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XENO-TRANSPLANTATION

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Abstract

The transplant has its own rules that are not suitable to follow the individual destiny, aspiring to abolish the intimate constraints of religious nature, becoming a valuable and sustainable activity, design by humans to save human's life. The transplant becomes an end in its self with a utilitarian purpose, both from the biological point of view, as humanitarian one, consisting in the extension or salvation of a human life.

Keywords: *transplant, organs, tissues, donors.*

Introduction

The transplant-type medical procedures save presently thousands of lives, but those waiting in line for compatible organs and tissues is bigger than the human donors[1]*. The transplant itself rises ethical problems, both in live donors version (in case of organs like kidneys, or partially liver), and in donors being in brain death version*[2]*.*

With living donors there are suspicions regarding possible pressures from the relatives of the potential receiver, arriving, in case of distant donors, to denunciation of "traffic organs" facilitated by the financial pressures above the potential donors. In case of brain death donors, the suspicion is mainly related by their or relative's consent, as well as by the irreversible (or not) character of their condition.

Anyway, both organs offered by living donors, and those taken from patients in brain death are not enough to satisfy the transplant needs of a society where the waiting lists are longer and longer[3]*.*

A possible solution, still at the beginning of the tests on human subjects, is represented by cell, tissues and organs removal between species – named xeno-transplantation, to differentiate it from allo-transplantation (the exchange of tissues or organs inside the same species). The transplantation of whole organs is realized with less success than tissues or cells (the longest period of survival reported in kidney transplant from chimpanzee to human if of 9 months, while in the case of heart transplant, the life time of the donor didn't exceed 21 days), but the xeno-transplantation procedures still remain experimental.

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[1] A. Boroi, *Infracţiuni contra vieţii*, All Beck Publishing House, 1999, p. 41.
[2] O. Ungureanu, *Noile dispoziţii legale privind prelevarea şi transplantul de organe, ţesuturi şi celule de origine umană în scop terapeutic*, "Dreptul" no. 5/2007, p. 17.
[3] V. G. Cheung, *Whole genome amplification using a degenerate oligonucleotide primer allows hundreds of genotipes to be performed on less than one nanogram of genonic DNA*, Genetica, 1996, p. 32.

XENO-TRANSPLANTATION

1. Difficulties in xeno-transplantation

Ethical issues associated to xeno-transplant, the short life time of the receiver, at least in case of organs transplantation, raise often problems, certain physicians preferring to speak about medical experiments instead of treatments. This short life time is also a problem from the ethical point of view, because rises the issue of equity distribution (for the patients that cannot afford allo-transplantation[1].

First observation regards that, generally, the life time of the animals used differs from those of humans and one cannot know how would operate the respective organs long term. But, the short life time is due, largely, to the immune rejection reaction. Thus, even that this is a problem in case of transplantation between human beings, in case of xeno-transplantation the organ or graft received are perceived as more distant than those belonging to humans[2].

Thus, the more the donor's genetic code is more distant than of the receiver, bigger are the chances of brutal rejection of the received organ. The traditional remedy is represented in this case too by the immunosuppressive drugs (that inhibit the rejection reaction), only that in this case the drug's doses are greater and more aggressive. Another solution is to try to suppress the markers in animals' cells modifying their genetic code and thus, developing a transgenic animals, with less risk of rejection. For the moment this technique is tested in laboratory and not used on large scale, being perceived with much concern by the animals' rights supporters.

The risk of pandemic diseases (xeno-zoonoses) is correlated to the first issue. Due to the aggressive inhibition of the immune system reaction of the host organ, this can easy break down, even confronted with micro-organisms that, usually, do not harm drastically. Thus, a part of receivers of xeno-transplants have succumbed in front of infections or diseases that do not devastate normal people.

More, there is the risk of transmission of viruses – known or unknown – that are present in the cell of animals of origin, where they do not manifest at all, but entering the human cells could give birth to dangerous diseases, like AIDS, of avian flu. It is presumed that HIV virus that cause AIDS is of animal origin that succeed to transfer it to humans, and avian flu (at least on Asian continent) caused many human victims. Such a virus is the PERV retrovirus, detected in pigs, with unknown effects when transmitted to humans. The experts in virology warn about the consequences of an outbreak of pandemic diseases in case of such virus is transmitted from animals to human beings. In reply, the xeno-transplantation supporters indicate that this danger can be avoided using only tissues and cells carefully selected and analyzed from the point of view of viruses.

A way to prevent this issue, but this raises other ethical aspects, is the carefully monitoring and controlling of receivers of xeno-transplants. This monitoring must include periodical tests and regularly tissue' samples preservations. Not only the patients must be monitored, but also the individuals that are frequently in touch with them, and also must be limited certain personal decisions, like that of procreation, also to avoid the eventual transmission of certain genetically diseases. When the slightest sign of such disease appear, the person (and those close to him/her) must be isolated and send to quarantine till all the negative effects disappear. Such permanent procedures and test raises questions about privacy.

Another issue rises in case of organs' xeno-transplants when the conflict appear between the research role of the physician (preoccupied to investigate an unknown

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[1] C. Maria Romeo Casabona, *Biotechnology, Law and Bioethcs Comparative Perspectives,* Bruilant, Bruxelles, 1999, p. 134.

[2] C. Maria Romeo Casabona, *Biotechnology, Law and Bioethcs Comparative Perspectives,* Bruilant, Bruxelles, 1999, p. 139.

phenomenon) and the physician (from that the patient is looking for relieve of suffering shortening). For example, the physician that decides to transplant the heart of a baboon to a baby (the Fae case), that resisted 20 days, was more preoccupied by research then the family distress[1]. Strictly correlated there is the problem of receiving-person distress because the associate treatments still remain mainly under uncertainty. As an example, there is the case of a receiving patient, with a liver transplantation from a baboon that survived for 70 days after surgery but, in absolutely inhuman conditions: septic intoxication, bone-myelitis, viremia (the presence of viruses in blood), bleeding in pleural cavity, circulatory collapse, and acute cough). The associate question is if the progress of the research justifies such atrocious sufferings.

Another controversial topic is the use end experimentation on animals in the process of studying xeno-transplantation[2]. As any other medical experimental procedures, the studies involving human subjects are approved by the ethics committees only after the results of the studies involving animals present acceptable rates of success. So, initially the researches are done on animals. More, the fundamental characteristic of xeno-transplantations is that the animals are used (like donors) in the following stage of the process too. The issues of unjustified pain, as well as the idea of their potential use only for transplantation purposes, or their genetic change aiming to weakening the immune reaction of the host organism are very questionable from the animals' rights activists. There are organizations that militate, online also, considering that the treatments applied to animals, in case of xeno-transplantations, are producing unbearable pain and cannot justify at all the theoretical scientific progress, due to the fact that the respective techniques are not yet applied to human subjects. This issue is more delicate as the categories of animals involved in these experiments are often primates like humans (chimpanzees and baboons), or domestic animals (pigs, cows)[3]. Thus, not only the radial supporters of the animals rights, that promote equality among species, but also the moderates one, followers of certain differentiations between animals based on their complexity, are unanimously saying that the use of animals in researches related to xeno-transplantation violates their rights.

Finally, xeno-transplantations encounter certain resistance from some categories of persons whose religious precepts forbids the association with certain type of animals. Thus, the use of pigs' grafts is questionable from the point of view of Jews, Muslims and certain Christian groups.

Despite the positive considerations of Reformed religious leaders, the mood on the possibility of xeno-transplantation remains rather confusing, if not negative, among Orthodox believers.

2. Solutions for an ethical use of xeno-transplantation

If the whole-organs transplantation still remains a medical problem, more successful are the partial grafts of tissues and cells from animals, in treatments for still incurable diseases. More, these are less questionable from the animals' rights militants' perspective. Thus, in 1972 pig heart valves (and cow since 1981) were used on large scale to treat heart diseases. Also, there are cases of using pig' neuronal cells to treat Parkinson disease, of the high rate of survival in case of baboon medullar cells transplantation to a HIV/AIDS patient (that still lives 8 years after the xeno-transplantation. Another use is the bridge-procedure, temporarily, till a transplantable human organ is found.

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[1] D. Cooper, R. Lanza, *Xeno: The Promise of Transplanting Animal Organs into Humans*, Oxford University Press, 2000, p. 213.

[2] S. Hummel, B. Herrmann, *Organ Transplants: Making the Most of your Gift of Life,* Patient Centered Guides, 1st edition, 2000, p. 205.

[3] An English company produced cloned pigs whose organs can be transplanted into humans without fear that they are rejected by the body.

In further experiments the procedure on humans (whose success would justify the legitimacy of the procedure to a greater extent), there are several variants proposed. Some physicians emphasizes that the use of "success" term is relative in medicine and is defined strictly according to previous expectations[1].

Thus, comparing heart transplantation from human and non-human donors, it shows that the first cases are rather related by the experimental field, and their success is comparable. Since in both cases the first attempts were aimed at humans whose survival was critical in the absence of a transplant, even temporary success of the operation and survival of patients is a success[2]. Of course, as the repetition process and sophistication of medical procedures expectations rise accordingly.

Another possible solution that would allow further experiments on human subjects minimizing the associate risks (outbreak of pandemic diseases, unbearable suffering, and invasion of privacy) is that proposed by A. Ravelingien concerning further experiments on subjects which are on permanent vegetative state (PVS), given that the consent was obtained before[3]. The advantages of continuing research on these patients seem self-evident: the lack of consciousness, those patients do not feel pain, so that the devastating effects of possible transplant failure should be avoided; all patients are under medical supervision, so immunosuppressive drugs may be better tested; also any signs of viral infection would be detected immediately and the risk of disease outbreak, according to the quasi-total isolation of the patient, are almost zero; moreover, their isolation does not contradict with their privacy, those patients being hospitalized from the beginning. Among the disadvantages mentioned, probably the strongest that further research could reveal are the differences between normal human condition and the PVS, which would decrease their relevance, but this remains to be determined.

Another sensitive topic is obtaining the consent of the potential subjects, or the approval from their families, while the latter might be considered as a questionable procedure. But Ravelingien remains optimistic believing that the benefits far outweigh any disadvantages and the use of the procedure would accelerate the advancement of knowledge in this area, making xeno-transplantation a safe and affordable alternative to traditional transplants.

Presently the demand for organ transplants far exceeds the supply, and the alternative use of organs from animals remains open. As medical techniques will improve and the procedures become safer and will allow a prolonged survival in patients recipients is likely that the ethical dilemmas raised today will be less pressing. However, ethical reflection on these issues must remain present to provide evidence and justification for all those involved and to facilitate the decisions in controversial situations.

Organ and tissue transplants have been and still are the great hope for the "renewal" of biological life[4].

Once committed, the present conditions and results, especially on such a delicate, mythical and mystical organ, as is the "life clock", they had either to face "antibodies" of a rigid, conservative and hermetically system of social values, or to find the way and the place of assembly in this system architecture. The effects of such attempts are easy to imagine[5]. The effects of such tests are easy to imagine. What could be more shocking than to invoke

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[1] S. D. J. Pena, R. Chakraborty, J.T. Epplen, A.J. Jeffreys, *DNA Fingerprinting*, Ed. Birkhauser Verlag Basel; Switzerland, 1993, p. 165.

[2] S. Mclean, *Genetics and Gene Therapy,* Ashgate Publishing, 2005, p. 123.

[3] See, *Medical Law and Ethics*, Sweet & Maxwell, London, 2006, p. 214.

[4] M. Gheorghe, G. Popescu, *Introducere în teoria drepturilor personalităţii. Învingerea forţei gravitaţionale a geneticii. Transplanturile de ţesuturi şi organe umane,* Academia Română, Bucureşti, 1992, p. 104.

[5] O. Predescu, *Convenţia Europeană a Drepturilor Omului. Implicaţiile ei asupra dreptului penal român*, Ed. Lumina Lex, Bucureşti, 1998, p. 55.

the apparently paradoxical idea of a "useful dead" or the idea of a "death contribution to therapy of life"?[1] What could be more shocking than the effort to give a "definition to death", especially in the endless deaths, more or less explicable? What could be more thrilling than to confess your intention to "recover" what's left of a man to use to another man? Instead of an answer, one must remember Goethe's reflection: "on one hand, we hold tight to tradition, on the other, we cannot prevent the movement and change of things. Here people fear a useful innovation, there they have fun and joy for what is new, even when it is useless or even harmful".

Hetero-transplantation[2] and auto-transplantation[3] has become a daily replacement of tissues and organs, of training, supervision and integration of the transplanted human products in a new human body. The medical procedures acquire, thanks to the technical progress and the manifested interest, a more and more pronounced place in lives of individuals, serving as concrete forms, safe to the relief of man from the brutal diseases, everything except selling human tissues or organs.

People are willing to live fairly and well but, in the concrete life, there are moments that generate an imbalance between individual needs and the possibilities to achieve these needs, to avoid interrupting the pathological phenomena and to alleviate their aggressive effects.

For the receiver-patient there is no alternative: either they adopt the behavior that the disease, treatment and medical recommendations impose, or they renounce to the transplantation and rely on their own physical resistance.

Therefore must be changed the mentality of the way of life as a whole, concerning the way of thinking in case of acceptance of the transplant by youth, by those living in urban or rural areas. The double process of removal and transplantation keep a moral sense, being designed as aim and finality.

If one would not keep the rationality of the removal as necessary and enough, and without material benefit, this would destroy the meaning of the transplantation. Transplantation requires planning focused on individual needs, the strategy aiming to transform the life of the receivers through transplantation.

Approaching the transplantation thematic there are some morality issues. Thus, if in terms of donor characterization it is possible the donation of tissues or organs atavistic (if one was born with four kidneys that operate in good conditions, he/she could donate one, two, or three kidneys), or if the person is sentenced to life imprisonment and is waiting for an organ, he/she may require or can hope to a transplantation of an organ?

There are tendencies that, although deemed as immoral, are essentially useful: the suicide of a mother to make possible the cornea transplantation to her two born-blind kids; desperately attempts, forbidden by law, to sell an organ (kidney) in order to have enough money for the treatment of an incurable disease of a family member.

The innovation is the only proof of genius. The transplants were not and are not fortuitous or deliberate innovation designed with total disregard for risk, only to enter in the kingdom of geniuses. They are, in a particular plan, the expression of the practical needs, the only that polarize, ultimately, the force lines of the scientific research, mainly the applicative one.

Thus viewed, medical innovations in question are truly legitimate. The psychological factors played and are playing an important role in propelling novelty,

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[1] M. Udroiu, O. Predescu, *Protecţia europeană a drepturilor omului şi procesul penal român*, Ed. CH Beck, Bucureşti, 2008, p. 78.

[2] Hetero-transplantation represents the removal of an organ or tissue from a person and it's binding to another human subject.

[3] Auto-transplantation represents the removal o an organ or a portion of a multiple-organ (veins) and it's binding to the body of the same human subject.

practical constraints remaining the essential criterion, the critical value of our deeds. Questing spirit, rebellion in front of the barriers considered inescapable, laudable ambition in the face of weakness, the always renewed project of moving beyond, led to a certain extent the consuming searches where one thought that reigns the impossible.

Conclusions

Till present, the whole evolution of the attitude concerning the organ and tissues transplantation, as well as the Romanian legislation in the area had in their core the respect for individual autonomy, either donor, or receiver. Would be a pity that, rashly, copying foreign models to Romanian culture, to abandon this line.

Because the law of organs' removal and transplantation provides like offenses only certain facts related to non-compliance of consent, obtaining benefits, result that the death of a victim, or its health damage will form the murder offences or bodily injury in relation with special offenses regarding the preservation or transplantation.

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S. D. J. Pena, R. Chakraborty, J. T. Epplen, A. J. Jeffreys, *DNA Fingerprinting*, Ed. Birkhauser Verlag Basel; Switzerland, 1993;

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PROTECTION OF THE ENVIRONMENT, WASTE MANAGEMENT, EVIDENCE OF SOLIDARITY WITH FUTURE GENERATIONS

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Abstract

Solutions are to be applied to management of these serious problems not only consist in the adoption of laws or rules of ceaseless work that researchers, scientists make a discovery for new ways of countering the problem of pollution, conservation Earth health but is especially in our ability to be in solidarity with future generations in how each of us believes that it should participate in conservation and preservation of natural resources.

Keywords: *the environment protection, climatic changes, pollution, Earth conservation, natural resources.*

Introduction

Climate change, biodiversity, health, the use of resources and the establishment of viable instruments regarding the protection of the environment against pollution by waste have been and continue to be the most critical challenges related to the environment, the most important problems with which we confronted during the last decades and with which we are confronting continuously.

Solutions which are and which will be applied to manage these serious problems do not only consist in the adoption of rules of law or of the continuous work which researchers, scientists put for discovery of new methods to counteract the phenomenon of pollution, the preservation of Earth's health, but they consist, in particular, in our ability to be sympathetic with the future generations, in the way that each of us consider that it is necessary to participate in the conservation and maintenance of the natural resources.

It is necessary to embrace and apply concrete measures to avoid the irreversible consequences of pollution, it is necessary to establish a continuous balance between available resources and their exploitation.

I will deal here with this problem of wastes, because I consider that the wastes and all that involves them, production, use, storage, transport, neutralization, or disposal are a maximum factor of toxicological and ecological risk for the public health and the environment.

Initially, in the category of wastes have been included materials of any kind resulting from human activity, which can no longer be used in the process from which they have derived. For the designation of that category of materials, the following expressions were used: residues, scraps, debris or wastes.

The effects of production, accumulation and destruction of wastes do not only involve technical and economic aspects, but they mainly involve social aspects, both internally and internationally.

This is why I am going to present some definitions, more or less developed, regarding wastes.

The Environment Law defines wastes as “substances resulted from biological or technological processes which can no longer be used as such, some of which are reusable” [1]. From this definition results that wastes, in general, can be natural, resulted from biological or industrial-technological processes which are produced by human activities, and that some can no longer be used as such, having to be neutralized or destroyed, while others can be reused as secondary raw materials, showing no toxicological or ecological risk.

The Law of Protection of the Environment does not define the significant risk for man, environment and materials, but only the potential environmental risk as being the possibility to produce some negative effects on the environment which can be prevented by an assessment study.

In Addendum C(83)180 from 1 February 1984 of the Organization for Economic Co-operation and Development shows that the waste is “any matter considered to be waste or legally defined as residue in the countries where it is located or it is sent to be found” [2].

Directive O.E.C.D. in 1987 gives a more complete definition to waste, since it considers the waste as “materials intended to disposal, materials accidentally discharged, lost, contaminated, rendered unfit for use, various residues of production, etc.”[3], and it specifies the operations which could explain the possibilities of use, and it sets out the generic types of hazardous wastes, in whatever form in which they are presented, liquid, solid, sprays, etc.

The Basel Convention in 1989, on the transport over border of hazardous wastes and their disposal, provides that waste means: “substances or objects which are disposed or are going to be disposed, or it is necessary to be disposed of in accordance with national legislation” [4].

It is difficult to define toxic or hazardous wastes.

According to the Environment Law no. 137/1995, hazardous wastes shall mean: “toxic, flammable, explosive, infectious, radioactive wastes or other like these which, introduced or maintained in the environment, may harm the environment, plants, animals, or humans” [5].

Hazardous wastes are therefore originating only from anthropogenic activities, and, from the moment of their introduction and maintenance in the environment, they have a noxious affect on the environment, humans, plants, animals and material goods.

The Basel Convention provides the categories of wastes considered hazardous which are going to be controlled for the international transport, such as: chemicals, originating from hospitals, pharmaceutical production, oil wastes, explosives, etc.

The Bucharest Convention in 1992, on the protection of the Black Sea against pollution, defines the concept of noxious substance as “any dangerous, poisonous or another type of substance which being introduced in the marine environment, due to its toxicity, would cause pollution or would adversely affect the biological processes” [6].

A dangerous or noxious substance is the waste considered dangerous because of its composition and its noxious affect on a component of the environment or on the environment in general.

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[1]Environment Protection Law no. 137/1995, Addendum 1, definition for „wastes”
[2] Addendum C (83) 180/1.02.1984, Organization for Economic Co-operation and Development.
[3] Directive O.E.C.D./1987.
[4] The Basel Convention /1989.
[5] Environment Law 137/1995, Addendum 1, definition for „wastes”
[6] The Bucharest Convention on the protection of the Black Sea, 1992.

Toxic wastes, in whatever form they may be, solid, liquid or gaseous form, can cause many damages both to people (injury, illness, death) and to the environment, its destruction, if they are treated, stored, disposed or transported inappropriately.

Hazardous wastes are also the flammable, corrosive, reactive or toxic substances, mixtures, debris, or materials containing toxic residues.

They are considered to be toxic wastes:

- industrial wastes, which are generated by almost every industry;
- agricultural wastes, products such as pesticides, herbicides or materials used in their usage. Even soluble nitrates resulting from the use of manure as fertilizer can be dissolved in the ground water, contaminating wells and causing serious health problems.
- municipal wastes, which include toxic dyes, products used for household cleaning, toxic batteries, pesticides, mercury from the broken thermometers, all causing some lung diseases or cancer.

Uncontrolled storage of the problematic and toxic wastes caused in many places the appearance of areas that are a danger for the environment, natural resources, and for humans.

Wastes pollute soil, air, surface water or ground water and affects people, plants and animals.

Air may be contaminated by direct emissions of toxic wastes; rivers, lakes, if they are contaminated, can destroy fauna and flora, immediate or in time; phosphates and nitrates, usually harmless, can fertilize algae which exist in lakes and rivers, generating them a quick growth, causing them to consume large quantities of oxygen, asphyxiating other forms of life, certain algae even poisoning drinking water.

I could continue to give countless examples regarding the vast range of substances which affect the environment, the multitude of situations which endanger LIFE, but I think it is more important to talk about measures that are available to everybody in our mission to protect the environment, about the ways through which we could monitor with great seriousness the disposal of wastes, through the establishment of strategies for their management.

In the first place in the framework of strategies for the waste management, there are activities of avoiding the production of wastes and their exploitation; extended discharge can only be done taking into account all the components of a complete system of waste management, consisting of collection, exploitation, treatment and storage.

I would dare to say that we now live in a society in which waste has become an established practice, and I say this because, if we look in a waste container, we understand that many things do not belong there, that is we can talk about “the treasure from the waste bin”.

We have developed over the past few years a wrong mentality about throwing away, an excessive mentality of contempt for everything we believe that it is useless, but which can be reused, and thus, as a result of a wrong mentality, a lack of facilities, a lean exploitation, waste deposits are among the causes generating an impact and a risk for the environment and for our health.

Romania is confronting with a series of issues regarding waste management, as such:

- some of deposits intended for wastes are located in sensitive places, such as: near the houses, of recreation areas, near surface and underground water, therefore, by their location itself, they are a danger for people and environment;
- present deposits, in particular deposits for public wastes, are not operated properly which lead to the provocation of fire, spreading unpleasant odors, there is no strict record regarding the quality and the quantity of wastes entering these deposits, there are no warning signs to inform population about the existence of such deposits, there is no

- selective collection of household wastes which lead to the loss, in large part, of their useful potential, being mixed, and negative examples could continue.

Waste management requires the adoption of specific measures, suitable to each phase of waste disposal.

This is why I will also discuss the ecological waste management.

Ecological management represents the assembly of works, measures and activities of waste management, which are intended to ensure the protection of human health and the environment.

Ecological waste management is ensured by the development and implementation of appropriate legal rules regarding the production, collection, transport, processing, neutralization, recycling, commercialization, storage, incineration and other activities which are related to wastes.

The Government Emergency Ordinance no. 78/2000 regarding the regime of wastes governs the activities of waste management in conditions of protection of public health and environment, which relate to: household wastes, production wastes, construction and demolition wastes, hazardous wastes, these categories being expressly referred to by the law.[1]

At the base of the waste management of any kind are, according to the law, the following principles:

- The principle of the exclusive use of those activities for the waste management which are not detrimental to health and environment;
- The "polluter pays" principle;
- The producer responsibility principle;
- The principle of use of best available techniques, without driving any excessive costs;
- The proximity principle, which implies that the wastes should be exploited and disposed as close as possible to the point at which they are generated;
- The principle of non-discrimination, consent and permission of transporting hazardous wastes only in those countries that have the appropriate disposal technologies which must be complied with in international trade of wastes.

In Romania, central public authority for the protection of environment, which is the highest authority for decision and control of waste management, elaborates the Plan for waste management, which contains information relating to types, quantities and origin of wastes to be recovered or disposed, information relating to natural and legal persons authorized to carry out activities of waste management, estimated costs of the operations of exploitation and disposal, measures to encourage collection, exploitation and treatment of wastes.

Regarding European norms, the wastes' regime was governed by the Directive 75/442/EEC of 15 July 1975 and the Directive 91/156 of 22 March 1991, which amended the first one. According to these Directives, member states have the obligation to prevent or reduce wastes and to exploit them by recycling. When these operations are not possible, the wastes must be destroyed without creating other dangers. In each of the member state of the Community, plants for the disposal or destruction of the waste must operate, also assigning national regulatory authorities, drawing up and following the carrying out of plans for the disposal of wastes. Community regulations intended to limit the negative effects on the environment caused by the operations of waste storage[2] and their incineration[3].

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[1] Dr. Ştefan Ţarcă, *Dreptul mediului*, curs universitare, Ed. Lumina Lex, 2005.
[2] Directive 1999/31, 26 April 1998, published in OJEC no. L182 on 16 July 1999.
[3] Directive 2000/76, 4 December 2000, published in OJEC no. L332 on 28 December 2000.

Directive 91/689 of 12 December 1991, as amended by Directive 94/31 of 27 June 1994, sets special measures of identification, recording, packaging, and authorization for firms which work with the disposal of hazardous wastes.

Regulation (EC) No 259/93, as amended by Regulation (EC) No 12/97 of 20 January 1997[1], provides that for the trans-boundary transports of hazardous wastes, their movement is controlled, the state of destination being obliged to accept the transfer, but it must be notified by a written notice, in which all the necessary information relating to the nature of wastes, the security measures adopted and the itinerary, that must be followed, have to be noted.

Transfers of hazardous wastes in third countries are allowed only if their exploitation is intended and not their elimination. On 19 November 2008, the European Parliament and the Council have approved the Framework Directive on waste[2], such inserting a new approach to waste management, by putting into order of priority prevention, reuse and recycling of wastes.

In addition, this directive clarifies some important definitions, for example, it makes the distinction between wastes and secondary products and it sets ambitious targets for member states regarding the recycling. It also provides the development of national programs for prevention, as well as the monitoring by the Commission of these objectives. At the same time, the Commission adopted a communication which presents an EU strategy for the improvement of practices of dismantling the ships. This includes actions to support the development of an international convention on ship recycling, whose adoption was provided for May, 2009.

The communication also provides measures to encourage voluntary actions in maritime transport, as well as a better application of current Community legislation about waste transport. On 3 December 2008, the Commission adopted a Green Paper which describes current situation regarding the management of biodegradable wastes in the EU, and it proposes options for the future[3]. Its aim is to raise a debate in respect for a possible elaboration of a legislative proposal, and also to help the Commission to assess if the Union must propose additional actions.

At the same time, the Commission also presented a proposal to amend the Directive aiming to reduce the impact on the environment of wastes from electric and electronic equipment (WEEE Directive)[4], as well as a proposal to amend the Directive on the restriction of the use of certain hazardous substances in electric and electronic equipment (RoHS Directive) [5].

Conclusions

To preserve and to improve the quality and the availability of information necessary to the environmental policy, the Commission adopted, on 1 February 2008, a communication entitled “Towards a Shared Environmental Information System (SEIS)” [6]. The Commission proposes the modernization and simplification of the European system for the collection, analysis and communication of information relating to the environment, and it provides to replace gradually the current systems of notification, mostly centralized, with systems based on access, sharing, and interoperability.

Also, on 19 November 2008, the European Parliament and the Council adopted a ***Directive*** on the ***protection of the environment through criminal law. The Directive***

[1] Published in OJEC no. L22 on 24 January 1997.
[2] Directive 2008/98/EC(OJ L312,22.11.2008).
[3] COM(2008)811.
[4] Directive 2002/96/EC(OJ L 37, 13.2. 2003).
[5] Directive 2002/95/EC(OJ L 37, 13.2.2003).
[6] COM(2008)46(OJ C 118, 15.5.2008).

constrains the member states to provide in their national criminal law effective, proportional penalties and with a discouragement effect for serious breaches of provisions of Community law on the protection of the environment[1].

The protection and the conservation of the nature is a fundamental element to protect the environment. The protection of the environment is not only about the conservation of it's wild form but is also about it's administration and it's fitting out in order to maintain or to establish it's circuits' the last decades, in the wide world there are so many theories regarding the necessity of environment protection[2].

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ASPECTS REGARDING THE PENAL RESPONSIBILITY OF PUBLIC OFFICERS

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Abstract

The penal responsibility of the public officer appears then when he has committed a transgression in exercising his duties or in situations connected to his office duties. The public officer can play an active role in a transgression when he commits the deed as author/co-author, instigator or accomplice, but he can also play a passive role when the transgression is committed by other persons against him.

Key words: *public officer, Penal Code, statute, responsibility.*

Introduction

The penal responsibility is a form of juridical responsibility. Moreover, it is the result of the non-observance of the juridical penal norms. To establish the general order of law as well as the penal order of law supposes - from the part of all those whom the law addresses - a behaviour in consonance with its provisions for a normal evolution of the social relationships.

The penal order of law is achieved through the observance of the dispositions provided by the law in case of conflicting situations - by the majority of those whom the law addresses to and especially by the public officers. In case they do not adapt their behaviour in harmony with the penal dispositions by committing forbidden deeds, the order of law is restored and implicitly achieved, by coercion within a penal juridical conflicting report.[1] As stipulated in art. 17 paragraph 2 of the Penal Code, an offence/ infringement of the law is the sole ground of the penal responsibility. Within the penal juridical conflicting report there shall be established the existence of the fact that generates a penal responsibility and the corresponding penalty to be applied and completed by the public officer.

Art. 2 paragraph 2 of the Statute of the Public Officer [2] defines the public officer as the *person legally appointed in a public function.* At the same time, the second proposition of the above mentioned paragraph provides that *the person dismissed from a public office and is a member of the reserve team of public officers is still considered to be a public officer.*

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[1] For more details see Mitrache, Constantin; Mitrache Cristian – *Drept penal român. Partea generală,* VIIIth edition, Universul Juridic Printing House, Bucharest, 2010, pp. 336-337; Nechita (Mihuț) Elena-Ana, Laura-Roxana Popoviciu – *Drept penal. Criminalistică. Culegere de spețe din practica judiciară*, Agora University Press, Oradea, 2008.

[2] Law no 188 of December 8, 1999 regarding the Statute of the Public Officer, published in the Official Gazette of Romania, Part I, no. 600 of December 8, 1999, republished.

Unlike the regulation included in the Statute of the Public Officer, the Romanian Penal Law in force[1] attaches a larger interpretation to the definition of the public officer. In conformity with art. 147 paragraph 1 of the Penal Code a public officer can be defined as "*any person who permanently or temporarily exercises - irrespective of title or investiture - any kind of duty - remunerated or not - in the service of any institution mentioned in art. 145.* As provided in paragraph 2 of the same article, a "public officer" is *the person mentioned in paragraph 1, as well as any other employee who exercises a duty in the service of a juridical person other than those stipulated by that paragraph.*

In the regulations proposed by the New Penal Code[2], in agreement with the legislative solutions of other legislations and with the international conventions in the domain, in accordance with art 175, the concept of "a public officer" will refer to "*the person who*, *permanently or temporarily, with or without remuneration*: a) *has attributions specific to the legislative, executive or juridical power*; b) *exercises the function of a high public officer or of any kind of public officer*; c) *exercises alone or together with other persons for an autonomous administration, for another economic agent or for a legal person possessing in integrity or in majority the State capital or, for a legal person considered to be of public interest, attributions connected with the fulfillment of the objectives of that person's activity. At the same time, according to the penal law, a public officer is considered to be that person who acts in the benefit of the public interest for which he/she was invested by the public authorities, or who is submitted to their control and supervision in as far as the carrying on of the respective public office duties.*

Yet, in title X on "The meaning of certain Penal Law terms or phrases" of the Penal Code, the term "officer" is no longer used.

Consequently, unlike the Statute, the Penal Law considers that for the quality of being a public officer, neither the name of the responsibility nor the way he was invested are relevant; it is enough that the active subject of the offence should exercise a duty in the interest of a public authority, a public institution or another juridical person of public interest. In as far as the penal responsibility of the Romanian public officer, Law no 118/1999 about the Statute of the Public Officer appeals to the general principles of the Penal Law established by the Romanian Penal Code.

The Penal Code stipulates the offences that can be committed by the public officers in exercising their office or connected with their job attributions. At the same time some offences are also stipulated by special laws. The special laws are able to include specific provisions departing from the general law. We can refer to Law no 188/1999 that stipulates that as a consequence of the information from the prosecutor's office or from the body of penal investigation that a criminal prosecution was instituted, the leader of the public authority or institution has the obligation to take measures to suspend that public officer from his public function. The Statute stipulates the obligation of the suspension from office then when a criminal prosecution was issued against the public officer who committed a offence severe enough as to make him incompatible with the position he used to have.

The provisions of art 75 and 86 of the Law no 188/1999 point out the situations the penal responsibility is required, as well as the rules to be applied when a penal prosecution is opened or ceased in case the investigated officer is absolved.

When the instance orders the acquittal or the cessation of the trial, the suspension of the officer will cease, too. Consequently, the officer will resume his activity and will be

[1] Law no 15 of June 21, 1968 - "Code of Romania", published in the Official Gazette no. 79 - 79 bis of June 21, 1968, republished in the Official Gazette of Romania, Part I, no. 65 of April 16, 1997, with further modifications.

[2] Law no 286 of July 17, 2009 regarding the Penal Code, published in the Official Gazette of Romania, Part I, no. 510 of July 24, 2009.

remunerated for the period he was suspended. For certain categories of public officers certain regulations regarding the penal responsibility are to be found in the Constitution.

Art. 72 paragraph 2 of the Constitution[1] mentions that the senators can be prosecuted and sentenced under penal accusations for deeds that have no connection with the votes or with the political opinions expressed while exercising their mandate, but can be searched, detained or arrested after having been heard, without the approval of the Chamber they belong to. The prosecution and the appearance in the Court can be decided by the prosecutor's office of the High Court of Justice and Cassation.

Paragraph 3 mentions that in case of flagrant offences, deputies and senators can be detained and searched. The Ministry of Justice will immediately inform the President of the Chamber with respect to detention and search. In case there is no ground for such measures the decision will be revoked.

Moreover, the Constitution of Romania stipulates special provisions with regard to the penal responsibility of the President of Romania; all provisions are included in art 96 paragraph 1 that grant the Parliament the possibility to incriminate the President of Romania - in the joint session of both Chambers - for high treason; in this case at least two thirds of the votes of the deputies and senators will be necessary.

Paragraph 3 also underlines the fact that from the bringing the prosecution to the President up to his dismissal the President will be legally suspended.

According to paragraph 4, of the same article, the competence of judgment will be incumbent to the High Court of Justice and Cassation.

In art 109 paragraph 2 the Constitution includes provisions regarding the penal responsibility of the members of the Government; it is only the Chamber of Deputies, the Senate and the President that can ask for the penal prosecution of the members of Government for the deeds committed during their mandate. If the penal prosecution was asked, then the President of Romania can approve their suspension from office. When a member of the Government is sent to the Court he is automatically suspended. The competence of judgment is incumbent on the High Court of Justice and Cassation.

The cases of responsibility and the penalties applied to the members of the Government are regulated by a law referring to the responsibility of the ministries, as provided by paragraph 3 of the above mentioned article. For the appliance of these provisions on June 28, 1999 was adopted Law no 115 - regarding the responsibilities of the ministries - published in the Official Gazette, Part I no 300 of June 28, 1999, including further modifications and completions; it was re-published in the Official Gazette Part I no 200 of March 23, 2007; these provisions set up a special penal regime concerning the responsibilities of the members of the Government for the deeds committed against their attributions during their mandate.

Conclusions

The penal responsibility of the public officer can be cumulated with the disciplinary responsibility that appears then when the public officer committed a certain violation, and with the civil violation[2] that means - in the idea of his Statute - the reparation of the prejudice committed by him when exercising his job attributions or connected with other prejudices he

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[1] Constitution of Romania amended and completed by the revising Law of the Constitution of Romania no 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003, re-published in the Official Gazette, Part I, no. 767 of October 31, 2003.

[2] Civil responsibility appears in the following cases: guiltily brought damages to the patrimony of the authority or to the public institution the officer works in; legal and in due time return of the undeserved sums received; damages paid by the authority or the public institution - in the quality of a trustee - for a third person, on the ground of a definitive and irrevocable judicial decision. See more in Preda, *Mircea – Drept administrativ. Partea generală,* Lumina Lex Printing House, Bucharest, 2000, p. 148 and next.

made. Within each form of responsibility, for one and the same illicit deed there cannot cumulatively be applied two or more sanctions/ penalties of the same nature.

We emphasizes the fact that the penal responsibility of the public officer cannot be cumulated with the contravening one - which appears in case they have committed a contravention during and connected with their office duties, - as the same deed cannot be at the same time violation and contravention.

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POLITICAL RETHORIC AND RELIGIOUS LANGUAGE

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Abstract

The most important political discourses in the human history, many of them transmitted during difficult times, talked not to the public mind, giving them rational explanations, they talked to the masses soul. And what is the best word by which anyone can reach to the masses' soul than the wordGod?

Key words: *religion, political communication, political discourse,, civil religion.*

Introduction

In July 2011, the Public Religion Research Institute in partnership with Religion News Service conducted a survey in order to measure the perceptions of the American public over the religious beliefs' of presidential candidates.

A majority (56%) of the public says it is very important or somewhat important for a presidential candidate to have strong religious beliefs regardless of whether those beliefs are the same as their own. 70% of those who think that Obama has the same religious convictions as they do would vote him again for presidency. 32 % of those who think that the actual president has different religious convictions that theirs, would vote him again for presidency.

The survey (14th -17th July 2011) was designed and conducted by Public Religion Research Institute. Results of the survey were based on RDD telephone interviews.

The political and sociological studies showed that America is a place where one's beliefs about God are a significant component of daily life, more than any other Western or industrialized nation.

The need of religion

Religion is often used to provide answers to metaphysical inquiry because faith transcends positivist approaches to understand human experience. The psychological need to feel as if human existence has purpose is so fundamental that social structures are integrated into existential schemas. Social identity theory sustain that individuals have a fundamental need to feel cognitively connected to others. This connection is primarily done through group affiliation where in-group members share core values and beliefs. Individuals may affiliate with numerous social groups as an expression and formation of their personal identity; this would include both religious and political groups. These social spheres, to which individuals belong, by their nature, overlap and influence one another. Therefore, it can be argued that religious affiliation, or sensibilities, are inextricably linked with political identity.

As shown in the book of David Weiss[1], for us to understand the important role that religion plays in American contemporary politics and political discourse, it is essential to grasp how central a sense of human purpose and social identity are to American culture. The actual researchers in the field of political sciences tend to emphasize positivist approaches in the examination of human action and behavior. If we tend to make mostly positivist inquires, questions to which there is a predisposition to finding or fixing a definitive answer, strips away meaning and purpose, essential to human nature. A person's view over the world cognitively generates more metaphysical questions about the purpose of life.

Americans, in general, hold a paradoxical view of religion. Rhetorically a separation of church and state is considered essential. A survey designed and conducted by Public Religion Research Institute between 1st – 14th August 2011 shows that nearly two-thirds (66%) of Americans agree that it must maintain a strict separation of church and state[2].

Despite this general opinion, religion profoundly influences public policy and daily life and is so embedded in the American psyche that the symbiotic nature of the two goes unnoticed and unexamined. Conventional wisdom has turned a blind eye to the active role religion plays in contemporary American politics. However, image restoration research has long argued that the character of a political candidate, which could include moral fairness for office and religious affiliation, can be a compelling issue for voters and many serve as a point of either acclamation or attack during any given campaign cycle.

As described in the book *The God Strategy*[3], in A Pew Research Center study of 44 nations in 2002, for example, showed that religion is much more important to Americans than to people living in other affluent nations. Nearly six out of every ten U.S. adults told Pew researchers that religion plays a "very important" role in their lives. This roughly doubled what was found in Canada, in Western Europe, and in Japan and Korea. Even in heavily Catholic Italy, fewer than three in ten people said religion was very important. In-depth analysis by Pew found a steady decrease in citizens' religiosity as a nation's per-capita income rose, with one exception: the United States.

Additional public opinion data among U.S. adults buttress these statistics. In survey after survey, more than 90% of Americans say they believe in God or a universal spirit. In the words of pollster George Gallup, Jr., "so many people in this country say they believe in the basic concept of God, that it almost seems unnecessary to conduct surveys on the question". Further, large majorities of American adults have integrated elements of faith into their daily experiences.

On a consistent basis, roughly 70% say they pray several times a week or more, and about 60% claim that faith provides a "great deal" or "quite a bit" of guidance in their day-to-day lives. Similar results can be found in the confidence of U.S. adults about their religious beliefs: nearly 90% consistently say "I never doubt the existence of God", and slightly more than 80% consistently say that people will be called before God on a judgment day.

In short, faith runs wide and deep in America. It is perhaps inevitable that religion and politics have converged now and again in U.S. history.

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[1] David Weiss, *What democrats talk about when they talk about God: religious communication in democratic party politics*, Lexington Books, 2010.

[2] http://publicreligion.org/site/wp-content/uploads/2011/09/PRRI-Brookings-What-it-Means-to-be-American-Report.pdf. Results of the survey were based on bilingual (Spanish and English) telephone interviews conducted between August 1, 2011 and August 14, 2011, by professional interviewers under the supervision of Directions in Research. Interviews were conducted by telephone among a random sample of 2,450 adults 18 years of age or older in the continental United States (804 respondents were interviewed on a cell phone).

[3] David Domke and Kevin Coe, *The God Strategy. How Religion Became a Political Weapon in America,* Oxford University Press, 2008, p. 10-11.

Religion and political identification, in American public sphere, can't be compartmentalized. "The right to be" it's essential in a democracy[1]. The concept of a meaningful existence is an existential one that finds legitimization through praxis. Thus, a political theology is created, where the system of government is seen as a mechanism to protect the human element. Such a political theology can be reduced to absolutes. The human mind feels no dissonance with the scientific/religious tension because it allows for the reverence and protection of the individual and his or her purpose in life by the government.

The religion is essential to American democracy because the business of politics needs a semblance of morality to make it palatable to the citizenry. Although moral judgments often find their roots in religion, there is enough universality among religious beliefs and value system to sustain such a democracy. Citizens need to believe that they have some influence over government – and religion is a mechanism by which that can be accomplished.

For good or for ill, God has always been a part of American politics. Religion formally entered the U.S. presidency at its inception, when George Washington, in his 1789 Inaugural address, declared that "it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe". In the years since, presidents have spoken of a higher power, prayed and been prayed for, sought divine favor for America, and expressed gratitude for providential outcomes. This confluence of faith and American politics has commonly been called "civil religion", a phrase coined in the 1960s by sociologist Robert Bellah. Building upon ideas of earlier philosophers and thinkers, Bellah defined civil religion as "a set of beliefs, symbols, and rituals" through which a society "interprets its historical experience in light of transcendent reality". In general, civil religion in America has been perceived—by many scholars, at least—to be a benignly symbolic practice, without distinctly partisan motivations or implications. But something profound has changed in recent decades.

What is God Strategy?

In 2008 David Domke and Kevin Coe published their book called "The God Strategy. How Religion Became a Political Weapon in America". The book offer a timely and dynamic study of the rise of religion in American politics, examining the public messages of political leaders over the past seventy-five years – from the 1932 election of Franklin Roosevelt to the early stages of the 2008 presidential race. They conclude that U.S. politics today is defined by a calculated, deliberate, and partisan use of faith that is unprecedented in modern politics.

Sectarian influences and expressions of faith have always been part of American politics, the authors observe, but a profound change occurred beginning with the election of Ronald Reagan in 1980. What has developed since is a no-holds-barred religious politics that seeks to attract voters, identify and attack enemies, and solidify power. Domke and Coe identify a set of religious signals sent by both Republicans and Democrats in speeches, party platforms, proclamations, visits to audiences of faith, and even celebrations of Christmas. Sometimes these signals are intended for the eyes and ears of all Americans, and other times they are distinctly targeted to specific segments of the population. It's an approach that has been remarkably successful, utilized first and most extensively by the Republican Party to capture unprecedented power and then adopted by the Democratic Party, most notably by Bill Clinton in the 1990s and by a wide range of Democrats in the 2006 elections.

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[1] *Rocco Gangle, Jason Smick, Political Phenomenology: Radical Democracy and Truth,* Political Theology, Vol. 10, no. 2 (2009).

"For U.S. politicians today, having faith isn't enough; it must be displayed, carefully and publicly. This is a stark transformation in recent decades", write Domke and Coe. The book was very successful among politics researchers and religious leaders as well.

So, how the two authors describe the "God strategy"?

"On issue after issue, U.S. public debate today includes—and often is dominated by—faith-based perspectives espoused by politically adept individuals and organizations. Religion has always been part of the political subtext in the United States, but it is now a defining fault line, with citizens' religious affinities, regularity of worship, and perceptions of "moral values" among the strongest predictors of presidential voting patterns. Political leaders have taken advantage of and contributed to these developments through calculated, deliberate, and partisan use of faith. In their book, David Domke and Kevin Coe[1] call this the God strategy.

Central to this approach is a series of carefully crafted public communications employed by politicians to connect with religiously inclined voters. Sometimes these religious signals are intended for the eyes and ears of all Americans, and other times they are implemented in targeted ways, as veritable „dog whistles" that only distinct segments of the population fully receive. In combination, these approaches seek to entice both the many religious moderates who want leaders to be comfortable with faith, as well as devout Protestants and Catholics who desire a more intimate convergence of religion and politics. The God strategy moved to the fore in 1980 and, in the years since, politicians, especially those in the Republican Party, though Democrats are now responding in kind, have utilized and refined this model to accrue political capital and transform the role of religion in American politics.

As the two authors mention, at the heart of the God strategy have been four signals: (1) Acting as political priests by speaking the language of the faithful; (2) Fusing God and country by linking America with divine will; (3) Embracing important religious symbols, practices, and rituals; (4) Engaging in morality politics by trumpeting bellwether issues

In combination, these signals have provided a compelling synthesis of faith and politics that appeal to many Americans - especially, but not only, Christian fundamentalists, conservative evangelicals, and conservative Catholics.

God in American Presidency Discourses

Invocations of God and faith function as a crucial, foundational signal for political leaders trying to communicate their beliefs and convince religiously inclined Americans that they share their world view.

In particular, an ability to speak the language of believers can be powerful for a president, who is frequently in the spotlight and is most commonly called upon to be America's "high priest" in times of crisis, national celebration, political turmoil, or tragedy.

How often presidents have invoked a divine entity in their public communications? Domke and Coe made a research on this matter[2].

Their reading of every word of these speeches revealed that presidents from Roosevelt in 1933 through Jimmy Carter, who exited office in 1981, invoked God in roughly half of their national addresses. There were some differences: most notably, John Kennedy, Richard Nixon, and Carter were half again lower in their invocations of God. Nonetheless, the fundamental trend is apparent: explicit invocations of a higher power have been a regular feature of the American presidency.

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[1] David Domke and Kevin Coe, *The God Strategy. How Religion Became a Political Weapon in America,* Oxford University Press, 2008.

[2] Idem, p. 33.

In their presidential addresses to the nation, Ronald Reagan invoked God 96% of the time, George H. W. Bush did so at a 91% clip, Bill Clinton came in at 93%, and George W. Bush (through six years of his presidency) followed suit 94% of the time. Since the mid-1970s, invocations of God have become a fixture in American presidential addresses, every bit as de rigueur as the band striking up ''Hail to the Chief'' to announce the arrival of a president.

The trend lines show a marked increase in the volume of explicit language about God in the presidency since 1981. Figure 2 show that the four most recent presidents invoked God far more than previous modern presidents, regardless of the speaking context. Looking at the entire collection of addresses, the highest mean among the first eight presidents—by a sizable margin—was Harry Truman with 1.87 references to God per address.

Beginning in 1981, the means were 2.7 for Ronald Reagan, 2.2 for George H. W. Bush, 1.89 for Bill Clinton, and 3.2 for George W. Bush. Inaugural and State of the Union addresses reveal a similar pattern, but with consistently more God invocations—an outcome suggestive of the political capital thought to accrue with such language. Again, in the first group of presidents, Truman was the high-water mark, averaging 2.86 references to God per address. Beginning in 1981, the means elevated to 5.8 for Reagan, 4.5 for the elder Bush, 2.89 for Clinton, and 5.3 for Bush the son. For both trend lines, presidential invocations of God in a typical address 1981–2007 were more than double the average for addresses delivered 1933–1980.14 The data in Figures 1 and 2, then, show that the election of Ronald Reagan was a watershed moment. It's not that explicit language about God entered the presidency in 1981; it's that with Reagan explicit language about God became publicly embedded in the presidency—and, by extension, in U.S. politics.

I think that I can't conclude this paper before I give some examples of historical discourses sustained by the American Presidents.

A very important speech was Franklin Roosevelt Pearl Harbor Address to the Nation. Roosevelt requested a declaration of war against Japan from Congress on December 8, after Pearl Harbor was bombed on December 7, 1941.

The following evening he spoke to the nation in one of his fabled fireside chats. Roosevelt began by detailing the state of relations between Japan and the United States and the record of Italian, German, and Japanese aggression over the previous decade. As a result of these developments, he said: "*We are now in this war. We are all in it—all the way. Every single man, woman, and child is a partner in the most tremendous undertaking of our American history"*. He then spent most of the address on the plans of the federal government and responsibilities of U.S. citizens. It was not until the final word of the speech that Roosevelt explicitly invoked God. He closed with these words: „*We are going to win the war and we are going to win the peace that follows. And in the difficult hours of this day—through dark days that be yet to come – we will know that the vast majority of the members of the human race are on our side. Many of them are fighting with us. All of them are praying for us. For in representing our cause, we represent theirs as well—our hope and their hope for liberty under God"*.

Sixty years later, when terrorists attacked the United States in 2001, George W. Bush formally addressed the nation via live television three times in the space of nine days: from the Oval Office on the evening of September 11, at the National Cathedral as part of a memorial service on September 14, and before a joint session of Congress on September 20. All three speeches invoked God a number of times. On September 11, Bush spoke for only five minutes, concluding with these words: „*Tonight I ask for your prayers for all those who grieve, for the children whose worlds have been shattered, for all whose sense of safety and security has been threatened. And I pray they will be comforted by a power greater than any of us, spoken through the ages in Psalm 23: Even though I walk through the valley of the shadow of death, I fear no evil, for You are with me. This is a day when all Americans from*

every walk of life unite in our resolve for justice and peace. America has stood down enemies before and we will do so this time. None of us will ever forget this day. Yet, we go forward to defend freedom and all that is good and just in our world. Thank you. Good night and God bless America!”.

Three days later at the National Cathedral, on a day that he had proclaimed to be a national day of prayer and mourning for the victims of the attacks, Bush overtly invoked God and quoted biblical texts several times. He concluded this way: *„On this national day of prayer and remembrance, we ask almighty God to watch over our nation and grant us patience and resolve in all that is to come. We pray that He will comfort and console those who now walk in sorrow. (…) May He bless the souls of the departed. May He comfort our own, and may He always guide our country. God bless America.”*

Finally, Bush spoke before Congress and the nation on September 20 in an address watched by 82 million Americans, the largest audience for a political event in U.S. history. The speech ran 3,013 words, two words fewer than Roosevelt’s fireside chat 60 years earlier. Bush began by thanking U.S. allies, American families, and Congress for their support and perseverance in recent days – including, he noted, Congress’s singing of ‘‘God Bless America’’ on the steps of the Capitol. The president then offered an explanation of who the terrorists were, why they had attacked the United States, and what steps the government and citizens would or should take. Along the way, he framed the conflict in distinctly religious terms by twice referencing “Allah” almost certainly the first time that the Muslim word for God had been invoked in a U.S. presidential address. At the end, Bush declared: *“The course of this conflict is not known, yet its outcome is certain. Freedom and fear, justice and cruelty have always been at war, and we know that God is not neutral between them”*. He then added, *“Fellow citizens, we’ll meet violence with patient justice, assured of the rightness of our cause and confident of the victories to come. In all that lies before us, may God grant us wisdom, and may He watch over the United States of America”*. Recall that after Pearl Harbor, Roosevelt spoke to the nation once and invoked God one time. In the days following the 2001 terrorist attacks, Bush addressed the nation three times and invoked God more than 20 times in those speeches.

Conclusions

When the political environment is dominated by religious language, symbolism, and concerns, church-and-state separation begins to feel foreign. At best, this principle soon seems a noble but impractical notion; at worst, it appears a mistaken illusion. Either of these outcomes puts at grave risk the American experiment in democracy.

History has shown with tragic consistency that too intimate a relationship between religion and politics can do irreparable damage to both – from the crusades of medieval times to the terrorism of modern times. Constant use of the God strategy by political leaders encourages just such a relationship.

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GOOD MORALS WITHIN THE REGULATION OF THE NEW CIVIL LAW

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Abstract
The hereby survey sets its goal to analyze the way in which the issue of good morals is mirrored within the new civil law of Romania, considered as an element limiting the principle of civil judicial deeds as well as the identification of circumstances where the law giver has understood to rule expressly the need to observe the good morals while acquiring, assuming and exercising rights and obligations by placing judicial deeds.

Key-words: *civil judicial deed, good faith, moral directions vs. judicial directions, illegal and immoral cause.*

Introduction

Considering the truism that all that is moral is just, the civil law directions comprise two classes of directions: mandatory and dispositive. Surely, for as much the mandatory directions pertain to the objective law, they observe by themselves the good morals too. On the other hand, in terms of dispositive directions, the civil law directions cultivate the parties' freedom of will, contractual freedom; this means that they can derogate from these, but with the observation of two boundaries: mandatory directions – of public order – and good morals.

