself on a head of claim or on a related or incidental claim. The correction of errors in the arbitral decision can be requested in the case of material errors in the text of the arbitral decision or other evident errors that do not change the substance of the settlement, as well as calculation errors, but it can also be done *ex officio*. The establishment of a legal stipulation was proposed *de lege ferenda* for this situation, similar

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[11] I. Leş, *Noul Cod de procedură civilă. Comentariu pe articole. Art. 1-1133*, 1st edition, C. H. Beck Publishing House, Bucharest, 2013, note under art. 603.

[12] For criticism brought to the stipulations of para. (3) of art. 603 of the New Romanian Code of Civil Procedure, see I. Leş, *Hotărârea arbitrală în reglementarea Noului Cod de procedură civilă,* in *Dreptul* no. 10/2011, p. 14-16.

[13] C. Roşu, *Drept procesual civil. Partea specială*, 3rd edition, C. H. Beck Publishing House, Bucharest, 2010, p. 328-329.

[14] The text of art. 600 in the New Romanian Code of Civil Procedure establishes the possibility of regularization of arbitral expenses, if there is one more or less difference, at the latest by arbitral decision, and their payment until the communication of the decision to the parties.

to that regulated by art. 442 para. (1) of the New Romanian Code of Civil Procedure in common law, referring to the possibility of correcting material errors comprised in a decision[15]. It should be noted, however, that the term in which an application can be filed for the conduct of any of these procedures is 10 days of the date of receipt of the decision. It can be seen that in institutionalized domestic-law arbitration, the term in which one can request the correction of material errors in the arbitral decision, the clarification of the operative part and the completion of the decision is different, namely 15 days of the date of receipt of the decision (art. 69-71 of the Rules of arbitral procedure of the Court of International Trade Arbitration attached to the Chamber of Commerce and Industry of Romania). *De lege ferenda* we believe that the provisions of the New Romanian Code of Civil Procedure should expressly establish the application of the penalty of forfeiture in the case of not filing the application for correction, clarification or completion of the arbitral decision within the 10-day term, given the imperative nature of this term.

Differences between the procedures stipulated by art. 604 appear in connection with the obligation or non-obligation to summon the parties on the occasion of the conduct of the procedure and with regard to the procedural act through which the arbitral court pronounces itself. In this sense, in the case of correcting errors, the parties are summoned "if the arbitral tribunal deems it necessary", with the latter pronouncing itself through a deed of correction, whereas in the case of the other two above-mentioned procedures, summoning is compulsory, and the settlement pronounced on the request will take the form of a resolution. On the resolution of clarification or completion or deed of correction, the arbitral tribunal must pronounce itself "immediately", as these procedural acts will be an integral part of the arbitral decision. Likewise, it should be noted that, similar to common-law norms, the parties do not have the obligation to incur expenses related to the clarification, completion or correction of the decision.

Procedural norms stipulate the obligation of communicating the arbitral decision to the parties within no more than one month of the date of its pronouncement.

As regards the effects of the arbitral decision, they are the same as those generated by any judicial decision[16]: compulsoriness, divestiture of the arbitral tribunal[17], *res judicata*, enforceability, probative value, declaratory effect, prescription.

Regarding these effects, the provisions of art. 606 of the New Romanian Code of Civil Procedure are limited to stating that the arbitral decision that was communicated to the parties is final and binding. The final character of the arbitral decision designates the idea of impossibility in exercising an ordinary means of appeal with regard to the arbitral decision, as well as its ability to be translated into practice by way of enforcement.

Likewise, even though legal provisions do not expressly regulate, we believe, as do other authors[18], that the arbitral decision benefits from *res judicata* authority.

As regards the storing of the file case, is established the arbitral tribunal obligation to file it together with the evidence of having communicated the arbitral decision, to the district court in whose jurisdiction the arbitration takes place, within 30 days of the date of communication of the decision or of the date of its clarification, completion or correction. It can be seen, however, that, in the case of institutionalized arbitration, organized by a permanent institution, the file must be stored at that institution [art. 619 para. (5) of the New Romanian Code of Civil Procedure].

2. Annulment of the arbitral decision

[15] I. Leş, *Noul Cod de procedură civilă…*, *op. cit.,* note under art. 604.
[16] G. Mihai, *op. cit.*, p. 155-156.
[17] This is the sole effect produced after the pronouncement of the arbitral decision, the rest being produced after the communication of the decision.
[18] I. Leş, *Noul Cod de procedură civilă…*, *op. cit.*, note under art. 606.

The only procedural means stipulated by both the old and the New Romanian Code of Civil Procedure by which the arbitral decision can be annulled[19] is the action for annulment[20]. The legal nature of this action is that of a procedural means aimed at the exercise of judicial control over an arbitral sentence[21].