Moral consists of a body of ideas, precepts, rules regarding to good and bad, to honest and dishonest, to just and unjust.[1]

Moral, viewed as a system of directions, is based upon the intimate conviction and the individual consciousness of each person within his/her own behaviour. The motive of the moral direction consists of the person's duty towards itself. People relates their behaviour to the moral value of good and bad, from which derives as well the determination of such a behaviour as moral or immoral. Therefore, moral includes as fundamental values the principles of good, justice and truth, elevated and defended by right.[2]

Moral directions are provided with sanctions of the same nature, sanctions which may be exterior of the subject, for example the public opprobrium, or they may be interior, thus occurring within the subject's consciousness sphere, and we can list here some of them: sorrows, regrets, remorse, consciousness scruples and others.

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[1] Gheorghe Boboş, *General Theory of the Law*, Course drafts, Cluj-Napoca, 1992, pp. 225.
[2] Dogaru I. et co, *General Theory of Law*, Basic Course, Scientific Publishing House, 1999, Bucharest, pp. 195.

The most majority of human manifestations are in accordance with conduct rules and this is a conformist behaviour, but also there is a series of attitudes that are diverting from this line and come in conflict with these rules, thus being called a non-conformist behaviour[1].

Considering the doctrine, the following resemblances and differences between the moral and judicial directions:[2]

a) Both moral and law represent a body of behaviour directions.

b) Moral directions in a society are not necessarily unitary. They change according to the social group, the national, social, religious collectivity. There are no absolute moral values, as they change with every period, with classes (even during the same period), with social or professional categories.

c) The law though is and must be unitary securing a unique judicial order within the society in a given country.

d) The moral directions have a spontaneous character as they emerge – the law directions represent the outcome of a conscious and organized creation.

e) The close bond between moral and religion, as religion has consecrated the ethical precepts and several social institutions. The development of law entailed the desecration and secularization of institutions, but the process differs from religion to the other. The Islamic judicial system, for example, is still nowadays greatly influenced by the religious moral. Koran is both "the holy book" and the "code" of Islamic people.

f) Considering the sanction, the difference between law and moral is noticeable. The laws directions may be secured by the coercive force of the state, moral directions have the sanction of: public opprobrium, marginalization, disregard, regret, and remorse. The effectiveness of the moral sanctions relies on the related person's moral profile.

g) Numerous directions with similar content have both a moral and a judicial nature. For example, besides the penal directions requiring the persons to show a respectful behaviour towards the others' life, dignity and property, there are also directions comprising a highly moral content. The strength of the law lies both within its logical, rational justification and its moral approval and support. Or: every injustice is implicitly immoral.

h) Nevertheless, there are moral directions of no judicial relevance (i.e. friendships or the relationship between spouses up to a certain point), as well as vice versa (for example, certain procedural, technical or organizational directions).

The new Civil Code, effective on the 1st of October 2011, according to the law of its implementation no. 71/2011, reproduces the provisions included within the Romanian Civil Code inured in 1864, providing the same way as limit of the free of will within the judicial deeds besides the compulsory directions, the good morals as well.

Thus, we notice the regulation included in the article 11 of the new Civil Code according to which "It may not be derogated by conventions or unilateral judicial deeds from the laws of interest for the public order or from the good morals". The same regulated one is reproduced as well within the agreements issue according to the article 1169 of the new Civil Code, where the parties are free to place all kind of agreements and define their content, observing the law, the public order and good morals.

The same limitation of judicial will in the issue of judicial deeds exist expressly in relation with the judicial deeds by which the exercise of the ownership is limited. Thus,

[1] Laura-Roxana Popoviciu, *Criminal Law. The General Part*, PRO Universitaria Publishing House, 2011, p. 7

[2] Gh. Boboş, *op. cit.*, pp. 226.

according to the article 626 of the new Civil Code, “the owner may consent to its right by judicial deeds, provided that it does not violate the public order and good morals”.

Whether in the former Civil Code the good faith failed to be defined, within the new Civil Code we notice the regulation included in the article 14 which explaining the good faith relates, naturally, to good morals, stating that “every natural or artificial person must exercise its rights and observe its obligations in good faith, in compliance with the public order and good morals”.

Therefore, in order to secure the recognizance and protection of the right as civil subject, its holder must exercise its rights according to the compulsory directions and the good morals.

Consequently, *per a contrario*, we derive as well the definition of bad faith which according to the article 15 of the new Civil Code consists of the purpose of injuring or damaging another excessively or unreasonably, contrary to the good faith.

A new provision that has never existed before within the civil law is included in the article 60 of the new Civil Code providing that the “natural person has the right to dispose of itself, provided that it does not violates the others’ rights and liberties, the public order and the good morals”. We appreciate that the text relates to the person’s right to give up on, respectively to acquire new capacities, features, different of those possessed at its birth. For example, a natural person may give up on an organ to save from death another person (a kidney), the right to donate blood, of being sampled for different tissues to reimplant them in other parts of the human body to mitigate the effects of aging or simply for curative purposes. While in the same situation, it is to approach how the person’s right to change its gender, or to have homosexual relations etc. relates to the good morals.

Good morals occur for the first time in our law as a limit as well as for choosing the child’s forename; the registrar is not allowed to register indecent, ridiculous and other alike forenames, potentially having an impact on the public order and good morals or child’s interests, as appropriate.

On the issue of allowance obligation we notice also references to the good morals. Thus, the person severely in fault towards the person required providing the allowance, in contradiction with the law or good morals will not be allowed to pretend any allowance.

It is clear that within the new Civil Code the condition of observing the good morals is preserved both in relation to the object and the cause of the civil judicial deed.

Thus in the article 196 paragraph letter c of the new Civil Code it is set that the invalidity of the artificial person appears among other, also when the field of activity is illegal, in violation of the public order or good morals.

According to the article 1009 paragraph 2 of the new Civil Code, it is considered void every testamentary provision which among others “is in violation of the public order or good morals”.

Within the same setting we find as well the provision in the article 1225 paragraph 3 in relation with the validity of the object of the judicial deed according to which “the object is illegal when it is prohibited by the law or violates the public order or the good morals”. A peculiar application of this principle we find it in the matter of company trading articles of incorporation, in which regulation it is expressly stipulated, according to the article 1882 paragraph 2 of the new Civil Code that “Every trading company needs to comprise a defined and legal object, in compliance with the public order and the good morals”.

The text of the article 1126 of the new Civil Code in relation with the validity of the cause secures the replacement of the former article 966 of the Civil Code stipulating that the cause needs to exist, to be legal and moral.

The sanction occurring due to the violation through judicial deeds of the good morals may not be other than the absolute nullity taking into account the way of drawing of the directions regulating the observance of the good morals.

These directions being compulsory, according to the article 1255 paragraph 1 of the new Civil Code will entail the absolute nullity of the whole judicial deed, provided that through those items violating the good morals have been essential for its drawing or provided that in the absence of those items considered to violate the good morals the civil judicial deed would not have been drawn.

Once the new Civil Code became effective, finally the allowance agreement benefits from a special regulation. If up to the regulation of the allowance agreement, the doctrine and the experience hardly permits or at all the possibility to terminate the allowance agreement upon the debtor's initiative required to provide the allowance, in compliance withy the new regulations (art. 2263 paragraph 2 of the new Civil Code) and the debtor required to provide the allowance may demand in court the termination of the allowance agreement when the behaviour of the other party makes impossible the execution of the agreement within the conditions observing the good morals.

As it was judiciously ascertained in the doctrine, a judicial deed may not be nullified for violating any ethical precept, since it would mean to eliminate the limit between law and moral, which is neither necessary or possible.[1]

Nevertheless the judicial deeds vexing the society ethics will not be validated by the Romanian civil law or the legal court. For example, it is the case of those agreements by which, in exchange of providing a convenience, one individual seeks to establish or preserve certain concubinary relationships; the convention by which someone would commit to carry out a violation; the marriage brokerage agreement, by which a person willing to get married, undertakes to pay a certain amount of money to the person intermediating the marriage, the agreement by which in exchange of a certain amount of money one person benefits from sexual services, etc.

Analyzing the degree in which a civil judicial deed is compatible with the good morals, the legal court challenged to pronounce the validity of the civil judicial deed will refer to the cause of the civil judicial deed comprising two elements: the immediate goal as an abstract element, objective, intrinsic and invariable within the same type of deed or category (within the purchase agreement, the cause – the immediate goal sought by the seller consists of the mental preconfiguration of the execution by the buyer of the correlative obligation – paying the price); the immediate goal or the defining motive which is a concrete item, variable not only within the same category of judicial deeds, but also from one judicial deed to another, consisting of the real motivation, the parties' action impulse.

Judiciously, it was ascertained[2] that when it is alleged the illegality or immorality of the cause related to a judicial deed, it must be distinguished between the deed by onerous title and the deed of voluntary consequences. Thus, within the deeds by onerous title, the immediate goal, the illegal or immoral defining motive entails nullity provided that it is known or could have been known by the other party also, securing preference to the principle of necessity of the dynamic security of the civil circuit. Within the deed of voluntary consequences, especially in the matter of munificence, it is enough to entail the nullity so that the illegal or immoral mediate motive to exist from the part of the person commanding it, even if the gratified failed to know the said defining illegal or immoral motive.

Conclusions

As a conclusion, the regulations in relation with the good morals, meaning the rules of social cohabitation represent a needed corrective of the parties' behaviour included within a certain judicial deed meant to secure the undamaged preservation of the society moral consciousness.

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THE END OF AN INTERNATIONAL TREATY

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Abstract

Treaties normally cease under their own arrangements. The end of a treaty can result either from special agreements of the parties, from legal developments outside or within the Treaty or even procedural aspects (execution, arrival to legal term, disappearance of initial circumstances, impossibility of performance or material breach of the Treaty).

Key-words: *international treaty, Vienna Convention of 1969.*

Introduction

The initial concept and law of the international treaties was customary for the most part of the past, but major achievements have been made when all those disparate rules were codified by the Vienna Convention of 1969 on the Law of International Treaties, which entered into force in January 1980. Based on this Convention's dispositions, we could define the treaty as an international written agreement, whether embodied in a single instrument or more related instruments and whatever its name is, concluded between two or more States or other subjects of law International and governed by international law, meant for them to set obligations and recognize reciprocally rights, in order to rule over their respective international relations.

Stages of the life of a treaty depend largely on the willingness of member States attitude towards them, but, in order for them to be as useful for the international society as they are meant to (based on the fact that, due to specific configuration of the international society, the treaty is the main tool through which international law is set), there must be some specific conditions ruling the end of those instruments.

There are two main causes for terminating a treaty. One is related to the quality of the consent and will not make the object of the present study and the other will be related to all other causes of termination. It will therefore be necessary to distinguish here between situations of temporary cessation of operation of a treaty - suspension and situations where there will be termination of the same – extinction, with their respective legal consequences (whilst suspension simply puts the treaty on hold for a certain period of time, extinction means the complete disappearance of the Treaty from the legal order). We will also, indirectly, analyze concepts like revision and amendment of treaties as a way to avoid the extinction of these and adapt them to changes in the international environment in which they function.

I. The end of treaties by the will of the parties

This objective can be expressed either in the treaty itself (A) or subsequently (B).

A. Ending conditions expressed within the Treaty

The Vienna Convention of 1969 sets some specific elements, with regard to the following termination possibilities:

- *Arrival of the term*: the treaty sets the date of termination of its effects most often with an evergreen clause, with or without time limit;

- *Execution:* the treaty may be extinguished simply by what it has been complied with;

-*Termination clause:* the treaty can end upon emergence of a subsequent condition set by the treaty's dispositions, but it is quite exceptional. This may include, among others, the stipulation that the occurrence of a hypothetical event may terminate the treaty;

- *Denunciation of the treaty or withdrawal of one or more parties*: as provided by art. 56 of the Vienna Convention, this manifestation of the unilateral will of either party to the treaty must be provided either expressly or implicitly by the other parties and follows either the implicit nature of the institution of the parties' intent or "the nature of the treaty". The denunciation or withdrawal is generally regulated by the treaty. These rules may concern the specification of the body which will be notice of termination, the determination of the date from which the termination is possible and the minimum notice period for the effective date of termination and the consequences of the termination. Another important aspect is the spell of the treaty when the number of terminations exceeds a certain threshold, which allows a treaty which entered into force to still remain operational even for a smaller group of States than when it entered into force initially, allowing the treaty to fulfill its goal as instrument regulation international relations[1].

- *Revision and amendment of the treaty***:** the transformations of the international context can be reconciled with respect to treaties, provided that they are timely adapted as to meet again appropriate conditions. These adaptations may be made, provided that the parties agree that, in some cases this can be cause for problems. This whole issue will be in a theoretical context defined both by the necessity of adapting to changing circumstances treated, but also by the need to preserve legal certainty in relations between states. With this in mine, one must stress out the fact that provisions of the treaty itself may determine the standards of the initiative, the development and entry into force of the revision or amendments and also the problem of the minority in multilateral conventions in case of such modifications. As such, the proliferation of multilateral agreements has led to admit the fact that amendments can be implemented by agreement without the involvement of all Parties.

The problem then is to know what will happen to the small amount of minority States that have not voted, or voted against the treaty revision. The problem can be solved in different ways[2]:

- either the Member States of the minority can no longer be bound by the amended treaty, based on the fact that they signed that treaty based on their free will and therefore the treaty ends for them;

- either the revision or amendment is binding on all states, even those who have not accepted, based on the "*pacta sunt servanda*" concept.

B. Termination of the Treaty following a subsequent agreement. This agreement may be express or implied. Based on the art. 59 of the Vienna Convention, an agreement on the abrogation of the treaty puts an end to it. In the case of a multilateral convention, some

1 This principle was laid down by art. 55 of the Vienna Convention of 1969, which states that "*unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only that the number of parties falls below the number necessary for its entry into force*".

2 As per art. 30 § 4 and 40 § 4 of the Vienna Convention of 1969 and art. 108 of UN Charter.

grades are needed as, based on the art. 59 mentioned above "a treaty is considered as terminated if all Parties to the treaty concluded a later treaty relating to the same subjects" and if it results that the latter is otherwise established that the parties intended that the matter should be governed by that new treaty, or if the provisions of the later treaty are incompatible with those of the earlier one, it will be impossible to apply both treaties at the same time and the earlier treaty should be considered as only suspended if it appears from the later treaty that this was the real intention of the parties. However, if the new agreement is not reached between all parties of the primitive one, then the original agreement remains valid, theoretically, between the States which have not accepted the new one[1]. When a *tacitus* agreement appears, the positive law does not seem to be definitively set as the concept of disused treaties (by non-application), generally does not appear as an accepted cause for the termination of treaties[2]. However, one can observe lately that the case law has been questioning itself whether this attitude of silence and lack of interest of the State towards a specific treaty does not amount to a waiver of the benefits that had been granted in that specific treaty. This is why the newly established is not to admit a formalistic conception of the consent, whether it's related to the entering into a commitment on jurisdiction and admissibility[3] or to the extinction of a treaty as per art. 54-b of the Vienna Convention. Finally, the case law admits that the conduct of the parties may sometimes be the source of an amendment to an agreement[4].

II - Extinction of the treaty outside the will of the parties

There are various ways of extinguishing are allowed customarily. Some can arise from the behavior of the parties, unilaterally (A), others can be influenced by external facts (B).

A. State's unilateral actions

The problem that arises at this level is whether a State has the right to exit a treaty regime by a unilateral act. Normally, a State may not withdraw unilaterally from its treaty obligations, as this this principle was stated in 1871 by the London Protocol on the Black Sea which wrote: "*there is an essential principle of international law that no power may withdraw from a treaty commitments nor change the terms, as a result of a concurrence of the contracting parties, through a mutual agreement*". However, one State may waive the benefit of a treaty but this waiver normally needs to be enshrined in a treaty, but it can also arise from under a unilateral act, which must, in principle, be express, in order to avoid practical difficulties of the waiver.

B. Other circumstances of termination of a treaty

The question treated here is the end of a treaty following an event, other than the agreement between the parties or the termination of the treaty, which had the effects of rendering that treaty obsolete. One major principle here is that the lapse is not presumed and can only be recognized in certain specified circumstances, as follows:

- *Disappearance of an essential element of the treaty:* the treaty may become obsolete, unenforceable, due to total and permanent loss of the object, the rights and obligations of the Treaty[5].This issue was raised concerning the lapse of treaties containing a clause for

1 Idem as above.
2 See Court of Justice of the European Community case 7-71 of 14/12/1971, Commission vs. France.
3 ICJ judgment of 26 November 1984 in the "Case of military activities in Nicaragua".
4 Arbitration decision of 22 December 1963 regarding the "French-American air agreement".
5 As per art.61 § 1 Conv. Vienna 1969.

compulsory jurisdiction at the time of the dissolution of the PCIJ in April 1946. The solution adopted was found under the Vienna Convention stating that "*if the impossibility is temporary, it may be invoked only as a ground for suspending the execution of the treaty*".
- *"Rebus sic stantibus" clause:* it was often argued in the International Law area that the occurrence of a new circumstance, changing the conditions existing when the treaty was initially concluded, would be enough to end that treaty. This concept is known under the name of the "*rebus sic stantibus*" clause, a term derived from the Latin adage "*conventio omnis intellegitur rebus sic stantibus*", meaning that any agreement is supposed to have been designed according to the state of things. So, if the parties agree to consider that the change of circumstances is such, the treaty loses all purpose. The doctrine proposed some solutions, according to which the existence of the clause "*rebus sic stantibus*" would be the concrete manifestation of the state of necessity (for its supporters such as Jellinek and Anzilotti (the latter citing Grotius and Vattel). The opponents, such as Bruno Schmidt and Arrigo Cavaglieri, stated, during the period 1920-1930, that this clause had a major disadvantage, as it went against the *"pacta sunt servanda*" principle and, moreover, this clause eventually lacked the concept under the principle "*opinio juris juris sive necessitatis*"[1].

Also the positive law had some saying on that matter, but one must distinguish in this area on whether one is located before or after the Vienna Convention of 1969 on the International Law of Treaties. Before the Vienna Convention the clause "*rebus sic stantibus*" was often mentioned in international practice, as some have seen a sort of evocation of that principle in Article 19 of the League of Nations Pact, which stated that "*the Assembly of the League may, from time to time, invite members of the company to conduct a further review of treaties which have become inapplicable and of international conditions whose continuance might endanger the peace of the world*". After the Vienna Convention entered into force, its art. 62 regulates precisely the concept of "fundamental change of circumstances" as potential cause of the end of the treaty as it states that "*a fundamental change of circumstances that occurred from those existing at the time of the conclusion of a treaty which had not been foreseen by the parties cannot be invoked as grounds for terminating the treaty or to withdraw, unless the existence of these circumstances constituted an essential basis of the parties' consent to be bound by the treaty, and that this change has the effect of radically transforming the nature of the obligations still to be performed under the treaty*"[2].
- *Violation of the treaty by one party:* in the private law area, there are usually provisions relating to non-execution of contracts, which provide that a violation thereof shall not *ipso facto* lapse the agreement. Generally the case is brought before the judge who will decide the dispute either by ordering the defaulting party to execute the faulty obligation, or pronouncing the termination of contract. At the same time, in the international law area, the effects of treaties violation will be much more difficult to treat, because of the exceptional and not systematic intervention of judicial bodies in international relations, because the principle of state sovereignty, as international courts have a rather secondary role. In this way, at the international level it is assumed that the contracting party may still invoke the treaty despite the violation by the other party[3]. Although the treaty can be however unilaterally terminated for the breach of the treaty by the other party, it seems that the exception "*non adempleti contractus exceptio*" is limited to agreements with mutual exchange of benefits.

1 Lawful conviction of the right and/or the need.
2 The issue of change of circumstances was laid before the ICJ in the Case of fisheries between the UK and Iceland, and in its judgment of February 2, 1973 the Court appeared to consider that the application of the theory of changed circumstances does not automatically render void the treaty, but only the possibility to apply for revision.
3 At the Nuremberg trial, the Germany's violation of the Kellogg-Briand Pact of 1928, prohibiting the use of force, was not considered to have resulted in eliminating the legal obligations resulting therefrom.

The Vienna Convention distinguishes under art. 60 between the material breach of a bilateral treaty by one party, which entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part, and the material breach of a multilateral treaty which may be a cause of total or partial suspension from all parties or in respect of the offending party. As such, a material breach shall mean either a rejection of the treaty, not sanctioned by the Convention or a violation of a provision essential to the accomplishment or purpose of the treaty. However, art. 60 § 5 specifies that these rules do not apply to "*provisions regarding the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties*". In order to let the treaty fulfill its sociological purpose, the Vienna Convention lies under art. 66 the possibility of a conciliation procedure in disputes on this point.

- Violation of an imperative (or peremptory) norm of international law (*jus cogens*[1]): the article 64, without precisely defining this notion, stipulates the fact that any treaty that, during its lifetime, enters into conflict with such a norm, will terminate automatically.

Conclusions

The international treaty represents the backbone of the international society and, as such, it should be at the same time, easily amendable, in order to concur to a globalized context, permanently changing, but also to be protected from potential misconducts by State Parties in terminating an agreement. The ways of ending a treaty shown above confirm this double need of protection of this institution which is of paramount importance for the international society.

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1 The imperative norm of international law can be defined as a norm which was accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified by a subsequent norm of general international law having the same character.

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A STUDY ON EMIGRATION AND IMMIGRATION INSTITUTIONS IN ROMANIA

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Abstract

The present paper aims at analyzing the Romanian citizens' migration fluxes before and after Romania's joining the European Union. It also focuses on viewing the consolidation process of the institutions that are in charge with immigration issues, with making the European Union Eastern border more secure on the Romanian sector and with the implementation of the community Aquis stipulated in the SCHENGEN Agreement.

Key words: *migration, UE enlargement, borders, SCHENGEN, asylum, immigrants, emigrants, SIS.*

Introduction

The geopolitical events that occurred on the map of 1989 Europe have led to in depth system changes: i.e. the political, social and economic systems in Romania. Transition from a totalitarian political system to a democratic social system took place through an evolutionary parallelism which alternated between developing the Romanian society and adaptation of the legislative mechanisms to build "The State of Law" with democratic meanings. In the past 20 years, Romania has almost completely changed the national legislation starting from substantial changes brought to the Constitution and ending with the rules of law enforcement. The legislative framework in Romania was adapted to the standards and the EU Directives, and after integration in the European Union, in 2007, Romania has implemented the relevant Community aquis stipulated in the Schengen Agreement and Prüm Convention.[1]

[1] The Prüm Convention provides, among other things, setting up a DNA database and training counselors to detect fake documents of immigrants. The Convention allows direct access to databases containing information on fingerprints, DNA or on vehicles registered in each EU member state of the signatory states.

According to some researchers[1], in more than forty years in recent history, Europe was an entity divided by the effects of the contrasts between the political and socio-economic systems: a "political-economic" System in Eastern Europe with totalitarianism and planned economy versus a Western European System with free market economies and democracy.

1. Migration in Romania during the EU pre-accession period

The contrast between the East and the West was manifested in human rights and freedom, and this generated a stream of migration of people from the East to the West. During 1918-1989 the Eastern European states excessively militarized the borders and blocked the right of citizens to move freely, the right to migrate legally or to travel abroad. During this period, legal migration was not even present at a conceptual level in countries in Central and Eastern Europe. Before 1989, Romania allowed legal immigration but only to segments of ethnic minorities (ethnic Germans and Jews). Emigration of citizens belonging to ethnic minorities was strictly controlled by the authorities. A Romanian citizen who wanted to emigrate received or did not receive this "fundamental right" according to a political decision and only after the State of destination[2] "discharged" the value of financial expenditures made by Romania with the education and training of "the immigrant". Studies were fully funded by the state as there was no alternative to private education during that period.

Illegal emigration before 1989 was almost nonexistent due to very restrictive measures. In Romania "immigration" was strictly controlled and was manifested in the Black Sea ports, in some parts of the southern border with Bulgaria and in some isolated cases at the border with the USSR through Soviet Moldavia. After the removal of the totalitarian political regime in Romania, illegal migration has dramatically increased. Political changes and economic reforms determined massive migration of the Romanian population. Immediately after 1989, the first people who migrated were Germans. The Germans left for family reunification or for another standard of living.

The mechanisms through which Romanians emigrated illegally at that time were made by forced and illegal border crossing with Hungary and Serbia or hiding under the status of "tourist" without returning to the country. Romania, along with other states of the former communist bloc, was no exception to the rule of the emigration flow from East to West. A significant number of people chose to emigrate to the United States, Canada, the UK, Germany, France, Italy and then Spain and Portugal. The purpose of migration has been generated by the desire to have a higher standard of living and higher incomes. Some sociologists have identified positive and negative effects of migration. The positive effects of migration are quite insignificant and they refer to:

- Improving the financial situation of the family (improving housing conditions, access to different household goods and services etc)
- The possibility of travelling to other country, contact with another culture.

The negative effects of the workforce migration both at micro-social and macro-social levels may lead to serious social and economic dysfunctions.

In the context of an aging Europe[3], the potential contribution of immigration to the EU economic performance is significant. The life expectancy of Europeans is higher, and the so called "baby boomers" are approaching retirement and birth rates are low. According to

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[1] Paolo Ruspini, *The Post-Enlargement Migration Space*, Migration, Mobility and Human Rights at the Eastern Border of the European Union – Space of Freedom and Security, Edited by Grigore Silaşi and Ovidiu Laurian Simina, Editura Universităţii de Vest, Timișoara, 2008.

[2] This system was accepted by Germany and Israel in the 80's.

[3] Communication from the European Council, the European Economic and Social Committee and the Committee of the Regions - A Common Immigration Policy for Europe, Brussels, June 20, 2008 (24.06).

the latest population projections[1], by 2060, an estimated population of the EU working age will fall by almost 50 million even if net immigration will remain to a similar level of historical levels and about 110 million if we do not take immigration into account. The evolutions presented above highlight the risks to the sustainability of pensions, health and welfare and require increased public spending[2]. Immigration is a reality that must be managed effectively. In an open Europe without internal borders, no Member State can manage immigration on its own. Immigration is a reality that must be managed effectively. In an open Europe without internal borders, no Member State can manage immigration on its own.

Schengen States believed in 1998 that immigration control measures are required by:

- close cooperation with the competent agencies of countries of origin and transit countries in accordance with the law of the Schengen States, especially in terms of providing advice and support by liaison officers from Schengen States;
- provision of assistance by liaison officers from Schengen member countries of origin and transit countries, regular mutual information between all Schengen States;
- intensive controls at authorized border crossing points, very careful surveillance of the land and sea borders outside authorized border crossing points, especially in sectors affected by illegal immigration, by deploying mobile units;
- checking public areas in ports serving international shipping and checks on ferries during loading and embarkation.

In 2011 the issue of immigration to the European space has not diminished[3]. The Afro-Arab revolutions caused increased flows of immigrants who attack the south borders of the European Union (Italy, France, Spain, Malta and Greece). Recent statistics show a worrying increase of immigrants in the year 2011. Statistics on irregular arrivals of migrants by sea to European Union countries between 2007 -2011 show that in 2007-2008 the wave of immigrants was very high and then declined in 2010 and grew exponentially again in 2011. Irregular arrivals are from:

- Turkey to Greece and the Greek islands in number: 1030 people (2011), 1765 (2010), 10.165 (2009), 15.300 (2008), 19.900 (2007), 9050 (2006);
- North Africa, Greece and Turkey and the islands ITALY: 61,000 (2011), 4348 (2010), 9573 (2009), 36,000 (2008), 19.900 (2007), 22,000 (2006);
- North Africa in MALTA: 1574 (2011), 28 (2010), 1470 (2009), 2700 (2008);
- North and West Africa in Spain: 5443 (2011), 3632 (2010), 7285 (2009), 13.400 (2008), 18.000 (2007).

[1] Eurostat Demographic projections, EUROPOP 2008, the convergence scenario based on 2008, the convergence year 2150.
[2] See the document Economic Policy Committee and European Commission (DG ECFIN), (2006), "The impact of aging on public expenditure: projections for the EU-25 Member States on pensions, health care, long term care, education and transfer allowances unemployment (2004-2050) ", European Economy, Special Reports No. 1, 2006.
[3] UNHCR The UN REFUGEE AGENCY (http://www.unhcr.org/pages/4a1d406060.html).

Figure no. 1 - The Migration Routes. (www.abroadintheyard.com/wp-content/uploads/Europe-Present-Day-with-Ancient-Migration-Routes)

Revolutions in North Africa led to an unprecedented immigration pressure in Italy, Malta and Spain culminating with the invasion of immigrants from Italy with 61,000 people, irregular arrivals in 2011.

From a social perspective, studies[1] have shown that migration has regional migration corridors. As far as Romania is concerned, the Romanian migrants to countries of Western Europe have created real migration corridors. Virtually every emigrant has determined another family member or friend to go to work in Western countries of the EU. The flows of migrants from Romania are shown in Fig. no. 2. One may notice the corridors of emigration to Germany, Italy, Spain and Britain. In the years 1990-2000 there was a stream of emigration from Romania to Canada and the USA based on the policies and criteria established by these countries. One particularity is to be found in the case of Romanian citizens of Hungarian ethnicity who live mainly in Covasna and Harghita counties with a migration corridor to Hungary.

[1] Dumitru Sandu - *Transnational Migration from the perspective of a census of Romanian Community* - Romanian Journal of Sociology, 2000, 3-4, 5-52.

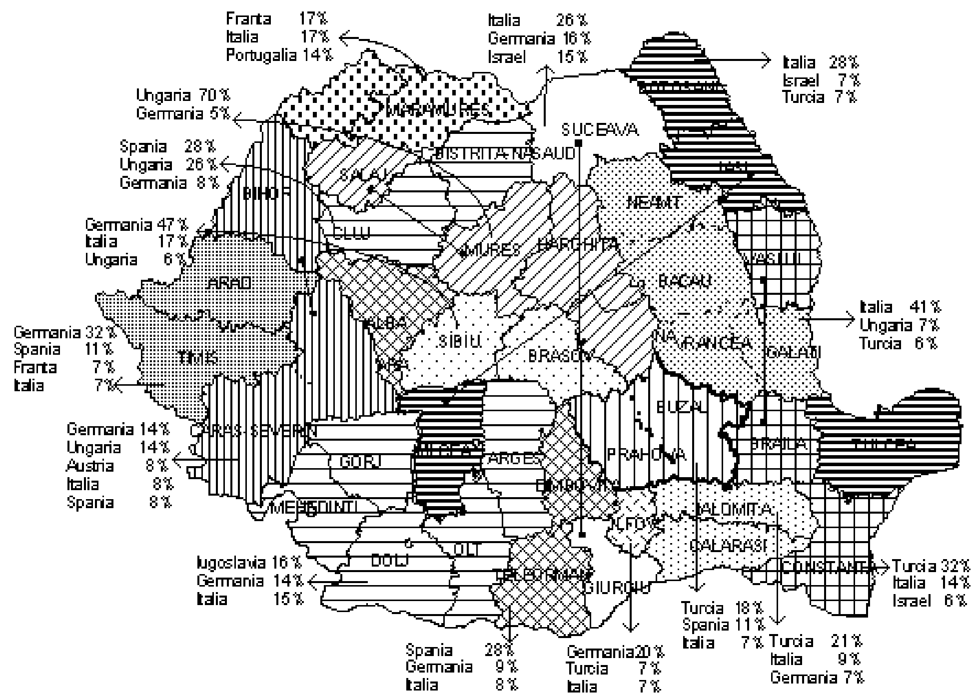

Figure no. 2 - The main areas of external circulatory migration of rural population in Romania. (Source: Dumitru Sandu - Transnational Migration of Romanians from the perspective of a community census*)*

The countries of destination for migration corridors have introduced strict border control through introducing visas. In Romania some immigration is controlled by specialized structures within the Ministry of Administration and the Interior by the Romanian Immigration Office.

2. Admission and Residence in Romania

2.1. Entrance of foreign citizens in Romania (Admission)

In Romania, the institution that deals with the management of immigrants is the Romanian Immigration Office. The Romanian Office for Immigration's purpose is to answer common questions and inform citizens about travel conditions in Romania, residence in the territory and how to get permanent residence in Romania.

A. Citizens of European Union member state of European Economic Area or the Swiss Confederacy are allowed to enter Romania on basis of the national identity document valid for a period not exceeding 3 months. If their stay exceeds 3 months, the EU / EEA / Swiss Confederation citizens must register their residence in Romania.

B. Entry into Romania of non-EU citizens and their family members can be done with a passport and a valid entry visa. The visa is granted by the diplomatic missions and consular offices with the approval of the National Visa Center of the Ministry of Foreign Affairs of Romania. Family members of EU citizens or those who join a European Union citizen having the right of residence in Romania are exempt from entry visa requirements. The exception to the visa to enter Romania applies to family members who hold a valid

document certifying the right of residence in the territory of another EU state that accompanies or joins a person that is within Romania.

C. Entry into Romania of citizens coming from non-EU countries. Traveling in Romania for non-EU citizens can be based on a visa prior to entry into the country. Depending on the purpose they are given, airport transit visas can be (identified by the symbol A), transit visa (identified by the symbol B), short stay visa (identified by the symbol C), long-stay visa[1] (D).

In our approach we will determine only the immigrant visa required. Called "short-stay visa" this is attributed to non-EU citizens for a continuous period or more inputs and outputs limited to 90 days and a limited term of six months from the date of the first entry. The visa can be issued with one or more entries. The Romanian Immigration Office shall according to art. 11 of the European Parliament and Council Regulation no. 562/2006[2] establish a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code). The list of countries whose nationals require visas to enter Romania is provided in Annex no. I to Council Regulation (EC) no. 539/2001[3] listing the third countries whose nationals must have visas when crossing the external borders and the list of third countries whose nationals are exempt from that requirement.

There are citizens of states at the time of application that had to have short-stay and invitation from the natural or legal persons, authorities or organizations in Romania[4]. The need to have an invitation is applied to the citizens of states in areas with high emigration from Asia, Africa and Arabia. Short-stay visa to visit Romania are not granted.

By law if a citizen wants to stay in Romania longer he/she must obtain a long stay visa and then a residence permit in Romania. For non-EU citizens the visa in Romania is determined by the purpose of the trip: travel, visit, business, transport, sport, cultural, scientific, humanitarian, medical or other short-term activities which do not contravene the law. In the case of non-EU citizens who need an invitation[5] [6] in order to get a visa, they must submit evidence demonstrating the purpose of their trip. Legislation on the right of immigration also provides exceptions for non-EU citizens of the countries which are required invitations. This exception may be granted to the foreigner Minor / husband / wife / parents whose parents have refugee status or residence permit in Romania with more than 90 days. Another major exception is a foreign citizen whose father is a Romanian citizen.

2.2. Registration of residence in Romania

The EU / EEA / Swiss Confederation citizens. Residence registration in Romania is regulated strictly in accordance with the community acquis. Resident citizens are granted residence more than three months in Romania. EU / EEA / Swiss Confederation and their family members can work in Romania under the same regulations of the Romanian citizens according to the individual employment contracts, or detachment contract. The registration

[1] Long stay visa is identified by one of the following symbols, depending upon the activity the person who has been granted is to develop: (i) economic activities, identified by the symbol D / AE, (ii) conducting professional activities, identified by the symbol D / AP, (iii) commercial activities, identified by the symbol D / AC, (iv) employment, identified by the symbol D / (v) studies, identified by the symbol D / SD (vi) family reunification, identified by the symbol D / VF (vii) religious or humanitarian activities, identified by the symbol D / RU, (viii) research activities, identified by the symbol D / CS, (ix) diplomatic and service visa, identified by the symbol DS (x) other purposes identified by the symbol D / AS.

[2] Published in the Official Journal of the European Union (OJEU) no. L105 of 13 April 2006.

[3] Council Regulation (EC) no. 539/2001 listing the third countries whose nationals must have visas when crossing the external borders and the list of countries whose nationals are exempt from that requirement, published in the Official Journal of the European Communities No L series. 81 of 21 March 2001.

[4] Ministry of Foreign Affairs, Order no. 1743 of 29.9.2010 published in Official Gazette 696, October 19, 2010.

[5] Invitations are approved within 60 days from the date they have been submitted.

[6] The physical or juridical person inviting non-EU foreigners will bear the cost of removal (deportation) if the situation requires and if the invited person does not leave Romania in due time.

certificate is issued by the Romanian Immigration Office at request for a period between 1 and 5 years. The residence card is issued within 90 days from the request and is valid for 5 years without exceeding the period of residence. Romanian residents can also carry out employment, detachment, commercial, volunteer, humanitarian or religious activities. Students can also obtain residence during their studies.

2.3. Long-term stay of foreign citizens in Romania

In the case of long-term stay of foreign citizens in Romania, the EU citizens have the right of permanent residence and non-EU citizens have the right to stay on a long term residence permit.

2.3.1. Registration of permanent residence in Romania

EU / EEA / Swiss Confederation citizens. If the period of continuous and legal stay in Romania exceeds five years, the person may request the Romanian Immigration Office permanent residence of family members. Legality of permanent residence condition is given by OUG/124/2002 with the subsequent amendments and provisions of OUG/2005 which proves that there was a right of residence before 31.12.2006. The second condition is met if no action has been ordered to remove from the Romanian territory[1], or as limiting or restricting the right of free movement and residence[2]. Permanent residence is lost if the citizen is absent from Romania for more than two years consecutively. The permanent residence document may change with 30 days before the expiry or where a change in name, address of residence or citizenship occurs.

2.3.2. The right for long-term stay for non-EU citizens

The right for long-term stay is granted on the basis of the conditions met by non-EU foreigners. It may apply to foreigners as employment, business, family reunification, education, entrepreneurial activities. The proof of long-term right of residence is based on a residence permit with a validity of 10 years for family members of Romanian citizens and five years for other lawful purposes. This right is obtained only if the applicant previously had a continuous stay in Romania for 5 years and he/she was absent less than 6 consecutive months or over 10 months in total. In the case of resident education the applicant must have had an absence of less than 3 consecutive months without overcome all of five months. Immigration law in Romania states that long-term residence may not be granted if there is a long term temporary stay right for studies or the applicant has the right to asylum or temporary humanitarian protection.

2.4. Returning the immigrants to the states they come from and restricting the right of residence

When resident rights or rights of residence in the short term and / or long term / permanent expired the immigration authority shall make the decision to return / expel citizens who are losing rights in Romania.

2.4.1. Limiting the right of residence

EU / EEA citizens and their family members who do not meet the conditions for exercising the right of residence receive a decision from the Romanian Immigration Office which requires leaving the Romanian territory. The decision to leave the Romanian territory may be appealed to the court for administrative litigation line. When taking the decision to leave the Romanian territory the deadline is 30 days. If the EU / EEA or their family members have applied for restriction of the right of free movement in the Romanian territory, they are not allowed to enter Romania and are declared undesirable or are expelled.

[1] Government Emergency Ordinance no. 194/2002.
[2] Government Emergency Ordinance no. 102/2005.

2.4.2. Voluntary Return

The EU citizens whose rights to stay has expired or non-EU citizens who have entered Romania illegally are removed forcibly from the Romanian territory through the voluntary repatriation program[1] assisted by the International Organization for Migration – represented in Romania and in the Romanian Government. The citizens who have applied for asylum and have no means to return to their country of origin are also included. The right of temporary residence visas can be canceled[2] in case it is found that foreign citizens have used false documents or information on visa and / or have breached customs regulations and those relating to border crossing.

2.4.3. Tolerance of non-EU citizens

Non-EU citizens who no longer have the right to stay in Romania for objective reasons, unpredictable and cannot be removed are temporarily tolerated in Romania. The tolerated citizen right is given to those accused or convicted for which the court has decided the prohibition of leaving the town or country. The right of tolerance can be applied when public custody ceases when their presence is required by important public interests. There may be situations where citizens are victims of human trafficking situation in which tolerance is acceptable. The tolerance right is granted by documents and a written request.

1. The Right to Asylum

The issue of asylum[3] and integration of foreigners in Romania is consistent with the Convention on the Status of Refugees done at Geneva in July 28, 1951, to which Romania adhered by Law. 46/1991 for Romania's accession to the Refugee Convention and Protocol on the Status of Refugees done at New York on January 31, 1967. Asylum work is coordinated by the Romanian Immigration Office through a subordinated structure specializing in asylum and integration called Asylum and Integration Directorate. The institution aims to provide free access to the asylum to foreigners in need of international protection. Authority records, identify and keep track of people seeking asylum and people who received some form of protection in Romania. Another objective of the institution is to establish which Member State is responsible for examining an asylum application under the Dublin procedure. The Romanian State assures accommodation, material and financial assistance to asylum seekers who have no means of support, counseling and medical assistance. Romania cooperates with international, governmental and nongovernmental organizations specialized in integration of foreigners on the principle of complementarity and respect the standards for asylum under national law, and international community.

2. Immigration in Romania in the context of implementation the Schengen Agreement

If by the early '80s France and Germany started discussions to eliminate border controls, now 25 European countries are full members of the Schengen Agreement[4]. It should be mentioned that Iceland, Norway and Switzerland have signed the Schengen Agreement but are not EU Member States and Ireland and the UK have decided not to fully implement the Schengen acquis. Under the agreement the following countries will be members: Bulgaria, Romania, Cyprus and Liechtenstein.

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[1] Law no. 374 of 22 September 2003 ratifying the Memorandum of Understanding between the Government and the International Organization for Migration on cooperation in voluntary humanitarian assisted repatriation, signed in Bucharest on June 28, 2002, published in Official Gazette number 683 dated September 29, 2003.

[2] EMERGENCY ORDINANCE no. 194 of 12 December 2002 regarding foreigners in Romania.

[3] Law no. 122 of May 4, 2006 on Asylum in Romania.

[4] The Schengen Agreement member states are: Belgium, France, Germany, Luxembourg, Netherlands, Czech Republic, Lithuania, Slovakia, Switzerland, Italy, Portugal, Spain, Greece, Austria, Estonia, Malta, Slovenia, Denmark, Sweden, Finland, Iceland, Norway, Latvia, Poland and Hungary.

Romania is obliged to accept in full the Schengen Protocol[1]. Implementation of Schengen was in two stages that Romania fulfilled. The pre-accession provisions were not related to internal controls but the post-accession the provisions directly related to the lifting of internal border controls. Implementing the Schengen Agreement in Romania was made according to the roadmap established jointly with the European Union by ratifying the Schengen Agreement. Joining supposed to be met all legal operational and technical requirements. One of the most important conditions to be met relates to access to SIS II and effectively control the external borders Romania has with Ukraine, Moldova and the Black Sea. The steps have been fully followed[2]. The evaluation process of Romania to become a member of the "club" Schengen was completed on 28.01.2011 technically. With this occasion was adopted last Evaluation Report on the SIS / SIRENE. The decision to eliminate internal border controls is a legal act entered Romania in the legal parameters of membership in the Schengen space. The text decision was voted in favor of Romania and Bulgaria in the Council conclusions of 08.06.2011. The date of the completion of the evaluation process of the preparation stage of Romania and Bulgaria were adopted by the European Parliament.

Implementation of Schengen acquis in Romania was achieved by amending national legislation so that legal provisions to meet border security needs. Thus was developed a Law[3] establishing the organization and functioning of NISA and Romania's participation in the Schengen information. This law was created to outline the legal framework for implementation of Decision 2007/533/JHA of the Council of Europe, the establishment and operation and use the Schengen Information System (SIS II). Abolition of checks at internal borders of the Schengen Member States allows citizens of these countries to travel freely, irrespective of time and any place, only with a valid ID. Internal border journey is similar to a trip inside the country. The treaty provides exceptional situations in which there is a possibility for limited periods in time that States can establish internal border controls for reasons of public order or national security. Cross-border cooperation of police activities, customs and border police are to protect their citizens through information exchange and mutual assistance.

At this moment Romania has met all criteria of the Schengen evaluation process but it still waits acceptance from Netherlands and Finland to join the Schengen area. Although the Schengen acquis provisions are met, the political factor remains the deciding factor.

Conclusions

Romania possesses an emigration, immigration and asylum law according to the Refugee Convention, done at Geneva on 28 July 1951 and the Protocol on the Status of Refugees done at New York on January 31, 1967;

Romania adopted into the national law the Community aqui, and the Schengen aqui meeting standards in the field of free movement. Criteria for inclusion in the Schengen space are fulfilled; access will be made after the Netherlands makes a political decision.

The flow of immigrants from Afro-Arab countries generated by political movements did not dramatically affect the flow of inputs, admission or application for

[1] Article 8 of the Protocol integrating the Schengen acquis within the European Union.

[2] Transmission by Romania of a Declaration of training (Declaration of Readiness) on preparation for starting the Schengen evaluation process. This statement was sent on 28.06.2007 and started the visa process visa assessment of police cooperation and data protection, transmission by the Secretary General of an extended questionnaire with detailed questions about all Schengen Agreement aspects in the accession period; Starting evaluation visits and transmission of additional questions or questionnaires, drafting of a report that analyzes the state of implementation of the acquis-accession report including recommendations for correction and improvement of the activity which do not meet the desired standard, the EU Council decision to eliminate internal border controls.

[3] Law No 141/12.06.2010 published in the Official Gazette of Romania no 498/19.07.2010.

asylum in Romania, even if other member states have a large number of requests from EU borders;

The evolution of migration flows in Romania has declined in the recent 20 years being influenced by political, social and economic changes (EU accession, modernization and democratization of the state, raising living standards, etc..). Migration flows have reached the maximum in the period 1990-2000;

Immigration flows are strictly controlled to prevent illegal immigration. In the legal immigration statistics in Romania, it appears that most of the immigrants with legal residence in Romania[1] are from the Republic of Moldova, followed by people from Turkey, China, Syria, USA, Lebanon, Serbia, Tunisia, Iraq and Ukraina. Most foreigners are legally resident in the capital, Bucharest;

Family members of Romanian citizens or EU citizens represent a rate of 33% of third-country nationals staying legally in Romania;

More than half of issued work permits were issued to citizens from China and Turkey;

Most work permits were issued in the capital Bucharest and aims to work in the field of constructions;

Most return decisions were issued to citizens of Chinese nationality and are present in Bucharest on grounds of illegal residence.

Romania's accession to full membership in the Schengen space will bring benefits to all countries in the European Union; implicitly it will bring benefits to Bulgaria and Romania also.

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[1] Source: INFOSTAT - Romanian Immigration Office.

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RENUNCIATION OF INHERITANCE ACCORDING TO THE REGULATIONS OF THE NEW ROMANIAN CIVIL CODE AND OF FRENCH LAW[1]

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Abstract

In this paper, dedicated to the issue of inheritance renunciation, our primary goal is to point out the innovations introduced by Law no. 287/2009 on the Civil Code[2], as compared to the 1864 Civil Code, and to consider the fairness and appropriateness of these two regulations.

Secondly, we intend to analyze the issue of inheritance renunciation from the perspective of French civil law and to determine the extent to which the latter was, one time again, a source of inspiration for the Romanian legislator.

Keywords: *person entitled to inherit, right of succession option, renunciation of inheritance, revocation of inheritance renunciation, acceptance of inheritance.*

Introduction

The new Civil Code governs waiver of inheritance in Book IV – "On Inheritance and Liberalities", Title IV - "Transmission and Division of Inheritance", Chapter I - " Transmission of Inheritance", Section 3 - "Renunciation of inheritance", Art. 1120 to 1124. In these pieces of legislation, the enactment in question governs the form that the act of renunciation of inheritance must take, the effects of the waiver, fraudulent renunciation, revocation and cancellation of waiver of inheritance.

The French Civil Code, as amended in 2006, governs the renunciation of inheritance in Art. 804-808.

1. Renunciation of inheritance according to the regulations of the new Romanian Civil Code[3]

1.1. The notion of renunciation of inheritance

Renunciation of inheritance is, together with acceptance of inheritance, one of the possible variants of the right of succession option [Art. 1100 par. (1) NCC][1]. Thus, we find

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

[2] It was republished in the "Official Gazette of Romania", Part I, no. 505, of July 15, 2011. The provisions of the enactment in question are only applicable to inheritances opened after 1 October 2011, the date of its entry into force. Inheritances opened before that date will be governed by the provisions of the Civil Code of 1864, according to the tempus regit actum principle.

[3] See also B. Pătraşcu, *Continuitate şi discontinuitate în reglementarea opţiunii succesorale,* under the coordination of Marilena Uliescu, *Noul Cod civil. Comentarii,* Universul Juridic Publishing House, Bucharest, 2010, pp. 271-272.

that the new Civil Code no longer regulates the acceptance of inheritance under the benefit of inventory.

Renunciation of inheritance is the express and solemn act of succession option by which the person entitled to inherit rejects the inheritance, within the prescription time limit of the right of succession option[2], thus abolishing retroactively his/her succession vocation.

Any person entitled to inherit[3], be it legal or testamentary, an heir who can or cannot be totally disinherited, having a general or concrete vocation, a universal vocation, with a universal or particular title, can make use of this type of succession option.

The persons'entitled to inherit decision to waive inheritance is based on the most varied reasons, but most times, such an option is determined by the insolvency of the inheritance[4].

1.2. Conditions of validity of the renunciation of inheritance

The validity of waiver of inheritance is subject to compliance with formal and background legal requirements. To produce legal effects, renunciation of inheritance must cumulatively meet the background conditions specific to any legal acts and certain special conditions.

1.2.1. Special background requirements

a) In principle, the renunciation of inheritance is express and cannot be deducted, as a rule, from material facts or related legal acts, such as the acceptance of inheritance. This character is enshrined in the provisions of Art. 1120 par. (1) NCC, that the "Renunciation of inheritance is not presumed, except in the cases provided for in Art. 1112 and Art. 1113 Par. (2)".

So, in principle, renunciation of inheritance is express and, therefore, cannot be presumed. This view had also been supported by the majority of the speciality literature[5] in light of the Civil Code of 1864, which did not contain any express provision to that effect.

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[1] On the issue of acceptance of inheritance, see Ilioara Genoiu, *Acceptance of the Inheritance in the New Civil Code Regulation*, in the volume of the conference "CKS - Challenges of the Knowledge Society", organized by the Nicolae Titulescu University of Bucharest, 15-16 April 2011, Prouniversitaria Publishing House, Bucharest, 2011, pp. 471-484.

[2] According to the provisions of art. 1103 par. (1) NCC, "The right of succession option is exercised within one year from the date of opening the inheritance". We must specify that, exceptionally, this period may be extended in accordance with Art. 1104 NCC or may be reduced in accordance with Art. 1113 NCC.

[3] The new Civil Code has the merit of defining the notion of "person entitled to inherit". Thus, in accordance with the provisions of Art. 1100 par. (2) NCC, "a person entitled to inherit is a person who meets the conditions prescribed by law in order to inherit, but who has not yet exercised the right of succession option". Thus, we find that in light of the new Civil Code, the person entitled to inherit must meet all the conditions of the right to inherit. Whereas, according to the doctrine prior to October 1, 2011 (the Civil Code of 1864 not having defined the term in question), the person entitled to inherit represented the person having succession vocation, but who had not yet exercised the right of succession option.

[4] For a presentation of the reasons that may cause the renunciation of inheritance, see Fr. Deak, *Tratat de drept succesoral*, 2nd edition, updated and supplemented, Universul Juridic Publishing House, Bucharest, 2002, p. 431.

[5] See, for example: M. Eliescu, *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România*, Academy Publishing House, Bucharest, 1966, pp. 132-133; C. Stătescu, *Drept civil. Contractul de transport. Drepturile de creaţie intelectuală. Succesiunile*, Didactic and Pedagogic Publishing House, Bucharest, 1967, p. 224; St. Cărpenaru, *Dreptul de moştenire*, in Fr. Deak, St. Cărpenaru, *Drept civil. Contracte speciale. Dreptul de autor. Dreptul de moştenire*, University of Bucharest, 1983; p. 503; Fr. Deak, *op. cit.*, p. 431; Al. Bacaci, Gh. Comăniţă, *Drept civil. Succesiuni*, C.H. Beck Publishing House, Bucharest, 2006, p. 211; L. Stănciulescu, *Drept civil. Contracte şi succesiuni*, 4th edition revised and updated, Hamangiu Publishing House, Bucharest, 2008, p. 437. A contrary opinion was expressed, however, according to which renunciation of inheritance may be tacit, resulting from the non-acceptance of the inheritance within the legal time limit. See, to this effect: D. Rizeanu, *Principii de drept*, Scientific Publishing House, Bucharest, 1958, p. 430; D. Chirică, *Drept civil. Succesiuni,* Lumina Lex Publishing House, Bucharest, 1996, p. 235.

However, as a novelty, Law no. 287/2009 expressly enshrines exceptions to the rule according to which waiver of inheritance is express, thus ending the doctrinal controversy arising in the light of the old Civil Code on this subject. Thus, in Art. 1112, the new Civil Code governs the presumption of waiver of inheritance. According to this legal text, "It is presumed, until proven otherwise, that a person entitled to inherit has waived the inheritance if, although aware of the opening of the succession and of his/her quality of a person entitled to inherit, following his/her citation under the law, he/she does not accept the inheritance within the period prescribed in Art. 1103. The summons shall include, under penalty of cancellation, in addition to the requirements of the Code of Civil Procedure, the specification that, if the person entitled to inherit does not exercise their right to accept the inheritance within the period specified in Art. 1103, he/she shall be deemed to have waived the inheritance. The presumption of waiver only operates if the summons was served to the person entitled to inherit at least 30 days before the expiration of the succession option".

Thus, the presumption of waiver of inheritance (whose practical utility cannot be doubted, as it provides certainty both in terms of the number of accepting heirs, and of the civil circuit of the goods acquired as a result of the succession)[1] operates as an exception, if the following conditions are met cumulatively:

- the person entitled to inherit knows of the opening of the succession and his/her quality of heir, following his/her citation under conditions of the law;
- the summons must contain the elements provided for by the Code of Civil Procedure, and the specification that if the person entitled to inherit does not accept the inheritance in due time, he/she will be considered a renouncer;
- the summons is served to the person entitled to inherit at least 30 days before the expiration of the succession option;
- the person entitled to inherit does not accept the inheritance in due time.

With regard to the legal provisions mentioned above, we consider that a declaration of renunciation made by the person entitled to inherit cited after the expiration of the legal time period for the succession option, is intended to strengthen the presumption of waiver, which, by virtue of Art. 1112 par. (1) NCC, has a relative character[2].

Information regarding the place of summoning will be obtained from the statements of other persons entitled to inherit. In case the domicile of the person entitled to inherit who is to be cited is not known and the other persons entitled to inherit declare they have done all they could to find it, *summons by advertisement cannot be resorted to*, as it is provided for by the new Civil Code only in matters of vacant successions[3].

Another exception to the rule of the express character of inheritance renunciation is enshrined in the new Civil Code, in art. 1113 par. (2). Thus, if the person entitled to inherit has not made an option within the legal time period, reduced by the court under conditions of the law[4], he/she is presumed to have waived the inheritance. Thus, this presumption, unlike that established by art. 1112 NCC, has an absolute character.

In another context, we underline that, in light of art. 956 NCC, according to which "...the legal acts by which... inheritance is waived before its opening... are *sanctioned by absolute nullity*", the agreement between the heirs by which one (or several) of the heirs

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[1] See, in this regard, Uniunea Naţională a Notarilor Publici din România (The National Union of Notaries Public in Romania), *Codul civil al României. Îndrumar notarial*, Volume I, Official Gazette Publishing House, Bucharest, 2011, p. 421.

[2] Ibidem, p. 420.

[3] Ibidem.

[4] According to the provisions of Art. 1113 par. (1) NCC, "For good reasons, at the request of any interested person, a person entitled to inherit may be required, in compliance with the procedure provided by the law for presidential ordinance, to exercise his/her right of succession option within a period specified by the law court, shorter than that referred to in Art. 1103".

undertake to give up the inheritance does not produce any legal effects. This solution should be adopted both in the case of an agreement concluded before the opening of the succession, the heirs achieving thus a legal act that regards an unopened succession, *which is sanctioned by absolute nullity, and in the case of an* agreement completed subsequently to that moment but not followed by a disclaimer, made in the form required by the legislature.

b) The renunciation of inheritance produces legal effect only if the person entitled to inherit has not previously accepted the inheritance.

So, the renunciation of inheritance done after acceptance of the inheritance is ineffective, as the act of succession option is, in principle, irrevocable.

c) Just like the acceptance of inheritance, renunciation is an indivisible legal act, therefore the person entitled to inherit cannot give up a part of the inheritance, while accepting another part of it.

d) The renunciation must be purely abdicative, that is impersonal and free of charge, as renunciation *in favorem* (renunciation free of charge in favour of one or more specific coheirs or renunciation for a valuable consideration in favour of one, several or even all the coheirs or subsequent heirs) has, pursuant to art. 1110 par. (1). b) and c) NCC, the significance of an act of tacit acceptance of the inheritance, followed by an act of alienation of the succession rights[1].

1.2.2. Formal requirements

Renunciation of inheritance is, according to art. 1120 par. (2) NCC, a solemn act. It must meet two formal conditions, one required for validity, and the other for opposability. Thus:

a) The declaration of renunciation shall be given before any notary public or, where appropriate, at the diplomatic missions and consular offices in Romania.

Thus, we find that the declaration of renunciation of inheritance may be given before any notary public, not only before the one territorially competent to achieve the non-contentious succession proceedings. This puts an end to the doctrinal controversy on this subject, existing before the entry into force of the new Civil Code.

The declaration of renunciation may be given, in our opinion, both in person by the person entitled to inherit, and by a person acting as a special proxy. It is valid only if it takes the form of an authentic document, having a probative value until its declaration as false. Consequently, a verbal declaration of renunciation or one that is embodied in an act under private signature is *sanctioned by absolute nullity*. The nullity of the declaration of renunciation of inheritance results in the recovery by the person entitled to inherit of the right of succession option, which can be exercised within a limitation period of one year. As a result, the person entitled to inherit may accept or repudiate the inheritance, under the conditions provided by the law for this situation and within the statutory period of limitation. In no event does invalid renunciation have the significance of acceptance of inheritance[2].

b) The declaration of renunciation shall be recorded in the national registry of notaries, held in electronic format, in accordance with the law.

According to the provisions of art. 1120 par. (3) NCC, the declaration of renunciation is valid only if recorded in the n*ational registry of notaries,* held in electronic format. Unlike the first condition, which is imposed by the legislature to ensure the validity

[1] A. Vişan, *Cu privire la cazurile de ineficacitate a renunţării la succesiune*, in The Romanian Law Review, no. 2/1985, p. 21.

[2] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, Bucharest, 1929, p. 476; Fr. Deak, *op. cit.*, p. 434, Al. Bacaci, Gh. Comăniţă, *op. cit.*, p. 210; I. Adam, A. Rusu, *Drept civil. Succesiuni*, All Beck Publishing House, Bucharest, 2003, p. 422.

of the act of renunciation, this condition is imposed for reasons of informing third parties, therefore, its unfulfillment does not affect the validity of the act of renunciation[1].

We must specify that the recording of the declaration in the n*ational registry of notaries* will be done at the expense of the renouncer.

As the declaration of renunciation of inheritance is recorded in the n*ational registry of notaries, it* is opposable to the renouncer by coheirs or by subsequent heirs. The renouncer cannot invoke as a cause of nullity of the declaration its non-recording in the n*ational registry of notaries*. To accept the inheritance, after renouncing it under the conditions of the law, the renouncer may only follow the path of revocation of the renunciation, if the legal conditions in which it operates are met.

On the contrary, the non-recording of the declaration of renunciation of inheritance in the n*ational registry of notaries* is not opposable to a bona fide third party, with whom the renouncer made a contract. Moreover, the conclusion by the renouncer of an act of disposal of the inheritable goods amounts to a tacit acceptance of the inheritance[2].

1.2.3. The nullity of the declaration of renunciation of inheritance

The failure to meet the conditions of validity mentioned above is sanctioned by the absolute or, where appropriate, the relative nullity of the declaration of renunciation. The new Civil Code establishes a special period of extinctive prescription for exercising the right to action for annulment of the declaration of renunciation of inheritance. Thus, in accordance with Art. 1124 NCC, the right to action for annulment of the renunciation is prescribed within a period of 6 months, calculated in case of violence from the end of the violence, and in other cases, from the moment when the holder of the right of action acknowledged the cause of relative nullity.

1.3. Effects of the renunciation of inheritance

Following the renunciation, the renouncer becomes alien to the succession, considered to have never been an heir [Art. 1121 par. (1) NCC]. The renunciation produces retroactive effects from the date of opening the succession and is opposable *erga omnes*, if it has been recorded in the n*ational registry of notaries*, held in electronic format, in accordance with the law. Consequently, the renouncer will not benefit from the advantages resulting from the succession, but he/she will not be bound by the duties and liabilities related to it either.

Renunciation of the inheritance generates the following legal consequences:

a) The renouncer's share, as far as the assets and liabilities of the succession are concerned, will go to the heirs that he/she would have removed from inheritance or those whose share would have been diminished if he/she had accepted the inheritance, regardless of their will [Art. 1121 par. (2) NCC].

So, as a result of the renunciation of inheritance by the sole eventual heir having a concrete vocation to inherit, the subsequent heirs will collect the inheritance, in order of the classes of heirs and of the degrees of relationship and in compliance with the rules on the legal and testamentary devolution of the heritage, such as those regarding the distribution of the inheritance between relatives belonging to the second class of heirs, or those regarding the distribution of the inheritance in case of a competition between the surviving spouse and the relatives of the deceased belonging to the four classes of heirs, those regarding the distribution of the inheritance by strains and lines, etc. The subsequent heirs will acquire the inheritance, from its opening date, directly from the deceased, not from the renouncer.

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[1] Fr. Deak, *op. cit.,* p. 434; D. Chirică, *op. cit.,* p. 236; Al. Bacaci, Gh. Comăniţă, *op. cit*., p. 210; A. Vişan, *op. cit.,* p. 21.

[2] Art. 1110 par. (1) NCC.

b) The deceased *renouncer of the succession* cannot be represented by his/her descendants, who can only collect the inheritance on their own behalf (Art. 967 NCC).

c) The *renouncer* gratified by the deceased through a donation will not be obliged to report it, even if the liberality he was granted was not exempt from this obligation. Any donation, however, including that from which has benefited the *renouncer of the succession*, is subject to reduction, if by making it the heirs' legal reserve has been affected.

d) The mutual rights of the person entitled to inherit and the deceased, real rights and claims, extinguished by effect of the law at the date of opening the inheritance, through consolidation or confusion, are revived as a result of the renunciation of inheritance.

e) By renouncing the inheritance, the person entitled to inherit, who belongs to the category of heirs that have a seizin, loses the benefit of seizin[1]. However, the acts of conservatorship, supervision and provisional administration achieved by the person entitled to inherit, before renouncing the inheritance, will be preserved, if from the circumstances under which they have been performed it does not result that the person entitled to inherit has acquired the status of heir by performing them [Art. 1110 par. (3) NCC]. Conversely, if the person entitled to inherit has performed acts of disposal, definitive administration or use of goods from the inheritance or acts of conservatorship, supervision and provisional administration, which show indirectly, but undoubtedly, the will to accept the inheritance, he/she no longer has the possibility to renounce the inheritance [Art. 1110 par. (2) and (3) NCC].

f) In principle, the personal creditors of the person entitled to inherit do not have the right to pursue the inherited property. Exceptionally, however, pursuant to the provisions of Art. 1122 NCC, "The creditors of the person entitled to inherit who renounced his/her inheritance in order to fraud them may petition the court to revoke the renunciation as far as they are regarded, but only within 3 months from the date of acknowledging the renounciation. The admission of the action for revocation produces the effects of an acceptance of inheritance by the indebted person entitled to inherit only with regard to the complaining creditor and within the limit of the latter's claim".

Therefore, as in the light of the Civil Code of 1864, the creditors of the person entitled to inherit have the possibility to ask the court the revocation of a fraudulent renunciation of inheritance. But we must note that the new Civil Code retains a shorter period, of 3 months, to appeal the action for revocation of a fraudulent renunciation.

However, in no case do succession creditors have the right to pursue the renouncer's patrimony assets.

g) The renouncer has no obligation to pay the inheritance taxes.

1.4. Revocation of the inheritance renunciation[2]

1.4.1. The notion, the legal regulation and the conditions of the revocation of inheritance renunciation

Art. 1123 NCC offers the renouncer the possibility of revoking the renunciation of inheritance, mainly in order to avoid inheritance vacancy, although the act of succession option is, in principle, irrevocable.

The revocation of waiver of inheritance is possible only if the two following conditions are met, cumulatively:

a) the period of prescription for the right of succession option has not expired;

According to the provisions of art. 1123 NCC, the renouncer may revoke the waiver at any time during the term of the option. In the specialty literature[1], attention is drawn to the

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[1] On this aspect, see Ilioara Genoiu, *The Novelties Brought in the Matter of Seizin by Law no. 287/2009*, in the journal "Agora International Journal of Juridical Science", no. 2/2011.

[2] The Civil Code of 1864 regulated the retraction of inheritance renunciation.

fact that the expiration of the succession option does not operate automatically, at 1 year after the opening of succession, but must be considered in its concrete circumstances, by reference to the person entitled to inherit who has revoked the waiver of inheritance, taking into account all rules governing the prescription of the right of succession option (such as the suspension of extinctive prescription).

b) the inheritance has not been accepted, in the meantime, by other eventual heirs of the deceased who have vocation to the share that would go to the renouncer.

The renouncer cannot reconsider his/her decision if the inheritance has been accepted by the other eventual heirs. Elements such as the fact that the acceptance of inheritance is express or tacit, that it occurred before or after the renunciation of inheritance, that it comes from a coheir, subsequent heir, legal or testamentary heir are irrelevant[2].

The revocation of waiver of inheritance is possible, however, even if the legatee by particular title or that by universal title has accepted the inheritance. As regards the legatee by universal title, it is required that, by his acceptance, inheritance vacancy should still be preserved for the other share of the inheritance and that the retractor should have vocation to that share[3].

Therefore, the revocation of waiver becomes impossible from the moment when the succession is no longer vacant, having been accepted by the eventual heirs with vocation to its universality[4].

In relation to the rights of the village, town or, if that may be the case, of the city or state on the vacant succession, the renouncer may revoke his option until the expiry of the prescription period for the right of succession option, even if certain measures for declaring the succession vacant were taken by authorized persons.

In another vein, in art. 1123 NCC, the legislature specifies that the provisions of art. 1120 (regarding the form of renunciation) shall apply accordingly in the matter of revocation of the renunciation of inheritance. Consequently, renunciation of inheritance can be revoked only expressly[5], having to take the form of a statement given either before any notary public or before the diplomatic missions and consular offices in Romania, and, in order to inform third parties, it shall be recorded at the expense of the retractor in the national registry of notaries, held in electronic format, in accordance with the law.

With this, the legislature puts an end to the doctrinal controversy regarding the form of the declaration for revocation of the inheritance renunciation, arising in the light of the Civil Code of 1864, which contains no provision to that effect[6].

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[1] Fr. Deak, *op. cit.,* p. 436.

[2] M. Eliescu, *op. cit.,* p. 136-137; D. Chirică, *op. cit.,* p. 238; Fr. Deak, *op. cit.,* p. 437; Al. Bacaci, Gh. Comăniţă, *op. cit.,* p. 214.

[3] Fr. Deak, *Nota II la decizia T.J. Vaslui no. 599/1985*, in R.R.D. (The Romanian Law Review), no. 10/1986, p. 57, D. Chirică, *op. cit*., pp. 238-239.

[4] Fr. Deak, *op. cit.,* p. 436.

[5] Therefore, renunciation of inheritance can be revoked only expressly, although renunciation can be exceptionally presumed.

[6] According to the regulations of the Civil Code of 1864, the retraction of renunciation, just like pure and simple acceptance of the inheritance, may be express, tacit and forced, although renunciation of inheritance can only be express. Express retraction resulted from a specific document, authentic or under private signature, tacit retraction resulted from any acts, which undoubtedly expressed the renouncing heir's will to accept the inheritance, and forced retraction operated as a consequence of illegal acts being committed by the renouncer, as provided by art. 703 and 712.

1.4.2. The effects of revocation of inheritance renunciation

Following the revocation of waiver of inheritance, under the conditions mentioned earlier, the person entitled to inherit becomes an accepting heir. According to the provisions of art. 1123 par. (2) NCC, "The revocation of renunciation has the value of acceptance, the assets of the inheritance being taken in their current state and under the reserve of the rights acquired by third parties on those assets".

Therefore, it results from the above-mentioned legal provisions that the retracting eventual heir becomes acceptant of the inheritance, the revival of the right of succession option with its two variants being impossible in relation to him. Before 1 October 2011, this issue was controversial, as the previous Civil Code did not contain any express provision to that effect[1].

We consider therefore that revocation of inheritance renunciation is itself an acceptance of inheritance.

Following the revocation of inheritance renunciation, the inheritance assets are taken by the retractor in their current state, while maintaining the rights acquired by third parties over them, earlier than the time of revocation, either by prescription or by acts duly concluded by the custodian or trustee of the inheritance.

2. Renunciation of inheritance in the regulation of French law

In the same way as our legislation, the French Civil Code[2] considers the heir who has renounced the inheritance to have never been an heir. As a result, the renouncer does not benefit from succession assets, but is not held to support the succession liabilities either. The motivation of the renunciation of inheritance may vary from case to case, but most of the times it is represented by the fact that the succession liabilities surpass the succession assets.

Renunciation of inheritance is express and has a solemn character. Therefore, the declaration of renunciation must be made at the registry of the court territorially competent. In addition, in order to make it opposable to third parties, it must be entered in a special register.

The French legislature, just as our national one, recognizes the right of the renouncer's personal creditors to accept the inheritance in his/her place, to the extent that they prove that their debtor has renounced the inheritance with intent to fraud their interests. This acceptance, however, operates only with regard to the applicant creditor and only within the limit of his claim.

Equally, the French legislature governs the possibility of retracting inheritance renunciation. Thus, we find that the French legislature uses the term "retraction of the renunciation of inheritance", the expression used by the Romanian Civil Code of 1864 as well. However, as noted, the new Civil Code uses the term "revocation of inheritance

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[1] With regard to the majoritary opinion, that the revival of the right of succession option with its three variants does not operate in relation to the retractor, see: M. Eliescu, *op. cit.*; p. 137, St. Cărpenaru, *op. cit.*, p. 504; Fr. Deak, *op. cit.*, p. 438; D. Chirică, *op. cit.*, p. 239; L. Stănciulescu, *op. cit.*, p. 438. There was another view expressed, according to which retraction has the effect of reviving the right of succession option, thus allowing the retracting eventual heir to make a new option with regard to the inheritance, in the sense of either pure and simple acceptance or acceptance under benefit of inventory. See, in this regard: M.B. Cantacuzino, *Elementele dreptului civil*, All Educational Publishing House, Bucharest, 1998, p. 259; E. Safta-Romano, *Dreptul de moştenire*, Grafix Publishing House, Iaşi, 1995, p. 133-134; Al. Bacaci, Gh. Comăniţă, *op. cit.*, p. 215.

[2] Regarding the issue of inheritance renunciation according to the regulation of the French Civil Code, see, for example: Ph. Malaurie, L. Aynès, *Les successions. Les libéralités,* 3e édition, Defrénois, Paris, 2008, p. 129-133; Ch. Jubault, *Droit civil. Les successions. Les libéralités,* 2e édition, Montchrestien, Paris, 2010, p. 719-736; P. Voirin, G. Goubeaux, *Droit civil. Tome 2, Régimes matrimoniaux. Successions – libéralités,* 26e édition, L.G.D.J., Paris, 2010, p. 226-229; D. Guével, *Droit des successions et des libéralités*, 2e édition L.G.D.J., Paris, 2010, p. 243-244; A.-M. Leroyer, *Droit des successions,* 2e édition, Dalloz, Paris, 2011, p. 294-296.

renunciation". As in our law, retraction of renunciation of inheritance only operates if two conditions are met:

- that the time limit for exercising the right of succession option has not expired;
- that the inheritance has not been accepted, in the meantime, by other eventual heirs. As a result of the retraction of the renunciation of inheritance, the retractor accepts the inheritance purely and simply. We must mention that French law, unlike the new Romanian Civil Code, provides as a form of succession option, the acceptance of an amount of the inheritance up to reaching the net assets (as the equivalent of acceptance under benefit of inventory, covered previously to the 2006 reform). Although this acceptance operates retroactively, the rights that third parties have acquired over the inheritable goods are maintained, either by operation of prescription, or in the event that they were duly concluded by the trustee of the vacant succession.

Unlike our Civil Code, the French Civil Code does not retain the formalism of the declaration of retraction of the renunciation of inheritance. Consequently, the retraction of the renunciation of inheritance should not necessarily materialize in an authentic document. But the Code of Civil Procedure governs the obligativity of its publication, thereby making sure that the declaration of renunciation of inheritance may be invoked against third parties.

Conclusions

In the matter of renunciation of inheritance, the new Romanian Civil Code, while maintaining the principles of the Civil Code of 1864, is innovative in the following aspects:

- it covers, as exceptions, two situations in which the renunciation of inheritance is presumed (Art. 1112 and Art. 1113 NCC);
- it governs the possibility for the creditors of the person entitled to inherit who renounces the inheritance in order to fraud them, to ask the court to revoke the renunciation, within 3 months from the date they acknowledged the waiver;
- it uses instead of the term "retraction renunciation of inheritance", the more precise phrase – in our opinion – "revocation of renunciation of inheritance";
- it establishes expressly that revocation of waiver of inheritance has the value of an acceptance of inheritance, ending the controversy arising in the doctrine on the subject, in light of the old Civil Code;
- it covers expressly the formalism of the declaration revoking the renunciation of inheritance.

Thus, the new Civil Code demonstrates responsiveness to the proposals made before 1 October 2011 by the specialty literature.

Finally, we consider that, by using a specialized present-day language, the new Civil Code provides a modern, flexible and fair regulatory framework for the renunciation of inheritance.

We also find there is a great similarity, as regards the matter of renunciation of inheritance, between our regulation and the French one, which entitles us to consider that, once again, the French Civil Code was the source of inspiration for the Romanian legislator.

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MINORITY RIGHTS, DEMOCRACY AND DEVELOPMENT: THE AFRICAN EXPERIENCE

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Abstract

The focus of this paper is to contend that in spite of recent attempts to marry human rights to development, the marriage remains one of convenience, and to the inconvenience of disadvantaged groups, particularly indigenous peoples who are the focus of discussion in this paper. The paper also contends that, contrary to the claim that the relationship between rights and development were non-existent to begin with, there was such recognition. The crucial issue, however, is the category of people who were allowed to enjoy rights in order to facilitate development and to enjoy the fruits of development.

Key words: *minorities, human rights, democracy, African experience, modernisation*.

Introduction

This analysis is grounded in three types of relationship between rights and development which I identify – the negative, passive and positive. The paper contends that the positive relationship remains the domain of the political and economic elite who control and direct how and when those are under their control should benefit from a negative or passive relationship approach between rights and development. It is contended that the negative and positive relationship has continued to dominate the dynamics of economic development from the Enlightenment era, through colonialism, post-colonialism and the globalization era. In the context of promoting effective minority rights which lies at the heart of peace and stability in Africa, I suggest that a re-visioning of the relationship between rights, democracy and development in Africa which challenges the current notion of "market democracy," "good governance" and "liberal international orthodoxy." The analysis tackles ways in which effective promotion of minority rights can be realized based on a cultural relativist perspective.

The African Experience of the Negative/Passive Relationship between Rights and Development

When capitalist adventurism extended to the shores of Africa and other places, colonized people were not considered "human beings." Therefore the idea of extending rights enjoyment to the indigenous people of the land was simply unthinkable. Thus, violations of human rights were rife. According to Howard, the Gold Coast,[1] civil and political

[1] After independence in 1957, Gold Coast was changed to Ghana.

rights, as the contemporary world now defines them, were certainly not practised under colonial rule." She writes,

> *Indeed, the British initially opposed U.N. passage of the Universal Declaration of Human Rights because they were afraid that the declaration would oblige them to implement those rights in their colonies.*[1]

However, to foster and facilitate development of the colonial economic enterprise, some members of the colonised population were "raised" to a higher status than others, having been recognised as being "more human" or more prone to adapting European behaviour, lifestyle and mannerisms than others of their kind. These should therefore be given preferential treatment over their "less human" brethren. Thus the policy of "pick and choose" or "divide and rule" was put into place. The "less human" brethren were mainly communities who were not politically and socially-organised and lived a subsistence lifestyle. They had diffused political systems with no recognised headship apart from family or community leaders. These communities lived as hunters, gatherers and nomads whose economic lifestyles did not conform to Locke's theory of property acquisition – that is, "mixing one's labour with the soil" to produce wealth.[2] These were side-lined because they were not considered economically attractive to colonialism[3].

These marginalised indigenous communities suffered most at the hands of colonialism. Where minerals resources were e found on their land they driven off or subjected to all manner of abuse for them to relinquish control over their lands. Also, because of the nature of their political and social set-up, when it came to using local authorities to implement colonial policies such as the "indirect rule,"[4] the authorities found it more expedient to deal with the "more civilised brethren" with organised political structures. In other situations, in communities whose lands could not produce the cash crops such as cocoa, coffee, tea, etc. that were in demand in Europe, nor minerals, a deliberate policy to create labour reserves was implemented to trigger labour flow to centres of commercial, farming, mining and industrial activities. Also, some were unfortunate to be driven off their lands to live as "reserves residents" or as "squatters" in order to give their lands away to support settler colonialism.[5] Most of these fall today into the category of minorities – the Maasai, the San, etc.

Post-Colonialism and Modernisation Theory

As a modern concept, development began to take root during the decolonisation era when the industrial model of development with its accompanying modernisation theory emerged.[6] Modernisation was not only an attempt by colonialism to escape blame for the negative development impact generated by unrelenting exploitation and plunder; but also, for the

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[1] Howard, Human Rights in Commonwealth Africa, (Totowa: Rowman and Littlefield, 1987), at 9.

[2] John Locke, *Two Treatises of Civil Government* (Cambridge: Cambridge University Press, 1988).

[4] 1 According to Potholm.

[4] Indirect rule has been defined by Dr. Lucy Mair as "the progressive adaptation of native institutions to modern conditions." cf. K.A. Busia, *The Position of the Chief in the Modern Political System of the Ashantis* (London: Frank Cass, 1968) at 105.

[5]. In both cases, communities enjoyed a severely limited 'right of occupancy' over their lands. A colonial agent, is quoted by Okoth-Ogendo: 'I am afraid that we have got to hurt their (the natives) feelings, we have got to wound their susceptibilities and in some cases I am afraid we may even have to violate some of their most cherished and possibly even sacred traditions if we have to move natives from land on which, according to their own customary law, they have an inalienable right to live, and settle them on land from which the owner has, under that same customary law an indisputable right to eject them." H.W.O., Okoth-Ogendo, *Tenants of the crown: Evolution of agrarian law and institutions in Kenya* (African Centre for Technology Studies, Nairobi, 1991), 58. cf. Albert Barume, "Indigenous Battling for Land Rights: The Case of the Ogiek of Kenya," in J. Castellino and N. Walsh, eds, *International Law and Indigenous Peoples* (Leiden: Martinus Nijhoff, 2004), 363 at 365.

[6] Wilber and Jameson, "Paradigms of Economic Development and Beyond," in Wilber and Jameson, *Directions in Economic Development* (Notre Dame, Indiana: University of Notre Dame, 1975), at 7.

colonialists to act as the "new redeemers." Modernisation became the new development model for implementation in colonised states in order not to sever the centre-periphery relations that capitalism established through colonialism.

The concept of modernisation involves taking steps towards the attainment of progress from an earlier to a later stage of maturation through the process of *growth*.[1] According to the logic of this model, social and cultural differences between nations, regions and peoples are doomed to pass away unless they do not pose a stumbling block to progress or, unless they contribute to a nation's specific advantage, such as when traditional values help to discipline workforces to comply with the exigencies of organizational change.[2] Thus, W.W. Rostow outlined the 4 stages of evolution that all countries would have to go through to attain economic growth: first, the "traditional" stage; the "preconditions of modernisation" is established in the second stage; third, the "take off" stage, and; fourth, the "drive to maturity."[3] One salient feature of this model of development is the notion that economic growth, based on industrialisation and catapulted by science and technology, would spawn a gradual uni-dimensional evolution towards a more open global society imbued with some peculiar characteristics.[4] Development is thus to be measured by the level of technological advance as attained in a "high mass consumption" society. This model gives the state a prominent role to play as the agent "for advancing the human and economic dimensions of development through its exclusive prerogatives in collective problem-solving" and conflict resolution".[5] Obviously, the implementation of this theory impacted most negatively on the tribal communities who did not have organised socio-political systems.

Post-Colonialism and the Colonial Legacy

A major colonial legacy was the capitalist policy of homogenisation and integration of colonised economies into the global economy and amalgamation of different ethnic entities to form the independent nation-states of Africa. At the time of independence, African leadership pursued this policy by seeking to consolidate communities of people into the nation-state.

It was argued that to preserve unity, the community was to be incorporated into the state or the community equated to the state. In pursuance of this policy, for example, the OAU Cultural Charter for Africa stipulates in article 4 states that

> *The African States recognize that African cultural diversity is the expression of the same identity; a factor of unity and an effective weapon for genuine liberty, effective responsibility and full sovereignty of the people.*[6]

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[1] Karl Marx and Frederick Engels, *Manifesto of the Communist Party* (New York: International Publishers, 1989); Evandro Agazzi, "Philosophical Anthropology and the Objective of Development," in UNESCO, *Goals of Development* (Paris: UNESCO, 1988).
[2] Such as "indirect rule".
[3] W.W. Rostow, *Stages of Economic Growth: A Non-Communist Manifesto* (New York: Cambridge University Press).
[4] These include (a) increasing individual occupational and social mobility together with a growing equality of educational opportunities; (b) a fading away of differences based on traditional differences and life-styles; (c) a concomitant growth of the middle classes as a consequence of the increasing demand for highly skilled and professional workers; and, (d) consequently, a decrease in collective types of antagonism, especially of class struggle. Berting, *supra*, note...., at 145. It is contented that the perpetuation of this illusion of unilineal evolution toward an open, homogenised global society led to the slave trade and colonialism with its immeasurable negative impact on the naturally-evolving human rights and development from the *communal* to the *political* stages in Africa and the Americas.
[5] Shivakumar, "The Constitutional Foundations of Development Workshop in Political Theory and Policy Analysis," Indiana University, Bloomington IN 47408, at 2.
[6] Adopted at the 13th Ordinary Session of the OAU, in Port Louis, Mauritius, from 2nd to 5th July, 1976.

The pursuit of this policy meant, for most minority groups, "internal colonialism." They were and some are still treated as second-class citizens. They continue to struggle for recognition of their land rights; some remain on reserves carved out for them by the colonial authorities, etc. Some are still considered "backward and inconvenient entities" that pose as stumbling blocks to development and need to be assimilated or denied citizenship status. Some have been killed, dispossessed and/or forced to assimilate in the process of nation-building and national economic growth.[1]

Under the Charter of the then Organisation of African Unity (OAU), minority rights issues were put on the back burner. All references to "peoples" were interpreted to mean a whole people, a country as a whole. The principle of *uti posseditis* was affirmed in the 1964 OAU Cairo Declaration on Border Disputes among African States[2] by seeking to legitimise national borders inherited from colonial rule. In addition, sovereignty and territorial integrity were held sacrosanct, underpinned by the principle of non-interference in internal affairs. The OAU, supposedly, had more pressing issues to tackle and contended that giving room for human rights would compromise that goal, especially minority rights issues.

African leaders sought justification for a resort to this approach through the notion of cultural relativism. Among others, it was contended that a strong hand was needed to propel economic growth and giving room for the exercise of civil and political rights would hamper development. Politically, it was argued that granting of human rights would lead to the unleashing of divisive forces that may occasion the collapse of the fragile nation-state.[3] Consequently, the contention was that emphasis should be placed on economic, social and cultural rights over civil and political rights by. But in reality, African leaders did not pursue economic, social and cultural rights. Had they done so, better protection would have actually been accorded minority groups.

Response to the Cultural Relativist Argument

Indeed, African leaders got it wrong regarding the arguments made above. I contend that the human rights approach to cultural relativism is that it is to be used as a tool by oppressed people, not those who thread the corridors of power. Secondly, it should be a sword (a tool to fight injustice) and not a shield (a defence against injustices as a cultural choice). Finally it is to be a tool to correct the past, not justify abuses in the present or future.

The legitimacy and relevance of the cultural relativist claim rests on the recognition of indigenous and minority rights. The reason is simple: indigenous culture is the source for identifying the type of rights that the members of that community share. Rights from the cultural perspective are derived from the institutions, traditional symbols, proverbs, songs and indigenous knowledge of the local people.

Culture is supposed to enhance better protection of human rights. However, before it can effectively do so, it has to embody the voices of the people, especially marginalized entities such as minorities. A basic criteria will be that the rights should reflect the aspirations and input of the people, be grounded in their daily lived experiences, and the enjoyment of those rights should likely lead to a holistic form of development for them.

Responding to the community-state relationship argument, I contend that in reality, the community and the state are different institutions, and to some extent at odds with each other. While the state depends on laws, rules and institutions, the community, for the most part, relates to norms developed through forms of consensus and enforced through mediation

[1] Russell Barsh, "Socially-Responsible Investing and the World's Indigenous Peoples."
[2] Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), judgement of 22 December 1986, ICJ: www.icj-cij.org/icjwww/ (February 2000).
[3]Ghai, "Human Rights and Governance: The Asian Debate." (November 1994) *Centre for Asian Pacific Affairs*.

and persuasion. And within the community, one finds diverse groups distinguished along ethnic, linguistic and other lines.

For the sake of minority right analysis, we can identify two types of such communities: those who like to remain on their ancestral lands and engage in activities that reflect the cultural ethos of their ancestors and general way of life. These are generally referred to as indigenous peoples. Secondly, those who travel from away from the ancestral lands to live in urban areas but still want to preserve and practice, to a limited extent, their linguistic, ethnic and cultural identifies. These people are referred to as minorities, recognised under article 27 of the ICCPR.

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

There are others who as well those that cut across ethnic, linguistic and cultural lines. These are broadly defined as civil society.

The political situation in Africa is such that, as a result of the mistrust in the colonial system's artificially created nation-state or "civic" public, the original, the primordial (ethnic) public, has remained in tact. People will transfer their trust from their ethnic loyalty to the state and only if they get assurances from the state that it will take care of their interests. This trust will also facilitate the creation of social groups that cut across ethnic and primordial lines in the civil society. However, with the failure of the colonial state to achieve that, the 2 publics remain. As a result, viable functioning civil society remains non-existent.[1]

Minority Rights Protection at the International Level

Internationally, in respect of indigenous peoples, or recognition of group rights to culture, we have various declarations and conventions, such as the UN Declaration on the Right of Persons belonging to National or Ethnic, Religious and Linguistic Minorities[2] and the ILO Convention No. 169 on the Rights of Indigenous and Tribal Peoples.[3]

But at the same it is important to note that the conventionally accepted definitions of minorities do not easily fit into the African notion of a minority. For example, referring to one conventional definition of indigenous people proposed by Francesco Capotorti, [4] one notices there are some major shortfalls in its application to Africa. For example, it is found that it contains the idea of two main groups, one dominant and other non-dominant. However, looking at the ethnic composition of Africa, there are several different minority groups located in the same country, with one (or sometimes with a few more) as the dominant and the rest in non-dominant status. Another important lacuna that is significant for consideration in terms of minority rights in Africa is the notion that the idea of

[1] For example, in Ghana, according to a 1998 survey, while it was noted that "civil society is alive and well" membership of a religious organisation "remains the principal form of non-governmental association." 76.9% of the people interviewed said they attend religious services at least once a week. 34.3% claimed to officially belong to a political party. Michael Bratton *et al*, *Attitudes to Democracy and Markets in Ghana* (Afrobarometer Paper No.2), at 15 and 16.

[2] Adopted by General Assembly resolution 47/135 of 18 December 1992.

[3] Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session. Entered into force on 5 September 1991.

[4] UN Special Rapporteur on Minority Rights: "A group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members- being nationals of the State- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language." Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities UN Document E/CN.4/Sub.2/384/Add.1-7 (1977).

preservation of culture, traditions, etc. is not pursued in a vacuum; not in isolation from issue of survival and development. It is therefore vitally important to attach culture and tradition to the mode of economic survival and development of the group. Such lacunae are taken for granted in the leading literature on minority rights which only give scant attention to minority rights issues in Africa. Also, ethnicity is portrayed as the principal cause of civil wars in Africa. However, the ethnic factor is only the immediate cause. The remote factors are mainly economic and political: access to scarce resources and political power.

Again, looking at another conventional definition of "minority group" by José Martínez Cobo[1], Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination & Protection of Minorities it is noted that in the African context, "indigenousness" is not always tied to aboriginal status or original title to land. Also, there are other traditional means of tracing common descent or ancestry, such as through myths and fables.

In its report on conflicts in Africa, the Committee on Elimination of Racial Discrimination (CERD), among others, expressed "its alarm at the growing mass and flagrant violations of human rights of the peoples and ethnic communities in Central Africa, in particular, massacres and even genocide perpetrated against ethnic communities, and resulting in massive displacement of people, millions of refugees, and ever deepening ethnic conflicts."[2] As Christopher J. Bakwesegha, a representative of the OAU, laments, "[t]here is hardly any country in Africa that has been spared the wrath of ethnic conflicts in terms of loss of lives, destruction of property as well as human displacement."[3]

Thus, instead of hoping to attain development and stability through suppression of indigenous minority rights, the reverse has been attained. Typical example is the case of the

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[1] Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of that society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. Their historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

a. Occupation of ancestral lands, or at least parts of them;
b. Common ancestry with original occupants of these lands;
c. Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood and lifestyle);
d. Language (whether used as the daily language, as mother-tongue, as habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
e. Residence in certain parts of the country, or in certain regions of the world;
f. Other relevant factors.

Study on the Problem of Discrimination against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1986/Add.4

[2] The Committee on the Elimination of Racial Discrimination, *Statement on Africa:. 20/08/99. A/54/18,para.24. (Other Treaty-Related Document*) 55th session 2-27 August 1999 Reiterating its recent decisions, declarations and concluding observations, such as decision 3 (49) of 22 August 1996 on Liberia, resolution 1 (49) of 7 August 1996 on Burundi, decisions 3 (51) of 20 August 1997, 1 (52) of 19 March 1998, and 4 (53) of 18 August 1998 on the Democratic Republic of the Congo, the declaration of 13 March 1996 on Rwanda, the concluding observations on Rwanda of 20 March 1997, the concluding observations on Burundi of 21 August 1997, decisions 4 (52) of 20 March 1998, 5 (53) of 19 August 1998 and 3 (54) of 19 March 1999 on Rwanda, decision 5 (54) of 19 March 1999 on the Sudan, which were the results of the Committee's consideration of the ethnic conflicts in these States parties under its early warning and urgent action procedures within the context of the Convention,. It also referred to the Secretary-General's report on "Causes of conflict and the promotion of durable peace and sustainable development in Africa," (A/52/871-S/1998/318, dated 13 April 1998), which noted among others, that "the main aim, increasingly, is the destruction not just of armies but of civilians and entire ethnic groups."

[3] It is on record that in the last 30 years, more than 30 wars have been fought in Africa. In 1996 alone, 14 of the 53 Member States of the OAU were affected by armed conflicts accounting for more than half of war-related deaths worldwide and resulting in more than eight million refugees and displaced persons. Most of these states bear an ethnic dimension. Christopher J. Bakwesegha, Keynote Address on "The Rise of the Ethnic Question," Bonn, Germany 13-16 December, 2000.

Nigerian minorities in the Niger Delta. The strong-arm tactics employed by the Nigerian government as well as Shell to deal with the disruption to the work of Shell by the minority groups in the Niger Delta has resulted in exacerbation of Nigeria's chronic fuel shortages as well the death of thousands of people through various acts, such as explosions while trying to take out fuel from the leaking pipes, extra-judicial executions and wanton invasion and destruction by military task force personnel.[1] Shell has also reported increasing theft, or "bunkering" of crude oil from its facilities, resulting in the loss of up to 32,000 barrels per day of production recently.[2] In the same report, it says that the government forces from the non-Niger Delta community, after their wanton acts of destruction "left graffiti that included ethnic slurs and reflected views that the town and the whole Ijaw ethnic group must be punished for the crimes committed by their sons".[3]

Furthermore, as opposed to national minorities, Africa has "cross-border minorities", an issue yet to be examined by the scholarship on minority rights but which lies at the heart of most conflicts in Africa.

The importance of promoting minority rights in Africa, for instance, is that there are some unique aspects of rights that need to be protected. Land is crucial to minorities, language as a vehicle to propagate and preserve the culture of the people, protection of the environment and traditional means of subsistence. Also, there are other rights found in the mainstream notion of rights that may be redundant or not be ripe for exercise in such communities For example, in most indigenous communities, political rights in terms of voting and to be voted for is absent because they have a hereditary rule which automatically determines who qualifies to be the next leader. Also, some communities have other ways of determining who should lead the group, eg, through consultation of the oracle. Again, in some communities, there is no organised political system akin to the Western. Such societies are run on family head basis. For communities that fall into such a category, external self-determination will be the last thing on their minds since their cultural lifestyle does not have room for it. Without experience in a centralised traditional system of governance, if external self-determination is granted, it will lead to the collapse of the new entity. However, some form of internal self-determination will be crucial for them to maintain this lifestyle.

Globalisation and Minority Rights

In spite of the contention that human rights and development have finally become bedfellows, it is my contention that the relationship hovers between the negative and passive. So long as the positive is not put in place, the relationship remains a tenuous one and unsustainable. Particularly, attempts by Western states to impose its brand of democracy on non-Western states is not in the interest of minority groups and for the sake of political stability and social cohesion. Though to a large extent, the idea of liberal democracy has helped to sustain the Western society, the concept has not proven effective and workable in most non-Western societies for a number of reasons. But one fundamental factor that is most often overlooked is its lack of recognition of a pluralistic, multi-ethnic-based notion of democracy. It is the majoritarian vision of the liberal international orthodoxy[4] that has been suggested for implementation. This notion, however, does not have room for minority rights *per se*.

[1] In the most serious such fire, in October 1998, more than one thousand people died in Jesse, Delta State, but similar explosions have continued to take place. Several hundred people died in July 2000 in a fire in Adeje, near Warri, Delta State, and dozens died from smaller explosions throughout the year. HRW, "Update on Violations of Human Rights in the Niger Delta." www.hrw.org/backgrounder/africa/nigeriabkg1214.htm.

[2] *Ibid*.

[3] *Ibid*.

[4] Donald Rothchild, *"Liberalism, Democracy and Conflict Management: The African Experience*." Paper presented at Conference on "Facing Ethnic Conflicts: Perspectives from Research and Policy-Making," Bonn, Germany 14-16 December 2000: www.zef.de/download/ethnic_conflict/rothchild.pdf.

What makes the democracy idea even more precarious is the fact that it has been watered down to the notion of "market democracy" which aims more at ensuring the efficacy of the democratic structure to promote market efficiency. This notion of democracy is defined by the concept of good governance.[1]

It is this form of governance or democratic ethos derived from the liberal notion of rights, and carried over from the Enlightenment era that is being imposed on Africa and other developing countries. Thus, in the NEPAD document,[2] African states make an undertaking "to respect the global standards of democracy."[3] These seem to find expression in the Declaration on Principles Governing Democratic Elections in Africa:

1. Democratic elections are the basis of the authority of any representative government;
2. Regular elections constitute a key element of the democratization process and therefore, are essential ingredients for good governance, the rule of law, the maintenance and promotion of peace, security, stability and development;
3. The holding of democratic elections is an important dimension in conflict prevention, management and resolution.
4. Democratic elections should be conducted:
   a. freely and fairly;
   b. under democratic constitutions and in compliance with supportive legal instruments;
   c. under a system of separation of powers that ensures in particular, the independence of the judiciary;
   d. at regular intervals, as provided for in National Constitutions;
   e. by impartial, all-inclusive competent accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics.[4]

However, where sovereignty is vested in an authority "that proclaims its competence and willingness to settle all issues of collective action facing the society"[5] good governance becomes unitary in focus. Good governance then loses its relevance for application in communities that multi-ethnic in composition and has serious minority rights issues to grapple with. In such contexts, polycentric systems of governance work better.

Polycentric systems of governance mean freeing space for minorities to assert themselves. "Polycentric designs for governance stress processes of self-coordination [and cooperation] among multiple, independent, and overlapping problem-solving units, with each capable of making adjustments to other such units, *as coordinated through a general system*

[1] The UNDP policy document *"Governance for Sustainable Human Development"* defines governance as: [T]he exercise of economic, political and administrative authority to manage a country's affairs at all levels.... Good governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law. Good governance ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources Http://magnet.undp.org/Docs/policy5.html.

[2] New Partnership for Africa's Development (NEPAD). NEPAD is is a vision and strategic framework for Africa's Renewal. The NEPAD strategic framework document arises from a mandate given to the five initiating Heads of State (Algeria, Egypt, Nigeria, Senegal, South Africa) by the then Organisation of African Unity (OAU) to develop an integrated socio-economic development framework for Africa. The 37th Summit of the OAU in July 2001 formally adopted the strategic framework document.

[3] NEPAD Document para 47.

[4] OAU/AU Declaration on Principles Governing Democratic Elections in Africa: AHG/Decl. 1 (XXXVIII).

[5] www.indiana.edu/~workshop/wow2/publications/jun1699.pdf Shavikumar, supra note 12.

of rules."[1] This affords problem-solving units within a polycentric system greater discretion to solve local problems locally.[2] It also gives room for the realization of potential of the local people, and thereby to acquire agency, self-confidence and recognition of their worth and dignity. For that matter, it is not merely a question of recognizing the underdevelopment and poverty of minorities and seeking to help them. It is a question of giving them space to contribute to helping themselves.

Democracy is supposed to be empowering when people are able to transcend their personal interests and meet as a group to articulate needs, assess capacities, impose duties and make rights claims or assert the same in order to deal with their needs. It in turn involves finding through this interaction, the means to interpret their experiences, the injustices and stumbling blocks to their development and realise self-hood and contribute to community development. The process involves the exercise of the ensemble of right to freedoms of association, movement, assembly, etc. helps people to acquire agency, recover selfhood and earn self-confidence.

Judging by Africa's past record on lack of recognition of minority rights, and also the fact that the new Constitutive Act of the African Union (AU) does not deal with minority rights issues unless, indirectly a situation degenerates into a crisis,[3] this type of democratic arrangement does not bode well for the future stability and development of the African continent. It is noted that while the controlled democratisation process resulted in 16 regime changes between 1989-94,[4] 21 states remained "illiberal democracies",[5] and in 13 others no elections at all were held. However, the quality of elections declined in 11 out of 23 elections between 1995 and 1997.[6] Rothchild contends:

> *Even when viewed in terms of the narrow prism of competitive elections rather than the broader processes of accountability, high information, extensive participation, and equal resource distribution, the limits of constitutional engineering in Africa are apparent. Election processes, despite their emphases on individual choice and the possibility of cross-party voting, remain vulnerable to elite mobilization along ethnic lines, especially when elites play upon fears that members hold about their groups' security and economic well-being.*[7]

Rothchild cites the Burundi example, where at the urging of the US and various non-governmental organizations democratic elections were called for and held in Burundi in 1993-94 in an effort to bring ethnic peace between the Hutus and Tutsis. However, the plan failed. It rather paved the way for the resumption of intergroup violence in Burundi. The reasons for the failure of the Burundi plan was ethnic differences were exploited by the local elite who have always felt threatened by regular political change through the ballot box. The second reason is that political participation was emphasized over and above, first, the formation of strong civic institutions.[8] Rothchild:

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[1] *Ibid*.
[2] *Ibid*, 12.
[3] Under Article 4(h), the Union reserves the to intervene in a Member State "pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity."
[4] Rothchild, *supra* note at 3.
[5] Politics that combine elements of competitive elections with over-centralization of power and no transfers of power. Fareed Zakaria, "*The Rise of Illiberal Democracy,"* in (Nov/Dec 1997) Vol. 76 No. 6 *Foreign Affairs*, 22. cf, *ibid*.
[6] Michael Bratton, *"Second Elections in Africa,"* (1998) Vol. 9 No. 3 *Journal of Democracy*, 51 at 59.
[7] *Ibid*.
[8]. cf Rothchild, supra note at 5.

> *Clearly, to the extent this preference for liberal democracy becomes orthodoxy and fails to adjust to local realities and alternative visions, it can sometimes complicate the process of managing conflict in ethnically-divided societies.*

In the same vein, in talking about the roadmap towards poverty reduction, the emphasis on reform by poor country to be followed by more donor assistance – an approach strongly re-emphasised in the Millennium Development Compact – seems to be a biased, and therefore ineffective diagnosis. The reforms that are being suggested have been implemented since the imposition of the SAP in the 1980s, the principal addition being the democratisation process from the 1990s. But the majority of the citizens of African states continue to grow poorer, less healthy, less educated, more disenfranchised, etc.:

> *Between 1990 and 1998, the number of people living in poverty actually* ***increased*** *in Sub-Saharan Africa, from 242 to 291 million people. And while the number of people living on less than a dollar a day—in absolute poverty—declined in this period by five percentage points the world over, in Africa the change was barely discernible. Even with faster economic growth, the number of people living on less than a dollar a day will increase from nearly 291 million in 1998 to nearly 330 million in 2008. Under conditions of slower growth and rising inequality, that number could be as high as 406 million. In 17 of the 48 countries in Sub-Saharan Africa, life expectancy* ***declined*** *between 1990 and 1998, while it went up from age 63 to age 65 in all developing countries. Africa is home to 70 per cent of the adults, and 80 per cent of the children, living with HIV in the world. Of the nearly 22 million people who have died from AIDS and AIDS-related diseases, 17 million have been Africans. It is estimated that by the year 2014, the population of the world will be 7 billion. Of the increase, nearly a quarter—240 million—will be in Sub-Saharan Africa* [1]

In an unprecedented fashion, according to the HDR 2003, 21 countries, most of them were from Africa, actually experienced declines in the last decade, making the 1990's a decade of human development crisis.[2]

Conclusions

The paper has sought to analyse the critical role of the relationship between human rights, democracy and development, particularly as it affects minorities, and to contend that the so-called relationship between them has not crossed the line to the positive. Though the recognition of the need for positive relationship approach is there, its enjoyment is only made available to those who tread the corridors of powers – be it multinational corporations, heads of government, local political elite, etc. Thus, the notion that the positive relationship has been established now is being touted largely for political reasons and as a public relations gimmick. That, using human rights rhetoric is used as a charade and façade to deflect criticism; as a salve for the conscience of those who trample on the rights of others in the name of development; as a means to actually facilitate increased exploitation of an already exploit people, particularly minorities; as a means to hoodwink the oppressed and exploited that there are do-gooders who are seeking their well-being. The slogan is no more "giving

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[1] Foreword by James D. Wolfensohn, *The World Bank President in Shantayanan Devarajan*, *et al*, eds *Aid and Reform in Africa: Lessons from Ten Case Studies* (2001) The International Bank for Reconstruction and Development /The World Bank, Washington.

[2] Sakiko Fukuda-Parr, Director and Editor-in-Chief, Human Development Report 2003, *"Focusing on the Millennium Development Goals to Reverse a Development Crisis,"* July 8, 2003. www.undp.org/hdr2003/sakiko.html Last visited: July 12, 2003.

people fish for the day" but "teaching them how to fish". But is that enough, without letting the people decide if they like fishing or eating fish in the first place?

It is troubling that African states have been manipulated to go along with varied forms of development agendas by Western states, even in the NEPAD programme. This is reflected in NEPAD's subscription to the "global standards of democracy" which does not take into account a multi-ethnic approach to democracy. At best, African leadership has only given indirect attention to minority rights in the African Union Constitutive Act and this should be decried. With the realisation by the AU regarding the relationship between lack of democratic space and civil wars and the subsequent impact of that on development,[1] one would have expected that the AU will wake up to the realities of the times and give due recognition and respect for pluralistic approach to democracy. A positive approach to ethnicity in African politics is needed. It is the only way to constructively deal with the ethnic dimension that has been exploited by African leaders and has accounted for almost all the 30 or more wars that have been waged in Africa, including both inter-state and intra-state conflicts since the formation of the OAU.

To prove effective, any attempt to establish the positive relationship between rights and development should give a prominent place to the nurturing of a vibrant civil society. The new international order, though claiming to thrive on civil society, has only created a caricatured civil society whose basis for legitimacy are derived from their funders and the donor community, and not the local people they allege to represent. While the international civil society has managed to weaken the legitimacy of the state, and roll back the state in some respects, it has not actually empowered the people, as proposed and is touted. The precondition for that occurring was inexistent in the first place. The solution to the building of effective democratic structures lies in adopting traditional African approaches to establishing indigenous civil societies which link the urban to the rural communities, and expressed in town/village improvement associations. Such associations have proved effective in supporting community-based projects in rural communities, keeping the rural communities informed about developments in the city, etc. What was not included in their programme was human rights education, largely due to the wave of suppression of human rights and civil society activism in the past.

To facilitate monitoring of minority rights, I share the adoption of the "violations approach proposed by Chapman."[2] The author identifies three categories of violations. The second, which is of direct relevance to our discussion, contains violations relating to patterns of discrimination.[3] Articles 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights stipulate that violations related to discrimination represent a fundamental breach of the Covenant,[4] which cannot be excused on grounds of being subject to progressive realisation. Also, under the International Convention on the Elimination of all Forms of

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[1] Eg, the Preamble to CA states, inter alia, "Conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda."

[2] Audrey R. Chapman*,* A "Violations Approach" to Monitoring the International Covenant on Economic, Social and Cultural Rights":
www.carnegiecouncil.org/viewMedia.php/prmTemplateID/8/prmID/580

[3] The other two relate to state violations resulting from government actions, policies, and legislation; and, the state's failure to satisfy minimum core obligations of enumerated rights

[4] Article 2(2) calls on States Parties to guarantee that the rights enumerated in the Covenant "will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 3 further amplifies that States Parties must "undertake to ensure the equal rights of men and women to the enjoyment of all economic, social, and cultural rights set forth in the present Covenant."

Racial Discrimination,[1] apart from the usual obligation on states to promote non-discriminatory policies, states are also obliged to take proactive steps to eliminate discrimination against minorities through affirmative action.[2] The responsibility is on African states that have supposedly vowed preference for economic, social and cultural rights to live up to their commitments.

The type of democracy that is prescribed for Africa is not only tied, but it does not establish the positive relationship between human rights and development. It is simply presented as a functionalist tool to pave the way for the establishment of market forces that will facilitate further exploitation of an already over-exploited, marginalized, disenfranchised and disempowered community. That is the essence of *market* democracy. According to this democratic arrangement, human right is not considered key. The emphasis is simply on some form of political participation through periodic elections. But democracy is more than that.

It is also recommended that for democracy to thrive in Africa, it should be located in a broad-based, inclusive national governments represented by all ethnic groups in the country, no matter how large and diverse. This may include automatic reservation of certain parliamentary seats to disenfranchise and marginalised minority groups. National leadership could also be organised on rotational basis where the major political parties who obtain a certain percentage of the votes will have the opportunity to serve as Presidents in turn and the rest as Vice-Presidents with responsibilities over certain cabinet portfolios. Presidential elections should be held over a period longer than the conventional 4-year time frame to enable various party representatives to take their turn as leaders. However, parliamentary elections could be held on a more frequent basis.

African citizens should be given the opportunity to design effective, workable and practical grassroots democracy. Democracy should play a role in establishing the proper relationship with human rights and development. It has to be in tune with the needs and circumstances of the people. It has to be owned by them, be identified with their aspirations and daily experiences and its practice should likely lead to the attainment of sustainable, holistic development. It should have a functioning civil society.