The interpretation of the provisions of art. 608 para. (1) of the Romanian procedural law shows the interdiction of exercising an ordinary or extraordinary appeal procedure[22] against the arbitral decision. The grounds of unlawfulness for which the action for annulment can be exercised[23] are expressly regulated by the provisions of art. 608 in the new Romanian civil procedural law. They are[24]:

"a) the litigation was not susceptible to being settled by way of arbitration;

b) the arbitral tribunal settled the litigation in absence of an arbitral convention or on the grounds of a null or inoperative convention;

c) the arbitral tribunal was not established in accordance with the arbitral convention;

d) the party was absent from the hearing when the debates took place and the summoning procedure was not legally fulfilled;

e) the decision was pronounced after the expiry of the term of arbitration stipulated at art. 567, although at least one of the parties declared that they intended to plead obsolescence, and the parties did not agree with the continuation of judgment, according to art. 568 para. (1) and (2);

f) the arbitral tribunal pronounced itself on things that were not requested or granted more than requested;

g) the arbitral decision does not comprise the operative part and the grounds, does not show the date and place of pronouncement, or is not signed by the arbiters;

h) the arbitral decision infringes public order, mores or the imperative stipulations of the law;

i) if, after the pronouncement of the arbitral decision, the Constitutional Court pronounced itself on the exception invoked in that case, declaring as unconstitutional the law[25], ordinance or a stipulation in a law or in an ordinance which made the object of that exception or other stipulations in the contested act, which, necessarily and evidently, cannot be dissociated from the provisions mentioned in the claim."

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[19] If only one stipulation fits the grounds for nullity of the arbitral decision, it will determine the nullity of the entire decision (I.C.C.J., Sect. com., decision no. 1247/2010 - unpublished).

[20] Incidentally, this is also regulated by art. 594 as means to appeal decisions pronounced by the arbitral tribunal.

[21] I. Băcanu, *Controlul judecătoresc asupra acţiunii arbitrale*, Lumina Lex Publishing House, Bucharest, 2005, p. 22-33.

[22] See Bucharest Court of Appeal, decision no. 64/06.04.2000, in *Jurisprudenţa comercială arbitrală 1953-2000*, edited by the Chamber of Commerce and Industry of Romania and Bucharest City, 2002, p. 37.

[23] The same grounds also operate in institutionalized domestic-law arbitration organized by the Court of International Trade Arbitration attached to the Chamber of Commerce and Industry of Romania.

[24] For an exegesis of such grounds, see I. Deleanu, *op. cit.*, vol. II, p. 609 *et seq*.

[25] Regarding the control on the constitutionality of laws, see N. M. Stoicu, *Drept constituţional şi instituţii politice*, vol. II, Casa Cărţii de Ştiinţă Publishing House, Cluj-Napoca, 2014, p. 282-286.

In relation to the provisions of the old Romanian Code of Civil Procedure, the current regulation preserves the same legal considerations for the exercise of the action for annulment, with certain corrections: renouncement of the legal ground concerning the existence of provisions that cannot lead to fulfillment, as they can be removed by the arbitral decision clarification procedure; renouncement of grounds determined by the infringement of the principle of procedural availability, in the sense that the arbitral tribunal pronounced itself *minus petita*, since this reason can be invoked through the decision completion procedure. In the same vein, the Romanian procedural civil norms in force add to the previously stated considerations the one according to which, subsequent to the pronouncement of the arbitral decision, the Constitutional Court, following the pronouncement on the exception invoked in that case, declared unconstitutional the law, ordinance or another provision in a law or ordinance that was the object of that exception or other provisions in the contested act.

The text of art. 608 in the New Romanian Code of Civil Procedure establishes, in its last two paragraphs, certain restrictions regarding the exercise of the action for annulment. In this sense, there is an express provision of the interdiction on invoking, as grounds for the annulment of the arbitral decision, irregularities that were not raised according to art. 592 para. (1) and (3), that is, until the first hearing where the party was legally summoned, and if it was absent from that hearing, at the first hearing where it was present or legally summoned after the occurrence of the irregularity and before drawing conclusions on the merits; as well as such irregularities that can be remedied by the arbitral decision clarification and completion procedure. Another legal demand is aimed at the evidence of the grounds for annulment, which can be proved only by written documents.

Reiterating the stipulations found in the previous regulation (ex-art. 364^1), the current one legally enshrines the interdiction of the parties to renounce, by arbitral convention, the right to introduce the action for annulment against the arbitral decision, but only after the pronouncement of the arbitral decision.