More importantly, minority groups should be empowerment through a process of awakening them to assert their traditional rights. Ngoupande aptly points out:

> *The impossibility of achieving economic take-off brings us back to the most important question: that of man. Psychological blocks, the after-effects of traumatism caused by aggression, oppression and humiliation, are the first obstacles to mobilisation for development. Statistics, projects, plans, bilateral or multilateral aid, have for twenty-five years come up against this insurmountable wall of human despair. [emphasis added].*[3]

The exercise of these rights would not only lead to a psychological liberation of minorities, but would also empower them to protect their gains and human dignity against abuse by those who exploit their resources without adequate or no compensation and those who allow this exploitation to proceed.

An African notion of rights would see human rights as the key to unlocking the fetters to development. Put another way, the lower the level of development, the more human rights are needed for exercise to overcome the obstacles to development. Human rights are expected to help the people to appreciate the internal and external factors they need to deal with in their bid to attain development. The internal element concerns the inner abilities of the people represented by their potentials, gifts, talents and capacities and how to liberate and

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[1] Adopted and opened for signature and ratification by General Assembly resolution. 2106 (XX), of 21 December 1965. Entered into force 4 January 1969, in accordance with Article 19

[2] Article 1(4) thereof.

[3] Ngoupande, *supra*, note 50, at 138.

make maximum utilisation of these untapped human resources. The external is linked to their relationships with the ruling entities (both local and external) that tread the corridors of power: how to appreciate the obstacles they pose to the popular sector's development and how to confront power and demand change from the oppressive ruling elite.

The ultimate goal of development should be the realisation of the human potential and dignity through the ability of the community to meet its needs *per* its members' efforts and contribution. In short, development must be seen as an end in itself, to be attained through the exercise and enjoyment of rights. Clearly then, it is the contention of this paper that development is meant to enhance people's core values, and that development or growth is desirable only if it is consistent with people's deepest values.

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THE FINE PENALTY IN THE NEW CRIMINAL CODE

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Abstract

In the judicial system, the penal law has an essential role, those to defend and to guarantee the main relationship in a society. In its framework, one of the pylon institutions is represented by the penalty system. It reveals the penal policy of the state during a period of time. Therefore, taking in consideration the regulation of the new criminal code, we propose to analyze the fine penalty, which has a new regulation, substantial modified. This will be the topic of the present article.

Key words: *penalty system, fine penalty, new regulation.*

Introduction

The criminal sanctions represent a fundamental institution of the criminal law, and along with the institution of criminal offence and responsibility represent the basis of criminal code[1]*. The regulation of criminal sanctions can be found only in the general part of the Criminal Code, each offence assuming one or more of them, depending on its degree of abstract social danger. The specification of the types of sanctions, their general mode of implementation and execution has a special significance for the entire criminal regulation, being an essential aspect in the the law of legality, thus contributing to the accomplishment of the legal order.*

The Fine in the New Criminal Code. Due to this special importance, the legislator felt the need to dedicate an entire title to punishments, namely the IIIrd Title of the Criminal Code, this being one of the most extended and comprehensive title. The enforcement of a criminal sanction represents the final stage in the chane of basic institutions of the criminal law; the perpetration of a crime and the assessment of the criminal responsibility are

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[1] Gabriel-Silviu Barbu, Alexandru Şerban, *Drept execuţional penal*, Ed. All Beck, Bucharest, 2005, p. 12.

implicitly clenched by the infliction of a sanction which is inevitable and mandatory[1]. The punishment derives from a moral, juridical and social necessity which has the purpose of collective and personal attunement, out of a need for justness, and at the same time serving an utilitary role and one of social defence. In order to obbey the legality principle, the criminal sanctions are stipulated in the criminal rules and, as shown before, only in the content of the general part of the Criminal code, this regulation having a general nature. Also in the light of this principle, the enforcement and execution of the criminal sanctions must follow the stict rules of the Criminal code and of the law of execution of punishments, as a rule, the judge not being able to overstep the special bounds, the minimum and the maximum, stipulated for each and every offence[2], nor the general ones[3]. Coming to the analysis of the types of punishments, we remark that the number and the form undertaken by the system of penalties seems like a "carrousel" in relation to the way they were drawn up more than 200 years ago. Today, due to the evolution of the criminal thinking system, the variety of penalties allows the judges to give more customized punishments. In today's legal system the main penalties, applicable to the private person, are: life detention, imprisonment from 15 days up to 30 years and fine from 100 up to 50.000 lei[4]. Even if a certain evolution in the Romanian penalizing system cand be observed, even today it is liable to two critics: the low number of main penalties, which in essence and in practice are only two – fine and imprisonment, and their repressive character[5]. Unlike our criminal law, in the Spanish criminal law, the punishments are more complex, giving the judge the possibility to customize with more precision the criminal sanction[6].

a. For a private person. According to the displayed list of reasons in the new criminal code[7], the fine penalty is presented with a new regulation, "*and a range of applications significantly widened by the new criminal code*"[8]. As a matter of fact, out of the three main penalties, the fine is the one which has benefited from a special attention from the legislator, being the most reformed of all. In the new penal code, the fine is regulated by the provisions of art. 53 par. 1 letter. c) and art. 61-64.

Starting with the definition of the fine there are some new concepts. Hence, if in the current regulation, the fine is defined in reference to "*the convict who is sentenced to pay it*", in the new regulation, the juridical simplicity and accuracy of the text is closer to the essence of the institution: "*the fine consists of the amount the convict is obligated to pay*"[9]. The new paragraph is more appropriate since, having reached the stage of carrying into effect the fine, the judge has sentenced the person who has committed the crime - namely the offender -; in

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[1] *Ibidem*, p. 13.

[2] Matei Basarab, Viorel Paşca, Gheorghiţă Mateuţ, Constantin Butiuc, *Codul penal comentat*, vol. I, Ed. Hamangiu, Bucharest, 2007, p. 322.

[3] As they result from the dispositions of art. 53 C. Code.

[4] According to art. 53 par. (1) point.1 C. Code.

[5] Costică Bulai, Bogdan N. Bulai, *Manual de drept penal. Partea generală*, Ed. Universul Juridic, Bucharest, 2007, p. 303.

[6] Since they are many, we shall enumerate just some of them, as they are stipulated in the dispositions of art. 33 of the Spanish Criminal Code: *I. Severe penalties:* imprisonment over 5 years; the absolute disability; the special disability for a period of time of over 5 years; the suspension of the right to occupy a public office over a period of time of over 5 years, etc; *II. Less severe penalties:* imprisonment between 3 and 5 years; the special disability up to 5 years; the interdiction of the right to drive engine or one cylinder engine vehicles between 1 and 8 years; the interdiction of the right to carry weapons between 1 and 8 years; *III. Light penalties:* the interdictions of the right to drive engine or one cylinder engine vehicles between 3 months and 1 year; the interdiction of the right to be in certain places, over a period of time of less than 6 months, etc.

[7] The new criminal code is institutionalized by Law no. 286/2009, published in Off. M. no. 510 from 24th of July 2009.

[8] See the website www.just.ro, the official website of the Justice Department.

[9] According to art. 61 par. 1 from the new criminal code (N.C.C.).

other words, in this stage the judge has already decreeded the guilt of the defendant and his criminal responsibility, the stage of the customization of the penalty being the last in the causal chain of a conviction.

Another major difference is that regarding the way the fine is determined; according to the new criminal code it is set by the use of the fine days system, as it has been attempted even from 2004, when it was attempted the achievement of the first a new criminal code. The regulation also subscribes to the line of Western Europe's large justice systems, from which it was also inspired[1].

According to art. 61 par. 2 of the N.C.C., the fine can be set between 30 and 400 days, and the judge can set for a fine day an amount between 10 and 500 lei. In other words, the general minimum of the fine is of 300 lei and the maximum can reach up to 200.000 lei. If we compare these new limits with the ones already existing, we shall notice a tightening of the fine amount; for xample, the general minimum limit has doubled compared to the current one, while the general maximum of the fine has increased 20 times (from 10.000 lei it will reach 200.000 lei).

The assignment of the number of fine days, as well as of the daily amount, will be done by the judge, according to the general customization criteria[2], but also to other legal obligations the convict has towards other individuals in his care, a text identical in essence with that from art. 63 par. 5 from the current code.

With respect to the special limits of the fine days, they are henceforth established according to the main applicable penalty[3]:

- if the fine is single penalty for that offence, the limits in fine days are set between 61 and 180 days;
- if the fine is set alternately with imprisonment, the limits are between 120 and 240 fine days, if the imprisonment penalty is of 2 years or less and between 180 and 360 fine days, if the imprisonment penalty is over 2 years.

Unlike the current situation, the legislator has provided for a special case of aggravation of the penalty: if by the committed offence the acquiring a patrimonial benefit was intended, *the court cand rise the special limits of the fine days by a third*[4]**.** Evaluating this special case of aggravation from the point of view of its juridical nature, we consider to find ourselves in especially aggravating circumstances, even if it is provided for in the general part, being applicable only of it is proved that by means of the offence the acquiring of a patrimonial benefit was intended. This syntagm suggests that the aggravating situation will be applicable to a large variety of offences and not only to those of which the special judicial object is the patrimony. In this context, it might be that even for a striking offence, if by it was intended the acquiring of a patrimonial benefit, the aggravating could be applied. Hence, what needs to be decided in this case is that the criminal, legal[5] or subjective purpose set by the offender is acquiring this patrimonial benefit.

An injunction which can be asked for with regard to the content of art. 61 par. 5 of the N.C.C. is the way of drawing up its conditions of application. The text stipulates at first that this aggravation is applicable if the fine is a single penalty, adding up afterwards the situation

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[1] The Spanish Criminal Code regulates the fine on the days of fine system in art. 50-53. The same is in the French Criminal Code – art. 131-2, 131-3 pct. 2 and 3 and 131-5.

[2] According to N.C.C., the general customization criteria are regulated by art. 74 and are the following: a) the circumstances and the way the offence was committed as well as the means used; b) the state of peril created for the protected value; c) the nature and the gravity of the result or of other consequences of the offence; d) the reason of committing the offence and the pursued objective; e) the nature and the frequency of the convict's offences which constitute criminal antecedents; f) the convict's behaviour after committing the offence and during the trial; g) the level of education, age, health, family and social status.

[3] According to art. 61 par. 4 from the N.C.C.

[4] According to art. 61 par. 5 from the N.C.C.

[5] We are referring to the case in which the offence stipulates in its content a qualified legal purpose.

in which "*the court opts for applying this penalty*", if the fine is stipulated alternately with imprisonment. In fact, the last phrase comprises all situations, because as the text is drawn up, it implies that every time the judge has stipulated the fine penalty as single sanction alternated with imprisonment and finds appropriate the purpose of the fine, being met also the condition regarding the purpose aimed at by the offender, he ca apply for this aggravation. Therefore, in fact, the aggravation is applicable in any situation in which the judge choses the fine as penalty applicable to the offender, because had he chosen improsonment, out of the two alternative penalties (the fine and imprisonment) stipulated for a given offence, then, the text would not have found its place in the regulation of the fine. In other words, a useless waste of text and preciosity for a rigour and precision unfitted for the regulation.

However, the aggravation might raise also other issues in practice. For example, if the court would chose to increase the limits by a third, applying the aggravation, if the fine is stipulated alternately with imprisonment over 2 years, it can work up to a transgression of the general limits of this penalty (if it is chosen the maximum limit of 360 days, increased by a third, it results in 480 days and applying to each day the maximum quota, a fine of 240.000 lei can be reached).

In this case, what the court would have to do is: to limit the penalty to its general maximum limit (200.000 lei) or can it transgress it by applying the resulting fine?

A new paragraph embeded in the current regulation is the mention that, if the judge finds the presence of some aggravating or palliating circumstances, he will apply the fractions of increment or decrease specific to the effects of the aggravating or palliating circumstances for the special limits of the fine stipulated in the art 61 par. 4 and 5 from the N.C.C.[1]. The reference to art.61 par. 4 from the N.C.P. is again useless, since it is obvious. To which limits should the judge apply the fractions stipulated for aggravating or palliating circumstances when he assesses the fine penalty, if not to those already regulated as special limits for this sanction? Why is there no similar text for the imprisonment? Or yet, better asked, why the body of art. 61 par. 5 I[st] thesis hasn't been correlated with that of art. 76 par. 1 and art. 78 par. 1 from the N.C.C.? Since these paragraphs (art. 76 par. 1 and art. 78 par. 1 from the N.C.C.) refer to the penalty, without making any distinctions, why did the legislator have to create a new paragraph, completely unfit for use in its first thesis?

Coming back to the stipulations of art. 61 par. 5 IInd thesis, in our opinion, the text is unconstitutional or at least again uncorrelated with the stipulations of art. 78 from the N.C.C. No matter how we qualify, as judicial nature, the stipulations of art. 61 par. 5 from the N.C.C., they are clearly operating an aggravation of the offender's situation. According to the stipulations of art. 78 par. 2 from the N.C.C., the increment of the special limits of the penalty can be operated only once, no matter the number of contained circumstances. Therefore, why should I apply an incremental fraction to the increase already applied according to art. 61 par. 5, if I should uncover some aggravating circumstances, other than the patrimonial purpose pursued by the offender? Thus, wouldn't we brake the *non bis in idem* principle, even if the circumstances are different? I consider that, faced with this criticism, the stipulations of art. 61 par. 6 should be revoked, as not being in accordance with the purpose of the penalty, nor with any legislative techniques for drawing up a juridical paper.

Another new element is the possibility to cumulate the imprisonment penalty with that of the fine when by the offence was pursued the procurance of a patrimonial benefit[2]. The text does not make any distinctions between the situation when for the committed

[1] See the stipulations of art. 61 par. 6 from the N.C.C.

[2] See the stipulations of art. 62 par. 1 from the N.C.C. The possibility of cumulating the fine with imprisonment is, for example, stipulated in the French Criminal Code – art. 131-2.

offence, being pursued by the offender this patrimonial benefit, the fine is stipulated alternately with imprisonment or imprisonment is a single penalty. In other words, can one apply in the situation described in art. 62 par. 1 from the N.C.C. cumulated fine and imprisonment also when the committed offence has stipulated as a penalty only imprisonment? The text leaves room for interpretations and even if, in second paragraph of art. 62 from the N.C.C., mention is made for the case of alternative penalties, systematic interpretation of the body of art. 62 does not eliminate the shown incertitude.

Coming back to the regulation, we shall notice that, in this case, the limits of the fine penalty are those stipulated in art. 61 par. 4 letter b) and c), and more than that, these limits cannot be decreased or increased as a consequence of palliating or aggravating circumstances, which still does not mean that their effects (of the palliating or aggravating circumstances) can not be applied to the imprisonment penalty with which the fine is cumulated. Being a special situation, the legislator felt the need for a new explanation with respect to the customization of the amount of the fine penalty, showing that, for its assessment, the judge will also take into account the value of the obtained (in real) or pursued (potential, subjective, wished for by the offender) patrimonial benefit.

As in the current text, the legislator was cautious and regulated two special situations: the first is the one in which the convict does not carry into effect the penalty due to his ill-faith and the second situation is that in which the convict cannot carry into effect the fine penalty due to objective reasons.

In the first case, just as in the current regulation, the fine will be mandatorily replaced with the imprisonment penalty, one day in prison being the equivalent of a fine day. If the fine came along with the imprisonment penalty, then the days in prison resulting from converting the fine will be added up to the initial imprisonment penalty, without overlapping them, as it would occur in case of an offence juncture[1].

In the second situation, if the fine has not been carried into effect due to reasons which cannot be imputed to the convict, then, with his consent, the fine days left uncarried into effect will be converted into community service, the equivalent being the same, a fine day equal to a a day of community service[2]. If, even so, the convict does not give his consent for community service, the fine will be converted into imprisonment, obeying the principles stipulated in art. 63 from the N.C.C. Such a solution is meant to show the convict that it is in his own interest to show good-faith and start, with his consent, to become useful to the community and that, if he still persists in doing nothing, he will not be left unsanctioned, and will be sent to prison.

The situation in which the convict accepts to undertake community service seems like an innovative good idea, since it proves to be in an educational spirit for the convict, who will thus prove useful for the community from which he is part of; seen from a different perspective, we learn that by choosing such a way, the legislator will let the convict realize that he is given a punishment, but, on the other hand, he will carry the penalty into effect without being put into difficulty and avoiding being "forced" to commit other criminal acts, since he can no longer find the resources to do them.

When the fine accompanies the imprisonment penalty, the community work resulting from converting the fine will be carried into effect after imprisonment penalty is completed.

The execution of the community work will be overseen by the probation service[3].

Still, if, without taking advantage of the situation and of the legislator's clemency into his benefit, the convict circumvents from the execution of community service or, worst even, he commits a new crime, the court will replace the fine days unexecuted through community

[1] According to art. 63 from the N.C.C.
[2] According to art. 64 par. 1 from the N.C.C.
[3] According to art. 64 par. 4 from the N.C.C.

service with the same number of days in prison. In the second hypothetical case, the new crime must be committed by the end of the community service period and thus, the fine unexecuted as community service, and which in its turn will be converted into prison, *will be added up* and not overlapped to the penalty applied for the newly commited crime[1].

b. *For the legal person.* As in the current criminal code, the only main penalty is still *the fine*[2], which is completed by a diversified system of complementary punishments, much resembling the one in the current regulation. Unlike what we have in the present, the regulation of the sanctions for the legal person is, in the new criminal code, the object of an entire title, namely the IV-th Title, art 135-151, *The Criminal Responsibility of the Legal Person.*

In this context, as we have already seen in the case of the private person, the limits of the fine penalty are substantially increased, being set between 30 and 600 fine days, each fine day having as correspondent an amount between 100 and 5.000lei, thus making the general limits reach amounts between 3.000 and 3.000.000 ron (while the current limits are between 2.500 and 2.000.000 ron) [3]

Related to the actual settlement of the fine applicable to a legal person, the stipulations of art. 137 par. 3 from the N.C.C. establish that the court will take into consideration the general customization criteria[4], to which will be added up the turnover or the value of the patrimonial asset of the convicted legal person, depending on whether it has a lucrative purpose or not.

As far as the special limits of the fine applicable to the legal person are concerned, they are set as before, depending on the imprisonment limits for the private person, but with a better conditioned system, in relation to them. Unlike the current regulation where we have two situations, in the new criminal code we find 5 situations, depending on which the fine penalty for the legal person is set. Thus, the limits will be comprised of[5]:

- 60 and 180 fine days, when the law stipulates for the committed offence only the fine penalty;
- 120 and 240 fine days, when the law stipulates an imprisonment penalty of up to 5 years, only or alternating with the fine penalty;
- 180 and 300 fine days, when the law stipulates an imprisonment penalty of up to 10 years;
- 240 and 420 fine days, when the law stipulates an imprisonment penalty of up to 20 years;
- 360 and 510 fine days, when the law stipulates an imprisonment penalty of over 20 years or life detention.

Similar to the fine penalty for the private person, we find here also the special aggravating circumstance for the increment of the special limits by a third, if the legal person has pursued gaining a patrimonial benefit, its applicability in court being left to the court's disposal, namely optional. In this case, the settlement of the fine will be done taking also into consideration the value of the patrimonial asset obtained or pursued. Still, unlike the regulation of the fine penalty for the private person in the N.C.C., here the legislator had the inspiration of adding that such an increment cannot surpass the general maximum limit of the fine penalty, which operates discrimination in regulating and shows an unjustified legislative inconsistence. Since the criminal law is of strict interpretation, and since here the legislator

[1] According to art. 64 par. 5 from the N.C.C.
[2] According to art. 136 par. 2 from the N.C.C.
[3] According to art. 137 from the N.C.C.
[4] Which are stipulated under art. 74 from the N.C.C., being identical for the private person as well as for the legal person, with some adjustments taking into account the nature of the "offender".
[5] According to art. 137 par. 4 from the N.C.C.

has expressly specified that the general maximum limit cannot be surpassed, it is implicit that for the private person such surpass of the maximum general limit is possible.

Conclusions

Although the new regulation has its own disparity and inadvertence, which we have succeeded in finding and, in our opinion, commenting upon, we can still say that it is much improved in comparison with the current one. Even if, overall, regarding the special limits of the imprisonment penalty from the special part of the new criminal code, it has not proposed harder sanctions, regarding the fine, on the contrary we find a major increment of the limits, both general and special. It is a reflection of the criminal politics which want to make more effective sanctions which do not deprive of liberty, but which, by radically diminishing the patrimony of the private or legal person, can successfully be a means of prevention even more efficient than imprisonment.

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THE DEVELOPMENT OF THE SWEARERS' INSTITUTION AT THE ROMANIANS FROM TRANSYLVANIA

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Abstract

With the set I tried to prove Romanian origin, while the existence and functionality of the institution and its evolution swearers the Romanians in Transylvania. Although this institution was studied in the past, the study was done in terms of legal structure and not that of social relations. Swearers existed in the three Romanian countries, operating in the legal systems of different periods of time and adapts according to them.

Key words: *Swearers, land demarcation swearers, reconcilers, investigators.*

Introduction

In folk culture, the juridical traditions are marks that make evident the form of the Romanian people's ethnic spirituality. Out of the mystic atmosphere, result of certain protojuridical activities of our ancestors, the land law was born, within the first ethnic communities. This is the background in which in the judicial practice of the Romanian people the swearers' institution appeared, too. At the beginning, the institution appears conditioned by the relationship between relatives, being the juridical expression of the family solidarity. During this period, the criminal trials were more frequent, so that the family solidarity, materialized by the collective oath, was to be found more in trials of this kind.

During the Middle Ages, in the transition period from tribal to feudal relations, the swearers' institution, turns into the institution of class solidarity. It began to be used in law suits having as object the land and the property right over it. In this way, the swearers and the oath, appear in trials with the specification of judicial proof, functioning as institutions well known by the Romanian people.

Many historians and jurists refer to the general characteristic features of the institution, thus showing and trying to prove that it was borrowed from different peoples.

The oath, beside the ordeals, was thought to ensure the truth discovery by the miraculous intervention of divinity that punished the guilty person and defended the unguilty one. It was thought that the person, who swore false, drew upon him the divine punishment.

Due to this belief in divine power, the oath took place in a well established ceremony. Taking oath was a solemn action. He, who swore false, beside the divine punishment, was also punished by the community leader. The swearers were chosen in accordance with the type of litigation that had to be judged: from the ruling class or according to the way the leader of community wanted to dispose its classification. In the penal one, the claimant was obliged to bring swearers for the oath to be taken. In the civil one, they were chosen according to the written decision. In the old law, the accused were not

obliged to prove their innocence before the claimant proved his claim, as it happened with the Germanic peoples. The claimant had the task to prove the claim with witnesses and documents.

SWEARERS in Wallachia and Moldavia

In Wallachia and Moldavia the swearers' institution appears in a developed form compared to its features in the transition period from tribal to feudal relations. This institution was feudalised much earlier than it appeared in documents as a feudal institution, being largely used in practice.

The proof with swearers was mainly used at the princely judgement, the prince and his court being the highest judicial court, the feudal state having the internal function to defend his interests and that is why most of the trials were in power's favour. As a matter of fact, the swearers in these trials were feudal lords or wealthy people who wanted to get the power and keep it for their interest.

SWEARERS in Transylvania. Court proceedings

The institution existed and functioned in Transylvania, too. It was part of the custom in the country. Although till the first half of the Xth century there are no written sources to attest it, the fact that it appears in the writings from the Xth –XIth and the following centuries, proves its continuity in the past, too. The name given in Magyar 'eskutarsak' or in Latin 'cojuratores', is a proof that this institution was born out of an older reality, a Romanian one, found by the Hungarians when they conquered Transylvania. It was kept in all the occupied territories and it was known as an institution of justice. Usually when judging small cases between the inhabitants of a village, the court was made up from the village headsman together with good and old people. They usually gathered on Sunday and on holidays under an old tree or in the village house. The parties came in front of them, alone or together with witnesses, swearers (persons swearing for a person's credibility), people from the village, all of them having knowledge of the case. The judgement was public, all those interested taking part in it and the sentence was obligatory, the guilty person being in fact, judged and sentenced, by the whole community from the village. In the swearers' institution from Transylvania, we find a custom differing from that usually practised in Wallachia or Moldavia, that is, the oath taken at king Ladislau's grave. We have to specify that the ceremony of taking the oath was a special one, the swearers standing in front of the grave and swearing in the presence of the priests and the involved parties. In the studied documents we found beside the original form of taking the oath at king Ladislau's grave, all the categories of such persons existing in Wallachia and Moldavia. This institution functioned within the judge's benches, being a proof used by the parties. In addition to this, although the rules of using this proof were well known, a part of the princes and village headsmen, broke them on purpose, in order to be able to decide over the trials in accordance with their interest. Although in most cases, the judgements were made based on the general laws, on the towns' statutes and the won privileges, the local unwritten law was also respected, giving thus a characteristic feature to the trials. The sweares' institution within the judge's benches appears in many documents of the time, in some of them being very clear while in others it is implied. These documents show the real principle of judgement, that of the final oath granted on one of the parties so that the truth to be established. This institution is present in all the regions from Transylvania, being used as a leading element, as a final decision in finding the truth.

Categories of Swearers

Representing a proof in trials, the swearers had judicial tasks like those of the justice auxiliary bodies. From this point of view, there were four categories of swearers:

- investigators;
- swearers;
- land demarcation swearers;
- reconcilers.

INVESTIGATORS

They made investigations, examined the existing documents, asked questions and then wrote down their findings in deeds called makink up books, evidence ones, written decisions, judgement books, the number of copies being equal to that of the parties in trial.These investigators together with the parties and with deeds were present at the prince's judgement or before the high official. At the judgement, these persons declared "with their souls" what they had done, this having the character of a judgement in fact, on which the prince's or high official's verdict was given.

SWEARERS

In Wallachia and Moldavia, most of the trials judged based on the proofs with these persons, were those in which they were called to support by oath the parties' claims, thus strengthening their oath.

LAND DEMARCATION SWEARERS

Object of disputes being the land, the most precious of all values in all times, it was natural its ownership to be disputed. But before being owned and exercising the right of property over it, the land had to be delimited. Further to these land demarcations or measurements, either the previous ones were recognized according to different signs, property deeds, or other bounderies were marked to the land. In such cases the swearers who knew the land demarcation were used. Unlike the other persons, these ones had special tasks concerning the land demarcation, establishing the bounderies. They were usually accompanied by the subprefect for the land in question. The subprefects were appointed from among the old high officials who knew the territory and the laws.

Although in Transylvania this form of oath is assigned to the Hungarians and Saxons that lived on the Transylvanian territory, we can't agree with this practice belonging exclusively to these nationalities. Taking into consideration the fact that the Romanians were under occupation, we think that this custom was probably taken and adapted according to the social condition of the parties.

RECONCILERS

These persons represented a special category. As in many trials there were involved persons with a certain social condition or they were members of the same noble family, it was clear that they tried to solve the litigation in an amicable way, by parties' reconciliation. Those who made this were the reconcilers who wanted parties' reconciliation.

Requirements to Be Met in Order to Be a Swearer

The documents at that time show that in order to be a swearer, certain requirements had to be met. In time, there were disputes between historians and jurists regarding this institution and they either agreed with them or contested them. We show below these conditions as they were formulated.

a) to be of the same social condition with the party for which he swears;
b) not to be relative of the party for which he swears;
c) to be of the same sex with the parties in trial;
d) to be good and honest men;
e) to swear in church, before a priest, hand on the Saint Gospel and the cross;
f) to be in a fixed number;

g) not to swear false.

How the trials with swearers were carried on. Judicial proceedings.

Judicial organization and proceedings were almost the same in Wallachia and Moldavia. The prince had absolute power, of divine origin, the parties having to show respect towards the supreme judge. Even the great boyars, if they were party in the trial, had to appear before the prince, showing respect to the judge and the judgement. In Moldavia, the judgement started with the exposition of the claimant's claim followed by the accused person's defence. The proofs asked by the parties were then shown. That was the moment the swearers appeared. After the claim was made before the prince, in which it was clearly shown what he wanted, this … investigated and judged according to justice and law, with all the high officials of my princely dignity … and he gave law to the claimant, ususally, to swear with 12 boyars that what he claimed was true. According to the type of trial, the swearers were written in a decision or they were brought by the claimant to the court. In case till the term established by the prince, the swearers did not appear or swear, the claimant lost the trial, so he remained without a prince's decision. In case these persons came and swore in due time, the claimant won the trial. But the other party could ask for appeal and with a double number of swearers could win the trial. Each trial had, of course, its peculiarities, according to the type of trial: civil, penal or church one.

Appeal

The trials on review with a double number of swearers were called appeal. Usually this judgement was characterized by the proof with 24 persons used for the trials on review with 12 persons. The name of appeal or second law was given as the proof with the swearers was called law. The appeal was thought to be a way to attack the first decision given by the court.

The swearers could be found till the second half of XIXth century and beginning of XXth, the documents of the time mentioning them.

In the course of time, as new and more complex institutions appeared, taking their place, the swearers disappeared.

This institution functioned in the three Romanian countries, in Transylvania the system of Romanian law functioning even later, the custom of the country being more often used and thus the swearers's institution, too.

The institution disappears when the modern laws appear and the law in the Romanian countries is unified in the XXth century.

Conclusions

While due to the emergence of new more complex institutions have taken place, swearers disappeared. The only form of swearers` who survived for the same features, until the third decade of the nineteenth century, is the category swearers bound, the swearers the furrow on the head or shoulder bag with soil, being known as a special procedure land demarcation.

The institution has worked in all the three Romanian, but as noted, Romanian legal system in Transylvania later worked here until the early twentieth-century Austro-Hungarian functioning right. Because of this habit land was used more often, implicitly swearers` institution.

With the advent of modern laws in the second half of the nineteenth century, and Unification of the Romanian countries sec. twentieth century, we are dealing with the disappearance of the institution

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CONCEALMENT OF CASES OF MURDER AS TRAFFIC ACCIDENTS. A CASE STUDY

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Abstract

There are mentions in forensic practice of the possibility, even if rare, of concealing murder as a traffic accident.

The motivations of persons involved in such acts are related to: an attempt to circumvent criminal liability, the belief that, in case of a traffic accident, the crime is less serious and therefore the penalty is lighter or the offender's idea that the act will not be investigated or that there will be a superficial assessment of it as not meeting, under certain circumstances, the conditions required by law to consider it an offence.

In the first part of the article we present a brief analysis in terms of criminal law of the offences of simple murder and manslaughter, and in the second part we present some considerations on a case study of concealment of murder as a traffic accident.

Keywords: *murder, traffic accident, study, case, concealment.*

Introduction

National and international analyses demonstrate that traffic accidents are not random, unpredictable or unavoidable, only their occurrence at a given time is.

The factors contributing to the occurrence of a traffic accident may be grouped into internal factors and external factors. From the analysis of internal factors, it can be said that most traffic accidents are due to the fault of drivers (high speed of movement, irregular overtaking, not giving priority, driving under the influence of alcohol, illness, driving while tired, incorrect assessment of situations arising in traffic, etc.).

The category of external factors for traffic accidents includes specific structural and arrangement features of communication lines[1].

In forensic practice, there are cases where the active subject of the murder offence disguises murder as a traffic accident. Sometimes, in order to simulate/disguise an act as another act and sometimes as produced by another person, they create at the scene traces that are typically formed when committing a crime, in the same place and time. Other times, they remove the material object of the offence from the original place of committing the offence, transporting it to another location.

Despite the effort, attention and reasoning of the active subject of the murder offence, they fail to create the overall appearance of the scene and the details that are

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[1] C. Aioniţoie, V. Bercheşan, I. Dumitraşcu, *Treatise of Forensic Methodology*, Volume I, Carpaţi Publishing House, 1994, p. 112.

typically formed. Thus, a discrepancy becomes apparent between the different categories of traces, which highlights the artificial intervention of individuals in that area.

Such situations are referred to in the speciality literature as "controversial circumstances"[1] or "negative circumstances"[2] and they are determined by the disparity between the facts and the event alleged to have taken place, the absence of traces or objects which normally should have be found at the scene.

The interpretation of negative circumstances will help establish the constituent elements of an offence or another, especially in terms of its objective and subjective sides. It will also play an important role in the judicial individualization of punishment for the concrete application of punishment.

The court, knowing the concrete offence, the offender's personality, his contribution to the committing of the offence and the circumstances in which it was committed, can evaluate its concrete, real risk. Therefore, it will find that there is a certain responsibility, depending on which it will establish and implement a penalty of a certain species, duration/amount, accordingly[3].

I. In this respect, we refer to the Criminal Code of Romania. The Special Part, Title II, entitled "Crimes against the Person", Chapter I, entitled "Crimes against Life, Limb and Health", Section I, entitled "Homicide", in which the legislature qualifies within different categories the acts affecting the person, by taking into account their gravity. Thus, Art. 174 provide the offence of simple murder, with the following legal content: "the killing of a person shall be punished by imprisonment from 10 to 20 years and denial of certain rights", Art. 178 deals with the offence of manslaughte, having the following legal content: "the involuntary killing of a person is punishable by imprisonment for 1 to 5 years". In practice, the possibility of *suicide in traffic* can occur, too.

A short analysis of the two offences in the light of of criminal law will highlight the following:

A). The offence of murder has the following constituents:

Legal content. According to Art. 174 Romanian Criminal Code, "the killing of a person" constitutes the offence of murder.

Structure of the offence. The special legal object is represented by the social relationships involving the fundamental human right to life.

The material object of this offence is the body of the living person towards whom the action is directed.

The active subject is not qualified, as it can be any person.

The passive subject is the body of the living victim. In judicial practice, many situations are encountered where there are more passive subjects of the offence. It does not matter if the victim wished their own death, if it was healthy or not, if it had a long or little time to live[4].

Participation is possible in all forms.

The constitutive content. The objective side. The material element of the objective side can be achieved either by:

- an action of killing, or by

- inaction, in which case the offender was obliged to act in order to prevent a death, but did not act.

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[1] I. Mircea, *Forensic Science*, Lumina Lex Publishing House, second edition, Bucharest, 2001, p. 238.

[2] E. Stancu, *Treatise of Forensic Science*, fourth edition, Universul Juridic Publishing House, 2007, p. 335.

[3] In this regard, see Laura-Roxana Popoviciu, *Criminal Law. The General Part*, PRO Universitaria Publishing House, 2011, p. 301.

[4] See Gh. Nistoreanu, V. Dobrinoiu, I. Molnar, I. Pascu, Alex. Boroi, V. Lazăr, *Criminal Law. The Special Part*, Continent XXI Publishing House, Bucharest, 1995, p. 95.

The subjective side involves the perpetrator's guilt in the form of intent, which may be direct or indirect.

For the existence of the offence, the motive or purpose of committing the crime has no relevance.

The immediate consequence is the death of the victim.

The punishment. The offence of murder shall be punished by imprisonment from 10 to 20 years and denial of certain rights. Attempt shall be punished.

B) The offence of manslaughter

Legal content. Art. 178 of the Romanian Criminal Code provides the offence of manslaughter as "the involuntary killing of a person", in par. 1 – the simple form, and the aggravated forms: "involuntary manslaughter as a result of failure to comply with the legal provisions or precautions to take while exercising a profession or trade, or in order to perform a particular activity", in par. 2; "when the involuntary manslaughter is committed by a mechanical drive vehicle driver with a blood alcohol level exceeding the legal limit or who is inebriated", in par. 3; "the negligent act committed by any other person in the exercise of their profession or trade and who is inebriated", in par. 4; "if the offence committed led to the deaths of two or more persons", in par. 5.

Structure of the offence. The legal object is represented by the social relationships involving the fundamental human right to life.

The material object of this offence is the body of the living person towards whom the action is directed.

The active subject is not qualified, as it can be any person, according to Art. 178 par. 1. According to par. 2-4, the active subject is qualified, as it may be only a person exercising a certain profession or trade or performing a certain activity or is a mechanical traction vehicle driver.

The passive subject is the body of the living victim. We note that sometimes the same person may be, concurrently, the active and passive subject of the offence of manslaughter.

The content of the offence. The objective side. The material element can be achieved either by an action or inaction.

The subjective side. The form of guilt is negligence, in its two forms, that is: gross negligence and simple negligence.

The immediate consequence is the death of a person.

The causal relationship between the killing and the result must be present in all cases. It is irrelevant whether or not, besides the activity with the offender, other physical forces or mistakes of others have concurred to produce the result[1].

The punishment. The offence of manslaughter in its simple form is punishable, according to Art. 178 Romanian Criminal Code, by imprisonment: from 1 to 5 years – par. 2, from 5 to 15 years – par. 3 and par. 4. The aggravating element referred to in par. 5 concerns both the simple and aggravated forms. As a result, for each form there is a possibility of a more severe punishment, increasing the penalty by up to 3 years.

The large number of victims[2] of road events, the underlying causes and mechanisms generating lesions, on the increase in recent years, sustain the necessity for specialists to constantly have, besides a good training in the field (including familiarity with the technical features of cars, in a continuous process of modernization) an active attitude towards public awareness on the consequences of traffic accidents.

The main tasks of the research at the scene of traffic accidents are:

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[1] G. Antoniu, *The Criminal Code Commented and Annotated. The Special Part*, Vol I, op. cit., p. 107.

[2] With reference to direct and secondary victims, as well as collateral victims.

- to establish the circumstances of place, time and manner in which the accident occurred;
- to find, preserve and collect the traces formed at the occurrence of the accident[1].

The scene of the accident is examined in a *static* and a *dynamic* phase, and in order to preserve it as a whole and to determine the ratio between the main objects of the scene and the details, orientation photos and sketches of the main objects and of details are made[2].

In the practice of traffic accident investigation, traces are studied in all their aspects, from the way they are formed, to their appearance, the methods and technical means of searching, preserving and collecting them from the scene, their examination in laboratory conditions and the forensic expert's conclusions[3].

Reproduction traces are created through the direct contact of two objects, by imprinting in the negative some of the characteristics from the contact side of one of the objects on the surface or in the volume of the other object[4].

In the case of traffic accidents, in addition to reproduction traces, other categories of traces are found, such as: biological traces, traces of objects/remains of objects, of substances and sometimes traces resulted from fire or explosions due to the traffic accident. Specifically, the traces of feet, hands, wheels with tyres or wheels of animal traction vehicles, may be subclassified as follows:

- depending on the mode of action of the recipient object as opposed to the object generating the traces, into static and dynamic traces;
- depending on the plasticity of the recipient object, into superficial traces and deep traces.

The traces generated by vehicle tyres have characteristic features depending on the vehicle type. Also, the individual characteristics of the tyres are important, such as partial or total wear of the tyre antiskid device pattern, lateral tyre wear, holes, cuts or marks from pebbles imprinted in the tyre antiskid pattern.

In determining the type and model of the means of transportation used, the following elements are also taken into account: track width, wheelbase, tread width, number of traces, the direction of traces of dragging or sliding, shards of glass and the location of various traces of objects and remains of objects.

Usually, the purpose of the traffic accident investigation is to determine how the traffic accident occurred, the date of lesion onset, their severity and whether they were vital or not, mode of death and cause of death (if there are dead victims).

By comparing categories of traces with each other and taking into account the specifics of the accident site, logical explanations can be provided for the existence of certain categories of traces, along with traces resulted from other sources, and for the absence of other traces that are usually generated at the scene of the accident, in similar cases.

By interpreting reproduction traces, explanations are provided on the nature of the trace-generating objecs, the manner and conditions of formation of the traces in question, the relationship between them and the changes they might have undergone after the committing of the offence.

II. A good example, in the context of the theme of the proposed article, is the case occurred in the area of county XXX, where, on xx/2005, the body of a male was found by the

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[1] E. Stancu, *Treatise of Forensic Science*, Universul Juridic Publishing House, Third edition revised and enlarged, Bucharest, 2004, p. 617.
[2] Bercheşan, V., *The Scientific Evaluation of Crime Traces*, Little Star Publishing House, Bucharest, 2002, pp. 166-184.
[3] I. Mircea, *Forensic Science*, Lumina Lex Publishing House, second edition, Bucharest, 2001, p. 3.
[4] I. Mircea, op. cit., p. 61.

side of the National Road DNxx, in the locality A, parallely to the road, at a distance of 3.20 m. As a result of the forensic identification, it was determined that he was age 78 and lived nearby with his son-in-law.

During the investigation at the scene, it was found, in the static phase examination, that he had lesions on his face and body and there were articles of clothing scattered on the road verge.

After collecting data from the persons interrogated, two versions were developed as to the production of lesions:

- vehicle accident with leaving the scene, and
- violent death caused by repeated falls or blows.

No traces of blood were found at the scene, which are present in most cases of a traffic accident. They can be deposited anywhere, from the spot of the initial contact between the victim and the vehicle to the place where the victim is.

The crime scene was then investigated in a *dynamic* phase, the body was examined and it was found that it did not present lesions specific to a traffic accident (fractures caused by pulling or clinging, torn buttons, crumpled clothes, traces of friction and dragging, tyre impressions, lesions produced by the lower metal auto parts, etc.)[1].

Additional traces were identified, namely a bruise located in the right eyebrow area and a trace of sinking-in of the occipital skull cap.

During the external examination of the corpse, it was found that it presented purple, livid spots, located on the dorsal parts of the hypostatic body and cadaverous stiffness of all joints.

After the necropsy on the body, it was found that the victim had injuries caused by repeated blows, numerous rib fractures and a strong internal bleeding.

The discrepancies between the scarce data recorded on the spot, by examining a wide area, including the section of road and the land adjacent to the place where the body was found, and the pieces of information provided by the forensic examination led to the suspicion of another mechanism causing the victim's death and the involvement of the road accident only as a disguise.

The conclusion of the necropsy as to the cause of death was that it "was due to acute cardiorespiratory failure, with lung, myocardium and aortic artery contusion and rupture, consecutive to a chest trauma with multiple rib fractures"[2].

The existing data were supplemented by information stating the previous situation of the deceased, including a possible conflictual relationship with S. L., who was the victim's caregiver.

The violent nature of the latter's behaviour had previously led to quarrels, some with the victim being under the influence of alcohol. S. L.'s criminal record included forest offences that he admitted to.

The researches were continued at the victim's domicile, where a patch of reddish brown blood-like substance was found, as well as a deposit of reddish brown-coloured matter between the floor boards. Also, traces of this kind were discovered on the articles of clothing of the said S. L.

Following the completion of the DNA test, the genetic profile of the traces of blood found on the floor of the room inhabited by the victim and on the shoe of the said S.L., as identical with that of the blood samples collected from the victim.

The violent nature (admitted by the suspect) of the relations between the two in the evening prior to the death of the victim had led to injuries that were confirmed by the conclusions of the necroptic examination. It was also stated that "the lesions found [n/a,

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[1] Vl. Beliş, *Treatise of Legal Medicine*, Volume 1, Medical Publishing House, Bucharest, 1995, pp. 400-416.

[2] From the coroner's report, Department of Forensic Medicine of Bihor County.

autopsy report] occurred most likely by hitting with a hard body (fist, foot), fall and compression between two hard plans (hard body such as a leg, knee and the ground)". After the death of the victim, the body was transported to where it was found, to simulate a road accident.

Simulation (concealment) can be retained[1] as a possible means to obtain benefits, in the case of psychopaths (individuals with personality disorders).

Conclusions

1. In the absence of traces of blood in the case of traffic accidents (in combination with other characteristic elements), especially when external lesions are present on the victim's body, of a nature nonspecific to traffic events, investigators should consider the possibility of a murder concealment, subsequently supported or invalidated by the identified elements.

2. By comparing categories of traces with each other and taking into account the specifics of the accident site, logical explanations can be provided for the existence of certain categories of traces, along with traces resulted from other sources, and for the absence of other traces that are usually generated at the scene of the accident, in similar cases.

3. By interpreting reproduction traces, explanations are provided on the nature of the trace-generating objecs, the manner and conditions of formation of the traces in question, the relationship between them and the changes they might have undergone after the committing of the offence.

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Goldberg, R., *A Guide to Clinical Psychiatry,* All Publishing House, Bucharest.

*** From the coroner's report, Department of Forensic Medicine of Bihor County.

[1] Goldberg, R., *A Guide to Clinical Psychiatry,* All Publishing House, Bucharest, pp. 258, 289.

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CYBER CRIME AND THE PROLIFERATION OF YAHOO ADDICTS IN NIGERIA

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Abstract

The image of Nigeria today has been battered by the phenomenon of cyber crime and yahoo addicts popularly called yahoo boys. This phenomenon no doubt is associated with forces of globalisation which involves the intensive use of information communication technology (ICT) particularly the internet to do business even with persons from the remotest parts of the world. Instead of exploring the opportunity offered by this advancement in technology to better their lives, Nigeria youths mostly the unemployed school leavers have found fortune in the use of the internet to defraud unsuspecting persons whom they send out fake business proposals to and if they subscribe end up being duped of huge sums of money. It is pertinent to note that this crime is not limited to Nigeria as it is also practiced in other parts of the world with changing dynamics. This paper seeks to explore the origin of cyber crime, the modus operandi of the yahoo addicts and suggest possible ways to curb the crime.

Keywords: *Computer, Crime, Cyber, Internet, Nigeria, Yahoo Addicts.*

Introduction

Cyber Crimes and proliferation of Yahoo Addicts is a product of a recent technological advancement leveraged by the phenomenon of globalisation. Globalisation means different things to different people, which is one reason why opinions of it differ so dramatically. Some proponents see it as not only inevitable but fundamentally beneficial, if only man could distribute the benefits better. Yet millions worldwide experience it not as progress, but as a disruptive or even destructive force.[1] Globalisation seeks to remove all national barriers to the free movement of international capital and this process is accelerated and facilitated by the supersonic transformation in information communications technology particularly the internet which criminal groups have turned a safe heaven to perpetuate their nefarious activities. The convenience associated with the use of ICT and the internet is now being exploited to serve criminal purposes. Hence this paper will address contemporary issues about Cyber Crime and the Proliferation of Yahoo Addicts popularly called Yahoo Boys. To achieve this academic task, this paper will first embark on definitions of key words associated with the topic in their alphabetical seniority.

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[1]Women's International League for Peace and Freedom, *"Facing the Challenges of Globalisation: Equity, Justice and Diversity"*, Coordinated by Felicity Hill, Women's International League for Peace and Freedom (Geneva: NGO Millennium Forum 22-26 May, 2000) p. 1 (See:www.wilpf.int.ch/economicjustice/globalisation2000.htm#2#2 Visited 25 October, 2011).

Definition of Associated Terms

To understand the nature of Cybercrime and Proliferation of Yahoo Addicts in Nigeria, it's imperative to understand the meaning and nature of the term key terms associated with cybercrime: computer, crime, cybercrime, cyberspace, internet and Yahoo Addicts.

Computer means an electronic, magnetic, optical, electrochemical, or other data processing device, or a group of such interconnected or related devices, performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device or group of such interconnected or related devices, other than (i) an automated typewriter or typesetter; (ii) a portable hand held calculator; (iii) a similar device which is non-programmable or which does not contain any data storage facility; or (iv) such other device as the Minister may by notification in the Gazette, prescribe.[1] And the term crime[2] is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: (1). Death, (2). Imprisonment; (3). Fine; (4). Removal from office; or (5). Disqualification to hold and enjoy any office of honour, trust, or profit in this state".[3] A crime is otherwise viewed as an illegality against the interest of the public as a whole as against the individual victim of the violation.[4] A crime is an act or omission defined by law and of which, upon conviction, a sentence of death, imprisonment or fine, or both imprisonment and fine are authorized.[5] Then Cybercrime encompasses any criminal act dealing with computers and networks (called hacking). Additionally, cyber crime also includes traditional crimes conducted through the internet. For example; hate crimes, telemarketing and Internet fraud, identity theft, and credit card account thefts are considered to be cyber crimes when the illegal activities are committed through the use of a computer and the Internet.[6] Cybercrime can broadly be defined as criminal activity involving an information technology infrastructure: including illegal access or unauthorized access; illegal interception that involves technical means of non-public transmissions of computer data to, from or within a computer system; data interference that include unauthorized damaging, deletion, deterioration, alteration or suppression of computer data; systems interference that is interfering with the functioning of a computer system by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data; misuse of devices, forgery identity theft, and electronic fraud.[7]

While *Computer crimes* encompass a broad range of potentially illegal activities. Generally it may be categorize into two major groups: (1) crimes that target computer networks or devices directly; (2) crimes facilitated by computer networks or devices, the primary target of which is independent of the computer network or device.[8] Cyber crimes which are harmful acts committed from or against a computer or network differs from most terrestrial crimes in four ways. They are easy to learn how to commit; they require few

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[1]A Bill for An Act to Protect Nigeria's Cyberspace and Provide for the Prevention, Detection, Response and Prosecution of Cybercrimes and for Related Matters, Nigerian Cybersecurity Act, 2011. pp. 16-20 Section 38.

[2]Hence the words "crime", "criminal offence" apply and simply offence are often used interchangeably in describing criminal activity.

[3]Hazel B. Kerper., *Introduction to the Criminal Justice System.*, 2nd edn. (Minnesota: West Publishing Company, 1979).p 58.

[4] *Ibid*. p.59.

[5]*Ibid.*

[6]Webopedia. "Cyber Crime" Available online at http://www.webopedia.com/TERM/C/cyber_crime.html visited 25 October, 2011, p.1.

[7]Paul Taylor (ed.) *Hackers: Crime in the Digital Sublime* 1st edn. Routledge; 1999 p. 200 in Ehimen O. R., and Bola A. – "Cybercrime in Nigeria" *Business Intelligence Journal* January, 2009.

[8] *Ibid*., p.94.

resources relative to the potential damage caused; they can be committed in a jurisdiction without being physically present in it; and they are often not clearly illegal.[1] When using the computer to commit any kind of fraud of any type or illegal actions is all considered cybercrime.[2]

Cyberspace is a metaphor used in describing the non-physical terrain created by computer systems. Online systems, for example, create a cyberspace within which people can communicate with one another (via e-mail), do research, or simply window shop. Like physical space, cyberspace contains objects (files, mail messages, graphics, etc.) and different modes of transportation and delivery. Unlike real space, though, exploring cyberspace does not require any physical movement other than pressing keys on a keyboard or moving a mouse. Some programs, particularly computer games, are designed to create a special cyberspace, one that resembles physical reality in some ways but defies it in others. In its extreme form, called virtual reality, users are presented with visual, auditory, and even tactile feedback that makes cyberspace feel real.[3] It could also be referred to as the electronic medium of computer networks, in which online communication takes place. Furthermore the *Internet* is defined as an electronic communications network that connects computer networks and organizational computer facilities around the world. It is a global system of interconnected computer networks that use the standard Internet Protocol Suite (TCP/IP) to serve billions of users worldwide. It is a network of networks that consists of millions of private, public, academic, business, and government networks, of local to global scope, that are linked by a broad array of electronic, wireless and optical networking technologies.[4] An internet is a means of connecting a computer to any other computer anywhere in the world via dedicated routers and servers. When two computers are connected over the Internet, they can send and receive all kinds of information such as text, graphics, voice, video, and computer programs.

Yahoo Addicts/Yahoo Boys are persons who cons through e-mail, particularly through a Yahoo! address or identity and the yahoo messenger (an instant messaging device). They are usually youths who are preoccupied with the internet spending long hours a day browsing and sending out mass e-mail to people in other to dupe unsuspecting victims through all forms of antics that they can deploy to win the mind of their victim through sending mails via yahoo software addresses. Criminals involved in the advance fee fraud schemes (419) are popularly referred to as “yahoo boys’ in Nigeria.[5]

The Origin of Cyber Crime in Nigeria

Cybercrime which has become so prevalent in our societies today started as a small, local fraud, where fraudsters on internet send e-mail letters to inform their victims, or character, that a prince had to pay a large amount of money in their account and the brand would give to his using the money to reward the country. But sending the letters was expensive and time consuming, and saw the rapid influx of money to make it a little 'more than a job at home. The advance-fee fraud is similar to a much older scam known as the Spanish Prisoner scam[6] in which the trickster tells the victim that a rich prisoner promised to

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[1]McConnell International LLC., “Cyber Crime...and Punishment? Archaic Laws Threaten Global Information” December 2000 Available online at *www.witsa.org/papers/McConnell-cybercrime.pdf visited 26 October, 2011, p.1.*

[2] What is Cybercrime Available online at http://www.cybercitizenship.org/crime/cr...Visited 26 October, 2011.

[3]*Ibid*., The term “Cyberspace” was coined by author William Gibson in his sci-fi novel Neuromancer (1984). http://www.webopedia.com/TERM/C/cyberspace.html visited 25 October, 2011.

[4]Cyber security Act, 2011 *loc. cit*.

[5]Longe, O.B and Chiemeke, S. C., “Cyber Crime and Criminality in Nigeria – What Roles are Internet Access Points in Playing?” *European Journal of Social Sciences – Volume 6, Number 4(2008)*., pp.133-134.

[6]Nigerian Scam". *Snopes*. 2003-09-06. http://www.snopes.com/crime/fraud/nigeria.asp Retrieved 2006-07-09 Available online at http://en.wikipedia.org/wiki/Advance_fee_fraud visited 26 October, 2011.

share treasure with the victim in exchange for money to bribe prison guards. An older version of this scam existed by the end of 18th century, and is called "*the Letter from Jerusalem*" by Eugene François Vidocq, in his memoirs.[1] But what really made the Nigerian version of this trick as old as a major industry was the advent of the internet. The modern technology of telecommunications and internet cost-effective software collection, offers the potential for mass e-mail. Over the past twenty years, the Nigerian fraudsters have grown from a small local fraud scheme, to one of the largest industries in Nigeria and all over the world. This trick in itself, is actually much older than it is expressed, dating back at least 300 years [2]

Another version of the origin of Cyber crime in Nigeria can be traced to the early 1980s as the oil-based economy of Nigeria went downhill. Several unemployed university students first used this scam as a means of manipulating business visitors interested in shady deals in the Nigerian oil sector before targeting businessmen in the west, and later the wider population. Early variants were often send letters, faxes, and even telex messages to their victims. Though with the spread of email and easy access to email-harvesting software made the cost of sending scam letters through the internet extremely cheap.[3] In the 2000s, the cyber criminal has spurred imitations from other locations in Africa and Eastern Europe.[4] Until about 2001, the scammers were located primarily in Lagos, Aba, Owerri, and Port Harcourt, Nigeria. The scammers have recently set up their bases in many countries besides Nigeria, including Togo, the Ivory Coast, the Netherlands, the United Kingdom, and Canada[5] and other countries with large population of Nigerians. The number "419" which refers to the Cyber criminals is a section of the Nigerian Criminal Code, dealing with "Obtaining Property by false pretences; Cheating and dealing with fraud. The advance-fee fraud is similar to a much older scam known as the "*Spanish Prisoner*" scam. The fictitious prisoner would promise to share non-existent treasure with the person who would send them money to bribe their guards.[6]

The Phenomenon of Cybercrime in Nigeria

Technology has integrated nations and the world has become a global village. The economy of most nations in the world is accessible through the aid of electronic gadgets via the internet. Since the electronic market is opened to everybody, it also includes eavesdroppers and criminals. False pretence, finds a fertile ground in this situation. Some perpetrators of this crime usually referred to in Nigeria as "yahoo boys" are taking advantage of e-commerce system available on the internet to defraud unsuspected victims who are

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[1]Eugène François Vidocq (1834). *Memoirs of Vidocq, Principal agent to the French police until 1827*. Google Books. p. 58. http://books.google.com/books?id=uGQoAAAAYAAJ&pg=PA58&dq=vidocq+jerusalem+letter. Retrieved 14 September 2010.

[2]Parker., Law History:History of Internet Fraud, 2 March, 2011 Available online at http://history-law.blogspot.com/2011/03/history-of-419-internet-fraud.html visited 26 October, 2011.

[3] FRAUD ES-Home, "History Scam 419", 10 November, 2010., Information to avoid being swindled. sábado 10 de noviembre de 2007.p.1 Available online at http://fraud-es.blogspot.com/2007/11/historoy-scam-419.html visited 26 October, 2011.

[4]Longe. O. *et al* "Criminal Uses of Information & Communication Technologies in Sub-Saharan Africa: Trends, Concerns and Perspectives"., *Journal of Information Technology Impact*, *Vol. 9, No. 3, 200.9 pp. 155-172, 2009*.p.164 Available online at http://www.jiti.com/v09/jiti.v9n3.155-172.pdf visited 26 October, 2011.

[5]PRLog Press Release., "Origin of "scam"-attention to filtering the Nigerian 419 scam" Press Release of 26 May, 2010, Available online at http://www.thenigerianvoice.com/nvnews/43114/1/challenges-of-reporting-cyber-crime-in-nigerian-me.html visited 26 October, 2011.

[6] Fraud ES-Home, History Scam 419, *op. cit.*

mostly foreigners thousands and sometimes millions of dollars.[1] They fraudulently misrepresent themselves as having particular goods to sell or that they are involved in a loan scheme project. They may even pose to have financial institution where money can be loaned out to prospective investors. In this regard, so many persons have become duped. Merchants who take orders from merchandise on credit are also facing mounting losses from rip offs. Investigations revealed that "yahoo boys" also take undue advantage of some people that are looking for spouse through the aid of Internet. These criminally minded individuals usually have discussion with their victims via the internet. These criminals pretend to be interested and loving. And before the victim realizes what is happening, the criminals would have succeeded in cajoling them to send some dollars to enable them facilitate travelling documents. These criminals falsify document and tell all sort of lies to get money from their victims, when their victims begin to suspect fowl play, they will immediately stop interacting with them and shift their target elsewhere. Cybercrime in Nigeria is difficult to prove as it lacks the traditional paper audit trail, which requires the knowledge of specialists in computer technology and internet protocols. Specific computer crimes are Spam, Fraud, Obscene or offensive content, Harassment, Drug trafficking, and Cyberterrorism.[2]

Cybercrime is today one of the great legal frontiers, as at 2000 to 2010, the internet has expanded at an average rate of 444.8% on a global level, and currently an estimated 1.96 billion people are "on the Net,"[3] six trillion web pages are accessible on internet, 2.2 billion google searches per month and 12% of all global trade now happens online with US$ 240 million from global cyber-crime.[4] There is no dissimilarity between conventional crime and cyber crime however on deep analysis there is an apparent differentiation between the conventional and cyber crime, which is considerable.... The *sine qua non* for cyber crime is that there should be an involvement, at any stage, of the virtual medium. Business, economic and white collar crimes have transformed rapidly as computers are used to propagate into the activities and environments in which these areas occur. It has also been recorded that cybercrime today is one of the greatest legal frontier which has stimulated a different form of crime and thus creating a source for new avenues of crime, such as identity theft, embezzlement, bribery, larceny, sabotage, espionage, burglary, conspiracy, extortion, distribution of pornography, violation of privacy, and offences as brutal as attempted murder, kidnapping and man slaughter. Almost all crimes that can be committed in person can now be committed through the use of computers,[5] or such criminal actions may have been initiated through the internet. It should be born in mind that Nigeria is not the only country engaged in cybercrime, records has it that she is ranked as the third in the world behind the United States and Britain, and the first within the African continent in the rate of cybercrime prevalence. After Nigeria as hub of cybercrime in Sub Saharan Africa, Cameroon tailgates Ghana as king of cybercrime prevalence in Central Africa. A 2010 report by the McAfee cyber security firm cites Cameroon as the world's riskiest destination for internet surfers with more than a third (36.7%) of websites hosted in Cameroon being suspicious.[6] This

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[1] Okonigene Robert Ehimen, Adekanle Bola., "Cybercrime in Nigeria", *Business Intelligence Journal* January 2010 Vol.3 No. 1.

[2] Krishna Kumar. 2003. Cyber Laws, International Property and e-commerce Security, Dominant Publishers and Distributors New Delhi.

[3] See World Internet Usage and Population Statistics, *http:// www.internetworldstats.com/stats.htm* (Visited 26 October, 2011).

[4] Mohamed Chawki., "Best Practices and Enforcement in Cybersecurity: Legal Institutional and Technical Measures", Available online at www.cybercrime-fr.org visited 29 October, 2011, p. 8.

[5] Laura Ani., "Cyber Crime And National Security: The Role of the Penal and Procedural Law"., *Law and Security in Nigeria*., 2011 pp. 200-202.

[6] Eric Agwe-Mbarika Akuta, *et al*., "Combating Cyber Crime in Sub-Sahara Africa; A Discourse on Law, Policy and Practice", *Journal of Peace, Gender and Development Studies* Vol. 1(4) pp. 129-137, May 2011 Available online at http://www.interesjournals.org/JPGDS visited 28 October, 2011., p. 132.

conspicuous position which Nigeria occupy has been a catalyst in the way the nation has handled issues concerning cybercrime[1] coupled with the noise associated with the lifestyle and sharing of butty by the yahoo addicts

Distinction between Computer Crime and Cybercrime

Because Cybercrime is committed through the use of computer there is the tendency for people to assume that computer crime and cybercrime are the same and one phenomenon. There is need to distinguish both acts in this paper as there are not synonyms.

"Computer crimes" is often used to define any criminal activities that are committed against a computer or similar device, and data or program therein. In computer crimes, the computer is the *target* of criminal activities. The "computer" in this context refers to the hardware, but the crimes, as we shall see, more often than not relate to the software and the data or program contained within it. The criminal activities often relate to the functions of the computer; in particular, they are often facilitated by communications systems that are available and operated through the computer, thereby contributing to a less secure computing environment[2]. Examples of interactive systems include Internet connectivity for access to the World Wide Web (www) through Personal Computers, laptops, tablets and hand-held devices, and telephony or messaging connection through hand phones and other mobile devices. Crimes are also perpetrated not merely through the means of connectivity alone but also through other software programs and applications that are available for use in transaction and human interaction, such as electronic mail and instant messaging services, audio-visual conferencing programs and file transfer facilities.[3] Examples of such computer crimes include hacking, denial of service attacks and the sending of unsolicited electronic or "spam" mail. The array of crimes relating to cyber-trespassing has become more diverse due to advances in technological developments. "Cyber crime" will be taken to mean offences committed *through* the use of the computer in contrast to "computer crime" which refers to offences *against* the computer. Under this distinction, cyber crimes are a sub-set of the general term "crime" and the only difference is the use of the computer as the facilitative device and the use of electronic media as another means to commit a 'traditional' offence.

On the other hand, computer crimes are non-traditional crimes that arose directly from the advent of the age of personal computing for managing information and communication, and that do not exist separately from its existence. One can characterize computer crimes as cyber-trespass, the crossing of the tangible as well as intangible, but no less real, cyberspace boundaries onto property that are owned and controlled by another without permission or authorization. It can also involve the infringement of another's rights including privacy, informational, proprietary and economic rights.[4] Cyber crimes are activities committed using the Internet or computer or other electronic devices as the medium, in violation of existing laws for which punishment is imposed upon successful conviction. What we call cyber crimes largely consists of common crime, the commission of which involves the use of computer technology, and for which penalties already exists under

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[1]Adomi E, Igun S (2008). Combating Cyber crime in Nigeria; *the Electronic Library 26 (5):716-725* in Eric Agwe-Mbarika Akuta, *et al*., *loc. cit*., p. 132.

[2]Warren B. Chik., "Challenges to Criminal Law Making in the New Global Information Society: A Critical Comparative Study of the Adequacies of Computer-Related Criminal Legislation in the United States, the United Kingdom and Singapore", Available online at *www.**law**.ed.ac.uk/ahrc/comp**law**/docs/**chik**.doc visited 27 October, 2011* pp. 4-5.

[3]See, Douglas H. Hancock, *To What Extent Should Computer Related Crimes Be the Subject of Specific Legislative Attention?*, 12 Alb. L.J. Sci. & Tech. 97 (2001). See also, Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 *University Pennsylvania Law Review*, 1003, 1013 (2001).

[4]*Warren B. Chik., loc. cit.,* pp. 4-5.

existing legislation. Cyber crime also includes the *use of digital resources* to commit traditional crimes such as theft of identifiable information and other forms of proprietary information or property in both *digital and physical form*. The relevance of this to the phishing case study will become apparent in due course.[1]

Devices used in Perpetrating Cybercrimes in Nigeria

The Cyber criminals apart from their own mentality and the strength of their motivations, needs to see the path of crime ahead of him clear of obstacles. If every single individual were to put up obstacles of their own, no matter how small, the crime path will seem to be far less lucrative even in the eyes of the most desperate criminal.[2] Progress is observable in the fight against internet pornography (except in few cyber cafes). This is achievable by downloading and installing content filters to filter unwanted Internet content[3]. On the other hand, in Cyber Cafés with notices warning against spamming activities, bulk tickets are sold obviously meant for the purpose of sending spam mails.[4] Research has shown that out of the estimated 30 million e-mail messages sent each day, about 30% on average are sperm, that is unsolicited commercial and fraudulent e-mails.[5]

Apart from the availability and usage of internet facilities in cyber cafes for scam mails and other cyber crimes, the evolution of fixed wireless facilities in Nigeria has added another dimension to the Cybercrime problem. Fraudsters who can afford to pay for internet connection via fixed wireless lines and can now perpetrate their evil acts within the comfort of their homes. In some Cyber Cafés, a number of systems are dedicated to fraudsters (popularly referred to as "yahoo boys") for the sole purpose of hacking and sending fraudulent mails. Other Cyber Cafes share their bandwidth (popularly referred to as home use) to some categories of customers who acquire systems for home use in order to perpetuate Cyber-crimes from their homes.[6] *Though with the invention of supersonic telephone handsets like the Black Berry phones that has similar functions with computer system, online crimes can now be committed at any point with utmost ease.*

How the Crime Operated before the Proliferation of Yahoo Addicts

The scam starts when you are contacted, either by fax, telephone, telex or snail mail, by someone you do not know stating that they are a senior government officials in possession of a large amount of over-budgeted money, usually American dollars. The proposal entails the transfer of the over-budgeted money into your bank account. The person receiving the letter

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[1]*Ibid.*

[2]Longe, O.B. *et.al.*, "Internet Service Providers and Cybercrime in Nigeria-Balancing Services and ICT Development"., p.4-5. See also Aghatise, E. "Cyber crime Definition" Computer Crime Research Center June 28, 2006. Available online at www.crime-research.org visited 27 October, 2011.

[3]Longe, O, Omoruyi, I & Longe, F; "Restoring Balance to Intellectual Property Laws". *Journal of Industrial and Scientific Studies.* Vol1, No. 3. 2003 pp.6-9, See., Longe, O.B., "Software Protection and Copyright Issues in Contemporary Information Technology" Proceedings of the 2nd Annual Engineering Conference, School of Engineering, Auchi Polytechnic, Auchi, Nigeria 2004. See also., Longe, O, Omoruyi, I & Longe, F., Implications of the Nigeria Copyright Law for Software Protection. *The Nigerian Academic Forum Multidisciplinary Journal*. Vol. 5, No. 1. 2005, pp. 7-10.

[4]*Ibid.*

[5]Deborah, F. "Spam: How it is hurting e-mail and degrading life on the Internet," Deborah Fallows,Pew Internet & American Life Project 2005.
Available online at http://www.pewinternet.org/report_display.asp?r=102; Visited 27 October, 2011 (in Longe, Olumide and Osofisan, Adenike "On the Origins of Advance Fee Fraud Electronic Mails: A Technical Investigation Using Internet Protocol Address Tracers," *The African Journal of Information Systems*: Vol. 3: Iss. 1, 2011. Article 2. Available at: http://digitalcommons.kennesaw.edu/ajis/vol3/iss1/2 visited 27 October, 2011)., p. 19.

[6]*Ibid.*

or fax is generally promised a sizable percentage, between 20 and 35 percent, of the moneytransferred, as a commission, for the use of the bank account.[1]

If the intended victim is interested in the deal, they are requested to forward a variety of paperwork which generally includes blank company letterheads which are duly signed, blank invoices, telephone and fax numbers, and especially bank account details. These are being required to affect the transfer of the money into the bank account.[2]

The money is obtained from the victim in a number of ways, such as: asking the victim to deposit money into a specified bank account to help cover expenses for completing the deal, which may include paying bribes to other parties in Nigeria. Once the original fee has been paid, "complications" may arise which necessitate the payment of more fees. Organizing a meeting in Nigeria and once the victim is in Nigeria, his passport is confiscated and he is detained until sufficient payment is received. Are used the bank details and official letterheads to transfer money out of the victim's bank account and into an account under the control of the criminals. Once the money is lost, an "official" may contact the victim on the pretext of helping the victim retrieve the lost money which, in turn, also costs money.[3] Though with the advancement in science and technology, this approach used in committing fraud is fast becoming archaic and almost outdated as few of the con men still rely on this trick to defraud unsuspecting characters.

The Emergence of Yahoo Addicts/Boys in the Cybercrime Scene

In Nigeria, various means of disseminating information in the past consists of the Post offices, Town criers, Public Switched telecommunication network (PSTN) and Telegrams. With the ICT initiatives began in the 1950s there was focus on newspapers and the electronic media such as the radio and television. These media were owned, controlled and monopolized by the government. In 2001, the National Information Technology Development Agency (NITDA) was established as a bureau for the implementation of national policy on Information Technology. NITDAs main focus is to fashion best practices policies that will enable effective and efficient usage of ICT facilities and infrastructures in the country[4] that is why today, there are private radio and television stations in Nigeria. Digital satellite television is also in operation using pre-paid services to stream contents to subscribers. Internet services are available on mobile phones making it possible to transact a wide range of services in electronic form. Fixed and mobile wireless systems offer key advantages in these regards with the advantage of speed and universal availability coupled with the anonymity of the user.[5] An elusive scenario created the right breeding place for crime because crime ever strives to hide itself.

With this evolution in internet communication technology, there emerged this group of cyber-criminals popularly called Yahoo Boys who spend long hours a day browsing the internet and using e-mail extractors to harvest email contacts of persons to enable them send out hundreds if not thousands of dubious emails per day to their unsuspecting victims using the Yahoo Software or identity, (@yahoo.com). The innovative nature of these set of people mostly Nigerians is really amazing and have set the thinking of security agents and members of the international community ablaze as the ingenuity employed in their operations involves

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[1]419/Advance Fee: "How the Scam Works..." Available online at http://www.scamvictimsunited.com/419_advance_fee.htm visited 28 October, 2011.

[2]*Ibid.*

[3] *Ibid.*

[4]Longe, O. B., & Chiemeke, S. C. "Information and Communication Technology Penetration. in Nigeria: Prospects, Challenges and Metrics", *Asian Journal of Information Technology*, *6*(3), 2007 pp.280–287. Available online at http://www.medwellonline.net/fulltext/ajit/2007/280-287.pdf visited 27 October, 2011.

[5] Longe. O. *et al*., *op. cit*. pp.157-159.

a lot to ponder upon. The anonymity of the internet user has been an aid to most crimes perpetuated in the cyber space and ICT-induced anonymity has popularised cybercrime among the different actors in the scene.

Although electronic scam mails are generally believed to be linked to Nigeria, the scam is now prevalent in many other African countries, and the targets are usually gullible individuals who could be anywhere in the world. Many of them are linked to countries such as Ghana, Benin, Togo, Sierra Leone, the Democratic Republic of the Congo and South Africa. For example, using the Nigerian scam letter style, some tricksters in Zimbabwe used the controversial land crises in their e-mail scam letters to deceive innocent people into parting with their money with the hopes they will receive large portions of the (sometimes) illegally distributed land. [1]

The *Modus Operendi* of Yahoo Addicts

What makes Nigeria Yahoo Addicts look mystical to people around the world is the innovative approach engaged in their operations. There devise numerous ways to beat the imagination of the victims and as security agents discover one of their antics, another one is invented over and over, again and again. Researches have shown that many operations are professionally organized in Nigeria; the victim who attempts to research the background of the offer often finds that all pieces fit together. Such scammers can often lure wealthy investors, investment groups, or other business entities into scams resulting in multi-million dollar losses. However, many scammers are part of less organized gangs or are operating independently; such scammers have reduced access to the above connections and thus have little success with wealthier investors or business entities attempting to research them, but are still convincing to middle-class individuals and small businesses, and can bilk hundreds of thousands of dollars from such victims.

Among the tactics employed by these Yahoo Addicts include but not limited to the following: the use of fake cheques, Western Union/Money Gram Wire transfers, Anonymous communication, web based e-mail, bad english, email-hijacking/friend scam, short message service (sms), fake websites, invitation to visit the country, purchasing goods and services, vehicle matching service scams, cheque cashing, lottery scam, charity scam, fraud recovery scam, bona vacantia, fake job offers, rental scams, attorney collection scam among others.2

The use of cheques in a scam hinges on a United State law (and common practice in other countries) concerning cheques: when an account holder presents a cheque for deposit or to cash, the bank must (or in other countries, usually) make the funds available to the account holder within one to five business days, regardless of how long it actually takes for the cheque to clear and funds to be transferred from the issuing bank. Regardless of the amount of time involved, once the cashing bank is alerted that the cheque is fraudulent, the transaction is reversed and the money removed from the victim's account.

In thesame way, wire transfers via Western Union and Money Gram are ideal for this purpose of cyber crime as one central element of advance-fee fraud is that the transaction from the victim to the scammer must be untraceable and irreversible. The wire transfer, if sent internationally, cannot be cancelled or reversed, and the person receiving the money cannot be tracked. Other similar non-cancellable forms of payment include postal money orders and cashier's checks, but as wire transfer via Western Union or MoneyGram is the fastest method, it is the most commonly used by yahoo addicts.

Since the scammer's operations must be untraceable to avoid identification, and because the scammer is often impersonating someone else, any communication between the

[1]Standard Correspondent. "Internet Fraudsters Reap from Zimbabwe Land Crisis", (June 2004) Available online at http://www.eastandard.net/headlines/news10060407.htm visited 27 October, 2011.

[2]Wikipedia Project, 2011 Advance Fee Fraud, November, 2010. Available online at http://en.wikipedia.org/wiki/Advance_fee_fraud visited 28 October, 2011.

scammer and his victim must be done through channels that hide the scammer's true identity. The following options in particular are widely used by the yahoo addicts: Bad English: invariably their emails contain numerous spelling and grammar errors. This is deliberate and not the result of sloppiness or a lack of education on the part of the scammers as such bad English lulls the native English speaker or educated reader into a false sense of security to think that he or she is superior to the scammer and even though the victim "knows" the email is a scam that he or she can outwit the “stupid” scammer if there is any danger at a later stage.

Because many free e-mail services do not require valid identifying information, and also allow communication with many victims in a short span of time, web based e-mail are the preferred method of communication for the yahoo addicts. Some services go so far as to mask the sender's source IP address, making the yahoo boys completely untraceable even to country of origin. A yahoo addict can create as many accounts as he wishes and often have several at a time and apart from that they can engage in email hijacking and friend scam involving the hijacking of existing e-mail accounts and use them for advance-fee fraud purposes. These Yahoo Addicts, e-mail associates, friends, and/or family members of the legitimate account owner in an attempt to defraud them.[1] This ruse generally requires the use of phishing [2] or keylogger computer viruses to gain login information for the e-mail address.

A transaction may have been initiated using a yahoo software but could be completed using a fax machine, whenever their client requires a hard copy of a document. They can also be simulated using web services, and made untraceable by the use of prepaid phones connected to mobile fax machines or by use of a public fax machine.

Though cybercrimes are not often perpetrated by e-mail alone, some scammers enhance believability of their offer by using a sham website. They create these sites to impersonate real commercial sites, such as, PayPal, or a banking site like UBS Switzerland, Central Bank of Nigeria, Central Bank of Ghana, Bank of America or Natwest Bank for phishing. Others represent fictional companies or institutions to give the scam credibility. Another twist on scamming is where links are provided to real news sites covering events the scammer says are relevant to the transaction they propose. For instance, a scammer may use news of the death of a prominent government official as a back story for a scam involving getting millions of dollars of the slain official's money out of the country. These are real websites covering legitimate news, but the scammer is usually not connected in any way with the events reported, and is simply using the story to gain the victim's sympathy.

Furthermore, following an advanced stage of cyber criminality, victims are invited to a country to meet real or fake government officials. Some victims who do travel are instead held for ransom. Scammers may tell a victim that he or she does not need to get a visa or that the scammers will provide the visa.[3] A Yahoo Addict having successfully duped a victim, recognise that same victim who has just been duped is more likely to fall for scamming attempts than a random person. Often after a scam, the victim is contacted again by these yahoo Addicts, representing himself as a law enforcement officer. The victim is informed that a group of criminals has been arrested and that they have recovered his money. To get the money back, the victim must pay a fee for processing or insurance purposes. Even after the victim has realised that he has been scammed, this follow up scam can be successful as the scammer represents himself as a totally different party yet knows details about the transactions. The realization that he has lost a large sum of money and the chance he might

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[1]E-Mail Scammers Ask Your Friends for Money, *The New York Times.* See Wikipedia Encyclopaedia., *op. cit.*

[2]Firefox Release Notes. Mozilla.
http://www.mozilla.com/en-US/firefox/2.0.0.1/releasenotes/. visited 27 October, 2011.

[3]Nigerian Advance Fee Fraud, *United States Department of State Bureau for International Narcotics and Law Enforcement Affairs*. 6. Retrieved on December 1, 2010. See Wikipedia Encyclopaedia Available online at http://en.wikipedia.org/wiki/Advance_fee_fraud visited 28 October, 2011.

get it back often leads to the victim transferring even more money to the same scammer. This is called follow up scamming.

Finally Yahoo Addicts also rely on telecommunications relay services which involves the use of telephone calls to convince the victim that the person on the other end of the deal is really, a truthful person. The scammer, possibly impersonating a US citizen or other person of a nationality, or gender, other than their own, would arouse suspicion by telephoning the victim. In these cases, scammers use TRS, a US federally-funded relay service where an operator or a text/speech translation program acts as an intermediary between someone using an ordinary telephone and a deaf caller using TDD or other teleprinter device. The scammer may claim they are deaf, and that they must use a relay service. The victim, possibly drawn in by sympathy for a disabled caller, might be more susceptible to the fraud.[1]

Federal Communications Commission (FCC) regulations and confidentiality laws require that operators relay calls verbatim, and that they adhere to a strict code of confidentiality and ethics. Thus, no relay operator may judge the legality and/or legitimacy of a relay call, and must relay it without interference. This means the relay operator may not warn victims, even when they suspect the call is a scam. MCI said that about one percent of their IP Relay calls in 2004 were scams.[2]../../../../Users/MICHAEL/Documents/Cyber Crime advance-fee-fraud Modus Operandi.htm - cite_note-29 Tracking phone-based relay services is relatively easy, so scammers tend to prefer Internet Protocol-based relay services such as IP Relay. In a common strategy, they bind their overseas IP address to a router or server located on US soil, allowing them to use US-based relay service providers without interference.

It is pertinent to note that there are several tricks being employed by the Yahoo Addicts to dupe their unsuspecting victims and this paper cannot treat all such as new tricks continue to emerge every day because of the flexibility in the use of the computer device but a search on the internet will reveal web pages devoted to educate people on the tricks being employed by Yahoo Addicts and other fraudsters worldwide in duping unsuspecting victims and there are numerous.

Strategies for Curbing Cybercrime in Nigeria

Research have shown that there is increasing number of computer uses all over the world on daily basis as all human activity appear to revolve around the computer and internet as such the desire to use this medium to commit crime is also on the increase. Statistics reveal that African top five internet users include Nigeria with 43,982,200, rated as 28.9% of the population, Egypt with 17,060,000 being 21.2% of the population. Morocco with 10,442,500 internet users, being 33.4% of the population, South Africa with 6,800,000 internet users, that is 13.8% of the population and Algeria; 4,700,000 being, 13.6% of the population.[3] But contrary to above statistics, the Internet Complaint Centre (ICC) report for the period 2006-2008[4] reflects that the United States tops the list of nations that perpetuates cyber crime (62% - 66.1% in three years). This is followed by the United Kingdom where cybercrime activities by percentage dropped from 15.9% to 10.5% between 2006 and 2008. Nigeria is third on the list with a marginal increase of 1.6% between 2006 and 2008. Two

[1]See Wikipedia Encyclopaedia Available online at http://en.wikipedia.org/wiki/Advance_fee_fraud visited 28 October, 2011.

[2]*Ibid*., (Con Artists Target Phone System for the Deaf, MSNBC).

[3] Mohamed Chawki., "Best Practices and Enforcement in Cybersecurity: Legal Institutional and Technical Measures", *op. cit*., p. 9.

[4] Internet Crime Complaint Centre Report (2006-2008) – http://www.ic3.gov/media/annualreports.aspx visited 29 October, 2011.

other African countries; Ghana and South Africa are also listed in the midst of other European and Asian nations.[1]

Therefore there is urgent need for nations and the international community to adopt stringent measures to curb the menace of cyber crime and yahoo addicts. Among these strategies include but not limited to the following:

1. *Aggressive Public Enlightenment Campaign*: There should be aggressive public enlightenment campaigns that will cut across communities, provinces, countries and international community on the spread of cybercrime and the *modus operandi* of the actors so that individuals and citizens of nations will not fall victim. This involves the use of the mass media: radio, television and newspapers. At present there are several internet sites devoted to educate persons on how the cybercriminals operate and how to avoid becoming victims.

2. *Law Enactment Enforcement and Review*. All over the world, laws are enacted as a means of social control and punishments provided as a means of deterrence, therefore stringent criminal laws with long prison sentences should be enacted to deal with persons caught perpetuating cybercrimes. The cybersecurity Act, 2011 which was passed by the Nigerian National Assembly recommends punishment ranging from N15 million (about $1.2 million USD) to N20 million naira and a maximum of thirty years' imprisonment for anyone found guilty of cyber-related crimes is typical of such laws as weak penalties limit deterrence.[2] Again, laws enacted without adequate enforcement is no law therefore, for the law to serve its purpose, there is need for the law enforcement agents to adequately enforce laws dealing with cybercrimes to the later. Furthermore nations should ensure that all applicable local legislation is complementary to and in harmony with international laws, treaties and conventions dealing with cybercrime.[3] An act has to be crime in each jurisdiction before it can be prosecuted across a border. Nation must define cyber-crimes in similar manner, to enable them pass legislation that would fight cyber-crimes locally and internationally.[4] Furthermore, Cybersecurity laws should be constantly reviews to address the dynamic nature of cyber security threats which cybercriminals criminal pose

3. *The Role of Civil Society Organisations*: The Civil Society Organisations in many countries has become agents of social change; therefore there can form international coalition to fight the wave of cybercrime in our societies. This could be done through increasing awareness and competence in information security and sharing of best practices at the national level through the development of a culture of Cybersecurity at local, national and international levels. There could also formalize the coordination and prioritization of cyber security research and development activities; disseminate vulnerability advisories and threat warnings in a timely manner. [5] There should be a symbiotic relationship between the firms, government and civil society to strengthen legal frameworks for cyber-security.

4. *Development of Institutional Framework to deal with Cyber Crimes:* Nations should establish institutional frameworks that will deal with cyber crimes. Such frameworks will ensure the monitoring of the information security situation at the national level, dissemination of advisories on latest information security alerts and management of information security risks at the national level including the reporting of information security breaches and incidents.[6]

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[1] Longe, Olumide and Osofisan, Adenike (2011) *op. cit*., p. 20.
[2] Cybersecurity Law, 2011.
[3] Azeez N. A and Osunade O. "Towards Ameliorating Cybercrime and Cybersecurity"., *(IJCSIS) International Journal of Computer Science and Information Security, Vol. 3, No. 1, 2009*., p.9.
[4] *Ibid*, p. 9.
[5] *Ibid*, p. 10.
[6] *Ibid*, p. 9.

5. *Protecting Personal and Corporate Computer Software Identities:* There is the need for individuals and corporate organisations to safeguard their individual and corporate software identities such as personal and corporate passwords. Information relating to passwords must be strengthened or properly coded lengthy digits which will include letters/words, figures and signs to make them less susceptible to manipulation by cybercriminals and information should not be carelessly given out to other persons even family relatives. Such information should be constantly changed and updated. Safeguarding the privacy rights of individuals when using electronic communications and developing a national cyber security technology framework that specifies cyber security requirement controls and baseline for individual network users. Firms should secure their network information. When organization provides security for their networks, it becomes possible to enforce property rights laws and punishment for whoever interferes with their property.

6. *Registration of Cyber Cafe Operators*: Since most of the cybercrimes committed on Nigerian cyberspace is done through the internet. The government should register the operators and issue them with an operating licence through a regulatory agency/mechanism and the Internet Service Providers should be constantly monitored to see that they comply with regulations stipulated for their subscribers operations. Cafe owners, should be mandated to place notices on their walls and business premises with warning messages of possible arrests of scammers who send fraudulent mails though individuals can only take precautions within the limit of the knowledge of the dynamics of the Internet and the e-mail system.[1] Nigerian Telecommunication Commission (TCC) should put in place a policy mandating Internet service providers in Nigeria to report suspicious and unusual bulk emails traffic per service points going through their systems. This practice could flag off the identification of the scammers, their locations and their eventual prosecution.[2]

7. *Partnership with other Nations and International Organisations*: with the complex nature of crime perpetuated in Nigerian cyberspace, apprehending the culprits is always difficult and financially involving and time consuming so in ameliorating these huddles, there is need for local organisations in the fight against cybercrime to partner with the United Nations, other African and West African countries, African Development Bank, INTERPOL, Microsoft, Western Union, Yahoo, Google, and Coca cola.[3] The creation of a central agency to enforce crime laws, and the regulation of cybercafés by banning the operation of overnight cybercafé services has been a strong step towards curbing cybercrime. These efforts have been buttressed among other things by the amount of funds received by various anti-crime commissions. In 2004, the EFCC received an initial funding of about two million ($2 million) US dollars from the Nigerian Federal government and about thirty two million ($32 million) US dollars from 2005-2009 from the European Union. In the same year (2004), Nigerian Cyber-Crime Working Group (NCWG) received about seven hundred thousand ($700,000) US dollars from the Nigerian Federal government to allow them the ability to smoothly carry on their responsibilities.[4] In 2005, the EFCC confiscated at least $100 million USD from spammers and other defendants. In 2008, the EFCC had retrieved a total $600 million USD in dubiously acquired funds, More than 700 accused persons have been prosecuted and 400 persons convicted.[5] According to Ribadu, between 2003 and 2007 EFCC successfully disrupted and blocked transactions worth £300 million; €200 million;

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[1]Longe, O.B., and Chiemeke, S. C., *op. cit*.

[2]Longe. O. *et al* "Criminal Uses of Information & Communication Technologies in Sub-Saharan Africa: Trends, Concerns and Perspectives"., *Journal of Information Technology Impact*, *Vol. 9, No. 3, pp. 155-172, 2009*., p.167.

[3]*Ibid*., See also Chawki M., "Nigeria Tackles Advanced Fee Fraud". *Journal of Information Law and Technology* 2009 1:1-18.

[4]*Ibid*, p. 133.

[5] Ayo Olukanni., *"Expert Group Meeting on Cybercrime",* Vienna, 17-21 January 2011, pp.6-7.

Pounds and $500 million USD respectively. In the same time span EFCC successfully prosecuted 97 cybercrime specific offences.[1]

These efforts have paid off to a great extent for example; the EFCC has also been playing a great part in arresting cyber criminals. Unlike other anti-corruption agencies, it has registered some rare successes in the fight against economic crimes, especially in its anti-fraud efforts. After months of investigation conducted by the agency into what has been described as the biggest cyber scam in Nigerian history, a $242 million online fraud that involved big businessmen leading to the bankruptcy of one of Latin America’s biggest banks, ended with the successful prosecution of some very prominent Nigerians. In 2004, the EFCC also returned $4million USD to a Hong Kong resident after arresting the fraudsters who swindled her out of her money.[2] It must be noted that Nigeria, which is regarded as the hub or safe haven for cyber crime in the world, has witnessed the creation of two outstanding crime commissions; the Economic and Financial Crimes Commission (EFCC) created in 2003 and the (NCWG). While the EFCC is involved in all economic and financial related crimes, the NCWG which was created in 2004 implements the objectives set up by the National Cyber-security Initiative (NCI) has its eyes more fixed on cyber related crimes.[3]

8. *Youth Engagement and Job creation Efforts by the Governments of Nigeria*: Research have shown that majority of those engaged in cyber crimes are young school leavers, undergraduates and graduates who are not gainfully employed. Therefore the government should create jobs to absorb this army of unemployed youths and where jobs are not available then a social security scheme should be put in place to provide them with monthly stipends that will dissuade them from criminal activities and keep their hopes alive. This is because the perpetrators are youths and thousands of unemployed but highly knowledgeable ones who are computer savvy and they actually drive the process. They are well connected through local insider conspiracy in the financial institutions locally as well as with Nigerian immigrant community elements abroad. Knowing full well that Nigerian enforcement procedures has become so vigorous they have migrated to mostly West African and other African nations with weak enforcement mechanisms.[4]

9. *Technical Approach:* Individuals and corporate bodies should turn on their spam blockers. Most Internet providers provide a spam blocking feature to prevent unwanted messages, such as fraudulent emails and phising emails, from getting to the inbox. In thesame manner there should be adequate anti-virus software programmes installed in computer systems, such as McAfee, Norton Anti-Virus, Stopzilla or other similar programs and this should be regularly update and atleast once-a-week scan to locate and eliminate any malware, spyware, viruses and other problems. It is also advised that the use of computer's firewall protection feature is necessary, as it is a digitally created barrier that prevents hackers from getting into your computer system and be wary of providing personal information via a website you know nothing about, especially those that ask for your name, mailing address, bank account number or social security number.[5]

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[1]Nuhu Ribadu., *“Cybercrime and Commercial Fraud: A Nigerian Perspective”,* Modern Law for Global Commerce Congress to Celebrate the Fortieth Annual Session of UNCITRAL Vienna, 9-12 July 2007., pp1-3.Available online at
http://www.uncitral.org/pdf/english/congress/Ribadu_Ibrahim.pdf visited 29 October, 2011.

[2]Longe. O. *et al* (2009)., *op. cit*. pp. 157-159.

[3]Longe, O.B and Chiemeke, S. C, *op. cit*., See Chawki, M. (2009).., *loc. cit*., p.131. see also., Maska MU (2009). Building National Cybersecurity Capacity in Nigeria: The Journey So Far, Regional Cybersecurity Forum for Africa and Arab States, Tunis, 2009, Available online at http://www.itu.int/ITU-D/cyb/events/2009/tunis/docs/maska-nigeriacybersecurity-june-09.pdf visited 29 November, 2011.

[4]Nuhu Ribadu, *op. cit*.

[5]eHow, “How to Prevent CyberCrime” 2011., p.1 Available online at http://www.ehow.com/how_4967690_prevent-cyber-crime.html?ref=Track2&utm_source=ask visited 30 October, 2011

10. *Teaching of Moral Values among Nigerians:* It appears that due to the influence of globalisation, as Africans, we appear to lose our long treasured moral values which forbid immoral behaviours such as stealing, questionable wealth and dubious lifestyles which are seriously frowned at by members of the society. Parents should educate their children on the need to uphold high moral values and shun bad associations as most of those engaged in cyber crime are vulnerable people susceptible to peer influence. They should be made to derive pleasure in success achieved through hard work no matter how long it takes.

Conclusions

It has been observed that the phenomenon of cyber crime has pervaded all societies in the world and no one or group is immune from the devastating effects of the activities of yahoo addicts who have turned the internet into a safe heaven for committing all sorts of crime. Apart from individuals and groups, government and corporate infrastructures of critical nature, documents and official information websites are now major targets of attack by cybercriminals who maraud the cyberspace. For example web espionage has becomes increasingly advanced, moving towards well-funded and well-organized criminal operations aimed at not only financial, but also political or technical gain. Again, as a growing and evolving form of crime, cybercrime cost an estimated $100 billion USD annually and as such, urgent need is required to curb this menace. The socio-legal approach as recommended in this research work will be of great value in salvaging this situation.

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ENSURING A JUST EQUILIBRIUM BETWEEN THE DEVELOPMENT OF THE COMPLEXITY OF PUBLIC INTERNATIONAL RELATIONS AND THE RESPECT FOR THE STATE SOVEREIGNTY

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Abstract

Considering our present society, characterised by a pronounced development of international relations, it is necessary to ensure a correct relationship between interdependence and state sovereignty, which, although continues to play an important role, can no longer be absolute or exclusive, as ensuring a peaceful cohabitation demands the respect for the public international law.

Key words: *state sovereignty, international relations, interdependence.*

Introduction

The notion of sovereignty comprises two distinct elements: external and internal sovereignty, notions which connect the internal and international law. External sovereignty stands for the state's absolute independence, which is not subordinated to a power exterior to it, while the internal sovereignty represents the state's right to organize its public power, and namely: the right to legislate, to exercise justice and police, to decide in all of the domains of the political, economical, social and cultural life, without any interference from the exterior[1].

Appearance and evolution of the concept of sovereignty

Kant foresaw a universal global state by which peace would be assured, claiming that a Constitution based on state equality is a step forward towards a Society of nations, destined to ensure order. This society represented, according to his theory, an evolutionary phase towards the Global State, whose undenying citizen would be the individual, and he failed to see the role of international law assuring peace achievable, without a superior state authority.[2]

The concept of sovereignty appeared in parallel with the idea of private property, both focusing on the exclusive rights concentrated in the hand of a single possessor, unlike the medieval system of economical and political laws which were diffusive and multi-layered. At the origins and

[1] To see the decision of the Permanent Court of International Justice, Ser A/B1931, observing the customs system between Germany and Austria, according to which sovereignty, as an interdependence of the state in the sphere of international relations, firstly implies the application of its external and internal policy at will; and the interdependence, as an element of sovereignty, represents one of the founding characteristics of the state as a subject of international right, which consists of his capacity to connect with other subjects of international law; the lack of interdependence calls into question even the state's existence as a subject of law.

[2] Sofia Popescu, *Fundamentul răspunderii juridice. Câteva remarci*, in "Studii de drept", volume II, Universitas Timisienses Publishing, West University Printing house, Timişoara, 1998, p. 76, 77.

for a long period of time, the term sovereignty expressed the existence of a final and absolute authority in the political community. [1]

The principle of state sovereignty is definitively recognised in the period of the absolute feudal monarchies. In the Middle Ages, the idea of sovereignty in Europe, especially France, starts to develop not only from a political-ethical point of view (as in Ancient Greece), but also a juridical point of view, firstly defending the independence and supremacy of the state in terms of classical notions.

In the 16th century, the concept appeared in France, according to which sovereigns are considered the persons with high ranks of the state, was replaced by the notion of the monarch's sovereignty, who is given unlimited state power, being the only representative on the international stage. But this period is acknowledged in the international law of the principle "*par in parem non habet imperium*"[2].

Hugo Grotius (1583-1645) grounded the theory of sovereignty and made delimitation between the state sovereignty and the monarch's sovereignty, making a difference between the *bearer of power* and *state*, as subject of power and sovereignty.

Consequently, as a result of the development of commercial relations and industrial revolutions, the attributes of sovereignty are transferred from monarch to people, orientations which were mirrored in the Declaration of independence of the American Revolution (1776) and then the Declaration of the Human Rights and Citizen of the French National Assembly from 1789.

From a philosophical perspective, sovereignty was perceived, in the vision of Hegel, as absolute power, unsubmitted to any jurisdiction, however at the end of the 20th century, the authors of international right promote o new concept of sovereignty. Thus, Georges Scelle and subsequently, Charles Rousseau considered sovereignty to be a sum of competences which states may authorize, to a smaller or larger extent, to certain international organisms.

Sovereignty of states in the context of current development of international relations

In conformity with the norms of international law, states, in quality of subjects of the international law with equal rights[3], own the same rights and obligations, having the obligation to respect in equal manner international regulations. Thus, sovereignty constitutes the base of sovereign equality[4], and, at its turn, respecting the sovereign equality of states contributes to recognizing and founding state sovereignty in international law.

The contemporary international society, in a continuous evolution, represents the result of a process of progressive integration and continuous enlargement of political frames, factors which confer a dynamical, Copernican[5] unit. The largest part of political and national events of this origin, traverse the state borders, determining the establishment of a just report between independence and interdependence, as well as statal anarchy and integration at the international community level, according to certain norms situated above the national judicial regulations[6].

Although the lack of homogeneity of the international society influences the unity of public international law- constituted of a juxtaposition of general rules, provided with a value of

[1] The idea of state sovereignty initially appeared not as a juridical, but as a political form, and it later resumed the form of a juridical concept.

[2] Vlad Alex Voicescu, *Suveranitatea de stat în epoca modernă*, in "Dreptul românesc în contextul exigențelor Uniunii Europene", Hamangiu Publishing, Bucharest, 2009, p. 526 and fol.

[3] The principle of state sovereign equality is consecrated in art. 2 from the UN Chart, where it is stipulated that the United Nations is founded on the sovereign equality of all its members.

[4] As a component of the principle of state sovereign equality, sovereignty led, after prolonged efforts of the international community, to removing the dependence forms of certain states, such as vassal, protectorate or others, and to the establishment of connections between states based on interdependence and right equality.

[5] Leontin Jean Constantinesco, *Tratat de drept comparat. Introducere în dreptul comparat*, volume I, C.H. Beck Publishing, Bucharest, 1997, p. 34.

[6] Mona Maria Pivniceru, *Drept internațional public*, volume I, Second Edition, Hamangiu Publishing, Bucharest, 2006, p. 1.

fundamental principles in the UN Charta or in universal international instruments or regional ones – one can, however speak of the existence of a general international right, applicable to the international community, respectively to the existent states[1].

Except the imperative norms of general international right, acknowledged according to art. 53 from the Convention of Viena[2], there are also international norms that exist only in a group of states (regional) or bilateral, which are found in the treaties concluded.

The relative pacification of the contemporary international societies[3], The reduction of major disputes after the fall of the communist block, constitutes the foundation of economic development[4], favoured by the improvement of international relations in time of peace[5], as well as by the creation of some control mechanisms with certain constraint value for the states which violate certain norms of international right, such as protection of human right in the framework of the Council of Europe, or in America[6].

On the other hand, state sovereignty ceases to be *absolute*[7] (for example, by entrusting defence policy to security organizations, such as the NATO) and *exclusive* (for example, by the commune exercising of sovereign competences in the framework of European Union institutions)[8].

The evolution of relations between states determines a qualitative transformation of the international right, materialized by: diversification of its regulations, especially towards the maintenance of peace, fight against racism and apartheid, as well as terrorism, protection of human rights, of the environment, natural resources, improving life conditions some underdeveloped regions etc. – all this contributing to avoid or peacefully put an end to international disputes. Likewise, solidarity and state interdependence have crystallized some fundamental values of the international society, and from a juridical point of view new right and obligations were consolidated at the level of international community, which means *the universalization of international right*[9].

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[1] For example, the Status of the International Court of Justice recognizes the existence of written and custom rules, and the international jurisdiction constantly appeals to "international common right" or "general international right".

[2] Art. 53 from the Convention of Viena, adopted in the year 1969, entitled *Tratate în conflict cu o normă imperativă a dreptului internaţional general (jus cogens)* announces the following: "any treaty which, in the moment of its conclusion, is in conflict with an imperative norm of the general international right is invalid. In the sense of the present Convention, a norm of the general international right is a norm accepted and acknowledged by the entire international community, as a norm from which no derogation is accepted and which cannot be modified except by a new norm of general international right with the same character".

[3] Alexandru Bolintineanu, Adrian Năstase, Bogdan Aurescu, *Drept internaţional contemporan*, Second edition, All Beck Publishing, Bucharest, 2000, p. 3.

[4] From an economic point of view, the international society tends towards a unique global market and the idea of military alliance is replaced with the concept of economic security, which leads to the formation of military economic blocks and regional areas for free commerce, expression of the growth of interdependences, translated by globalization.

[5] Likewise, the regionalism phenomenon is manifested at an intergovernmental level, as well as a level initiated between the communities and statal entities placed in different countries, and its generalization is a consequence of both decolonization and the tendency of political and economic integration.

[6] Quốc Dinh Nguyễn, Alain Pellet, Patrick Daillier, *Droit international public,* 7th Edition, LGDJ, Paris, 2002, p. 76.

[7] The states seek to exercise their sovereign plenitude; however this tendency tends to be more and more balanced by the tendency of numerous international relations of cooperation, for the accomplishment of which the states must continuously improve the international juridical frame.

[8] Alexandru Bolintineanu, Adrian Năstase, Bogdan Aurescu, [3], p. 6.

[9] This results from the responsibility of states towards the international community, establishing certain principles referring to the common heritage of humanity (by *The Charter of rights and state economic liabilities,* from the year 1974), which stood at the basis of extending the concept of international crime in case of the serious attacks to the imperative norms (aggression, colonial domination, genocide, massive pollution of the sea and atmosphere, legitimizing law), as well as from the emphasis upon duty of humanitarian intervention, which debates the definition of some of the most important principles in international law (See in this context Dumitra Popescu, *The Universality of International Law: Concepts and Limits* in Proceedings of the United Nations Congress on Public International Law, New York, 13-17 March 1995, International Law as a Language for International relations, United Nations, Kluwer Law International, The Hague, London, Boston, p. 27-36).

All this points to the fact that, beyond the technical and political obstacles, international right tends towards coherence and adaptability, under the pressure of interdependences, of the new international relations and the universalization of global climate[1].

Extrapolating in the international right the way of rationing from the internal right and seeking the identification with the latter in order to find a motif for individualization or for denying international right[2], we will not be able to detect its originality, as a specific difference given by the notion of sovereignty[3], which imprints its own logic both in existence, as well as in evolution[4].

Arguing with the inexistence of powers: legislative, executive and judicial, some authors deny the existence of international public[5], and others account for the necessity of founding a global state, under the lead of a global government endowed with an army force and with the disarming of all governments[6].

Unsubmitting to any superior authority and holding an equality of juridical competences, the states create their own juridical order and acknowledge international right as a coordinating element[7], as every state proves to be interdependent[8] of the others and not just independent. Thus, at an international level, the states have the "obligation of submitting to laws accepted by them in the virtue of their own"[9], situation which also results from many of their constitutions, which foresee the submittance of their right to the international law.

Sovereignty and international liability are considered to be independent concepts; however the state's obligation to abide by the norms of international law cannot be interpreted as a limitation of its sovereign rights. In basis of sovereignty, state ensures order in its territory, and by cooperation with other states contributes to maintaining order in the framework of international relations. As a result, the role of the state in directing social procedures is not only reduced, but also considerably increased.

Conclusions

The entry in the third millennium coincides with a period of profound transformations at the level of the entire world, every nation seeking a new balance, necessary for the continuation of life in social harmony[10], while sovereignty remains a notion strictly related to the state, which continues to

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[1] Mona Maria Pivniceru, [6], p. 27.

[2] The state is an institutionalized society, endowed with an juridical organization that rules over the individuals who create it, thus forming the *legal system of the elderly*.Translated at an international level, this organization of the elderly would include *the international society supra-organization of the elderly,* identical with the one in the internal law, which would essentialy contravene with the state sovereignty.

[3] The development of international relations coincides with the affirmation of the sovereign states, as well as their rivalries, as the concept of state in itself embodies remarcable continuity at the international level, as the characteristics and competences it singularly detains place it both at the origin as well as in the center of international relations.

[4] Jose Antonio Pastor Ridruejo, *Cours general de droit international public*, R.C.A.D.I., 1999, I, tome 274, Paris, p. 27.

[5] Quốc Dinh Nguyễn, Alain Pellet, Patrick Daillier, [6], p. 76.

[6] Jan Tinbergen, *Shaping the World Order Economy Suggestions*, in International Economic Policy, New York, 1962, p. 181.

[7] Louis Cavaré, *Le droit international public positif*, 1st tome, 3rd edition by Jean-Pierre Quéneudec, A. Pédone Publishing, Paris, 1967, p. 110.

[8] The technical and scientific progress has led the formation of a unique informational space, to the deepening and variation of international economic relations, based on technologies in all domains of activity, which made the state interdependence extend to a global level. The integration processes that take place today in the political, economical and spiritual life impose state collaboration, and the unification of defense means for peace and security, for the fight against terrorism, of ecological catastrophes or any other dangers that threaten human kind.

[9] Nicolae Titulescu, *La souveranité de l'État et l'organisation de la paix*, Dictionar diplomatic 2nd tome, A. F. Frangulis Publishing, Paris, 1937, p. 834.

[10] Iuliana Savu, Ştefan Zainea, *Statul la începutul mileniului trei*, in "Dreptul românesc în contextul exigenţelor Uniunii Europene", Hamangiu Publishing, Bucharest, 2009, p. 451 and fol.

be the only subject of public international right, which is in the same time: *sovereign* and *subordinate* to international regulations directly.

Under the increasing influence of supranational organizations (United nations Organization, World Bank, International Monetary Fund, NATO etc.), the national state must adopt the politics imposed or recommended by the latter, being only an acceptant or an executant of the decisions made in the high spheres, beyond its borders. Moreover, the global financial markets impose their laws and precepts on the planet, the states not having sufficient resources or liberty of movement to put into practice their own functioning mechanism[1], without taking into consideration the realities of the contemporary world. In these conditions, the extension of sovereignty, the sovereign competences and its form of accomplishment are continuously changing, depending on the tasks of the states, on the international liabilities that the state assumes, on the relations of integration.

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CUSTOMS OF THE ROMA PEOPLE – A SOURCE OF LAW?

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Abstract
Relations between people are regulated by juridical norms whose application is achieved by the force of sanctions stipulated in them. The Roma people communities, except the statal laws, must also respect certain specific rules, as they may be judged by the Stabor for violating them.

Key words: *custom, traditions, Roma people, Stabor.*

Introduction
Since the historical beginnings of mankind, the human communities established certain norms of conduct of a public organizational, religious or moral nature. Without respecting them, their cohabitation would have been extremely difficult, situation which is also found in the Roma people collectivities, which over time established their own set of conduct rules, whose application is realized by specific means.

General considerations regarding the role of customs as a source of law
Analysing the sources of law, two acceptions were highlighted: *source of law in a material sense and source of law in a formal sense.*[1].

The material sources represent sources of the substance of juridical norms and are factors of time and space, philosophical, moral and religious principles, social facts which condition the orientation and law[2], in the juridical domain, the expression "material source" suggesting social conditions that determine the appearance and the content of juridical norms from a certain society.

The formal sources of law are those forms, procedures and solemn documents by which these norms obtain their validity, forming the positive right.

The notion of material source answers to the question "who creates the law?", and that of the formal source answer the question "in what way and form are the juridical rules created?"

The totality of juridical norms, regardless of their form of expression (written laws, customs, principles, jurisprudence, normative contract), constitutes the positive right, which is ensured and guaranteed by the state[3], aiming at organizing and forming the human behaviour, in a climate

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[1] Mircea Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv*, All Beck Publishing, Bucharest, 1999, p. 306; Sofia Popescu, *Teoria generală a dreptului*, Lumina Lex Publishing, Bucharest, 2000, p. 143; Nicolae Popa, *Teoria generală a dreptului*, All Beck Publishing, Bucharest, 2002, p. 173; Ion Craiovan, *Tratat elementar de teoria generală a dreptului*, All Beck Publishing, Bucharest, 2001, p. 223.
[2] Sofia Popescu, *Introducere în studiul dreptului*, UNEX-AZ – University Complex, Bucharest, 1991, p. 190.
[3] Constituting the essence of right, the general will, made official by obligatory norms of behavior (thus becoming juridical will) is expressed by laws which are defended by the state (See in this sense Nicolae Popa, [1], p. 63).

specific to the manifestation of liberty coexistence, of defending the essential human rights and establishing the spirit of justice[1], as the true history of the society begins along with the appearance of the state and law, which embodies the highest point in the culture of a nation[2].

The oldest formal source of the law is the custom (juridical custom), thus the positive right must be considered customary[3] at origin, the authority of the custom being very great at the beginning of the human society, when the individual did not stray from the traditional practices of his ancestors.