Unlike the previous Romanian procedural law, which assigned the competence for judging the action for annulment to the higher court than the one competent in settling incidents regarding arbitration [ex-art. 365 para. (1)], the provisions of art. 610 in the New Romanian Code of Civil Procedure grants the prerogative of settling the action for annulment to the court of appeal in whose jurisdiction the arbitration took place. This court must be notified within the imperative term of one month of the date of communication of the arbitral decision, with the exception of the ground provided at art. 608 para. (1) let. i), when the term is 3 months of the publication of the decision of the Constitutional Court in the Official Gazette of Romania, Part I. If the litigating parties request the correction, clarification or completion of the arbitral decision, the term starts on the date of communication of the decision or, as applicable, the settlement by which the application was solved.

In this context, it is worth noting the possibility conferred by Romanian procedural norms to the court of appeal that was tasked with settling the action for annulment to suspend the enforcement of the arbitral decision against which this procedural means was exercised (art. 612 thesis one of the New Romanian Code of Civil Procedure). This suspension will operate based on art. 484 para. (2)-(5) and (7) which refers to the suspension of enforcement of the decision by the court of appeal, only for sound reasons. The suspension may occur only on the demand of the party which exercised the action for annulment and only with the submission of a bail. We acquiesce, however, to the opinion expressed in the literature, that

one should be able to order suspension *ex officio* by the competent court, if there are ineluctable grounds for annulment[26].

The current Romanian civil procedural law establishes in imperative terms that the composition of the panel of judges within the court of appeal which settles the action for annulment is the same as that of the judgment of the first court [art. 613 para. (1) of the New Romanian Code of Civil Procedure], thus no longer making the distinction, as in the previous regulation, between the panel that judges the action for annulment and the one that judges the appeal against the decision of the court of appeal in this matter (ex-art. 366^1).

At the same time, it is worth noting the legal enshrinement of the obligation to formulate and submit the statement of defense, making an express reference to the provisions of art. 205-208 in the New Romanian Code of Civil Procedure which governs it.

If the action is accepted, the court of appeal, based on art. 613 in the New Romanian Code of Civil Procedure, annuls the arbitral decision and, depending on the invoked grounds, proceeds to:

- send the case to be judged and settled by the competent court, according to the law, for the grounds mentioned at art. 608 para. (1) let. a), b) and e) in the New Romanian Code of Civil Procedure;

- send the case to be re-judged by the arbitral tribunal, if at least one of the parties should expressly request this, for the other grounds stated by art. 608 para. (1) of the New Romanian Code of Civil Procedure;

- pronounce itself of the merits, within the limits of the arbitral convention, in the contrary case, if the litigation is in pending. If the pronouncement on the merits by the court of appeal requires new evidence, the court will pronounce itself on the merits after the administration thereof. In this latter case, the court should first pronounce the annulment decision and, after the administration of evidence, the decision on the merits, and, if the parties expressly agreed to have litigation settled by the arbitral tribunal in equity, the court of appeal will settle the case in equity.

It can be seen that the text of art. 613 in the Romanian civil procedural law only analyzes the solution of accepting the action for annulment. We believe, as do other authors[27], that the legal text should expressly consider other possible solutions, for example the rejection of the action for annulment or the annulment thereof. According to para. (4) of art. 613, only the decisions of acceptance specified by para. (3) are susceptible of appeal. Yet, in this context, an issue is raised on the way of appeal that could be exercised against decisions to reject or annul the action for annulment. It would seem to us that it is opportune to legally enshrine the appeal as a means of contesting all settlements pronounced by the court of appeal regarding the action for annulment.

3. Enforcement of the arbitral decision

The provisions of art. 614 in the New Romanian Code of Civil Procedure enshrine the principle of willing enforcement of the arbitral decision by the party against which it was pronounced, immediately or on the term provided by this decision. This principle can be found in common law in matters of judicial enforcement [art. 622 para. (1)].

The above-mentioned way of enforcement is always to be followed, especially in disputes of a commercial nature, due to the advantage of allowing the future continuation of collaboration between the litigating parties.

By the completion of art. 614, the provisions of art. 615 in the New Romanian Code of Civil Procedure state that the arbitral decision is enforceable and is enforced just like a judicial decision. In relation to the provisions of art. 614, which establish the rule in this matter, the judicial enforcement of the arbitral decision should be construed as an exception from this rule. In this context, the litigating parties must also consider the norms of the Romanian civil

[26] I. Deleanu, *op. cit.*, vol. II, p. 614.

[27] I. Leş, Noul Cod de procedură civilă…, *op. cit*., note under art. 613.

procedural law, which stipulate the possibility of enforcing the arbitral decision against which the action for annulment was exercised (art. 635), as well as those (art. 612 thesis one) which grant the Court of appeal judging the action for annulment the possibility to suspend the enforcement of the arbitral decision contested through the action for annulment, under the conditions stated above. On the other hand, the creditor that obtains the valorization of claims by arbitral decision must not ignore the provisions of art. 637 para. (2) of the New Romanian Code of Civil Procedure, which tasks the creditor who requested its enforcement, prior to the settlement of the action for annulment, with the risk of change or annulment of the arbitral decision, as a consequence of exercising the action for annulment.