The customs acknowledged by the state power and invested by it with juridical force, have become juridical customs (known also as traditions), which constitute formal law sources. Thus, the juridical custom is based on the appliance of certain conduct rules existent in the tradition of a community, as to solve concrete litigations, to which reference is then made with the occasion of judging similar cases, being invoked as *precedent*, which led to their being *consacrated* and recognizing their juridical value. Thus, jurisprudence applies and interprets customary norms, as well as the norms of written law[4].

By the repeated application of the same rules in solving situations which have certain similar traits, the customary norm has been given a general character and has acquired obligatory juridical force, respecting it being imposed by the state authority, exercised by means of the specialized organs.

In this way, the first juridical norms appeared[5], and that was nothing more than the transformation of customs into obligatory norms, guaranteed by the public power.

Concerning the juridical nature of conduct norms and trial procedures founded in the framework of the Roma people collectivities

The totality of juridical customs form *the customary law* or *the traditional law,* also known as *the unwritten law,* because in the beginning stage of law, customs were not regularly, established by written texts.

However, not all customs established in a community become sources of law; thus, the customs which refer to reports that exceed the juridical sphere, even though close by structure to the juridical norms, do not represent positive right, because they are not applied by instances under the state authority and under the pressure of sanctions.

The custom is a source a law only if it succeeds in establishing a rule, an obligatory precept, and a rule become obligatory only when it provides an applicable *sanction* by the state organs.

Together with the normative acts, which govern juridical reports among all members of a society, in the communities where *Roma people* live, some social relations between them are regulated by *specific rules*, that have been maintained over time, in a form adapted to social changes which the Roma people have witnessed, but also the evolution of rules from the states they live in.

In the beginnings, the trial of the Roma People was considered the only procedure to which the Nomad *Roma people* from all the corners of the world who committed certain acts[6], were subjected to, however, in the present the Roma people cannot restrain from the laws in the states they live in, all these acting for the regulation of the reports between them, as in any other form of organized social life, in general.

The Stabor's Decision– pronounced by the chief "complete" judge of the Roma people – is subsidiary to the one expressed by the judge from the state organs, which also solve cases that involve the Rome people, as they have the obligation to submit to the laws adopted by the state and

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1 Sofia Popescu, [1], p. 144.
2 Georg Wilhelm Friedrich Hegel, *Principiile filosofiei dreptului*, Academia Publishing, Bucharest, 1969, p. 232.
3 Giorgio Del Vecchio*, Lecţii de filozofie juridică*, Europa Nova Publishing, Bucharest, 1992, p. 227.
4 Mircea Djuvara, [1], p. 313.
5 Ion Craiovan, [1], p. 228.
6 As well as judgements performed by other collectivities, until the appearance of state and law.

judicial decisions of the organs of official justice. Thus, for example, the Rome people's trial in penal causes may be considered only a tradition, because, regardless of its conclusions, they cannot be taken into consideration while conducting an official investigation, in the framework of which the administration of evidence rules id accomplished by means of procedure stipulated by the norms adopted by the state.

Moreover, the forum of judgement specific to the Roma people, in penal matters, is convoked especially for those reasons which may endanger the group's existence[1], as under the incidence of this trial are not regularly mentioned other rules, which are judged only by the state authorities.

Kriss Roma people or the Roma peoples[2] has been preserved over the ages as one of the customs by which the Roma people also solve problems which, not being regulated by the statal laws, would seem unnatural in the opinion of an official judge, such as: how many gold bracelets does a girl deserve at her wedding or why a family does no longer agree with an established marriage from the time when the future spouses were just children?

The trial of the Roma people is frequently resorted to, in order to solve family problems, the latter having specific rules, which regulate, differently from the common law, the manner to conclude a marriage, a divorce, the consequences of infidelity, etc. Thus, for example, when it comes to terminating the relations between women and man, the separation of the Roma husbands is not made by means of divorce, according to the state laws in which they live, instead they appeal to the Roma people's trial.

The most controversial cases which make the object of the trial specific to the Roma people, because of the difficulties of "choosing" a decision, refers to the situations in which a girl is engaged at a very young age, but another manages "to steal her heart", being unmarried.

The Stabor is also called upon to preside the trial in the situations of marital infidelity or when a married man "makes advances" to an unmarried girl.

The most severe punishment the *Stabor* may decide against adulterous women is cutting the woman's nose in case of adultery, decision which is still practiced in the present in some Roma communities.

Concerning the rules regarding the procedure of trial development, we mention that the "Jury" is formed of the Roma leaders, mature men or "old men", who are respected by the community for their honesty and hard work, and the number of jury members, is always uneven: a minimum of 5 and a maximum of 11.

The trial development takes place on neutral territories to the parties that request it, if the events are of a more severe gravity, and the place trial is usually situated in the open air.

At "*Kriss"* all members of the groups involved are present, including men, women and children: the men are those who participate in the debates, while the women are only consulted in their capacity of witnesses.

During the trial, the women uninvolved in the trial are forbidden to speak, and in situation of violating this rule, they are either amended or removed from the place of trial.

In order to elucidate cases in which the parties have no witness or other evidence, they practice their specific oath, with *cursed thrown on the children while holding their feet in water, while making the sign of a cross or sitting on their knees.*

If one of the parties has performed the oath and yet it has proven to be false, it is considered that "*he has taken upon him the sin*" and the oath is no longer taken into consideration.

The trial is performed in the following phases: the preceding phase, the possibility of reconciliation, the trial, the sacred oath, the verdict, execution of sanctions.

If the trial last for a period of certain days, the jury will be accommodated together and will not be allowed to get in touch with the parties involved or their family. In case there are sound

[1] Niculae Crişan, *Ţiganii. Mit şi realitate*, Albatros Publishing, Bucharest, 1999, p. 37.
[2] Angus Fraser, *Ţiganii*, Humanitas Publishing, Bucharest,1998, p. 236.

suspicions of relations with the parties or influences, the jury will be excluded from the trial forum. The decisions of the panel of judges are *without appeal* according to the roma people, and the sanctions administrated by the de *Stabor* are, generally: *submittance to the payment of certain amounts of money (fines), reconciliation advice and respecting of the word given, or the immediate removal from the place of the guilty person*[1].

Fines are payed in common by all the members of the family or by the group found guilty, and the expenses regarding the trial, such as: transportation, meals and the accommodation of the jury are equally supported by both parties.

The Roma people have complete faith in their trial and prefer it to the statal one, being dominated by the feeling that they are desconsidered by the "*gagii*" (other citizens of the state they inhabit) and that, in their trial, the parties speak the truth when performing their specific oath.

In the case of non-submittance to the decisions of the *Kriss*, the guilty will be declared "*marime"* (foul, soiled), which lead to his exclusion from the tribe, namely social death, and all the other Roma people that continue to maintain contacts with him also become *marime*[2].

Those who preside certain cases between the Roma people are named in their language "*krisinatori*", which means Roma judges.

Many Roma people consider that, because of the Romanian who appeals to their trial[3], the credibility of the *Stabor* will grow. They think that the Roma people are skilled businessmen and that, due to the strict application of their own procedure regulations, they manage to solve litigations much faster than the states courts of law[4].

Trying to answer the question regarding the possibility that Roma people's customs be included in the category of formal law sources, we express our opinion that, principally, such a quality cannot be attributed, as they are not adopted or integrated in the state legislative system and are not applied by the official organs, which are under the state's authority.

The discussion contains, however, some nuances because of the fact that these customs which regulate certain relations between the Roma people do exist, not being forbidden by the state, and in the case of cases they are applied, the decisions pronounced on their basis producing effects by regulating distorted relations, and their positive effect consists in ending litigations and in restoring social order in the respective community.

If in the cases of criminal character, the Rome people's trial is not taken into consideration, all penal acts stipulated in the laws adopted by the state (except those for which the penal action begins with the prior complaint of the person harmed), finding a solution in accordance with the official dispositions – independently of the parties will, in accordance with the formality principle of the penal process – in other matters, such as family and commercial litigations (generally, in litigations governed by the principle of availability of the parties), the trial of the *Stabor* produces effects upon the regulating of relations in the framework of the Roma community, without the state's intervention, as long as no official legal norm is being violated.

Conclusions

Even if the customs of the Roma people cannot be included in the category of the formal sources of the law, the existence of a system of material norms and specific procedures accepted by the majority of the Roma community (which grants them a certain obligatory force) cannot be denied. These are doubled by imposing of some specific procedures resulting in decisions applied by certain "official" organs in their group, whose respect is achieved, generally, by the force of custom

[1]There are cases when it is decided that the guilty left the place where he committed the act only for a period of time because he was sanctioned.

[2]Angus Fraser, [2], p. 230.

[3] In our country, some Romanians, which present litigations with Roma people appeal to their judgement avoiding addressing the instances of the state's legal organ system, which are extremely boarded and have a more complex manner of solving cases.

[4] Niculae Crişan, [1], p. 40.

and authority of both those who judge and the ones who lead the community. We could say that, even in some penal matters, some decisions of the Stabor (such as, for example, the ones mentioned for acts to which the procedure of prior complained is attached), in which certain measures to restore order are mentioned (not sanctions stipulated in the official legal regulations) may produce effects, if they are not contrary to some norms of public order.

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THE CRIME OF SERVICE ABUSE IN THE VISION OF THE NEW PENAL CODE

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Abstract

In the Penal Code adopted by the Law no. 286/2009, one single crime of service abuse is regulated, in contradiction with the previous code which comprised three similar incriminations. This crime broadly comprises the same acts, their sphere being only broadened by stipulating other means of committing abusive activities.

Key words: *abuse, official, service, damage, harm.*

Introduction

In the penal Code from 1968 three crimes of abuse in service are condemned: service abuse against the individuals' interests (art. 246), service abuse by limiting certain rights (art. 247) and service abuse against public interests (art. 248), unlike the new code, adopted by the Law no. 286/2009,in which only a crime of service abuse is mentioned[1]*, but which embodies two normative forms, mainly comprising the same acts, to which others are added by adding up new elements referring to the motif which stands at the basis of committing abusive acts.*

Pre-existent conditions for committing crimes (factors of the crime)

a) The special Juridical object for the crime of service abuse is formed by social relations regarding the well functioning of public units, respectively private units (for the attenuated form of a crime stipulated in the art. 308, Penal Code[2]), by the proper fulfillment of service attributions by the public officials (or any other individuals employed, in the case of an attenuated form), aiming to combat abusive behaviours, incorrect attitudes that lead to

[1] This crime is stipulated in the art. 297 from the new Penal Code, which has the following content "(1) The crime committed by the public official which, while exercising his work attributions, fails to fulfill an act or performs it incorrectly and by this causes a damage or harm to the legitimate rights and interests of a natural or juridical person is punished with imprisonment from 2 to 7 years and the interdiction to further exercise the right to occupy a public function. (2) With the same punishment one also sanctions the act of the public official which, in exercising his work attributes, limits the exercise of a person's right or creates a situation of inferiority based on principles of race, nationality, ethnical origin, language, religion, sex, sexual orientation, political affiliation, fortune, age, disability, non-contagious chronic disease or HIV infection".

[2] Art. 308 from the new Penal Code has the following content: "(1) The dispositions of art. 289-292 and art. 297-301 related to public officials is also applied appropriately to acts committed by or relating to persons which exercise, permanently or temporarily, with or without remuneration, a task of any nature in service of a natural person stipulated in the art. 175 par. (2) or in the service of any legal person. (2) In this case, the special limits of the sanction are reduced with a third of it."

b) damage or violation of the rights or interests of those which comes into employment contact with the units where the perpetrators work.

The crime also comprises an adjacent juridical object, which refers to relations which comprise the defence of legitimate interests of natural or legal persons which address themselves to institutions, so that the latter may revalue their legal rights and not present any losses by the inappropriate exercising of work attributions, by persons which are employed at the units requested; the normative content stipulated in par 2 of art. 297 also aims at defending social relations regarding the equal treatment of natural persons by the public officials (respectively by other employees in the case of attenuated form), with no discriminations, so as to provide them with the occasion to exercise their rights and not create a situation of inferiority for them, based on race, nationality, ethnic origin, language, religion, sex, sexual orientation, political affiliation, fortune, age, disability, non-contagious chronic disease, or HIV infection.

b) The direct Active subject of the crime of service abuse in its basis form is qualified at both normative versions, as the quality of author may comprise only one *public official*, category regulated in art.175 from the Penal Code[1].

In accordance with art. 308 from the Penal Code, there may exist direct active subjects, all qualified and other workers who do not possess the quality of public officials, but in this situation we are dealing with a crime of service abuse in an attenuated form and which is sanctioned in reduced limits.

Penal participation is also possible, however in order to possess the capacity of co-author, the perpetrators must be public officials (in case of the basic forms of crime), or the employees of a legal person or natural person assimilated to public officials (in the case of an attenuated form stipulated in the art. 297 reported to art. 308, Penal Code).

If a person who does not possess the necessary capacity requested by law and accomplishes acts of direct exertion, specific to the crime, she will be liable for complicity to service abuse.

The crime for service abuse cannot have as an active subject a legal person, because, as I have shown, this act can be achieved only by a qualified subject.

c) The passive Subject specific to crime of service abuse, in the form of a norm stipulated in par1 of art. 297 Penal Code may be represented by any natural or legal person, even a public official or any other employee working in the same unit, whose rights and interests are in any way violated by the abusive activity of the active subject, accomplished while exercising his attributes at work.

d) In case of the normative version stipulated in par. 2 of art. 297 Penal Code, the passive subject may be represented by any natural person (for cases in which, limiting the right of a harmed person or creating an inferiority situation is done, for example, on the motif of race), but it may also be qualified (when it must have a certain quality, for example, a disability, infected with HIV).

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[1] Art. 175 from the new Penal Code has the following content: "(1) A public official, in the sense of penal law, is the person who, entitled permanently or temporarily, with or without remuneration:
a) exercises attributions and responsibilities, established on the base of law, as to achieve the dispositions of the legislative, executive or judicial power; b) exercises a function of public dignity or a public function of any nature; c) exercises alone or together with other individuals, in the framework of autonomous administration, of another economic operator or legal person with integrated or majority capital or of a legal person declared as being of public utility, attributions related to the accomplishment of its object of activity. (2) Moreover, it is considered a public official, in the sense of penal law, the person who exercises a service of public interest for which it was invested by the public authorities or who is submitted to the supervision or control of the authorities regarding the accomplishment of the respective public service".

Constitutive content of the crime

a) *The Objective Side* of crime for service abuse refers to: the material element, immediate following and causality connection between the illicit activity and the result produced.

The material element of the crime for service abuse embodies the *failure to accomplish an act* which normally enters the service duties of the perpetrator, or *performing it incorrectly* – in the case of the normative version stipulated in par. 1. Thus, although generally, the crime is commissive, comprising an abusive activity against a natural or legal person, some acts may be achieved, by omission (for example, refusal to release a document necessary to the harmed person, although the active subject had the legal obligation to issue the document).

The normative ways of committing a crime are alternative, and not cumulative, thus the content of the crime is realized either by inaction to fulfill an act which enters the attributions of the author, either by the action of inappropriately accomplishing a service attribution.

In the case of the normative version stipulated in par. 2, the material element is accomplished by *limiting* the exercising of a right or by *creating* an inferiority situation for the passive subject, in terms of race, nationality, ethnical origin, language, religion, sex, sexual orientation, political affiliation, fortune, age, disability, non-contagious chronic disease or HIV infection.

The first alternative modality to commit this crime content is achieved by preventing the harmed person by the perpetrator, in the basis of the motives shown, to use the rights it has or exercise them as stipulated in the law.

The second modality embodies the creation by the perpetrator, on the basis of the same motives, of an inferiority situation concerning the harmed person, thus violating the constitutional principle of the equality right of all humans.[1].

In describing the material element of the objective side of the crime for service abuse a very general way of expressing is being used, without showing the actions or inactions by which the crime may be committed.

Although this incrimination has no open content, the general formulation used by the legislator does not help the operation of determining which of the violations of service attributions attract legal liability and which do not[2], thus debating whether this incriminating text fulfills the accessibility conditions imposed by art. 7 from the European Convention of the human rights[3].

Having a character of maximum generality, the text of crime for service abuse practically includes all the sphere of acts which may be committed by violating service attributions (if the violations shown have been committed), thus such crime is *subsidiary* to others, which are committed by the same category of perpetrators, in exercising the employment tasks and which are produced by certain *specific acts,* which cannot be framed in more general categories of acts stipulated in art. 297.

[1] The discriminations acts which do not accomplish the requests of the crime stipulated in the art.297 par.2 from the Penal Code will be contraventionally sanctioned according to dispositions of art. 2 and art. 5-15 of the Government Ordinance no. 137/2000, regarding the prevention and sanctioning of all forms of discrimination. The Ordinance was adopted as a result of our country's adherence to the International Convention regarding the elimination of all forms of racial discrimination, from the year 1965, of the General Assembly of the United Nations Organization.

[2] In compared law such general formulations does not exist, thus establishing more specific conditions for determining the criminal character of acts.

[3] Sergiu Bogdan, *Drept penal. Partea specială*, 3rd edition revised and completed, Universul Juridic Publishing, Bucharest, p. 306.

This character of subsidiarity has not been expressively foreseen by the legislator, but he deduces from the specificity of the material element of other crimes committed in exercising service attributions, to which it is exactly and limitatively determined.

Thus, the possibility to make a separation in the spirit of the penal law remains in question, between the acts of failure to fulfill and acts of inappropriate fulfillment of service attributions with a criminal character and those which do not posses this character, possibly placing them in the sphere of interdisciplinary liability of the author[1].

One element of separation for the given situation would be the gravity of the consequences of the concrete act, although, given that the new regulation of the criminal institution does not include the trait of *social peril* anymore, this argument may be less relevant, the more so as in the criminal norm no references are made regarding the gravity of the consequences for considering the act a criminal act.

The immediate consequence of the crime for service abuse, in the version mentioned in par. 1 of art.297, is alternative and consists in *producing damage*[2] or in *harming rights or legitimate interests*[3] of a natural or legal person.

The term "interest: used in the incriminating norm has a common meaning of desire to satisfy certain needs, of preoccupation for obtaining an advantage, of action targeted towards covering a necessity, of benefit, profit, and by the expression "legitimate interest" we understand that interest which is protected or guaranteed by a normative disposition[4].

As in the case of the version mentioned at par. 1 of art. 297, the criminal activity incriminated by the normative content of par. 2 must produce an injury to the harmed person, which consists of *limiting the exercising of a right* or in *creating a situation of* inferiority, based on the discriminatory motives shown. Thus, the person being discriminated, cannot exercise a legal right, or this fact is not permitted (for example, is not inscribed in the voting lists is not admitted to participate at the exam for occupying a post, has no access to certain leading functions for which it fulfills the legal conditions).

The causality connection. Service abuse, the version stipulated in art. 297 par. 1 penal Code is a result crime, thus between the action or inaction which form the material element and the consequence produced must exist a causality report, in the sense that damage or damaging the rights or legitimate interests of the harmed person must be the consequence of failure to fulfill or inappropriate fulfillment of service attributions by a public officer or another employee (in the case of an attenuated form of crime).

c) The Subjective Side. The form of guilt with which is committed the version stipulated in par. 1 of art. 297 from the Penal Code is *intention,* which may be *direct*, if the perpetrator aims to produce the illicit result in the damage of the harmed person, or *indirect*,

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[1] We appreciate that the sphere of the penal illicit would extend too much if the crime of service abuse (or service negligence, when the act is committed by guilt) would be committed for any failure to fulfill or inappropriate fulfillment of service attributions, with minimal damaging consequences.

[2] Producing a damage implies recording a material prejudice in the detriment of the person harmed, by the abusive exercising of service attributes by the perpetrator (for example, selling a product with a much larger price than the one legally established). In this sense, see Decision no. 1646/02.07.1992 of the Supreme court of justice, Section of administrative contentious, in *Repertoriu de jurisprudenţă şi doctrină română*, 1989-1994, vol. II, coordinated by Constantin Crişu, Nicorina Crişu Magraon, Ştefan Crişu, "Argessis" Publishing, Curtea de Argeş, 1995, p. 38.

[3] Damaging rights or legitimate interests of a person implies the effective violation of rights and legal interests in every manner: refusal to accord them, limiting their revaluation etc., by the employee who has service attributions regarding the achievement of the respective rights and interests. Moreover, it embodies injury or moral and physical prejudice to the person harmed.

[4] Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roşca, *Explicaţii teoretice ale Codului penal român*. vol. IV, Academia Română Publishing, Bucharest, 1971, p. 81.

d) when the abusive behaviour does not target to harm a certain person, but the author accepts only the consequences of his action, being indifferent to the situation of the person harmed[1].

The mobile or *purpose* of committing this version has no relevance regarding the qualification of the action as being a crime

The normative content stipulated in art. 297 par. 2, however, perceives the existence of a *special mobile* which stands at the basis of the decision to commit this crime, and namely the situation of the harmed person regarding: race, nationality, ethnic origin, religion, sex, sexual orientation, political affiliation, fortune, age, disabilities, non-contagious chronical disease or HIV infection. Thus, this version of crime may only be committed with *direct intention*, the perpetrator aiming at limiting the exercising or the rights or giving the person harmed feel a feeling of inferiority due to the discriminating acts, on the basis shown.

Conclusions

From those above-mentioned we may conclude that there is no longer a distinction made between service abuse against person's or public interests, as the crime text from the new Penal Code sanctions the one, who while inappropriately exercising his service attributions causes a "damage or harm to the rights or legitimate interests" of a *natural or legal person*, regardless whether the latter is or not a unity of public interest.

"The service abuse by limiting certain rights", regulated in the previous Penal Code, is found in par. 2 of art. 297 from the new Penal Code, in a more complete regulation, in the sense of expressively mentioning that acts are committed in exercising service attributions, and their mobile has a larger sphere.

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[1] Acts committed by fault are not sanctioned accordingly to this incrimination (taking into account art. 16, par. 6, 2nd thesis from the new Penal Code), but in conformity with art. 298, by which the crime of service negligence is condemned.

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THE ROLE OF THE INSTITUTE OF HUMANITARIAN LAW IN DEFENDING HUMAN RIGHTS

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Abstract

The International Institute of Humanitarian Law, similar to other international inter-governmental organizations, militates for the observance of human rights, especially the refugee right and immigration right, thus also contributing to the improvement of international reglementations in these domains.

Key words: *international inter-governmental organizations, human rights, humanitarian law.*

Introduction

The International Institute of Humanitarian Law (IIDU) is an independent, nonprofit organization, with humanitarian character, founded in the year 1970. The central office is in the Ormond Villa, Sanremo, Italia, and a contact body is established in Geneva, Switzerland.

The main purpose of the Institute is to promote the development of international humanitarian law, human rights, especially refugee rights, immigration rights and problems connected to these rights.

General consideration upon the contribution of international non-governmental institutions to defending the human rights .

The international non-governmental organisations represent international associations, without a profit, created from private or mixed initiative, which groups natural and juridical persons with different nationalities[1], in conformity with the internal state law on whose territory lies the head office.

They have an old history, as in the year 1914 having already established a number of 1083 such organizations[2], however, the expression “non-governmental organization” started to be used frequently after its introduction in the founding documents of the United

Nations Organization. In the year 1945, having been accepted the consultative role of one of them[1], as a result of their request to officially participate to the works of the organs of the United Nations Organization[2].

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[1] Miga-Besteliu, Raluca, *Drept internaţional. Introducere în dreptul internaţional public,* 3rd Edition, All Beck Publishibg, Bucharest, 2003, p. 212.

[2] *Subcontracting Peace - The Challenges of NGO Peacebuilding,* Edited by: Richmond, Oliver P. • Carey, Henry F. Published by Ashgate, 2005, p. 21.

Non-governmental organizations are becoming more and more implicated in the activity of international inter-governmental organizations, regarding the protection of human rights; their representatives participate in the works of these organizations, being involved in the process of issue of numerous norms of international law of the human rights – by means of promoting new ideas in the domain, or of proposing norms or amendments. Likewise, non-governmental organizations participate in the activity of specialized institutions to protect human rights, by providing information from the states involved, by informing and involving public opinion in the cases of serious violation of human rights or by the pressure exerted upon international organizations, in order to take measures: sending special reporters, organizing work groups etc. Moreover, non-governmental organizations are frequently releasing reports similar with those of the states, in some problems concerning observance of human rights, which they present to the international[3].

Before the international jurisdictions from the domain of the human rights, non-governmental organizations may exercise a right of action in quality of plaintiffs or may represent individual petitioners.

Today, over 1500 international non-governmental organizations have a consultative role for the Social and economical Council[4], thus contributing to the process of making decisions[5]. The ONG-s are, also, involved in the activity of some subsidiary organs of the Social and Economical Council (ECOSOC), such as the *Commission for human rights, Commission for sustained development and Commission for women's status*[6].

Involvement of the International Institute of Humanitarian Law in the protection of human rights

Due to its specific experience accumulated in the domain, the International Institute of Humanitarian Law has earned an international reputation as being a center of excellence in the forming domain, as well as of propagation of all the aspects of the humanitarian international right.

The institute is formed of more than 2000 individual members, of different nationalities[7], and in conformity with the State, they are persons who have distinguished themselves especially by their competence in domains of interest specific to the Institute.

The General assembly also establishes general political guides of IIDU, and the Council, which is chosen by the General Assembly, monitors the leading of the Institute and establishes the activity program. It chooses the president, the vice-presidents, also naming

[1] In conformity with art. 71 of Chapter 10 from the UN Charter, "The Economic and Social Council may take any measures considered appropriate in order to consult the non-govermental organizations which are dealing with the problems according to its own competence."

[2] Buergenthal, Thomas • Kiss, Alexandre, *La protection internationale des droits de l'homme*, Éditions N. Q. Engel et Kehl, Strasbourg et Arlington, 1991, pp. 155 and following.

[3]http://oliviamarcov.wordpress.com/2010/03/29/organizatiile-internationale-nonguvernamentale-ong-drept-international-public/, accessed in the 1st of Martch 2011.

[4] The juridical framework for the participation of non-governmental organizations to the ECOSOC works is established by the Resolution of 1296(XLIV), adopted by the Social and Economical Council, on the date of 23rd of May 1968 regarding the dispositions referring to consultations, which may be made in written or oral form. The Council acknowledges that these organizations must have the possibility to express their points of view, as the possess a special experience and valuable technical knowledge for the ECOSOC activities.

[5] For example, the Conference regarding the environment from Stockholm, from 1972, took place after the pressure exerted upon governments by the international non-governmental organizations, in this sense.

[6] For example, the non-governmental organizations with a consultative character for ECOSOC participates at the works of the Commission for human rights and of the Subcommission in order to prevent discrimination and minority protection.

[7]Institutions which significantly contribute to the activity of the Institute may also be, admitted as members.

the general secretary and the treasurer[1].The main activities of the International Institute of Humanitarian Law comprise the following sectors: forming of the civil and military personnel[2]; organizing conferences, seminaries, and round tables[3]; research and publication[4]. In these sectors, the Institute developed numerous concrete actions. Thus, in the period of 4-6 September 2008, the International Institute of Humanitarian Law organized at Sanremo, in cooperation with the International Committee of the Red (CICR), the XXXI *round table*, with the theme "*Human rights and peace operations in the international humanitarian law*". The round table reunited over 400 experts, national representatives, international officials, and represented an important event for the international community, as it constituted an opportunity for free and constructive debates regarding the actual and important problems regarding the humanitarian international law and its applicability in the operations to maintain peace. Professionists from diplomacy, NATO and EU representatives, the High Commissariat of UN for Refugees, representatives of the International Organization for Migration, of the UN and of other international organizations, members of the Red Cross and Red Crescent, experts, researchers and ONG representatives also participated in the debates.

[1] From September 2007, the president of the Institute is represented by the ambassador Maurizio Moreno, a career diplomat. Among the members of the Institute we find eminent personalities from the diplomatic cercles, scientist and experts such as: Dr. Mohammed Al-Hadid (Jordan), president, Permanent Commission of the Red Cross and the Movement of the Red Crescent; Prof. Mario Bettati (France), Special Representative at the Minister of External Affairs; Gen. Erwin Dahinde (Switzerland), chief of the International Relation Section of the Swiss armed forces; Dr. De Baldwind Vidts, juridical councilor at the General Secretary of NATO; Dr. Ndioro Ndiaye (Senegal), deputy general director of the Migration General Organization; Prof. Dinstein Yoram (Israel), honored professor at the University of Tel Aviv; Prof. Jacques Forster (Switzerland), honored professor at Geneva Institute for Advanced Studies in development; Prof. Dr. Wolff Heintschel Heinegg von (Germany), chief of the Faculty of Law from the University of Viadrina, Frankfurt; Prof. Marie G. Jacobsson (Sweden), main juridical councilor at the Swedish Ministry of External Affairs; dr. Michael A. Meyer (UK), chief of the Bureau of International Law of Humanitarian Aid of the British Red Cross; Hisashi Owada judge (Japan), president, international Court of Justice; Prof. Fausto Pocar (Italy), former president of the International Court of Law for the former Yugoslavia; Prof. William H. IV Taft (SUA), permanent representative of NATO, professor of international law at the Faculty of Law in Stanford; Prof. Michel Veuthey, associate professor at the University in Nisa. Municipality of San Remo and the Red Italian Cross. (http://en.wikipedia.org/wiki/International_Institute_of_Humanitarian_Law, accessed in the 1st of October 2011).

[2] Every year, the Institute organizes basic courses, training courses and advanced courses in the domain of humanitarian international right, of human rights, of the law of refugees and of laws regarding immigration for military personal, governmental officials, diplomats, experts, representatives of the non-governmental organizations and students from the entire world. These courses, organized in cooperation with countries and interested international institutions are taught in different languages (French, English, Spanish, Arabic, Chinese and Russian), by qualified professors of different nationalities using a multidisciplinary interactive approach (http://en.wikipedia.org/wiki/International_Institute_of_Humanitarian_Law, accessed of the 1st of October 2011).

[3] These events are highly appreciated by the international community as they offer opportunities for a periodical dialogue and disputes on themes of humanitarian international law, human rights and other associate problems. They also encourage members of the scientific, diplomatic, institutional and military circles all over the world, to organize formal meetings, to examine pressing problems regarding promoting, observing and developing humanitarian international law in the future. Almost forty years of reunions and intense academic activity of approach of the main themes of humanitarian law, under the auspices of the Institute created what became universally known under the name of "humanitarian dialogue in the spirit of Sanremo" (http://en.wikipedia.org/wiki/International_Institute_of_Humanitarian_Law, accessed in the 1st of October 2011).

[4] The Institute has become increasingly involved in research, study and analysis activities. It publishes texts, essays and monographies which contribute to growing aware of relevant aspects of the international humanitarian law and others diverse aspects. "The manual from San Remo (1994) regarding the international law applicable to armed conflicts at sea", still remains the most consulted manual in the military naval academies in all the world and is considered to a reference work of global recognition. The "Manual of San Remo regarding employment rules" (ROE) published in November 2009, represents the only work of this type, which tries to explain in a practical manner the complex procedures and methodology which regulates development and puts into practice employment rules. Over the years, the Institute continued to achieve a series of publications dedicated to his works from the main round tables and seminaries. Moreover, the organization distributes an "Informative Bulletin" each every two months and periodical informative bulletins regarding his activities. (http://en.wikipedia.org/wiki/International_Institute_of_Humanitarian_Law, accessed in the 1st of October 2011).

The Mediterranean area, a traditional crossroads between cultures, religions, societies, passes through a period of changes at the beginning of the 21st century in different domains[1]. Constant growth, especially in the last 15 years of the Mediterranean migration flux constitutes one of the most powerful effects caused by the process of continuous liberalisation of commerce, thus the migration law and migration politics come to the attention of the countries in the regions, imposed on the agenda of regional politics, in order to start seeking commune solutions regarding problem solving which result from the great migrations in the area. In this context, the International Institute of Humanitarian Law, in cooperation with the International Organization for Immigration organized a *round table* with the theme "*International migration law and migration politics in the Mediterranean context*" in the period 15-16 December 2008, in Sanremo.

At this reunion participated important political figures and experts from various countries who approached a series of problems related to the phenomena of migration fluxes, including concerning the instruments of international law that regulate migration; the challenges of illegal immigration, especially mixed fluxes of migration and the implications for international security; human trafficking; international cooperation and the role of civil society in the steps to limit the respective phenomena by which the norms of international law of human rights are violated[2].

The International Institute of Humanitarian Law, in cooperation with the International Committee of the Red Cross organized in Sanremo, in the period 11-13 September 2009, under the High Patronage of the President of the Italian Republic, the 32nd *Round Table* regarding the present problems of the humanitarian international law. The subject of this meeting was "*Non-statal actors and the humanitarian international law. The organized armed groups: a challenge for the XXIst century"* and it was discussed over the whole period of the event, with the participation of govermental officials, representatives of the international organizations (UN, EU, NATO, CICR etc.), eminent jurists and experts of the scientifical, diplomatical, military and humanitarian circles[3]. *The round table* focused on the analyse of obligations and legal responsibilities of the non-statal actors, on the crucial problems of private security companies, which was discussed together with the challenges the international juridical framework is dealing with, challenges that result from the new models of violence and that consent upon the necessity to harshly sanction terrorism and piratery, phenomena which acquired a transnational dimension[4].

In the period 28-30 September 2010 Villa Ormond, from Sanremo hosted *the Annual NATO Conference of the Juridical Councillors*. During the meeting, 120 jurist experts from NATO Member States discussed the juridical implications of the intervention in Afghanistan and analysed, in an informal and constructive atmosphere, some delicate problems, such as civilian protection, role of regional organizations and detention. Likewise, the Institute organized a workshop, also at San Remo, in the period 26-29 October 2010, which aimed to analyse and discuss problems regarding *the armed conflict right and human*

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[1] From politics to economy, to inter-statal relations, each domain is directly influenced by the consequences the globalization phenomenon is generating.

[2] http://en.wikipedia.org/wiki/International_Institute_of_Humanitarian_Law, accesset on the 1st of March 2011.

[3] The round table was opened by the ambassador Maurizio Moreno, president of the Institute, in the presence of eminent authorities: Hon Scotti Vincenzo, state secretary for external affairs, Dr. Kellenberger Jacob, president of the International Organization of the Red Cross, admiral councilor Giampaolo Di Paola, president of the Military NATO Committee; general Pierre Michel Joana, special delegate of the High UE Representative Javier Solana; Dr. Francesco Rocca, extraordinary commissary of the Italian Red Cross; Dr. Sandro Calvani, director of UNICRI.

[4] A special work group of the Round Table composed of the ambassador Silvio Fagiolo and Prof. Jacques Forster, has, however, dedicated itself to the 60th anniversary of the Geneva Convention from 1949 and the 150th anniversary of the battle of Solferino.

rights, by means of study cases and the interventions of military experts along with the participant international university staffs. To this workshop participated juridical military experts, juridical councillors from the armed military forces, representatives of governments and international organizations originating from different regions of the world, as well as a group of civilians.

Conclusions

Taking into account the targets pursued the International Institute of Humanitarian Law works in close collaboration with important international organisations such as: The International Committee of the Red Cross, the High Commissariat of the United Nations for Refugees and the International Organization of Migration. The Institute also has operational relations with the European Union, the United Nations Organization for Education, Science and Culture, The Organization of the North Atlantic Treaty, the International Organization of Francophony and the International Organization of the Red Cross and Red Crescent. Moreover, it has a consultative role for the Organization of the United Nations – the Social and Economic Council and the Council of Europe, thus contribuing to the promotion of international humanitarian right, to the observance of refugees and the immigrants' rights.

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DEPOSIT FUNDS GUARANTEES UNDER ROMANIAN AND EUROPEAN LAW

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Abstract
Maintaining the trust of depositors in the Romanian banking system is ensured, essentially, through the institutionalising of a system of guarantees, ensuring the reimbursement of the deposited sums, within a certain limit and based on a strictly regulated procedure, both under internal and community law, procedure that is the subject of analysis in this paper.

Key words: *deposit guarantee fund, guaranteed deponent, compensation*

Introduction

With a large number of people using banking services, the domain became publicised, contracts being signed with great prudence from the banks. This prudence, on the one hand, imposes the guarantee of the contracts' execution and, on the other hand, limits or forbids certain operations, leading even to the decision to obligate certain authorities in the field to report – thus, the procedure is both 'governed' and 'ensured'. Moreover, the juridical inequality imposes the protection of the client – consumer of banking services, through juridical techniques conceived by the legislator, mainly, via the guarantee fund of deposits.

1. Deposit guarantee under Romanian and EU law

The deposit fund has been relatively recently regulated by the Civil Code[1], art. 2191 – its dispositions are though limited to its object and to the translative effect of property that it has. Not even the special law - the Emergency Government Ordinance (E.G.O.) no. 99/20066 regarding credit institutions and capital adequacy[2] doesn't regulate the deposit fund in its essence; it operates with the expression 'attracting deposits or other reimbursable funds', article 5, article 7 point 1, article 18 paragraph (1) letter a), art. 22 paragraph (2), letter c), when it defines the banking activity or when it decides on the activities that can be carried by the credit institutions and their limits. Preoccupied with safeguarding credit

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[1] Law no. 287/2009 on the Civil Code, Official Romanian Gazette, part I, no. 511 from July 24th 2009, modified by Law No. 71/2011, Official Romanian Gazette, part I, no. 409 from June 10th 2011, republished, Official Romanian Gazette, part I, no. 505 from July 15th 2011, in force from October 1st 2011.

[2] Official Romanian Gazette, part I, no. 1027 from December 27th 2006, called herein the special law or the Emergency government ordinance no. 99/2006

institutions subjected to special administration, the legislator has also included the deposit transfer in its area of protection giving it a well defined juridical statute (art. 240^{12} and 240^{14}, E.G.O. no. 99/2006).

In order to maintain public trust in the banking system and to prevent its destabilisation, the legislator conceived and developed, throughout time, a guarantee system[1] of bank deposits, institutionalised by the G.O. no. 39/1996[2] regarding the establishment and functioning of the Guarantee deposit Fund in the banking system[3], in the lines of Directive 1994/19/EC regarding deposits' guarantee systems[4].

The Directive states the obligation for every bank authorised to function in the EU territory to adhere to a guarantee system for deposit funds and to cover deposits (compensations) of all branches of a bank through the guarantee system from the origin state. This Directive foresaw a minimum level of harmonising, as a complete one is not possible among Member States, due to their difficulties to align numerous laws from their internal law. In essence, the Directive regulates: the guarantee amount, its extent, the nature of guaranteed deposits, the conditions of functioning of the guarantee, its deadline, informing deponents and the publicity of guaranteeing systems[5].

The credit crisis that bursted in 2008 determined the Commission to work on a measure package to modify[6] this normative act in a way that would stimulate consumers' protection and their trust in banking services, aiming, in essence, for: the growth of the guarantee limit, faster reimbursement of deposited sums, decreasing bureaucracy, better information of banks' clients, improvement in the financing system of the guarantee Fund, mainly gradually achievable, in 2012 and 2013, applicable in all EU Member States, as well as in Norway, Iceland and Lichtenstein, once included in the Agreement regarding the European Economic Area[7].

2. The public, beneficiary of the instituted guarantee

The special protection measures instituted has two sides: on the one hand, it limits the beneficiaries to the public and on the other hand, it specifically delineates the guaranteed deposits, subjected to compensation, if they become unavailable.

The deponent public is protected, in the view of the special law, art. 7 point 18. E.G.O. no. 99/2006 that defines it as: "any natural or legal person or entity without legal personality that does not have the necessary knowledge and experience to evaluate the risk of not being reimbursed for his investments". The following are not considered as 'public': the state, authorities of central, regional and local administration, governmental agencies, central banks, credit institutions, financial institutions, other similar institutions and any other person considered to be a qualified investor, as the legislation regarding capital market defines it'.

The phrase 'does not have the necessary knowledge and experience for evaluating the risk of not being reimbursed for his investments' prefigures a basic element of the

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[1] Integrated by the speciality literature in the area of measures called 'curative'. In this sense, see Th. Bonneau, *Droit bancaire,* 4e édition, Montchrestien, Paris, 2001, pg. 163-172.

[2] Republished, Monitorul oficial al României, part I, no. 587 from August 19th 2010, called herein G.O. no. 39/1996.

[3] Deposit funds guarantee scheme officially acknowledged in Romania, with the statute of public institution, having as goal guaranteeing deposits and paying compensations to guaranteed deponents, according to the conditions and limits established in this normative act; called herein, the Fund.

[4] OJEU, L. 135 from May 31st 1994, pg. 5, modified through Directive 2009/14/CE of the European Parliament and the Council from March 11th 2009, as regards the limit of guarantee and the deadline for payment of compensations, OJEU L. 68 from March 13th 2009, pg. 3.

[5] For more details, C. Florescu, *Aspecte ale evoluţiei reglementărilor privind protecţia deponenţilor în relaţia acestora cu băncile depozitare* (II), 'Revista de drept comercial', no. 1/2001, pg. 152 and following.

[6] On this, check the Proposal and the Report of the Commission http://ec.europa.eu/internal_market/bank/guarantee/index_en.

[7] http://ec.europa.eu/internal_market/bank/guarantee/index_en.

content of the deposit contract – the right for credit institutions to *freely dispose* of the trusted sums[1], in their own name, forcing them, at the same time, to protect the deponents.

3. **Guaranteed deposits**

We are interested in the notions of deposit, guaranteed deposit and guaranteed deponent, from the perspective of the special regulation, art. 2, paragraph (3), G.O. no. 39/1996.

a) The notion of 'deposit'. The deposit is 'any credit balance, including the owed interest, resulted from the funds that are in an account or from transitory situations derived from current banking operations and that the credit institution needs to reimburse, according to the legal and contractual conditions applicable, as well as any obligation of the credit institution emphasised through a debt title issued by a credit institution, *except* the obligations mentioned in art. 159, paragraph (6) from the Regulation no. 15/2004 regarding the authorising and functioning of investment management companies, collective investment ones and depositaries, approved by Order of the National Commission of Movable Assets no. 67/2004'[2] [art. 2 paragraph (3) letter a) G.O. no. 39/1996].

The definition doesn't deviate from the one given by Directive 1994/19/EU, art. 2 paragraph (1), the Proposal and Report of the Commission that include, though, the measure of eliminating from the deposit area 'any obligation of the credit institution emphasised through a debt title issued by a credit institution'.

b) The guaranteed deposit. The guaranteed deposit represents 'any deposit that is in the evidence of the credit institution, that is not in any of the categories set out in the *annex* (deposits expressly excluded, n.n. R.P.) and for which the Fund ensures payment of compensation' or, according to the Directive, 'eligible deposits that do not exceed the guarantee limit mentioned in art. 5' [art.2 paragraph (1) letter c) - proposal].

The relation between eligible deposits and those guaranteed is one from whole to part, the eligible ones representing the type, *as the guarantee is not complete.* On the one hand, the deposits mentioned in the Annex of the G.O. no. 39/1996[3] cannot be guaranteed, as they are not eligible – in essence, it is those deposits that do not come from the public, in the view of the banks' law; in other words, the law excludes from the guarantee the deposits from entities that have the possibility to evaluate their possible risks, as well as deposits coming from persons in special relations[4] with the depositary credit institution. On the other hand, deposits from the public that exceed the guarantee limit are not guaranteed (eligible, partially guaranteed, n.ns.).

We can thus conclude that the (guaranteed) deposit, in the view of this normative act, has a wider and at the same time more restricted range than the deposit regulated by art. 2191 from the new Civil Code that represents the common law of banking deposits; wider – as it regards 'any credit balance', exceeding the deposit stricto sensu; more restricted – because it limits the actual banking deposits to those that fall under the guarantee limit.

c) Guaranteed deponent. The law gives a wide meaning to the guaranteed deponent – 'the owner of the guaranteed deposit or, according to the situation, the person entitled to sums from the respective deposit', including for guaranteed deposits transferred to other credit institutions, as a measurement of restructuring within the special administration of the depositary credit institution[5].

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[1] Otherwise, the funds cannot be considered as received from the public, thus coming out from the protection of the banking laws. On this, S. Piedelièvre, *Droit bancaire*, Presses Universitaires de France, Paris, 2003, p. 35.

[2] Monitorul oficial al României, part I, no. 1271 from December 29th 2004.

[3] Having as correspondent the dispositions of art. 4 from the Directive 1994/19/EC, precit.

[4] The persons that, through the position they have, can influence the decisional process of the credit institution and to whom the E.G.O. no. 99/2006 regarding credit institutions and capital adequacy awards a special statute.

[5] As implementation of art. 240^{14} from the E.G.O. no. 99/2006.

The notion of *eligible deposit* should also be added in this context – it's those deposits that are not excluded from protection according to art. 4 of Directive 1994/19/EC [art.2 paragraph (1) letter b) - proposal].

4. Procedural aspects

4.1. Participants in the compensation legal relation

The execution of a guarantee needs the involvement of three different legal relations, having different owners:

- *The legal relation of deposit funds*[1], between the depositary credit institution and the deponent client;

- *The legal contribution relation*, between the Fund and the credit institution, for constituting the financial resources of the fund, according to the special regulation. We are referring to those credit institutions from art. 2 paragraph (3) letter j) from the G.O. no. 39/1996 – credit institutions that are Romanian legal entities (banks, credit co-operatives, savings and loans banks for housing, mortgage banks, n.n. – R.P.) and the branches of credit institutions from other countries that are in Romania[2];

- *The legal relation of compensation,* between the Fund and the deponent – owner of a debt regarding the trusted sums, subjected to reimbursement, characterised by complexity.

The guarantee is comparable with the personal guarantee, particular through the object, the extent and the execution procedure.

4.2. Deponents' compensation

Should the constituted deposits in a credit institution become *unavailable,* the Fund ensures payment of compensations, within the limit of the guarantee. This means that the law operates with two notions, notions to whom it attributed a specific sense: unavailable deposit and compensation, both took from EU law.

*a) Unavailable deposit***.** The unavailable deposit is 'the deposit that is *owed and demandable* that has not yet been paid according to the legal and contractual conditions, by a credit institution in any of the following situations: a) the Romanian National Bank determined that the credit institution in question is not capable, from legal reasons in direct relation with its financial situation, to pay the deposit and does not have immediate perspectives to do so; b) a court sentence has been given to open the bankruptcy procedure of the credit institution, *before* the Romanian National Bank determined the aforementioned situation' [art.2, paragraph (3), letter c), G.O. no. 39/1996].

b) Compensation. As the basic element of the legal relation of compensation, it represents the sum that the Fund pays to each guaranteed deponent for the unavailable deposits, regardless of their number, to the extent of the guarantee limit and under the conditions of the G.O. no. 39/1996. The name 'compensation' is justified, considering that we are talking about the execution of a guarantee whose beneficiary is the deponent and through which his reimbursement is ensured.

According to art. 17, paragraph (2), compensations are not owed for deposits resulted from transactions regarding which final court sentences have been pronounced for money laundering, according to the specific legislation for preventing and combating this crime.

Compensations received are exempted from the application of any commissions or taxes.

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[1] For more information, R. Postolache, *Drept bancar,* Cartea Universitară Publishing, Bucharest, 2006, pg. 174 – 175.

[2] Deposits placed in credit institutions that have their headquarters in other Member States, that operate in Romania, are guaranteed under the provisions of the applicable legislation in the *origin* state [art. 3 paragraph (2) G.O. no. 39/1996].

The limit of the compensation. This limit is set at the Lei equivalent of 100.000 euros [art. 6, paragraph (3) G.O. no. 39/1996].

The regularization of reciprocal debts. Legal compensation[1] of reciprocal debts of deponent and depositary has priority in operating, permitted by the dispositions of the Civil Code, art. 2185 ('The reciprocal compensation of debts'), except for those deposits that have a special destination. The compensation or the sum to be paid (credit balance, n.ns.) results from the *deduction* from the sum of all guaranteed deposits owned by the deponent from a credit institution at the moment when the deposits became unavailable, of the total value of the demandable debts of the credit institution towards the deponent, at the same date.

However, in order to increase deponents' trust in the banking system, there is a tendency to disregard the dispositions that allow compensation on a EU level.

Conditions for compensation payment. In order for the compensation to be paid, it must not exceed the guarantee limit and the deposit should be unavailable. The payment can be executed in compliance with the terms from art. 18 G.O. no. 39/1996[2].

If a guaranteed deponent is under prosecution for money laundering or a crime related to it, upon solicitation of the legally authorised institutions, the Fund *suspends* the payment of the compensation until it received the proof of the cease of prosecution, end of the criminal law suit, acquittal or closure of the criminal case [art. 7 paragraph (5) G.O. no. 39/1996].

Guaranteed deponents that have complaints regarding compensations can solicit the Fund, in writing, for solving their situation [art. 19 paragraph (1)].

„Without infringing other rights of guaranteed deponents, the Fund replaces them in their rights for a sum equal with that of the owed compensation according to the final list of compensations to be paid' [art. 23 paragraph (1) G.O. no. 39/1996] or, according to the Directive, art. 8, until the common limit of the sums paid (compensations). Also, the Fund can initiate *a liability action* against the heads of the credit institution that is in financial difficulty, in order to obtain the reimbursement of the sums it paid to its deponent clients.

Demandable deposits *that are not guaranteed*, as well as eligible ones that exceed the guarantee limit can be retrieved through the procedure regulated by the G.O. no. 10/2004 regarding the procedure of judicial reorganisation and bankruptcy of credit institutions[3], from the wealth of the credit institution, by putting them in the list of creditors, and excluding the application of those dispositions in O.G. no. 39/1996.

Conclusions

Unlike the credit contract, the deposit fund *does not* have the quality of enforceable title, neither is it accompanied by the variety of guarantees that are characteristic to it for ensuring the reimbursement of trusted sums, lack which is covered by the establishment of the guarantee Fund for bank deposits.

Moreover, the establishment of the special Fund for damages, administrated and different from the guarantee Fund for bank deposits, ensures the compensation of affected persons as a consequence of the existing measures and their implementation throughout the special administration of a credit institution, protecting, in the end, the credit institutions themselves.

Extending the guarantee to guaranteed transferred deposits, simplifying the procedure and increasing the level of given compensations are arguments that tend to lower public's fear regarding investments made.

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[1] Meaning payment of reciprocal debts, different than that established by the G.O. no. 39/1996.

[2] In *maximum 20 working days* from when the deposits became unavailable [art. 18 paragraph. (3) G.O. no. 39/1996; art. 7 paragraph. (1) Directive]; in perspective 7. working days from when the conditions of compensation payment have been fulfilled, according to the proposal for modifying the Directive.

[3] Official Romanian Gazette, part I, no. 84 from January 30th 2004.

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EUROPEAN COMMON FOREIGN AND SECURITY POLICY[1]

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Abstract

The twenty first century will be remembered in the history of mankind as the century of change, constant danger, "clash of civilisations", collective insecurity, mistrust towards "the other", injustices caused by the Iraq war and by the terrorist attacks of September 11th 2001, in the United States, March 11th 2004, in Spain, and July 7th 2005, in London, respectively. We should not, however, neglect all the other terrorist attacks to the most elementary human rights perpetrated every day around the world. Indeed, the "insecurity" epidemic proliferates around the globe. Therefore, it is urgent for the European Union (EU) to adopt and implement a reinforced Common Foreign and Security Policy (CFSP).

Keywords: *CFSP, Maastricht, Amsterdam, Nice, European Constitution.*

Introduction

The twenty-first century will be remembered in the history of mankind as the century of change, constant danger, "clash of civilisations", collective insecurity, mistrust towards "the other", injustice, Iraq war and mainly as the century of the tragic terrorist attacks of September 11th 2001, in the United States, March 11th 2004, in Spain, and July 7th 2005, in London. However, we should also not forget the most elementary human rights' violations perpetrated every day around the world. We should not continue to neglect these matters and to persist in the constant incrimination of "the other". We have an obligation to analyse that which lies before us and formulate conjectures about what is wrong in the relationship between the western and eastern worlds and between the north and the south. Indeed, we have a duty to understand that "the other" is "us."

The world has changed. If we grasp this fact, we ought to understand also that a Common Foreign and Security Policy (CFSP) is a necessity and that, therefore, it is imperative for the European Union to stop being a "political pigmy" and begin speaking with one voice in the world in bilateral, regional and international forums. The process of European integration was initiated in 1951 with the signing of the Treaty of Paris, which brought into place the European Coal and Steel Community (ECSC). In addition to the economic concerns that were central to its establishment, security considerations also played a decisive role: "Considering that world peace may be safeguarded only by creative efforts equal to the dangers which menace it; Convinced that the contribution which an organized

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[1] This paper was presented at the University of Santiago de Compostela (Spain)-Doctoral Programme in "Public Law and Integration Processes: The European Union and Mercosur"-course on "Common Security and Foreign Policy-European Defence and Security Policy", taught by Professor Dr. Rafael Garcia Pérez and Julio Jorge Urbina, of the University of Santiago de Compostela (Spain).

and vital Europe can bring to civilization is indispensable to the maintenance of peaceful relations;(...) Desirous of assisting through the expansion of their basic production in raising the standard of living and in furthering the works of peace; Resolved to substitute for historic rivalries a fusion of their essential interests; to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts; and to lay the bases of institutions capable of giving direction to their future common destiny; (...)" [1]

The purpose of this paper is to trace the historical evolution of the Common Foreign and Security Policy (CFSP) in the process of European integration (from the Hague Summit to the Treaty of Nice) as well as underlining the merits and faults of the of EU Constitutional Treaty (2004) with regard to such matters. We know from the outset that this Constitutional Treaty will probably "never" come into place, at least in its present form, given that France (29th May of 2006) and the Netherlands (1st June of 2006) have refused to ratify it.

I. Background of the CFSP

The "European Communities"[2], in their first decade of existence, prioritised economic integration and, as a consequence, relegated political integration to a secondary role. In reality, external political co-operation (EPC)[3] begins timidly in the 1970's, in great part due to the efforts of French President George Pompidou. Indeed, foreign policy, common security and defence were born from several European summits: A) in 1969, at the Hague European Summit[4], President George Pompidou proposed the creation of an institutional platform for foreign policy co-operation. He outlined "a programme of European construction for the future, in which the political goals of the founding members of the Community were to be re-addressed (...) in accordance with the renowned triadic formula *completing, deepening and enlarging.* After the Hague European Summit, Europe had, once again, a political objective, in spite of continuing to pursue economic integration.(...) [Europe] can stand only if it aims at a political union (...) [whose] immediate objective is the economical but whose final objective is (and must be) a political goal (...)"[5]; B) One year later, at the Luxembourg European Summit[6], the Belgian Étienne Davignon, inspired by the ideas of George Pompidou, outlined, in the so-called "Davignon Report", the embryonic institutional mechanisms of a not merely informal European intergovernmental co-operation. Hence, he proposed "(a) at least once every six months, a meeting of Ministers of Foreign Affairs that could be substituted by a Conference of Heads of State or Government; (b) at least four times a year, a political Committee comprising heads of the political departments of the Ministries of Foreign Affairs to prepare the groundwork for ministerial decisions; (c) a Committee of High Representatives to study the diverse questions that would arise; (d) [and attributes to the] President of the Council of Ministers [the task of reporting] once a year to the European Parliament on the state of Political Co-operation"[7]; C) At the Paris European

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[1] *See* Preamble of the Treaty of Paris, in "Tratado de la Unión Europea, Tratados constitutivos de las Comunidades Europeas y otros actos básicos de Derecho Comunitário", Madrid, ed. Tecnos, séptima edición, 1999, p. 261.

[2] There were three European Communities: E.C.S.C (Treaty of Paris-1951); E.A.E.C (Treaty of Rome-1957) and E.E.C (Treaty of Rome-1957).

[3] Fernandes, Luís Lobo: *A Cooperação Política Europeia*, course text on the discipline of European Security, Defence and Political Cooperation, VI edition of the Masters programme in European Studies, University of Minho, Braga, 2000.

[4] This Summit took place on the 1st and 2nd of December of 1969.

[5] For an elaboration of this point, see http://maltez.info/cosmopolis/anode1969/eurobalanca.htm.

[6] See Bulletin EU, 1970-11, p.9-15. This Summit took place in October of 1970.

[7] Bustamante, Rogelio Pérez, Colsa, Juan Manuel Uruburu: *História da União Europeia*, Coimbra, Coimbra, Editora, 2004, p. 106.

Summit[1] of 1972, the term "European Union" is invoked for the first time as a political objective and the procedures for foreign policy consultation are reinforced in accordance with the schema previously proposed by Davignon. In this manner, the Paris European Summit institutionalises four annual meetings of European Ministers of Foreign Affairs, thus replacing the previous two annual gatherings; D) in the following year[2], the Copenhagen European Summit[3] aimed at a "Europe speaking with one voice in world affairs." [4] As a consequence, meetings and/or consultations with the Heads of State are intensified, emergency gatherings are set in place, guidelines for the implementation of a concerted foreign policy are reiterated and the institutional mechanisms for a common European policy are established[5]; E) At the Paris European Summit[6] of 1974, the Heads of State and Government established the European Council[7] and stipulated that there should be three annual meetings to promote political cooperation, despite the fact that such an institution was not enshrined in any of the Treaties of the European Community, and created the Marjolin-Tindemans Reflection Group to address matters of political union. This Summit was, without a doubt, the precursor of the European Councils, the first of which took place in Dublin on the 10th and 11th of March of 1975; F) In the year of 1975, following the Councils of Dublin, Brussels and Rome[8], the Belgian Prime Minister Leon Tindemans[9] presented the so-called "Tindeman's Report on the European Union." In this report, he defended the reinforcement of the institutions of the European Community and recommended "that a common foreign policy be developed, one in which there is an obligation to adopt common decisions and, therefore, abandon the principle of voluntary decision that underlies political co-operation"[10]; G) In 1976, the Hague European Council[11], after analysing and approving the general guidelines of the Tindemans' Report, issued a statement: "The European Union will be built progressively by consolidating and expanding the Community's achievements. The existing treaties could serve as the basis for new policies[…]Co-operation in the domain

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[1] This summit took place on the 19th and 20th of October of 1972.

[2] Bustamante, *op. cit.* p. 106: "(on) the 23rd of July of 1973 a second "Davignon Report" was drafted that also addressed the subject of foreign policy cooperation and the formulation of a common policy: "each state shall commit itself to not fixing definitely its own position without having consulted the remaining members on political cooperation."

[3] *See* Bulletin EU, 1973-9, p. 13-21. This summit took place on the 14th and 15th of December of 1973.

[4] For a more profound elaboration on this topic, vide http://maltez.info/cosmopolis/anode1973/eurobalanca.htm.

[5] Machado, Tiago Pedro Fernandes Fonseca, "Onde está a PESC?" working-paper nº s/n-2004, Faculty of Law, Universidade Nova de Lisboa, p.5: "(...) It is in the Copenhagen Report that the true foundational charter of European Political Cooperation (EPC) is articulated in its triple dimension. In the first place, it supposed the express linkage of EPC with the objective of the European Union. In second place, the Report clarified the nature of the relations between EPC and and the EU in a paradoxical manner, since it addressed the existing differences between both. Finally, the Report succeeded in deepening those aspects related to the institutional and procedural organisation of EPC through the increase of the frequency of "Ministerial Meetings" and of the Political Committee, the Institutionalisation of the EUCOR (European Correspondents) group and of the workgroups, and by addressing the specific functions of the Presidency, which had become one of the major concerns in the ambit of EPC."

[6] This Summit took place on the 9th and 10th of December of 1974.

[7] Bustamante, *op. cit*., p.110 "(...) At the Summit of Paris of the 10th of December of 1974, the most important protagonist of the reforms, President Giscard D'Estaing, closed the meeting with the following statement: "the Summit is dead, long live the European Council."

[8] Ibid., p.112 "(...) fundamentally, it has been decided that the EEC shall be represented by a single delegation at the Paris Conference on International Economic Cooperation -North-South dialogue."

[9] For a more profound elaboration of this point see http://maltez.info/cosmopolis/anode1975/total.htm "(the) European Union implies that we present ourselves as a united front in the world. Our actions should be common in all of the essential domains of our external relations, whether it be foreign policy, security, economic relations or cooperation."

[10] Moreno, Fernando Díez.: *Manual de Derecho de la Unión Europea*, Madrid, 3ª Ed. Thomson, Civitas, 2005, p. 831.

[11] This European Council took place on the 29th and 30th of November of 1976.

of foreign policy should necessarily lead to the adoption of a Common Foreign Policy"[1]; H) At the London European Council[2] of 1981, the Ministers of Foreign Affairs of Germany and Italy, Hans Dietrich Genscher and Emilio Colombo respectively, proposed the "European Act", a series of procedures and mutual consultations in such areas as "political co-operation, culture, fundamental rights, harmonisation of the legislation not yet enshrined in the Treaties of the European Communities, the fight against terrorism, violence and criminality"[3], as well as flexible and pragmatic endeavours towards the objective of political co-operation and security; I) At the Stuttgart European Council[4] of 1983, Heads of State and Governments, inspired by the proposal of 1981 submitted by the German and Italian Foreign Affairs Ministers, adopted the Solemn Declaration of Stuttgart on the European Union.[5] This declaration[6] "(...) introduced the prediction that States would co-ordinate their positions on matters of political and economical aspects of security and (...) at the institutional level, it introduced the explicit configuration of the European Council as an essential institution with its own functions in the ambit of European Political Co-operation (EPC)"[7]; J) The Single European Act of 1986[8], in addition to undertaking the first revision of the Treaties of the European Community (Paris/Rome)[9], also institutionalised the European Councils, conferring them with oversight and control powers over the Communities[10], "Moved by the

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[1] Bustamante, *op. cit*., p. 114.

[2] *See* Bulletin EU, Supplement 3/1981, p.14-18

[3] For a more profound elaboration of this subject, see http://www.europarl.europa.eu/factsheets/1_1_2_pt.htm.

[4] This European Council took place on the 17th and 19th of June of 1983.

[5] Bustamante, op. cit., p 126. "(in) the Preamble, he manifests his interest in proceeding with the European project: «to continue with this undertaking on the basis of the Treaties of Paris and Rome»; to extend the purview of European activities: «the advances that have been made in the fields of economic integration and political cooperation as well as the need for new developments (...)»; to promote democracy, intensify its cohesion, deepen its polices, grant priority to social progress and to employment and to speak with one voice in foreign policy, to construct a European Union."

[6] Ibid., "(the Stuttgart Solemn Declaration on the European Union had the following objectives: a) to reinforce and proceed with the development of the Communities, the nucleus of the European Union; b) to develop European political cooperation in the domain of foreign policy and the political and economic aspects of security; c) to promote closer cooperation in cultural affairs as well as initiating concerted actions to deal with the international problems of public order, violence, criminality and delinquency; d) to modify the Institutions, emphasising the role of the Commission in favour of a delegation of competencies and reinforcing the attributes of the European Council, indicating its functions and relations with Parliament, to which an essential role is attributed (...)."

[7] Machado, *op. cit*., p.5.

[8] Soares, António Goucha: *A União Europeia*, Coimbra, ed. Almedina, 2006, p. 21-22: "(the) Single European Act constitutes the first general reform of the Treaties undertaken since the establishment of the three Communities. It is designated as a "single act" because, in the same normative act, the Member-States proceeded with the revision of the three Treaties of the different European Communities and agreed, also, to institutionalise the so-called European Political Cooperation. European Political Cooperation between the Member-States was a practice developed with the adoption of the Davignon Report, in 1970, by the Ministers for Foreign Affairs. It consisted in the establishment of a process of regular consultation and information between the Member-States on the great questions of international politics so as to promote the co-ordination of positions. The practice of Political Cooperation between the Member-States was intensified throughout the decade and, at the Summit of Copenhagen of 1973, it was decided that this would be the framework for the formulation of the principles of foreign policy that should be applied to third-party states and thus express the position of Europe on the most important themes of world politics. However, Political Cooperation remained outside of the Community-system. With the institutionalisation of European Political Cooperation by the Single European Act, the Member-States affirmed their intention not to confine the integration process to the economic sphere and to extend it to the domain of foreign policy." It was approved on the 17th of February of 1986 and was adopted in July of 1987. Published in OFL 169 of 29.06.1987.

[9] *See* article 1 of the SEA: "the European Communities and European Political Cooperation are guided by the objective to jointly contribute to the concrete progress of the European Union."

[10] *See Tratado de Roma y Acta Única Europea*, Madrid, ed. Tecnos, 1988, p. 171, article 2 of the SEA: "(the) European Council shall be composed by the Heads of State of the Member-States as well as by the President of the Commission of the European Communities. They will be assisted by the Ministers of Foreign Affairs and by a member of the Commission. The European Council shall meet at least twice per year."

will to continue the work undertaken on the basis of the Treaties establishing the European Communities and to transform relations as a whole among their States into a European Union, in accordance with the Solemn Declaration of Stuttgart of the 19 June of 1983; Resolved to implement this European Union on the basis, firstly, of the Communities operating in accordance with their own rules and, secondly, of European Cooperation among the Signatory States in the sphere of Foreign Policy and to invest this Union with the necessary means of action."[1] The European Political Cooperation envisaged in the Single European Act aims at promoting the joint progression of the European Union (Article 1, SEA) and is founded on the procedures adopted and outlined in the "Reports of Luxembourg (1970), Copenhagen (1973), London (1981), the Solemn Declaration on the European Union (1983), and the practices gradually established among the Member States.[2] The Political Co-operation is regulated by Title III (Treaty Provisions on European Cooperation in the Sphere of Foreign Policy), article 30[3]: "although the obligations of States in matters of foreign policy preserved their voluntary nature, the Member-states - «The High Contracting Parties» - (...) agreed to inform and consult each other in foreign policy matters before making final decisions. However, such matters as security and defence became a sort of "taboo" in European integration, given the failures of previous endeavours (European Defence Community and Fouchet Plan) but mainly because of the refusal of national governments in abdicating of, or even sharing, powers that are quintessential attributes of sovereignty."[4]

II. The Second Pillar of the Treaty of Maastricht

On the 7th of February of 1992, the second reform of the Treaty of Rome is undertaken with the signing of the Treaty of Maastricht and/or of the European Union[5] "(...)

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[1] Ibid., see Preamble, p.169.

[2] Ibid., p.171, see paragraph 4 of article 1 of SEA.

[3] Ibid., p.178-181, *see,* "(article) 30 - European Cooperation in the sphere of foreign policy shall be governed by the following provisions: 1- The High Contracting Parties, being members of the European Communities, shall endeavour jointly to formulate and implement a European foreign policy; 2- a) The High Contracting Parties undertake to inform and consult each other on any foreign policy matters of general interest so as to ensure that their combined influence is exercised as effectively as possible through the coordination, the convergence of their positions and the implementation of joint action. b) Consultation shall take place before the High Contracting Parties decide on their final positions; c) In adopting its positions and its national measures each High Contracting Party shall take full account of the positions of other partners and shall givedue consideration to the desirability of adopting and implementing common European positions. In order to increase their capacity for joint action in the foreign policy field, the High Contracting Parties shall ensure that common principles and objectives are gradually developed and defined. The determination of common positions shall constitute a point of reference for the policies of the High Contracting Parties. D) The High Contracting Parties shall endeavour to avoid any action or position which impairs their effectiveness as a cohesive force in international relations or within international organisations. 3-(a) The Ministers for Foreign Affairs and a member of the Commission shall meet at least four times a year within the framework of European Political Co-operation. They may also discuss foreign policy matters within the framework of Political Co-operation on the occasion of meetings of the Council of the European Communities; b)The Commission shall be fully associated with the proceedings of Political Co-operation; c) In order to ensure the swift adoption of common positions and the implementation of joint action, the High Contracting Parties shall, as far as possible, refrain from impeding the formation of a consensus and the joint action which this could produce; 4) The High Contracting Parties shall ensure that the European Parliament is closely associated with European Political Co-operation. To that end, the Presidency shall regularly inform the European Parliament of the foreign policy issues which are being examined within the framework of Political Co-operation and shall ensure that the views of the European Parliament are duly taken into consideration; 5) The external policies of the European Community and the policies agreed in European Political Co-operation must be consistent (...)"

[4] Camisão, Isabel, Fernandes, Luís Lobo.: *Construir a Europa – O processo de integração entre a teoria e a história, Cascais,* 1ªed. Principia, 2005, p. 91.

[5] Soares, p. 29: "(…) (The) Treaty on European Union adopted a normative structure that rests on three pillars (...) [this structure] constitutes a clear demarcation of the national governments regarding supra-national developments that arise from the process of European integration. The States demonstrated that they accepted the goal of deepening dialogue and cooperation in the domains of foreign policy, justice and internal affairs. However, the States did not want that decisions in the sphere of "high politics" could be taken in accordance with the decision-

Resolved to mark a new stage in the process of European integration undertaken with the establishment of the European Communities; (...) Resolved to establish a citizenship common to nationals of their countries; Resolved to implement a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world; Reaffirming their objective to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by including provisions on justice and home affairs in this Treaty; Resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity; (...) Have decided to establish a European Union (...).[1] This is a revolutionary treaty[2], with a *sui generis* structure and a "common architrave"[3] - Art. A to F of the TEU; a Pillar of the Community (art.1 to 240 ECT); and two intergovernmental pillars that reveal the lack of courage[4] of member-states to transfer powers to the European Union that are culturally and intrinsically linked to state sovereignty, for instance, see Title V "Treaty Provisions on European Cooperation in the Sphere of Common Foreign and Security Policy" [5] (art. J to J-11 of the TEU); and Title IV "Treaty Provisions on European Cooperation in the Sphere of Justice and Internal Affairs" (art. K to K.9 of the TEU).

This paper only considers Title V, which concerns Common Foreign and Security Policy (CFSP). This policy "is the continuation of (a timid progress of) the provisions of article 30 of Title III of the SEA, which addresses the "Provisions on European Co-operation in the Sphere of Foreign Policy". Not only in the SEA but also in the Treaty on European Union the CFSP, as the corresponding Title attests, is understood to be a matter to be co-operatively regulated by the member-states and is, therefore, not subject to the customary

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making processes of the Community and they did not accept that measures adopted in the new policy domains could emanate from the juridical system of the European Community, thus establishing two parallel normative pillars. Foreign policy, justice and internal affairs were henceforth integrated in the ambit of the Union, yet, the functioning of the new pillars was not subjected to the so-called communitarian method, given that Member-States preferred to keep decision-making in these domains within the inter-governmental sphere. " This Treaty was adopted on the 1st of November of 1993. Published in OJ C 191 of 29.07.1992.

[1] Enterria, Eduardo Garcia de, Tizziano, Antonio, Garcia, Ricardo Alonso.: *Codigo de la Union Europea*, Madrid, editorial Civitas, 1996, p. 21.

[2] Camisão, *op. cit.*, p. 96: "[The Treaty of Maastricht] contributed to advancing in the direction of a neo-federal model, not only because of what it enshrined, but, above all, for the possibilities that it opened: the conclusion of the process of economic integration opened the door to the process of political integration; the establishment of CFSP made possible the creation of an identity for the Union; the pillar of Justice and Internal Affairs created a real Freedom, Security and Justice Space; the new European citizenship created a Union that is closer to the citizen; the adoption of the principle of subsidiarity introduced a de-centralised governing and, lastly, the process of co-decision enshrined a more productive participation of the European Parliament."

[3] *See* article B, 2nd paragraph of TEU: "The Union shall set itself the following objectives: to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence".

[4] Camisão, op. cit., p. 92-93: "[the] agreement reached by the Member-States regarding this matter was enshrined in the second pillar of the Treaty of Maastricht. By joining in one single policy two dimensions previously separated (foreign policy and security), European leaders took a very important step toward political union. However, the inclusion of a third dimension of vital importance to the survival of the European project was postponed *sine die:* defence. Although the Treaty considers the definition of a common defence policy as a sort of corollary to the CFSP, there were no recommendations concerning a deadline for its implementation."

[5] Ibid., p.92: "[the] negotiations for the establishment of a CFSP by the TEU had the following precise objectives: (...) - Europe was striving to provide itself with a mechanism suitable to promote the security of the continent in a period of profound uncertainty (...); - the CFSP would also contribute to the emergence of a scenario of political and economic stability throughout the European continent (...); the aims of the new common policy, the consolidation of the market democracies and economies emerging in the countries of Western and Eastern Europe so that, one day, it would be possible to realise the dream of a united Europe at the continental level."

community procedures, thus remaining outside the judicial purview of the European Court of Justice - Title VII, art. L" [1]

The number 2 of article J-1 of the TEU delineates the CFSP objectives. This measure concerns a) the preservation of common values, fundamental interests and the independence of the Union; B) the reinforcement of the security of the Union and that of its Member-States in all its forms; c) the preservation of peace and the reinforcement of international security, in accordance with the principles outlined in the Charter of the United Nations, the Helsinki Final Act and with the objectives set out in the Paris Charter; d) to foment international cooperation; e) the development and reinforcement of democracy, the Rule of Law and the safeguarding of human rights and fundamental freedoms.

In order to achieve these objectives in an intergovernmental context, the Treaty on European Union established the following juridical mechanisms: a) Systematic cooperation between Member-States in the management of their common foreign and security policy.[2] In essence, the Treaty of Maastricht adopted, as a juridical mechanism, a practice that was proposed with the Single European Act (paragraph a, nº 2, article 3 of the SEA), which consisted of the agreement, undertaken by the High Contracting Parties, that they should inform and consult with each other on any matter of foreign policy that is of common interest [3] so as to ensure that their combined influence could be exercised more effectively through concerted action, the convergence of positions and the undertaking of common actions; b) Common positions in the policy domains mentioned in the nº2 of article J-1 of the Treaty on European Union. This juridical instrument "corresponds to what was already practised in the ambit of European Political Co-operation (EPC). It is, in truth, a higher form of the already established systematic cooperation, through which states inform and consult each other at the Council on matters that are deemed of general interest. The objective is the adoption of converging positions, which may not be necessarily common, but that nonetheless enable them to reinforce their capacity to influence international politics (whenever the Council deems necessary a higher level of cohesion, it will define a common position); (...) [c) Common Action[4] in domains in which the Member-States have important interests in common.[5] This juridical mechanism coordinates the Member-States when making and implementing policy decisions. In effect, when the Council adopts a common position[6], it sets out its scope, its objectives and the means of its implementation whilst control is exercised by the Presidency which, according to article J.5 - 2 "shall be responsible for the implementation of common measures"; d) Lastly, there is another element of significant importance which, although it is not a juridical mechanism, it is nonetheless the necessary lever for the implementation of CFSP]: the representation of the Union by the Presidency. Indeed, the Treaty of Maastricht, by conferring upon the Presidency of the Council of Ministers the responsibility to implement common policies, converts it into the representative of all Member-States. The Presidency represents them in the matters of CFSP at international organisations and conferences."[7]

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[1] BustamanteUSTAMANTE, *op. cit*., p. 178.
[2] *See* article J.1, nº 3, Paragraph 1 of the TEU.
[3] *See* nº4 of article J.1 and art. J. 2 of the TEU.
[4] *See* paragraph 2 of nº 1 of article J.3: "Whenever the Council decides on the principle of joint action, it shall lay down the specific scope, the Union's general and specific objectives in carrying out such action, if necessary its duration, and the means, procedures and conditions for its implementation."
[5] *See* article J.1, nº 3, paragraph 2 of the TEU.
[6] Michel, Denis y Renou, Dominique: "Código Comentado de la Unión Europea", Barcelona, editorial de VECCHI, 2001, p. 263: "Common Action - this term refers to a co-ordinated action undertaken by the Member-States with the objective of setting in motion resources of any type (human resources, experiences, financing, goods, etc.) to attain the concrete objectives of the Council. Common action results from a common posture."
[7] 45 Camisão, op. cit., p. 94.

With regard to the CFSP institutions[1], it should be emphasised that the CFSP, notwithstanding its intergovernmental nature, is a Pillar of the Community and that its institutional configuration is the same as that of the European Union. Hence, its institutions are: a) The Council, which is the driving force of the CFSP (art.J-8 of the TEU), while its Presidency represents the Union in this domain (nº 1, art. J-5 of the TEU); b) The Commission, which can partake in the CFSP decision-making process, present proposals and request extraordinary meetings of the Council when prompt decisions need to be made jointly with the Member-States (nº 3 and 4 of art. J-8 and art. J-9 of the TEU); c) The Political Committee, which is an institution specifically created to ensure the implementation of the CFSP; it consists of "Political Directors [who] shall monitor the international situation in the areas covered by common foreign and security policy and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or on its own initiative. It shall also monitor the implementation of agreed policies, without prejudice to the responsibility of the Presidency and the Commission."[2]; d) lastly, the Parliament, which is consulted by the Presidency regarding the fundamental aspects and options of the CFSP, is regularly informed about the evolution of this policy and may even direct questions and/or put forth recommendations to the Council (art. J.7 of the TEU). With regard to the decision-making process[3], the voting rule applied at the Council is that of unanimity, except on procedural questions and on common policy practical measures, in which a decision can be reached through a majority vote (paragraph 2 of Nº 2, art. J.8 and nº 2 of art. J.3).

III. Developments in the CFSP from Amsterdam to Nice

On the 2nd of October of 1997, a third revision of the Treaty of Rome is undertaken, with the signing of the Treaty of Amsterdam.[4] "(...) Determined to initiate a new phase in the European integration process, which was initiated with the establishment of the European Communities; Wishing to reinforce the democratic character and the efficacy of the Institutions so as to enable them to better perform, in a unique institutional framework, the tasks that are entrusted to them; Resolved to institute a common citizenship for the peoples of their countries; Resolved to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence

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[1] Ibid., p.95 "(...) the CFSP still remains, to a large extent, in the hands of the States, as the marginal role, in this domain, attributed to the Commission and to the European Parliament proves. In spite of its obvious inter-governmental character, the CFSP was, nonetheless, a noticeable step forward insofar as it institutionalises more ambitious exigencies for the integration of the policies of Member-States in this matter. As a result, notwithstanding the aforementioned limitations, the coherence and efficacy of the Union in this sphere increased. We are convinced that the Community will be able to affirm its influence as an important actor in international relations only by "speaking with one voice", therefore opposing the unipolar logic arose with the end of the Cold War.

[2] *See* nº 5, article J-8 of the TEU.

[3] Unlike what happens in the remaining common policies, the CFSP rests on a double network of decision-making: in the first place, the Council of Ministers is called upon to decide unanimously on the possibility of the inclusion of a certain domain in the CFSP. If unanimity is reached, a decision can then be made if a qualified majority is reached at the Council. This second phase of the decision-making process should address only the question of how to put into practice the policies that are necessary to fulfil the objectives that were put forth and to transpose them to the CFSP framework that had been proposed in the first instance.

[4] SOARES, *op. cit*., p. 36-38: "[unlike] the previous alterations to the Treaties of the European Communities - Single European Act and Treaty of Maastricht - that followed from the political aim of the Member-States in introducing new specific objectives in the European integration process, the internal market and the single currency, respectively, the Treaty of Amsterdam did not result from the original political aim of giving a new impetus to European construction (...) The European political situation that preceded the opening of the conference that elaborated the Treaty of Amsterdam dictated the emergence of two aspects that dominated the negotiations: an institutional reform to prepare the European Union for the challenges resulting from enlargement to the East; and the difficult and fragile relationship between European integration and the citizens of the Member-States." This Treaty was adopted on the 1st of May of 1999. Published in OJC 340 of 10.11.1997.

in accordance with the provisions of Article J.7, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world; Resolved to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty; Determined to continue the process of the creation of an ever close union between the peoples of Europe, one in which decisions are taken close to citizens, in accordance with the principle of subsidiarity; It has been decided to establish a European Union (...)"[1]. This Treaty has, in a manner of speaking, resolved some of the "leftovers" bequeathed by Maastricht related to the affirmation of the European Union in the international sphere as well as those that concern a Common Foreign and Security Policy. In this manner, the "Provisions relating to the Common Foreign and Security Policy" continue to be regulated by Title V, numerically ordered (article 11 to 28 of the TEU), unlike before (Title V, art. J to J-11 of the TEU).

In this context, some substantial alterations were introduced[2], such as: a) if we compare Nº 1 of art. J-1 of the TEU, which states "[the] Union and its Member-States shall formulate and implement the Common Foreign and Security Policy (...)", with the new provision nº 1 of art.11º as established by the Treaty of Amsterdam "[the] Union shall formulate and implement a Common Foreign and Security Policy", we will notice that the CFSP will henceforth be under the exclusive purview of the Union, and that the Member-States should actively support each other in a spirit of loyalty and mutual solidarity (nº 2 of art.11 of the TEU); b) the CFSP's objectives remain essentially identical to what was stipulated in nº 2 of art. J-1 of the TEU. However, some significant nuances were introduced, such as: 1) instead of "safeguarding the common values, the fundamental interests and the independence of the Union, just as established - the first paragraph of nº2 of art. 1 of the TEU - the Treaty of Amsterdam introduces some new elements, such as paragraph nº 1 of art.11 of the TEU, "safeguarding the common fundamental values and interests, the independence and integrity of the Union, in accordance with the principles of the United Nations Charter"; 2) instead of "the reinforcement of the security of the Union and its Member-States, in all its forms, just as established in paragraph two, nº2, art. J-1 of the TEU", the Amsterdam Treaty contemplates only "the reinforcement of the security of the Union, in all its forms – paragraph 2 of nº 1 art. 11 of the TEU". The Union is thus regarded as an ensemble and not as an entity at the margin of Member-States that are now comprised by the Union itself; 3) the third paragraph of nº 1 of art.11 of the TEU did not bring about a substantial alteration if we bear in mind the third paragraph of nº 2, art. J-1 of the TEU, which states that "the maintenance of peace and the reinforcement of international security should be pursued in accordance with the principles of the United Nations Charter (...) including those principles that concern the delineation of frontiers." Only those policies that concern the delineation of frontiers were integrated into the CFSP policy orientations; c) these add new juridical mechanisms[3] to the CFSP, whilst preserving preceding arrangements.

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[1] *See,* Tratado de Amesterdão, Lisboa, ed. Assembleia da República, 1998 and "Tratado de Amesterdão y versiones consolidadas de los Tratados de la Unión Europea y de la Comunidad Europea", Biblioteca de Legislación série Menor, Madrid, primera edicion, editorial Civitas, 1998.

[2] Vitorino, António.: "(…) Did Amsterdam bring something new? It made the decision-making process more flexible by introducing the possibility of positive abstention, an institutional innovation, the results of which are yet to be thoroughly evaluated, the creation of a so-called Mr. CFSP, that is, of a *persona* that centralises the visibility of the Common Foreign and Security Policy and which is, simultaneously, the Secretary General of the Council of the European Union and, in third place, and this seems to be the most important aspect, it added to foreign policy a structured component of Security and Defence."
In http://ec.europa.eu/archives/commission_1999_2004/votorino/speeches/230701_pt.pdf.

[3] *See* article 12 of the TEU: "(the) Union shall proceed with the objectives enunciated in article 11: (a) to define the principles and general orientations of Common foreign and security policy;(b) deciding on common strategies; (c)

We thus have: I) Joint actions – “Joint actions shall address specific situations where operational action by the Union is deemed to be required. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation."[1] II) Common positions – “Common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions.”[2] and; III) Common strategies: this is the new juridical mechanism that was introduced by the Amsterdam Treaty and which applies when "The European Council shall decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common; Common strategies shall set out their objectives, duration and the means to be made available by the Union and the Member States.”[3]

The Amsterdam Treaty introduced, in a similar manner, new provisions to the voting rules of the Council. Despite the fact that Council decisions continue to be made in accordance with the unanimity rule, the Amsterdam Treaty introduced a new exception clause based on the principle of "constructive abstention": “(...) any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position."[4] On the other hand, the Amsterdam Treaty also contemplates the possibility that the Council deliberate by qualified majority voting "when adopting joint actions, common positions or taking any other decision on the basis of a common strategy; [and/or] when adopting any decision implementing a joint action or a common position."[5], except when a member of the Council manifests its opposition to the decision for important reasons that have to do with its national policy. In such cases, voting will not be undertaken and the matter under evaluation may be submitted to the European Council; d) with the adoption of the Amsterdam Treaty, the establishment of the role of "Mr. CFSP and/or High Representative for Common Foreign and Security Policy" was, unquestionably, the measure proposed by the Amsterdam Treaty that was most noticed by the European public. "(The) Presidency shall represent the Union in matters pertaining to Common Foreign and Security Policy [being, therefore] responsible for the implementation of the decisions that have been made [as well as] expressing in principle the position of the Union at international organisations and conferences [and, in such endeavours, assisted by] the Secretary-General of the Council, which shall exercise the duties of High Representative[6] for the Common and Foreign Security Policy."[7] The Secretary “shall assist the Council in matters coming within the scope of the common foreign and security policy, in particular through contributing to the formulation, preparation and implementation of policy decisions, and, when appropriate and acting on behalf of the Council at the request of the Presidency, through conducting political dialogue with third parties." [8]; e) the possibility of the Union undertaking, when necessary, CFSP agreements with third party states or international organisations is one of the innovations introduced by the Amsterdam Treaty. “(...) the

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adopting common action; (d) adopting common positions; (d) reinforcing the systematic cooperation among Member-States in the formulation of policies."

[1] *See* nº 1 of article 14º of TEU.

[2] *See*. art. 15 of the TEU.

[3] *See*. nº 2 of article 13 of the TEU.

[4] *See* nº 1 of article 23 of the TEU.

[5] *See* nº 1 and 2º of article. 23º of the TEU.

[6] On the 18th of October of 1999, the first High Representative of the Union for Foreign Affairs and Security, Mr. Javier Solana Madariaga, takes office.

[7] *See* nº 1º and 3º of article 18º of the TEU.

[8] *See* article 26º of the TEU.

Council, acting unanimously, may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation from the Presidency. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall apply provisionally to them."[1]
On the 26th of February of 2001, a fourth revision of the Treaty of Rome[2] is undertaken with the signing of the Treaty of Nice[3] "(...) Desiring to complete the process started by the Treaty of Amsterdam of preparing the institutions of the European Union to function in an enlarged Union; Determined on this basis to press ahead with the accession negotiations in order to bring them to a successful conclusion, in accordance with the procedure laid down in the Treaty on European Union, Have resolved to amend the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (...)". [4] In practice, the Treaty of Nice did not significantly alter provisos relating to the CFSP. However, it introduced three substantial alterations in what concerns: 1) International Agreements in the domain of the CFSP. Hence, instead of the rule of unanimity demanded by article 24 of the TEU, which concerns the signing of international agreements: "When it is necessary to conclude an agreement with one or more States or international organisations (...) the Council, acting unanimously, may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation from the Presidency (...)." The Treaty of Nice, more specifically paragraphs nº 2 and nº 3 of art.24 of the TEU, made it possible that, in certain circumstances, agreements be undertaken and adopted through qualified majority. "The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions; When the agreement is envisaged in order to implement a joint action or common position, the Council shall act by a qualified majority in accordance with Article 23(2)"; 2) The Political Committee, as stated in article 25 of the TEU. This committee will henceforth be known as Political and Security Committee and, in essence, it retains the same functions[5]. However, "within the scope of this title, this Committee shall exercise, under the responsibility of the Council, political control and strategic direction of crisis management operations. The Council may authorise the Committee, for the purpose and for the duration of a crisis management operation, as determined by the Council, to take the relevant decisions concerning the political control and strategic direction of the operation (...)"; 3) Reinforced Cooperation shall henceforth be included in the CFSP's scope and "(...) shall be aimed at safeguarding the values and serving the interests of the Union as a whole by asserting its identity as a coherent force on the

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[1] *See* article 24º of the TEU.
[2] This Treaty was adopted on the 1st of February of 2003. Published on OJC 80 of 10.03.2001.
[3] Soares, *op. cit.*, p. 43-44: "[the] intergovernmental conference that led to the adoption of the Treaty of Nice had, in comparative terms, the most limited political agenda. In truth, the objective of this intergovernmental conference was to deal with matters that the Member-States had not been capable of resolving at the time of the conclusion of the Treaty of Amsterdam, but which they deemed pertinent to the forthcoming negotiations concerning the institutional reforms that had to be implemented prior to the enlargement of the EU, the so-called "Amsterdam leftovers" (...) [in practice, Nice prepared the European Union, at the institutional level, for future enlargements]".
[4] *See* Tratado de Nice – Revisão dos Tratados Europeus – Apresentação Comparada, Lisboa, ed. Assembleia da República, 2001, and also
http://www.fd.uc.pt/CI/CEE/pm/Tratados/Nice/tratadonice-f.htm.
[5] *See* article 25º of the TEU: "Without prejudice to Article 207 of the Treaty establishing the European Community, a Political and Security Committee shall monitor the international situation in the areas covered by the common foreign and security policy and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or on its own initiative. It shall also monitor the implementation of agreed policies, without prejudice to the responsibility of the Presidency and the Commission."

international scene. It shall respect: the principles, objectives, general guidelines and consistency of the common foreign and security policy and the decisions taken within the framework of that policy; the powers of the European Community, and the consistency between all the Union's policies and its external activities."[1]

However, this capacity for reinforced cooperation can only be applied in the implementation of a common policy or position and never upon questions that have military or defence implications.[2]

IV. The CFSP in the Constitutional Treaty

On the 20th of June of 2003, at the European Council of Salonika,[3] the Treaty Project that instituted a Constitution for Europe was presented. On the 29th of October of 2004, it is signed, in Rome, the Treaty that establishes a Constitution for Europe.[4] It should be emphasised that this treaty is neither a revision of the Treaty of Rome nor a revision of any other treaty. It is an autonomous Treaty conceived *ad inicio* to be applied in Europe with an unlimited validity (art.IV-446 of the CT). However, it has not yet come into place[5], due to the fact that the period of ratification, by the member states[6], is ongoing, notwithstanding the

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[1] *See* article 27º-A and 27º of the TEU.

[2] Martins, Ana Maria Guerra. *Curso de Direito Constitucional da União Europeia*, Coimbra, ed. Almedina, 2004, p.177 "(…) [the] main innovations concerning the CFSP are not mentioned in the Treaty of Nice since they were undertaken at its margins. In truth, the European Council of Nice approved the establishment of operational structures for crisis-management – the Political and Security Committee, the Military Committee and the European Union Military Committee, which, in practice, function since the year 2000."

[3] *See* Preface of the Treaty Project that institutes a Constitution for Europe, published by the Publications Office of the European Communities, 2003: "[having] realised that the European Union found itself at a crucial juncture of its existence, the European Council met in Laeken (Belgium) on the 14th and 15th of December of 2001 convoked the Convention on the Future of Europe [for the second time in the History of Europe, Europeans are called upon to deliberate on their future. The first time this happened, as noted earlier, was at the Congress of Hague, in 1947]. This Convention was entrusted the responsibility of formulating proposals on three subject-matters: to approximate citizens to the European project and institutions; to structure political life and transform the European political space into an enlarged Union; to transform the Union into a stabilising factor and reference point in the new world order (…) The Declaration of Laeken raised the question of knowing whether the simplification and re-structuring of the Treaties should not open the way for the adoption of a constitutional text. The Proceedings of the Convention led to the elaboration of a project Treaty that institutes a Constitution for Europe that was consensually accepted in the plenary session of the 13th of June of 2003". (This was the text that was presented at the European Council of Salonika).

[4] *See* Preamble of the Treaty that establishes a Constitution for Europe, Luxembourg, Published by the Publications Office of the European Communities, 2005, p.10: "Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law, Believing that Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world, Convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny; Convinced that, thus 'United in diversity', Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope; Determined to continue the work accomplished within the framework of the Treaties establishing the European Communities and the Treaty on European Union, by ensuring the continuity of the Community *acquis*; Grateful to the members of the European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe (...)."

[5] *See* nº 2 of article IV-447 of the CT: "This Treaty shall enter into force on 1 November 2006, provided that all the instruments of ratification have been deposited, or, failing that, on the first day of the second month following the deposit of the instrument of ratification by the last signatory State to take this step."

[6] This Treaty, which establishes a Constitution for Europe, in order to enter into force, must be ratified by all Member-States. Until the present time, only fifteen states have ratified it (Germany, Austria, Belgium, Cyprus, Estonia, Greece, Hungary, Italy, Lithonia, Lithuania, Luxembourg, Malta, Slovakia, Slovenia, and Spain) whilst two

fact that it may not be ratified in its current form, as the refusals of France and the Netherlands show.

The Constitutional Treaty eliminated the structure of the three pillars enshrined by the Treaty of Maastricht and which proceeded, with slight alterations, to Amsterdam and Nice. In what specifically concerns the Common Foreign Policy and Security[1] (CFSP), the Constitutional Treaty maintained a policy of continuity, without great ruptures, lacking courage and with few substantial alterations. Hence, the Foreign Policy of the Union is regulated in Part I, Title III (Union Competences), article I-16 (Common Foreign and Security Policy), Title V (Exercise of Union Competence), Chapter II (Specific Provisions), art. I-40 and in Part III (Policies and Functioning of the Union), Title V (The Union's External Action), Chapter I (Provisions Having General Application), articles III-292 and article III-293 and Chapter II (Common Foreign and Security Policy), section 1 (Common Provisions), of articles III-294 until article III-308 and section 3 (Financial Provisions), article III-313.

It is with this legal mechanism, now unified, that the European Union reiterates the postulate that its foreign policy in the international sphere has as its fundamental pillars the principles that presided " its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."[2] In addition, it reinforces/amplifies its objectives, especially if we compare them with the previously announced principles of Maastricht (nº 2 of article J-1 of the TEU) and with those enshrined at Amsterdam and Nice (nº 1 of art.11 of the TEU).

Hence, it is competence of the Union to "define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders; (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty [we should underline that this new aim is laudable. However, we shall see if it was not included with the sole purpose of closing the borders of the Union]; (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; (g) assist populations, countries and regions confronting natural or man-made disasters; and (h) promote an international system based on stronger multilateral cooperation and good global governance."[3]

Member-States (France on the 29th of May of 2006 and the Netherlands on the 1st of June of 2006) have voted no in their respective referendums.

[1] MORENO, *op. cit*., p. 829-830: "[The] CFSP had and has preserved a very peculiar nature due to the fact that foreign policy is a delicate matter for Member-States. Even though the Constitution has formally eliminated the three-pillared structure instituted at Maastricht, which made the CFSP an intergovernmental pillar, the decision-making process is still characterised by the primacy of states that have preserved their veto powers in most policy deliberations whilst the supranational institutions – the Commission, the Court of Justice and Parliament – have remained in the margins with regard to their usual competencies."

[2] *See* nº 1 of article.III-292 of the CT.

[3] *See* nº 2 of article III-292 of the CT.

In order to rigorously implement these aims, the Union[1] shall: a) strive for the coherence of the diverse policy domains in its external actions and between these and other policies of the Union (nº 3 and nº 4 of art.I-40 and nº 3 of the art.III-292); b) to formulate and implement a common foreign and security policy that extends to all domains of foreign policy and security (nº 1 of the art.III-294); c) to identify[2] interests and strategic objectives of the Union, consulting, for that end, regularly with the European Parliament on the principal aspects and fundamental options of a common foreign and security policy (nº 2 of art.I-40, nº 8 of art.I-40 and nº 1 of art.III-293); and d) to support actively and without reservations a common foreign and security policy, in a spirit of loyalty and mutual solidarity (nº 2 of art.III-294) (among Member-States, in the identification of matters of general interest and in achieving a growing degree of policy convergence among them[3] (nº1 of art. I-40),

As we mentioned, the treaty that establishes a Constitution for Europe did not bring about, in reality, noticeable progress in the domain of the CFSP, although it introduced some "innovative" measures and others that, in our view, are regressive. We shall endeavour here to present some of them in synthetic form: 1) number 4 of art. 1-3 of the Constitutional Treaty mentions that "in its relations with the wider world, the Union shall uphold and promote its values and interests." We agree fully that the Union should divulge throughout the world its values "of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail[4]".

However, we disagree completely that the Union should follow the same steps as its "American counterpart" in divulging and promoting its interests throughout the world. We embrace the thesis that this factor is the direct and most significant cause of insecurity in the World. Some states constantly seek to expand their interests, sometimes completely forgetting the interests of other States. In effect, we share the position that all state interests supported by the values of the Union are legitimate; 2) art. I-7 of the CT confers on the Union a juridical status equal to that of States. This European Union becomes then a subject of international law and probably "one day it [may] have a seat on the Security Council of the United Nations, side by side with the other States"[5]. In addition, the European Union has the exclusive competence to undertake international agreements when a legislative act of the Union requires it and when it is necessary, in order to grant it the possibility of exercising its internal competence, that is, liable of affecting common rules or altering their scope[6]; 3) the European Union shall henceforth have competence in every domain of foreign policy, in matters pertaining to security and in the gradual formulation of a common defence policy. In this ambit, Member-States, in addition to supporting actively and without reservations the

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[1] Council, Commission, European Parliament, Ministers for Foreign Affairs and Member-States.

[2] The European Council.

[3] *See* nº 5 and 6 of article I-40 of the CT: "Member States shall consult one another within the European Council and the Council on any foreign and security policy issue which is of general interest in order to determine a common approach. Before undertaking any action on the international scene or any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity. European decisions relating to the common foreign and security policy shall be adopted by the European Council and the Council unanimously, except in the cases referred to in Part III (...)".

[4] *See* article I-2 of the CT.

[5] Antunes, Manuel Lobo. "Notas sobre a política externa e de segurança comum no projecto de tratado constitucional", in *Europa Novas Fronteiras* "A Constituição Europeia: que novas perspectivas para a União Europeia?", nº 13/14, Cascais, ed. Principia – Centro de Informação Europeia Jacques Delors, 2003, p. 110.

[6] *See* nº2 of art.I-13 of the CT.

common foreign and security policy, should refrain from any undertaking that is contrary to the interests of the Union or that is likely to undermine them.[1] This is not an innovative measure; however it expands the purview of the European Union to other domains, such as the gradual formulation of a common defence policy, which may lead to an effective common defence. The common security and defence policy (CSDP) shall be developed within the scope of the CFSP[2], thus being its corollary; 4) the flexibility clause, addressed in nº 1 of art. 18 of the CT is one of the other revolutionary measures; it states that "If action by the Union should prove necessary, within the framework of the policies defined in Part III [it should be noted that the Common Foreign and Security Policy is addressed in Chapter II, Title V, Part III of the CT] to attain one of the objectives [nº2 of the art.III-292 of the CT] set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures." The inclusion of the "flexibility clause" is, undoubtedly, the lever that the European Union needed to autonomously foment new policies within the scope of common foreign and security policies; 5) the establishment of the Union Minister for Foreign Affairs[3] is, unarguably, the most significant measure introduced by the Constitutional Treaty (CT) to the CFSP. The Union Minister for Foreign Affairs is one of the Vice-Presidents of the Commission and is appointed by the European Council by qualified majority, with the agreement of the President of the Commission. This minister is responsible for the implementation of the Common Foreign and Security Policy (CFSP), as well as of the Common Security and Defence Policy (CSDP); he/she may present proposals for the formulation of these policies (CFSP and CSDP), to ensure the coherence of the external action of the Union, implementing these policies on behalf of the Council[4], utilising the national and Union policy for these purposes.[5] In addition, the Union Minister for Foreign Affairs represents the Union in matters pertaining to Common Foreign Policy and Security (CFSP) as well as engages in political dialogue with third parties on behalf of the Union and, moreover, expresses the position of the Union in international organisations and conferences.[6] The Common Security and Defence Policy provides the Union with an operational capacity based on civilian and military means, which may be employed in foreign missions with the aim of insuring peace-keeping, the prevention of conflicts and the reinforcement of international security, in accordance with the principles of the United Nations Charter[7]; 6) the "typification of the juridical measures adopted in the ambit of CFSP and bestowing upon them a status equal to that of measures adopted in other policy domains"[8] is another innovative measure introduced with the adoption of the Constitutional Treaty. Thus, "[in order to] exercise the competences of the Union, the institutions use juridical mechanisms in accordance with Part III (Union Policies and Internal Actions), European law[9], European framework-law[10], European regulation[1], European decision[2],

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[1] *See* nº 1 and 2º of article I-16 of the CT.
[2] *See* nº1 of article I-41 of the CT: (Specific provisions relating to the common security and defence policy) "The common security and defence policy shall be an integral part of the common foreign and security policy. "
[3] *See* article I-28 of the CT.
[4] *See* article I-28 of the CT.
[5] *See* nº4 of article I-40 of the C.T "Specific provisions relating to common foreign and security policy."
[6] See. nº3 of article III-296 do CT.
[7] *See* nº1 of article I-41 of the CT.
[8] Antunes, *op. cit*., p.110.
[9] "European Law - is a legislative act of general character. It is obligatory in all its aspects and directly applicable to all Member-States."
[10] "European framework law - is a legislative act that binds the Member-State to which it is applied with regard to the objective to be attained leaving, however, to the national governments the choice of the form and means of its implementation."

recommendations[3] and reports"[4]; 7) the inclusion, in the Constitutional Treaty, of the "solidarity clause"[5] is another measure that should be commended given that it will contribute to the real cohesion of efforts and means in the combat against insecurity and/or in the case of a natural or man-made disaster; 8) the possibility of Member-States instituting reinforced cooperation[6] among themselves in the domain of CFSP is another noteworthy measure. Notwithstanding the aforementioned, the Union could progress further in this domain, namely, in the application of this practice in military and defence affairs (art.I-44 and nº 1 and 2 of art. 419 and nº 3 of art. III-422 of the CT); 9) the inclusion of the "good neighbourhood rule" in the Constitutional Treaty (CT) is another measure that must be lauded given that threats to security often emanate from neighbouring countries[7]; 10) the adoption of new juridical instruments for the CFSP given that "the Union shall conduct the common foreign and security policy by: (a) defining the general guidelines; (b) adopting European decisions defining: (i) actions to be undertaken by the Union; (ii) positions to be taken by the Union; (iii) arrangements for the implementation of the European decisions referred to in points (i) and (ii); (c) strengthening systematic cooperation between Member States in the conduct of policy."[8]. In practical terms, the preceding juridical mechanisms (common positions, common actions and common strategies) are reformulated in more "European" terms thus instituting six new juridical mechanisms: I) General Orientations[9]; II) European Decision[10] on Action[1] to be implemented by the Union; III) European Decision on

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[1] "European regulation - is a non-legislative act of general character intended to implement legislative acts and certain provisions of the Constitution. It can either be obligatory in all its aspects and directly applicable to all Member-States or it can bind the state to which it is applied as to a particular objective leaving, however, to the national states the choice of the form and of the means of its implementation."

[2] "European decision - is a non-legislative act that is obligatory in all its aspects. It is only obligatory to its addressees."

[3] "Recommendations and reports are not binding."

[4] *See* nº1 of article I-33 of the CT.

[5] *See* paragraphs a) and b) of nº1 of article I-43 of the CT: "The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to: (a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack; (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster."

[6] *See* Paragraph 2 of nº1 of article I-44 of the CT: "Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article III-418."

[7] *See* 1 and 2 of article I-57 (The Union and its neighbours): "The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation. (...) the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation."

[8] *See* nº 3 of article III-294 of the CT.

[9] *See* nº1 of article III-295 of the CT: "The European Council shall define the general guidelines for the common foreign and security policy, including for matters with defence implications. If international developments so require, the President of the European Council shall convene an extraordinary meeting of the European Council in order to define the strategic lines of the Union's policy in the face of such developments." This is the procedure that replaced the common strategies.

[10] In this regard, the European Council and the Council of Ministers have, as a rule, adopted European decisions by unanimity (nº1 of article III-300 of the CT), expressing their views when solicited by a Member-State or by a proposal of the Union Minister for Foreign Affairs or of the latter with the support of the Commission (article I-40, nº6); "European decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States." (Paragraph 2 of nº1

a Position[2] to be adopted by the Union; IV) Rules of Implementation of a European Decision on an Action to be implemented on the position to be adopted. European decisions are adopted by the Council, deliberating in accordance with the rule of unanimity, except in the four situations established from paragraph a) to d) of nº 2 of the article III-300[3] of the Constitutional Treaty. However, any member of the Council that refrains from the voting procedure can qualify its abstention with a formal declaration. In this case, the abstaining Member-State is not obliged to apply the European decision but should nonetheless recognise that it is binding upon the Union. As a consequence, this Member-State must not act in a manner that contradicts or hinders the action of the Union. The other Member-States shall respect its position.[4] V) Systematic cooperation[5] among Member-States; and, VI) International Agreements "The Union may conclude agreements with one or more States or international organisations in areas covered by this Chapter"[6] because the Union already benefits from the status of a juridical entity[7]; 11) the establishment of a European External Action Service (EEAS) is another innovative measure introduced by the Constitutional Treaty. The inclusion of this service will, in the short term, enable the European Union to develop a diplomatic corps service similar to those of sovereign states. The Union Ministry for Foreign Affairs is assisted by this service in the exercise of its competences. The EEAS works in collaboration with the diplomatic services of the Member-States and is composed of functionaries from the General-Secretariat, the European Council, the European Commission and by personnel from the national diplomatic services that is appointed to serve at the European level[8]; 12) institutional cooperation between the diplomatic missions of the Member-States and the delegations of the Union in other countries and at international

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of article III-293 of the C.T.); In essence, the three modalities of European decisions have replaced the previous common positions and actions.

[1] *See* nº 1 and 2 of article III-297 of the CT. "Where the international situation requires operational action by the Union, the Council shall adopt the necessary European decisions. Such decisions shall lay down the objectives, the scope, the means to be made available to the Union, if necessary the duration (...). The European decisions referred to in paragraph 1 shall commit the Member States in the positions they adopt and in the conduct of their activity."

[2] See article III-298 of the CT: "The Council shall adopt European decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the positions of the Union."

[3] "By way of derogation from paragraph 1, the Council shall act by a qualified majority: (a) when adopting European decisions defining a Union action or position on the basis of a European decision of the European Council relating to the Union's strategic interests and objectives, as referred to in Article III-293(1); (b) when adopting a European decision defining a Union action or position, on a proposal which the Union Minister for Foreign Affairs has presented following a specific request to him or her from the European Council, made on its own initiative or that of the Minister; (c) when adopting a European decision implementing a European decision defining a Union action or position; (d) when adopting a European decision concerning the appointment of a special representative in accordance with Article III-302. [However, note that] If a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a European decision to be adopted by a qualified majority, a vote shall not be taken (...)."

[4] *See* nº1 of article III-300 of the CT.

[5] *See* nº 2 of article III-294 of the CT: "The Member States shall support the common foreign and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations." Nº 1 and 2 of art. III-305: "Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the Union's positions in such forums. The Union Minister for Foreign Affairs shall organise this coordination.

In international organisations and at international conferences where not all the Member States participate, those which do take part shall uphold the Union's positions. (...) Member States represented in international organisations or international conferences where not all the Member States participate shall keep the latter, as well as the Union Minister for Foreign Affairs, informed of any matter of common interest."

[6] *See* article III-303 of the CT.

[7] *See* article I-7 of the CT.

[8] *See* nº3 of article III-296 of the CT.

organisations[1] is an established practice that, in our view, will lead, in the short-term, to the establishment of a EU diplomatic corps; 13) the financing of CFSP[2] by the operational and administrative expenses and by the European Union budget is another measure that should be commended. Indeed, a Common Foreign and Security Policy that lacks budgetary support and satisfactory means is not viable.[3] However, all expenses related to operations that have military or defence implications are left out of the budget, as well as those that the Council decides to exclude.

Conclusions

Member-States must definitely become aware of the fact that their progress in the European Union is not and will never be uniform because "[each] state, like any other state, is a sovereign political entity. However, differences between states, from Costa Rica to the [ex] Soviet Union, from Gambia to the United States [from Portugal to Cyprus] are immense. States are similar but they are also different, much like corporations, apples, universities and persons. When we compare two or more objects of the same category, we presume that they are not similar in all respects but only in some. It is not possible to find two identical objects in the world and, yet, this does not mean that objects cannot be compared and combined in a useful manner."[4]

Thus, "united in diversity", we can all move forward effectively in the midst of the European Union, combining efforts, policies and/or means or, should this be the interest of some Member-States, to move towards a "Europe à la Carte" and/or "of variable geometry", in some societal sectors, for instance, CDSP, European Constitution, and/or in other uniformed specific policies in detriment of harmonised policies. The European Union should provide the legal mechanisms that will enable such reinforced cooperation(s) to be implemented and extended in the midst of the European Union.