Conclusions

Alternative means of settling conflicts, such as mediation or arbitration, through the plethora of options given to parties, including the possibility of opting between the judicial settlement of the conflict or through alternative means, the possibility of choosing the person(s) who will settle that litigation, the possibility of opting between institutionalized and ad-hoc arbitration, contribute to the increase in the parties' degree of confidence in the settlement of the dispute and in the solution taken with regard to it.

The current regulation of arbitration, as a complex, modern and private-law way of conventional settlement of litigation between the parties and, implicitly, of the arbitral decision, allows the obtainment of a pertinent decision by the litigating parties, within a reasonable term and without excessive expenses. The rapidity in settling the dispute by way of arbitration, as compared to its judicial settlement, is determined by the final and binding character of the arbitral decision (art. 606 of the New Romanian Code of Civil Procedure; art. 615 of the New Romanian Code of Civil Procedure). The amount of arbitral expenses is determined by the duration of arbitration, which is being left to the discretion of the parties, the maximum term enforced by the provisions of the Romanian law of civil procedure being 6 months of the date of establishment of the arbitral tribunal.

Although the current procedural regulation of the arbitral decision corresponds to the existing socio-economic realities, we believe that certain legislative rectifications may be brought to it. In this sense, we acquiesce to certain proposals *de lege ferenda* formulated in legal doctrine and presented in this study. For instance, we believe it is useful to introduce a legal provision, similar to the one regulated by common law [art. 442 para. (1) in the New Romanian Code of Civil Procedure], referring to the possibility of correcting material errors comprised in a decision. Likewise, we believe there should be an express stipulation of the penalty that can intervene in the case of not filing the application for correction, clarification or completion of the arbitral decision within the 10-day term stipulated by the Romanian procedural law, namely forfeiture.

Bibliography:

- N. M. Stoicu, *Drept constituţional şi instituţii politice*, vol. II, Casa Cărţii de Ştiinţă Publishing House, Cluj-Napoca, 2014;
- Deleanu, *Tratat de procedură civilă*, vol. II, Universul Juridic Publishing House, Bucharest, 2013;
- Leş, *Noul Cod de procedură civilă. Comentariu pe articole. Art. 1-1133*, 1st edition, C. H. Beck Publishing House, Bucharest, 2013;
- G. Mihai, *Arbitrajul internaţional şi efectele hotărârilor arbitrale străine*, Universul Juridic Publishing House, Bucharest, 2013;
- D. Berlingher, *Drept internaţional privat,* Cordial Lex Publishing House, Cluj-Napoca, 2012;

- Ş. Georgia, *Despre mediere şi arbitraj în societatea civilă românească*, in *Fiat Iustitia,* nr. 1/2012;
- Lupaşcu, D. Ungureanu, *Drept internaţional privat*, Universul Juridic Publishing House, Bucharest, 2012;
- M. N. Stoicu, *Conditions governing the exercise of commercial activities by professionals*, in *Studia Universitatis Vasile Goldiş, Arad, Economics Series*, Vol. 22 Issue 2/2012;
- Leş, *Hotărârea arbitrală în reglementarea Noului Cod de procedură civilă,* in *Dreptul,* no. 10/2011;
- Roşu, *Drept procesual civil. Partea specială*, 3rd edition,C. H. Beck Publishing House, Bucharest, 2010;
- Băcanu, *Controlul judecătoresc asupra acţiunii arbitrale*, Lumina Lex Publishing House, Bucharest, 2005;
- M.- C. Rondeau-Rivier, *Arbitrage. La sentence arbitrale*, in Juris-Classeur, 1996;
- S. Zilberstein, I. Băcanu, *Desfiinţarea hotărârii arbitrale*, in *Dreptul*, nr. 10/1996;
- M. N. Costin, S. Deleanu, *Dreptul comerţului internaţional*, vol. I, Lumina Lex Publishing House, Bucharest, 1994;
- Gh. Beleiu, *Hotărârea arbitrală şi desfiinţarea ei*, in *Revista de drept comercial*, no. 6/1993;
- H. Motulsky, *Écrits. Études et notes sur l'arbitrage,* Dalloz Publishing House, 1974;
- Decision no. 1/2014 for the approval of the Rules of arbitral procedure of the Court of International Trade Arbitration attached to the Chamber of Commerce and Industry of Romania, published in the Official Gazette of Romania, Part I, no. 613 of 19 August 2014;
- Law no. 335/2007 was published in the Official Gazette of Romania, Part I, no. 836 of 6 December 2007, was updated and supplemented by Law no. 39/2011 published in the Official Gazette of Romania, Part I, no. 224 of 31 March 2011;
- *Jurisprudenţa comercială arbitrală 1953-2000*, edited by the Chamber of Commerce and Industry of Romania and Bucharest City, 2002.