The virtues of these policies will become evident in the European Union due to their own merit and not by legislative decree. The Member-States and the European population must identify with these new policies. Today, it is evident that we are part of the European Union and there is not a single European State that has doubts concerning the usefulness of its adhesion. However, we cannot forget that in 1951 there were only six Member-States embracing the European project. Today we are twenty-seven Member-States and it is possible that this number increases as a consequence of the several adhesion requests. What has changed? Nothing, we suppose, except that the European project has succeeded and consolidated itself on account of its own merit and virtues. Thus, we also hope that the same will happen with regard to the domains of the Common Foreign and Security Policy and the Common Security and Defence Policy.

Presently, it is evident that the "incapacity of the EU to speak with one voice in important international matters is not only a political problem but also a security problem. The EU may have succeeded in modifying some of the foreign policy decisions of the Bush administration had it been able to speak with one voice. The Americans succeeded in their objective of dividing [into "new" and "old" Europe, as stated by the American Secretary of Defence, Donald Rumsfeld, in accordance with the old strategy "divide and rule"] the European Nations into opposing camps. Yet, in the final analysis, this strategy proved to be a

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[1] *See* nº1 of article III-301 of the CT.

[2] *See* nº1 and 2 of article III-313 of the CT.

[3] Machado, *op. cit.*, p.19: "(this) situation reminds me of what a German diplomat said in 1998 about the CFSP: "Much diplomacy, considerable sums of money but no soldiers", in, Wolfgang Ischinger, "Die Gemeinsame AuBen – und sicherheitspolitik nach Amesterdam – Praxis und Perspektiven", 1998, p. 4."

[4] Waltz, Kenneth N.: "Teoria das Relações Internacionais", Lisboa, 1ª ed. Gradiva, 2002, p. 136.

defeat for both the United States and Europe."[1] Therefore, in the current geopolitical context, in which new threats (natural and/or human) proliferate throughout the world, a weak Common Foreign and Security Policy (CFSP), and/or an "inexistent" Common Security and Defence Policy (CSDP), is not only a problem of the Member-States and/or of the European Union. It is a global problem with tremendous repercussions for citizens. As Samuel P. Huntington wrote "[in this] new world, local politics is characterised by ethnicity and global politics is that of civilisations. Superpower rivalry is thus replaced by the clash of civilisations. In the new world, the most generalised, important and dangerous conflicts will not take place between social classes, rich and poor and other economically defined groups, but rather between peoples that belong to different cultural entities. Tribal wars and ethnic conflicts will take place within the civilisations."[2] To understand this reality is to safeguard the archetype of international security.

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MARRIAGE IN ISLAM – RELIGIOUS AND LEGAL ISSUES

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Abstract

Over time the institution of marriage in Islam has suffered very important and major changes in an effort to be in line with modern legislation and the new social norms of coexistence in the world in general and especially with those of the Eastern world. For this reason, I think that the topic of this work is fascinating and is worth our attention, is worth being thoroughly researched.

Key words: *Koran/Quran, Muslim, Testimony of Faith, Dowry, Oath of anathema.*

Introduction

Muslims are now about one fifth of the world population. The Organization of the Islamic Conference comprises 57 countries, 22 of which forming the Arab League. Mutual understanding is essential to avoid the aggravation of the confrontation between the Muslims and the Western world. To reach such an understanding it is essential to know Muslim law, which has been governing the Muslim mentality and behaviour for fourteen centuries.

Concepts and general aspects of a marriage

The Muslim law conceives marriage as *a civil contract signed between the future husband and the legal guardian of the future wife*. In this contract the husband states that he agrees to pay a sum of money, a 'dowry'[1], to his wife.

For that contract to be valid the following are needed:

- there should be no impediments to marriage
- to have the consent of the determined people
- the dowry to be ready
- the legal formalities to be done

The impediments to marriage are of two types:

- permanent (*kinship by blood or marriage, having been breast-fed by the same woman, consummation of marriage during the period called idda, oath of anathema)*
- temporary *(mixed religion, polygamy, kinship among the same husband's wives, idda, triple repudiation).*

Several things draw our attention to some of the impediments to marriage. First, marriage is not possible with a wide range of '*prohibited people*' (maharim) including their

[1] *Koran*

ascendants and descendants and their wives, the sister and the descendants of their sisters and brothers, aunts, the ascendants' sisters and aunts, the mother-in-law and her descendants.

Two cousins can marry, but two children who have been breast-fed by the same woman cannot; nor can the man marry the woman who breast-fed him or her relatives. It is forbidden the simultaneous marriage with two women who are blood-related or kinships or 'milk-sisters'[1].

The Muslim law gives special attention to the 'withdrawal of continence', called idda – related to establishing the paternity of a child, subsequent to a previous marriage, period that lasts four months and ten days when the woman must refrain from any sexual contact in order to avoid the 'parties' confusion', in other words, in order to be able to determine the true father of the child who is to be born. It is, however, a moral obligation, respect for the deceased's memory, a kind of mourning, because this period of continence is also imposed on the widow, even if the marriage was not consummated. If, ignoring the ban, the marriage is consumed during this period of abstinence; the woman is forever prohibited to the man who had committed the sin.

The '*Oath of anathema*' is a formula that calls God's wrath against the adulterous woman, which means not recognizing the paternity to the child who is to be born and an irrevocable divorce.

Regarding the temporary obstacles: in Islamic religion[2] the 'mixed religion' is an obstacle only under certain conditions:

- marriage of a female Muslim is not allowed with a non-Muslim, but the marriage of a male Muslim with a woman belonging to one of the revealed religions (*Christian and Jewish religions*)
- the marriage between a male Muslim with a woman belonging to one of polytheistic religions is not allowed.

A Muslim can not marry a woman married to another because a female Muslim can have only one spouse[3]. But a male Muslim can have two, three or four wives; not more than four at a time. The marriage with a fifth woman is not possible: CAUTION! It is a temporary barrier because one of the four places may become vacant by divorce or death.

It is not allowed marriage with a person during the continence or with a person repudiated three times. Regarding the necessary consent for getting married, it mainly refers to the legal guardian, but it may refer, under certain conditions, to the persons who will get married.

The legal guardian is, first of all, the father, who can exercises his right of restraint (jabr)[4] on his son until his son reaches puberty and on his daughter until her first marriage. With the exception of the period when one or both of the spouses to be still have a legal guardian (the father or other guardian – *wali*[5]), the interested parties must give their direct consent. Guardianship is designed as a means of protection of the person who has a guardian, so it may be exercised only in that person's sole interest. Children can be married, on condition the guardians agree with each other, the consumption of the wedding taking place when the two spouses reach the legal age.

Giving dowries (*mahr,sadaq*[6]) is a prerequisite for marriage: it is forbidden any agreement between the parties to refuse the dowry. In general, the dowry should be real, not

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[1] *Idem.*
[2] Nadia Anghelescu, *Introducere în islam*, Encyclopaedic Publishing House, Bucureşti, 1993, p. 39.
[3] www.femeia-musulmana.blogspot.com.
[4] see *Koran.*
[5] *Idem.*
[6] *Ibidem.*

symbolic, to belong entirely to the woman; the woman is supposed to have no personal dowry from her parents. The husband has no right to demand the consummation of the marriage before paying the dowry, in whole, or as previously established by contract. The woman:

- is entitled to the full dowry if the marriage was consumed or even if the husband dies before the consumption
- is entitled to half of the dowry if the marriage is dissolved before the consumption
- is not entitled to the dowry when the marriage is annulled.

Conditions for ending a marriage

For ending the contract represented by marriage some simple formalities are necessary [1]:

- both parties' consent is required and there must be two witnesses.
- the two witnesses must be free sane male Muslims.
- the *hanefit*[2] *ritual* admits one of the two male witnesses to be replaced by two women.

Modern codes[3] add to this administrative formalities related to the act, i.e. the contract of marriage.

Marriage involves rights and duties of the spouses – mutual debts, such as cohabitation, mutual respect and affection, inheritance rights, rights on the children resulted from the marriage and rights of each party.

The wife is entitled to:

- maintenance (food, clothes, housing, medical care)
- right to equal treatment as the other wives in polygamy case
- the right to visit her parents and welcome them
- freedom to manage her property and goods without her husband's control.

The husband is entitled to ask from his wife:

- loyalty
- submission
- breastfeeding their children
- to take care of the home
- respect for his father, his mother and his close relatives.

It should be noted that, according to the Muslim law, spouses have complete separation of property/goods.

Dissolving a marriage

This occurs either due to a party's death or divorce. Regarding divorce, there is, on the one hand, *rejection* which occurs at the husband's initiative (*talaq)*, and, on the other hand, *proper divorce* (*tatliq sau tafriqa*), pronounced by cadmium, at the request of the man or the woman.

1. Repudiation: It can happen only after the marriage was consumed and leads to the separation of the spouses during the continence period: during this period, repudiation can be revoked. If not revoked, a further period of separation follows, after which the separation is final. If the husband states a third repudiation after two successive ones, he can not marry that woman unless the dissolution of another marriage legally contracted by the woman and after its consumption. Although the solution is not very

[1] Nadia Anghelescu, *op. cit.*, p. 47 and the others.
[2] *Koran.*
[3] www.femeia-musulmana.blogspot.com, see more about *Sharya*.

2. orthodox, the husband may state three times, one after another, the repudiation formula, thereby rendering a final farewell, even without observing the temporary separation periods during which reconciliation can take place.

3. Proper divorce: It is pronounced by the judge if there is an '*oath of anathema'*, when the physiological conditions for the consumption of marriage are not accomplished or when one of the parties fails to fulfil the obligations incumbent upon s/he by marriage. The wife can ask for divorce, for example, when her husband is absent for more than a year or when not given the required level of maintenance provided by her social status.

Parentage in Islam

It should be noted that neither the Islamic law, nor the traditional marital moral encourages the husband's infidelity: *extramarital relations are permitted only during the slavery period*, with the concubine slaves. If a boy is born from this type of relationship, he can be recognized by his father, and that slave acquires the status of *umm walad – 'mother of the boy'*[1], which means that she can not be sold, and at her owner's death she is free.

Thus, parentage is recognized by the very existence of marriage. The principle is: 'the child belongs to the conjugal bed' (*al walad li-l firaş*)[2].

The father has rights over the child, arising from his status as guardian. But, first, he has the right to force marriage *(jabr)*; he has this right until his son is 18 years old[3] and until his daughter's first consumption of the first marriage. During this period, the father must provide the child support and education.

The mother has the right to guard *(hadana*) her children as long as they need her care. This right is exercised from a boy's birth up to the age of seven and from a girl's birth up to the age of nine[4] and it is exercised even if the marriage is dissolved, on condition that the woman does not remarry during this period[5].

Family in Islam[6]

The Arab group deserves special attention primarily because it is the one in which Islam was born, and then because it continues to exert a shaping influence on other groups.

In the dispute that has been created in our century between traditional and modernist representatives regarding the status of women in Islam, the marriage and family in general, the former insist on the improvement that the Islamic law brings in all respects to the previous situation.

The most important thing on which attention is paid is the abolition of the barbaric practice of burying newborn girls alive in order not to feed an extra mouth. The habit was born, apparently, because of very low resources that are in the desert and because many intertribal wars sickle men's lives, diminishing the workforce able to provide food for the weaker sex.

However, in today's society there are some improvements on the women's status, such as:

- ensuring a system in which women inherit 2 to 1 (two women to one man) from father, mother and collateral relatives; but the man is the one who has the duty to maintain the house and pay the tax;

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[1] *Koran.*
[2] *Idem.*
[3] 15 years old in the hanefit ritual.
[4] the age varies in different rituals.
[5] if she does, she loses the right to guard her child or children from her previous marriage.
[6] www.femeia-musulmana.blogspot.com.

- the matrimonial law of property/goods separation preserves the woman's property and gives her some freedom
- the Koran limits the father's authority in the family (*the right to "constrain" is exerted within certain limits*)
- both polygamy and repudiation are tolerated, not recommended[1].

After Mohammed's death[2], the newly created conditions in the Islamic Empire brought some changes in the status of women and family. Thus, some authors consider that a major change was the new status that got by the institution of legal cohabitation and the institution of slavery - which increased the number of slaves. The value of a slave grew because of her beauty, but also due to her good manners, poetic gifts, her singing and dancing talents. The most expensive were those who, besides the already mentioned gifts, were learnt. They say that their price was set by juries that examined them in medicine, astronomy, music, mathematics, philosophy, lexicography, rhetoric, legislation etc. Such a woman did not struggle fairly with the wife-woman and therefore it is said the cohabitation institution led to the devaluation of the Arab woman as wife. This woman, travelling on her own will, without a veil, educated and cunning, ends up being preferred, compensating thus her subservient social status.

With regard to Muslim marriage, trends of its modernization also concern the girl's 'dowry'. Although the Muslim law speaks only about the dowry that the man pays, in return for which he should not ask anything, it has become quite common for wealthy families to give their girls a dowry which may exceed in value the received dowry.

There are small innovations in the wedding ceremony, too. Traditionally, the bride and the groom did not see each other before their wedding night; nowadays, young people meet on the street and at school, where classes are often mixed. Once an important constituent of the ceremony[3], the proud and loud proclamation of the girl's virginity has almost disappeared. The great publicity of the future marriage did not disappeared, because the event gathers the whole village, the whole neighbourhood for a long joy, sometimes several days in a row, because it is part of the very concept of marriage in the Muslim environment, fulfilling the divine commandments, as a form of community integration. Therefore: secret marriage would not be possible in Islam.

We cannot speak of a 'religious marriage' in Islam because they do not conceive such a marriage: the act itself is entirely sacred. There are few religious elements during the ceremony: they are reduced to reading the introductory part of the Koran, *Al-fatiha*, in the house and to signing the contract in the witnesses' presence. The other elements that appear in different areas during the ceremony are due to local traditions and are linked especially to rituals for ensuring fertility.

One of the most important issues that today threatens the Arab and Islamic families is repudiation. In many Arab countries the number of divorces recorded each year represents about 20-25% of all the marriages registered in the same year. A man usually does not remarry only a repudiated woman, but also a single, usually younger woman, so the chances

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[1] Before Islam appeared, polygamy was widespread among the Arabs, as it was common in other countries around the Mediterranean, Asia, and Africa etc. The Islamic law limits the number of wives to four. The conditions to be met by a Muslim who wants to take a second, a third, a fourth wife are pretty tough: he must absolutely ensure equal treatment of all wives; every wife should have a separate house and receive support at the level required by her social condition (to have her own slaves or servants, and nowadays to have all the modern facilities needed in a house); each wife should have a number of nights equal to the others, except for the newly married one, entitled to seven consecutive nights immediately after marriage. Both the Koran and the traditions about the Prophet emphasize the importance of the equal treatment: the Muslim who cannot provide this treatment for a variety of reasons has to stick to one wife (*Koran, 4, 3*).

[2] Asa Briggs, ş.a., *Când, unde şi cum s-a întâmplat- cele mai dramatice evenimente şi cum au schimbat ele lumea*, Reader's Digest Publishing House, Bucureşti, 2008, p. 288.

[3] Asa Briggs, ş.a., *op. cit.,* p. 320.

of a repudiated woman to remarry are much lower. Attempts to introduce in the status of women from various Arab countries equal rights for men and women to file for divorce are still shy and hit the net opposition of conservative circles.

A sterile woman is always threatened with repudiation[1], because a woman's faith is to have children. In the Arab countries, as well as in the Islamic countries in general, there is a fairly high number of children per couple, for a large family is considered a blessing. The use of various contraceptive methods, some even justified by quotations from the sacred text, does not enjoy equal attention to all Muslim families. As in other countries, fertility is lower in cities than in the countryside, lower with those who received education than with the illiterate.

The preference for boys continues to be everywhere, especially when it is about the first born. A father of girls considers himself doomed, because girls are considered a nuisance: they must be watched carefully as soon as they get nubile because they may bring dishonour to their family; they have to be married because a single woman is a socially disabled person. Education[2] is for some fathers the only solution to ensure his daughter a dignified life. But some say that only ugly girls learn beyond primary school or high school; the others marry as quickly as they can so both them and their families are not worried anymore.

Conclusions. Today's woman in the Islamic community

Today, as opposed to the past, women have an important enough place in the Islamic society. Unlike other religions, Islam still looks up to women. Its importance as a mother and a wife was clearly shown by *Prophet Mohamed*.

However, as in many other states of the world, the Muslim woman is not always as important as one might think. There are men, particularly in the west, who have doubts about the status of women in Islam. For these people, the Muslim woman is seen almost as a prisoner between the four walls of the house, a non-person, as someone who has no rights and lives under male domination. These notions are totally wrong, based more on ignorance than knowledge of Islam.

Today, the 'emancipated' Muslim women can work, own companies, drive, participate in sports competitions and even more.

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MEDIATION IN PENAL CAUSES

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Abstract

Law 192/16 May 2006 regarding mediation and organization of the profession of mediator, modified by different normative acts – the last modification being inserted by Law 202/2010 – has the merit of inserting in the Romanian jurisprudence a new way of solving conflicts. In terms of this study, it is relevant the way in which the institution of mediation has helps in solving penal conflicts which is already, or is about to be brought before judicial bodies.

This analysis considers the corroboration of the first mentioned law with the provisions of the Criminal Procedure Code, but also the way in which mediation is an important institution of the new Criminal Procedure Code, adopted by Law 135/2010, published in the number 486 from the date of July, 15th 2006.

Law 192 of 16 May 2006 is part of the European set of laws in this area, without stating that its elaboration was made based on a certain pattern. This law guarantees the adjustment to present Romanian realities and the acceptance by the jurisprudence of this new institution.

Key words: *mediation agreement, penal trial, new Criminal Code, new Code of Criminal Procedure.*

Introduction

In Romania, mediation was stated by Law 192/2006, published in the Official Journal, 1st Part, no. 441 from the date of May 22nd, 2006. Subsequently, this law has suffered several modifications and amendments[1], necessary for the Romanian legislation to harmonize with the communitarian one, especially with the provisions of Directive 2008/52/EC[2] on certain aspects of mediation in civil and commercial matters. Thus, express provisions regarding the way in which the parties enforce their mediation agreement by public notary or by court were inserted.

Though it was adopted in 2006, the law entered into force in 2008, when was published the Mediators' Table. The purpose of the law was the decrease of the volume of activity of courts and prosecutor's offices and, as a consequence, reliving them of some cases, in order to increase the quality of justice by satisfying the interest of both parties.

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[1] By Law 370/2009 and Government Injunction No. 13/2010. Prosecutor at the Prosecutor's Office attached to the Court of Appeal Pitesti, Lecturer PhD – University of Pitesti, (e-mail: cameliamorareanu@yahoo.com).

[2] Elise Vâlcu**,** *Introduction to Community law. Course for students*, Sitech Publishing-house, Craiova, 2010, pp. 278-279.

Although, the law settles a vast area of mediation (in civil, commercial, family, penal, labour or consumer's protection area), this study focuses only on mediation in penal cases.

Mediation nowadays

As stated by Art. 67 of the Law 192/2006, "The provisions of the present law also apply accordingly and in penal cases concerning offences for which, according to the law, withdrawal of prior complaint or parties' reconciliation exonerates penal liability".

Corroborating this provision with the Criminal Code – thus modified by Law 202/2010, some measures for accelerating the solution of cases[1] – penal offences for which the withdrawal of prior complaint or parties' reconciliation exonerates penal liability:

- Hitting or other forms of violence (Art. 180 Criminal Code, for which the reconciliation of parties removes penal liability, and it takes effect also in case that the penal action was initiated *ex officio*);
- Bodily harm (Art. 181 C. Code, for which the reconciliation of parties removes penal liability, and it takes effect also in case that the penal action was initiated *ex officio*);
- Serious bodily harm (Art. 184 Para 1-4 C. Code);
- Violation of domicile (Art. 192 Para 1 C. Code);
- Violation of postal secrecy (Art. 195 Criminal Code);
- Rape (Art. 197 Para 1 C. Code, also stating that the penal action is initiated upon prior complaint by the victim);
- Seduction (Art. 199 C. Code, for which just the reconciliation of parties removes the penal liability);
- Punishment for certain cases of theft upon prior complaint (Art. 210 C. Code)
- Breach of trust (Art. 213 Criminal Code);
- Fraudulent management (Art. 214, Para 1 C. Code, for which penal action is initiated upon prior complaint from the injured person);
- Destruction (Art. 217, Para 1 C. Code);
- Disturbance of possession (Art. 220, C. Code, for which just the reconciliation of parties removes penal liabilities);
- Desertion of family (Art. 305 C. Code);
- Non-abidance by measures for child custody (Art. 307 C. Code);
- Disturbing the use of habitations (Art. 320 C. Code).

Nevertheless, neither the victim, nor the offender can be constrained to accept mediation.

According to Art. 68 of the Law 192/2006, in penal cases mediation should develop as to guarantee the right of each party to legal counselling and, if necessary, the right to an interpreter. In this regard, the minute concluding mediation must mention if the parties have beneficiated from an attorney and an interpreter, or, as the case may be, to mention the express refusal of the parties.

For minors, the guarantees stated by law for the penal trial must also be applied in mediation.

Regardless the mean, purpose and phase of trial in which the mediation occurs it is important to consider the psychical mechanisms of primary processing of information[2]. Mediation can be seen as a confrontation, and, therefore, the tactic adopted during mediation shall be essential for its purposes.

[1] Published in the Official Gazette No. 714/26 October 2010.

[2] The presence of a subjective trial is specific to each individual, and the process of knowing the objective reality has three phases: perception, memory and reproduction. See in this regard, Elena-Ana Nechita, *Forensic. Forensic techniques and tactics*, 2nd Edition, Pro Universitaria Publishing-house, Bucharest, 2009, p.116.

The researches on the line of especially studying witnesses, and generally studying people, have revealed that the psychological process of statements is not just a simple process or recording.

Thus, the preparation of mediation shall also depend on the degree in which the participants are familiar with the persons in mediation, as well as the relationships between them with the evaluation of psychological dominants, spiritual features, health conditions, of causes generating certain emotions[1].

Based on the moment when mediation in penal cases occurs, we can distinguish:

a) Mediation before the beginning of the penal trial

This mediation occurs before the beginning of the penal trial and concludes with the reconciliation of parties. As its consequence, the victim can no longer notify, for the same offence, the penal investigation body or the court[2]. About mediation before the penal trial we can talk also when the mediation was initiated by a prior complaint in the legal term[3]. As a consequence of this type of mediation, the legal term for submitting a prior complaint is suspended during mediation. If the reconciliation of the parties did not occurred, the victim may submit a prior complaint in the same legal term, which will start to flow from the moment of concluding the mediation by a minute, also being calculated the time elapsed before the suspension.

b) Mediation during penal trial[4] is unfolded after the beginning of the trial. Due to the contract of mediation, the penal investigation or, trial, is suspended until the parties conclude this procedure. The suspension lasts until the mediation is concluded by any of the ways stated by Law 192/2006, but no longer than three months from the conclusion of the contract of mediation. When the mediation is concluded, the mediator must notify the judicial body with a copy of the minute concluding the procedure.

We must note that the penal trial is resumed ex officio, right after the notification of the minute stating that the parties were not reconciled or, if not communicated, at the fulfilment of the three months term above mentioned.

For solving penal cases based on the agreement concluded after mediation, the parties are compelled to submit to the judiciary body the agreement in authentic form or to present themselves in front of the judiciary body confirming their will.

According to the modifications of the new Criminal Procedure Code, inserted by Law 202/2010 on certain measures to accelerate the settlement of lawsuits (Little reformation of justice), the penal action cannot be initiated, or carried out in case it has already been initiated if a mediation agreement was concluded. This aspect is stated by Art 10 Point h) of the Criminal Procedure Code – modified by the present law[5].

Thus, if the mediation procedure concluded by a signed agreement, the prosecutor or judge notes on the agreement submitted in authenticated form or sustained personally[6], stating one of the following:

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[1] See Elena-Ana Nechita, *Forensic. Forensic techniques and tactics*, 2nd Edition, Pro Universitaria Publishing-house, Bucharest, 2009, p.174.

[2] Art 69 Para 1 of the Law 192/2006.

[3] Art 69 Para 2 of the Law 192/2006.

[4] Art 70 of the Law 192/2006.

[5] Nowadays, Point h) of Art 10 of the Criminal Procedure Code states the following: "*the preliminary complaint has been withdrawn or the parties have reconciled or an agreement of mediation was concluded, according to the law, in the case of offences where criminal responsibility is annulled by the withdrawal of the complaint or the reconciliation of the parties*". Until the modification inserted by Law 202/2010, Point h) stated that the "*the preliminary complaint was withdrawn or the parties have reconciled*".

[6] Decision XXVII of 18 September 2006, published in the Official Gazette No 190/20 March 2007, the Joined Sections, applying Art 11 Para 2 Let b), regarding Art 10 Para 1 Let h) Thesis II of the Criminal Procedure Code, decided that: "Cessation of the penal trial, for offences for which the reconciliation of the parties annuls penal responsibility, can be decided by the court only if it establishes the direct agreement of the defendant and victim to

- Based on Art 11 Point 1), Let c) – *cessation of criminal investigation* – decided by the prosecutor ex officio or proposed by the criminal investigation body during criminal investigation.
- Based on Art 11 Point 2 Let b) – *cessation of the criminal trial* – decided by the judge during trial.

Another novelty of the Law 202/2010 is Art. 16[1], inserted in the new Criminal Procedure Code, stating that during penal trial, regarding civil claims, the defendant, the civil part and the civilly responsible part can conclude a transaction or a mediation agreement. On this occasion, the defendant, with the agreement of the civilly responsible part can totally or partially admit the claims of the civil part.

In the case of admitting civil pretentions, the court compels to compensations to the extent of recognition.

In another train of thought, the above mentioned regulation, as modified by Law 202/2010, transposes in internal legislation the general principles of Recommendation No. R (99) 19 of the Committee of Ministers to Member States concerning mediation in penal matters[1]. According to this international judicial instrument, mediation in penal matters cannot take place unless the parties freely consent. Also, mediation should be available at all stages of the penal trial, and before mediation the parties must be informed on their rights, on the nature of the mediation process and on the possible consequences of their future decision. Minors should, in addition to their right to legal assistance, have the right to parental assistance.

All provisions of the Recommendation No. R (99) 19 were transposed by the modified Law 202/2010 on the Criminal Procedure Code and by the modified Law 192/2006.

Also, "*the reasonable time-limit within which the competent penal justice authorities should be informed of the state of the mediation procedure*" has correspondence in the three months term stated by Art. 70 of the Law 192/2006.

According to Art. 17 of the same Recommendation, discharges based on mediated agreements should have the same status as judicial decisions or judgments – namely, during judgment, the penal trial is solved by a decision of ending the trial, and during penal investigation, the prosecution or judgment is precluded in respect of the same facts according to the principle *non bis in idem*.

Mediation in the future codes

Mediation is also considered by the new codes, with an imminent entrance into force[2].

Correlating the provisions of Art. 63 Let a) of Law 304/2004 on the organization of the judiciary, according to which the prosecutor takes part, according to the law, in the resolution of conflicts by alternative methods with the provisions of Art. 318 Para 1 of the future Criminal Procedure Code, according to which the prosecutor may order exemption

completely, unconditionally and definitively reconcile, expressed in front of the court by these two parties, personally, by persons special mandated or by authentic documents".

[1] This Recommendation was adopted by the Committee of Ministers on 15 September 1999, on the 679th meeting of the Ministers' Deputies.

[2] The new Criminal Code was adopted by Law 286/17 July 2009, published in the Official Journal No. 510/24 July 2009. The future Criminal Procedure Code was adopted by Law 135/2010, published in the Official Journal No 486/2010.

from penal investigation in condition expressly stated by the law, or when there is the possibility of mediation between prosecutor – as initiator – and defendant[1].

In this new procedural framework, the doctrine[2] considers mediation to achieve the legal condition for cessation of penal investigation, as well as for repairing the prejudice, thus it will satisfy both the public interest, as well as the personal interest of the victim.

Thus, Art. 16 Let g) of the new Criminal Procedure Code states the mediation among cases of exemption or cessation of penal investigation. Also, the new Code comprises the provisions of Law 192/2006 on the suspension of penal investigation or judgement during mediation (Art. 312 Para 3 and Art. 367 Para 3), as well as provisions on solving the civil part (Art. 23).

As a result of the modifications inserted by Law 202/2010, Art. 320^1 of the new Code states the possibility of the defendant to admit his guilt, representing a case for reduction of the limits of penalty stated by the law.

In the new Criminal Procedure Code, the legal provisions above mentioned are amplified by the institution of negotiating the acknowledging guilt agreement[3]. This type of mediation is specific for the Anglo-Saxon law, the Romanian procedural provisions continuing and adapting elements of the acknowledging guilt agreement from the French and German penal law systems.

In accordance with Art. 479 of the new Criminal Procedure Code, the purpose of the acknowledging guilt agreement is the confirmation of committing the offence and the agreement on its judicial qualification for which the penal investigation was initiated, behaviour directly linked with the applicable penalty and its mean of application[4].

The agreement can take place between the defendant and prosecutor during penal investigation, after the initiation of the penal investigation and can be concluded only for the offences punishable by fine or imprisonment for maximum seven years, and when from the evidences are obvious enough data on the existence of the offence and guilt of the defendant (Art. 480).

Acknowledging guilt agreement – a new institution for the Romanian legislation – leaves enough room for mediation and creates the premises of crossing from an imposed judicial order to a negotiated one.

The judicial literature considers that mediation could take place also in the post-conviction phase[5]. Considering the concept of probation, of reintegration of persons in conflict with the law and the competences of the Probation Service, as a penal institution, by the decisions of the court, of the penal investigation bodies or at the request of the mentioned Service, mediators could interfere in the penal trial for promoting alternatives to detention, could take part in the hearing of the victim or of the civil part, as well as in the hearing of the witnesses who need protection, namely whose lives, body integrity or freedom are endangered.

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[1] In the French Criminal Procedure Code it is stated the principle of opportunity of the criminal investigation, according to which, by mediation, in exchange with the prosecutor's order to cease the criminal investigation, the defendant shall receive a punishment proportionate to the caused prejudice.

[2] Gheorghe Mateuţ, *Treatise on Criminal Procedure, General part, Vol.I,,* C.H. Bech Publishing-house, Bucharest, 2007; Claudiu Ignat, Zeno Şuştac, Cristi Danileţ, *Mediation Guide*, University Publishing-house, Bucharest, 2010, pg.168.

[3] The acknowledging guilt agreement is stated by a special chapter of the new Criminal Procedure Code, Art. 478-488.

[4] The defendant has a reduction by a third of penalty's limits stated by the law for imprisonment, and a reduction by a quarter of penalty's limits stated by the law for fines.

[5] Lecturer PhD Ana Bălan, authorized mediator, presentation in the workshop "Mediation in penal", Bucharest, 17 November 2010.

In the execution of the penalty, mediators could offer social assistance or counselling for both the offenders, as well as for the victims, thus contributing to the activity of the Probation Service.

In the post-conviction phase, the mediator could have the same competences as the mentioned service, to survey in the community the mean in which the convicted respects the measures and obligations imposed by the court (for education measures of the parole and of the suspension of penalty under supervision).

Conclusions

To those exposed, as the volume of work of the prosecutors and judges is continuously incrementing[1], for the judicial system, mediation represents a valid alternative in solving the cases with celerity, and for the parties involved, a more economic way to solve the conflicts and reparse the damages.

In this way, it is also changed the repressive mentality of the penal justice, and the imprisonment becomes, as it should be, the "ultimo ratio".

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[1] According to the Report on Justice in 2010, in some courts one judge ruled over 1000 cases in one year.

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THE DOCTRINE OF NATURAL LAW AND THE FATHERS OF THE CHURCH

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Abstract
Still from the moment the human became aware of the rationality he possesses, he could perceive the existence of the bindings which he has with others, but also the existence of some rules above his will. The Fathers of the Church achieved, according to the roman jurists, this set of premeditated rules, known as the natural right, trying to be in accord with religion.

Key words: *natural right, divine law, positive right, law, state.*

Introduction

In the nature there is, between the beings of the same kind, connections that make them to connect with in communities, between those animals and human societies there are common factors and cleavage factors, the last ones being impregnated in rationality.

Rational animal, the human participates at the general natural necessity, being the subject of the laws of nature, but also having its own laws, abducted from its rational nature dominated by conscience.

So, there is a natural right, of the whole nature, and a proper right of the human race. Since from the roman lawyers this distinction has been established, between a common right of human and others beings, and the right of the community, of the human society, dominated by rationality.

The roman lawyers and the institution of natural right

The recognition of the natural right existence was accomplished “once the roman right, which brought under regulation in detail the commercial relationships of roman people could no more be imposed, especially as a consequence of the expansion of Rome, therefore

the lawyers had to elaborate a system with simple rules, accepted by anybody, and with the same meaning for everybody, named ius gentium"[1].

The Church renews ancient tradition, the lawyers and its theologians getting closer with the idea of natural law. This idea of divine rationality foretelling the world order, finds an important role in the divine Christianity, personified God and leading the world takes the nature place, the natural law being the one which He proclaimed, the divine law. Like the roman layers, the fathers of the church, talked about only the natural right, not searching to predict it content.

The natural law was an important source of the canonic right, in terms of natural and supernatural inspiration from the human's heart, deposit there to show it the path and its behavior in society.

The ideal principles of natural law are expressed in precise rules of the Greco-roman law, without missing an exact hierarchy between the foresights. It is clear that we can speak about the natural right only because exists a rational human nature which sits at the base of the positive right.

The roman lawyers didn't rule out a interaction of natural right with the right of nations (*jus gentium*), since they had to many common points, but the Christian church bind up always the natural right with the rational divine law of Christ, because Christ assumed in His natural humanity, the whole humanity, therefore giving reason the capacity head for divine rationality.

The principles of natural right are for Church just rayon of the divine law, that light up the natural capacities of human rationality, to reveal the finality of natural law in its eternal functionality of the divine law.

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The concepts of the fathers of Church regarding the natural law - Saint Augustine

The fathers of the Church took over from the roman lawyers the idea of natural right, but they grafted it on theological bases, seeing it as a dominant principle on positive right.

Among them, the most important is Saint Augustine, which develops the ideas about nation and law in his study "De Civitate Dei". The state it is seen from his point of view not as a necessity, but as an effect of sin emerged due to the aberration of people from faith.

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The aim of law is to determine pace (*opus justitiae – pax*), so that people could be prepared properly for the after life. Seeking to analyze thoroughly the judicial rules, Saint

[1] Boldurean, C. M., *Drept şi raţionalitate*, Editura C. H. Beck, Bucharest, 2007, p. 136.

Augustine refuses to admit unfair laws the rightful quality, because they are in conflict with ethics.

Realizing an analysis of the types of law, he identifies *lex temporalis*, the right law, which does not punish the sin, but only the trespass of peace and order, and *lex aeterna,* which constitutes the background of ethics. “Though distinct, law and ethics stand for mutual relationships, because the law prevents the wrong and allows that through him the divine law to forbid and punish; but only the eternal right makes the human better. In its turn, the ethics, as an eternal right circumscribes the right law, drawing limits which if they are transgressed, it looses the quality of law (what is not rightful, is not right)[1]”. The natural laws must be derived from the natural ones and their destination is rather defensive: they protect the social pace and order established by God. If some of them are not derived from the natural law, then respecting them is not obligated[2].

Right and equitable can be something only through the power that comes from God and from the protection of the church. St. Augustine makes the distinction between the “eternal law” and the “natural law”. The first one is the will of God (*ratio divino vel voluntas Dei; ordinem naturalem conservari jubens, perturbari vetans*), and on the other hand the natural law is a sort of an imprint of the eternal law in our being(*transcripta este naturalis lex in animam rationalem*)[3].

The doctrine of Saint Augustine influences the medieval Christianity philosophy, having echo as far as the modern age.

Saint Thomas from Aquino (Thomas Aquinas)

Marked from a partial return at Greek philosophy, Scholastic philosophy has in Saint Thomas from Aquino one of the most prestigious exponents. This philosophical current, born in the clerical schools, started from the idea that truth, which the holy books and the studies of antiquities philosophers contained, must be brought to light and spread.
Saint Thomas from Aquino gives precision to the juristic thinking, starting from the division of the law. In “Summa theologica” he distinguishes three types of law: *lex aeterna*, *lex naturalis, lex humana*. *Lex aeterna* it is divine ration itself which governs the world, „*ratio divinae sapientiae*”, it is the will of the divinity,which none can know it entirely („*legem aeternam nullus potest cognoscere, secundum quod in se ipsa est, nisi solus Deus, et beati, qui Deum per essentiam vident*”), and it must be accepted through faith. *Lex naturalis* can be known by people through ration; she is not perfect and partial *lex aeterna*, which in reality is what people can in a rational mode can understand from the first one: „*lex naturalis nihil aliud est quam participatio legis aeternae in rationali creatura*”; ”*secundum proportionem capacitatis humanae naturae*”. *Lex humana* it is an invention of the human, „*lex ab hominibus inventa secundum quam in particulari disponuntur quae in lege naturae continentur*”; she is or must be a particular application of the natural law. She can be derived from *lex naturalis*, *per modum conclusionum* or *per modum determinationis*, as *lex humana* represents the resultant of permits of *lex naturalis*, a right conclusion of a syllogism, or a larger specification of what is already declared in general in *lex naturalis*[4].

[1] Georgescu, Șt., *Filosofia dreptului. O istorie a ideilor din ultimii 2.500 de ani*, Editura All Beck, Bucharest, 2001, p. 35.
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[4] Vecchio, G., del, *Lecţii de filosofie juridică*, Editura Europa Nova, Bucureşti, 1992, pp. 69-70.
[6] Georgescu, St., [2], p. 41.
[7] Popa, N., Dogaru, I., Dănişor, Gh., Dănişor, D.C., *Filosofia dreptului. Marile curente*, Ediţia 2, Editura C. H. Beck, Bucharest, 2007, p. 91.
[8] Sf. Toma din Aquino, *Summa theologiae*, Quaestio 60, IIa, Iiae, citat în Malaurie, Ph., *Antologia gândirii juridice*, Editura Humanitas, Bucharest, 1997, p. 57.

Between the natural law and the positive one, Saint Thomas sees a fundamental difference because, while the rules of the natural law are demanded, because they are good, the ones of the positive law are good because they are imposed.

The most important law is *lex aeterna*, the one which represents the divine rationality. From this is derived *lex naturalis*, adequate for "speculative intellect of human being".[1] Furthermore as the ones ahead of him, Saint Thomas distinguishes two types of natural laws: primary natural law (which is universal, irremovable and has only one principle: the good must be done and the evil avoided) and the secondary natural law (which consist of different rules from one country to another, adequate to the variety of legislation, variety flown from the diversity of human things).

The latter fits the positive law creation of human spirit "which has the function to legislate, to create standards of behavior in society. In this last sense the law is a prescription of the reason, which reports at general good, realized and issued by the ones who govern the community[2].

For Saint Thomas, the injurious laws, against the human good are violent, and not laws, unbarred in consequence, unless in case they must avoid the disorder and the anarchy. As for the injurious laws against the divine law, they will be not taken into account in no circumstance, this opinion is retrievable in the following quote: "1) Because not the written law offers the natural law its authority, she can not either be diminished, nor removed because the will of the human can not change nature. Therefore, if the written law contains any forecast that contradicts the natural law, she is not right and so can not obligate: positive law has its justification only where it is indifferent from natural law point of view, if the things are presented this way or otherwise.

Such writings cannot be called laws, but rather falsifications of the law, as it been said already: so we can not judge on its foundation. 2) Injurious laws are through themselves opposed to the natural law, always or sometimes; similar to them, the laws well-set are in some cases defective; in this cases there will be no judgment after the letter of the law, but appealing to labels, according to the intention of the legislator"[3].

The common good it is understood by Saint Thomas as "a good living, necessary to the exercise of virtue, like the necessary order for the crowd to live in unity and pace [4] ". Towards this concept of good, the laws are reported too, which must be subordinated. "When the laws are right, people respect them not from constraint or fear, but from reason[5]". The right laws can be of two types counter to common good (the ones which do not have in view the public utility, but the concern of legislators) and the ones counter to the divine good. The latter ones can not be accepted in any situations. "The positive law must be enrolled in the eternal principle law for it to be right"[6].

As far as the state is concerned, this is a natural product for the satisfaction of people needs, derived from the social nature of those. Thereby in this conception, Saint Thomas is carried off from Saint Augustine, who he saw as an effect of the original sin. Being constituted from a human necessity, the state must assure the good of all, being an imagine of God's Kingdom.

Being the result of a natural lean, the state represents a good, represents the mean through which people are sometimes inclined to division, are united. On the other hand, the state can not be compared absolutely, because it is limited of right and ethics.

Right, through the mediation of natural law, assures the setting of organization of the state, which must act only in the sense of obtaining good.

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[9] Georgescu, Şt., [2], p. 43.
[10] Idem p. 43.
[2] Popa, N., *et al.*, [7], p. 95.

Besides the two exponents of the Christian thinking, there had been others Christian authors that give precision to the ideas which will be developed after. Therefore, it is sketched the theory of social contract, a idea taken over from the Sophists, pointing the existence of a period in the history of humanity, in which had lived without government and laws, but people gave away that condition, through a contract to be united in a state (*status societatis*).

Between the monkish orders created, the one of the Francine gave two important names for the judicial philosophy John Duns Scot and William Occam. The first one dispute Saint Thomas, showing that the will of God is as free as the will of people, and from this will emanates the laws of life. Divinity may or not create the world or to make it different than it is already.

The second one, William Occam admits the existence of a natural law, but which is reduced at the point that the human can not hate God.

Conclusions

Based on the straight of religion, the Church managed to govern a whole century Europe. After a long period of obedience, terrestrial stronghold succeeds to declare interaction towards the papacy, and the human, at his point, reclaims in front of the civil power, his personality less known and recognized. In this period, of decline of the Church, until the rise of well organized state structures, the world has known an epoch of misfortune, crimes and wars.

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CURRENT AND TRADITIONAL IN APPROACHING A PERSONALITY WITH AGGRESSIVE POTENTIAL

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Abstract

This article contains information as well as classical models on dealing with major psychological aggression. A synthesis of scientific highlighted factors which are present in the psychosocial environment, influence the individual and predispose to aggression is also performed. The first part comprises the opinion, the definition and explanation of classical psychologists who are preoccupied with this field. Explicative models that have logically adjusted up to this point are then presented, as well as the assumptions on origin of the aggresive behaviour. The following are thus highlighted: the innate character with its corresponding model, biological-ethological; aggression as response to frustration with the psychosociologic model; aggression, as learned feature with the socioculturalist model. The new tendencies of research in the field that describe the role of heredity and genetics involved in the state of aggression and violence are not left out. The methods mentioned are: chromosome research, genealogy research and twin research. Scientific certainties and controversies regarding the causal level generating aggresion in human beings are presented in the paper’s conclusion.

Keywords: *aggression, violence, school, frustration, psychological.*

Introduction

In the field of these potential and real psychological and social dysfunctions, at the level of the society and that of the individual, part of the local government as well some parents have lost interest in the problems of children and adolescents who fail to identify cultural and civic models of behaviour. As social and individual effects a negative emergence can be seen, and one can state that personal identity, still developing during childhood and adolescence, is often affected by: deviance of character, aggression and social maladjustment of an avoidant type. Environment factors of this visible, constant dysfunction can be easily identified in socius, we herein specify: the perpetual experimental education system, chronic poverty, somatopsychic disorders, and the government institutions’ chronic and obvious lack of interest in the formation of the person, this whole picture being easily justified now by the “economic crisis”. Individual factors can cause deviance to some extent, aggressive and criminal behaviour of children and adolescents having neuropsychological valences. Thus the complex nature of these factors is deciphered only in addressing biological-personological coordinates. Factorial constellations likely to produce behavioural deviations primarily in children and adolescents no longer resemble those who influenced the society of previous generations, but they have already caused

serious mutations in character, intelligence and skills of those today. Disengagement attitudes left their mark on culture, but especially on Romanian adolescents' subcultures, which went through an atypical transition, mostly subconscious, passive, unlike the few valid, existential and moral models in society. School dropouts' phenomena, juvenile delinquency, verbal, emotional and physical aggression within the school now occur mainly in the structure of school-age population. These attitudes are often highlighted by dysfunctions occurring in the evolution of the character, emotional disorders and serious deficiencies in educational and professional training. These aggressive tendencies are often seen, learned or transmitted by psychological contagion, being perpetuated as references in affirming personality at the level of small groups in school. This phenomenon of imitating aggressive behaviour may be an early start or pointer of a social regression of an anomic type.

1. DEFINING HUMAN AGGRESION

The etimology of the word (*aggresion* comes from Latin "*agressionem"*), which means "to attack". In French the term is explained in the Grand *Larousse* Dictionary as: "tendency to attack the other or any object likely to stand in the way of an immediate gratification" (1999 p. 44)[1]. It is a state of the neuropsychophysiological system, the response of the body through a series of hostile behaviour that aims to destroy, degrade, coerce, repudiate or humiliate a being or a thing, invested with meaning, that the aggressor perceives per se, representing a challenge for him (Păunescu, 1994).[2] The notion of aggression refers to an individual willingness to initiate an attack, to the ability to oppose the other and not give in or give up in case of any confrontation. Paul Popescu-Neveanu (1978 describes aggression as a destructive and violent behaviour towards people, objects or self. He shows that aggression involves active denial and produces damage or just transformations. He also identifies a nonviolent calm aggression, but which always means a propensity to attack, offensive and hostility. Aggression originates in the stimulation mechanism of the nervous system, being concurrently a feature of living beings throughout their evolutionary scale. Manifestations of human aggression are extremely various and different. They have different levels relating to drive, affect, attitude, behaviour. The concept of aggression also comprises mentions designating the aggressive behaviour as well as the involvement of the aggressive act in the social life. It is the most common reaction of frustration and it is pointed towards an obstacle (Petcu, 1999)[3]. Dollard emphasizes that frustrated people tend to develop a direct aggression towards the source of frustration. (Rădulescu, according to Baron 2001)[4] shows that he defines aggression as deliberate behaviour undertaken with the intent to harm or impair another individual who doesn't want to be treated in this way. This definition involves four elements: behaviour, intent, perpetrator and victim. In the case of animals, intra-species aggression is usually triggered in a justified way, in cases of external threat or violation of territory or hierarchy. In reality, the man is aggressive even without real grounds. Human aggression has a wide area of unwinding. Man can focus his aggression directly on an object, this being the case of vandalism or on an animal or fellow, hitting him, offending him or mocking him. Human aggression can also manifest indirectly, when the opponent is, "slandered" or "fooled" (Farzaneh 2011)[5]. Another hostile manifestation is the refusal of social contact (failure to

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[1] Larousse-Marele Dicţionar de Psihologie*:* Tison, C., Grenier A.., *La surveillance neurologique au cours de la premier anne de la vie*, Paris, Mason, 2002 p.44.

[2] Păunescu, C., *Agresivitatea şi condiţia umană,* Bucharest, Editura Tehnică, 1994.

[3] Petcu, Marioara., *Delincvenţa. Repere psihosociale* Cluj-Napoca, Editura Dacia, 1999 p.102.

[4] Rădulescu, S., *Sociologia violenţei intrafamiliale*. *Victime şi agresori în familie,* Bucharest, Editura Lumina Lex, Bucharest, 2001.

[5] Farzaneh, P., *Comportamentul agresiv,* Institutul European, 2011.

help, failure to accept communication). Aggression may be directed against an individual or group and can include both ideological and armed conflict (Şoitu, 2001 according to Eilb-Eibesfeldt, 1995)[1].

2. EXPLICATIVE MODELS OF AGGRESIVE BEHAVIOUR

The aggressive behaviour, seen as a feature of behavioural types aiming at destruction, is found in the extremity point of manifestation at the level of delinquency. There are several theories regarding the issues of origin of the aggressive tendencies:

2.1 INNATE CHARACTER

Biological-ethological model. It explains the overall native, instinctive and neurobiological aggression. This model was approached and developed by the authors Sigmund Freud, K. Lorenz, J.G Vanderberg or F. Molina, along with their explanations of psychoanalytic, ethological and neurobiological nature. In Freud's view, people have an instinct of aggression and violent manifestation from birth, the author pointing out that aggression is based on an innate instinct (Rudică, according to Freud, 2006).[2] Thus, the innate and/or acquired or learned character of aggression, is the topic of scientific controversy that engaged biologists, ethologists, doctors, psychologists, sociologists, philosophers, criminologists etc. From the study of these assessments it can be inferred that, as in the case of other human traits, aggression appears as an emergence manifested in different proportions or intensities which embodies elements transmitted and triggered by biological mechanisms, as well as influences of the social environment. Aggression and strong emotions, mainly affects, appeal to innate mechanisms, but nonspecific ones, that man uses to continue or to exacerbate aggressive acts. Cultures, respectively subcultures can develop different combinations of aggression, fear, hatred, which under certain conditions, are prerequisite onsets of deviant behaviour. *The ethological model.* Konrad Lorenz emphasizes in his work the "*So-Called Evil"*, the biologic-instinctive nature of aggression, yet justified by a sense of survival by reproducing and ensuring a vital space of action. Aggression can be doubled in the context of violent confrontation, with the instinct that prevents the total destruction of the opponent.

2.2. AGGRESSION AS RESPONSE TO FRUSTRATION

The psychosociological model. According to this model, aggression is a feedback to frustration. Those who support this theory assume that aggression is caused by external conditions, and in fact by life relationship. The theory of frustration-aggression supported by J. Dollard in his work *Frustration and Aggression* is highlighted in this sense (S. Boncu, Course of Social Psychology, 2004).[3] This thesis was subsequently improved, enhanced and developed through the contribution of Leonard Berkowitz, who took into account a series of intermediate variables: assignments, prior learning and instrumental means. Frustration-aggression theory, formulated by John Dollard, seeks to explain the mechanism of aggressions through the emergence of frustrations (states of nervous tension, created by the appearance of an obstacle in the way of a person's wishes). In his work "*Frustration and aggression"*, J. Dollard considers that the two basic directions are: aggression is always a consequence of frustration; frustration always leads to some form of aggression. (Rudică, 2006). The blockage that appears in the way of achieving the established purpose is really generating frustrations, which in turn constitute sources of aggression, but not always any

[1] Şoitu,L., Hăvârneanu,C., *Agresivitatea în şcoală,* Iaşi, Institutul European, 2001.
[2] Rudică,T., *Psihologia Frustraţiei*, Editura Polirom, 2006, p. 26, 42-431, 78-191.
[3] Boncu, Ş., *Curs de Psihologie Socială, Comportamentul Agresiv,* Iaşi, Facultatea de psihologie şi ştiinţe ale educaţiei "Al. Ioan Cuza", 2004.

frustration causes aggressions. The advocates of this theory formulated by Dollard are those who lay stress on determining the aggression of external conditions. Dollard sought to explain the mechanism of aggression through the emergence of frustration in the problematic field of human action.

Intolerance to frustration. Frustration is a dysthymic state, being a result occurred when the individual encounters an obstacle in his path (internal or / and external) that prevents him from satisfying a need. This state is an emotional experience of failure, living in a more or less dramatic way the failure and it is manifested through increased emotionality according to the individual's temperament and affective structure (Rudică, 2006). In certain pronounced cases it can lead to increased deviant behaviour, the individual not taking into account norms and values established by the society. From a dynamic point of view, frustration turns into conflict, generating it in turn, especially when this state is the result of an act of unjustified, subjective, rendering of a malicious intent. The conflict is only a general condition that can lead to the state of frustration. Failure to concord internal necessities and social environment requests also lead to emotional conflicts and frustrations. So consequently, distrust, hostility and indifference generate an emotional conflict and serious nervous tension which can trigger aggression. Delinquents who are emotionally and morally immature people have a low tolerance to frustration due to egocentrism and they can attempt to satisfy their needs in illegal ways, including aggression and violence. Not satisfying a need, be it biological, psychological or social, triggers in the behavioural system a series of processes and internal or external turmoil, including aggression, frequently manifested through aggressive acts. However the relation between frustration and aggression should not be generalized. Real frustrations and imaginary ones can have a trigger effect, being both reasons of hostile and instrumental forms of aggression. On the one hand the momentary acute frustrating situation, usually leads to occasional crimes, even homicides, these crimes sometimes being caused or precipitated by the victim's behaviour. On the other hand, the continuous state of frustration mostly leads to aggressive acts that are well prepared before committing the crime. Taking into account the pyramid of needs, it can be said that an adolescent with deviant behaviour was frequently deprived of its physiological necessities or those of security and love. In these cases, not satisfying necessities can lead to a conflict between the individual and the social environment, aggressive behaviour being often manifested. The delinquent, wanting to meet some needs by illegal, socially unacceptable ways not only fails to resolve the conflict "and restructure the specific requirement, but enters a vicious cycle, increasing the state of tension and thus placing himself in the state of social maladjustment. Well balanced people can also trigger aggression in response to a negative emotional state. During a challenge perceived or not as a personal attack, the response strategy becomes directly proportional to the intensity of the aversion felt towards the triggering stimulus (Farzaneh, 2011). All this shows that the factors in social environment through their multiple interconditioning with psycho-individual factors can incite to violence by activating a latent potential stressor or, on the contrary, they can contribute to the socialization of the human being aggression (Muntean, Ana, 2011).[1]

2.3. AGGRESSION AS LEARNED TRAIT

Socioculturalist model. It focuses on socially learned behaviour. This view has been indirectly accredited as of 1935 by Margaret Mead, in her paper *Sex and Temperament in Three Primitive Societies,* (Net site)[2] in which she stated that cultural rules are the ones that are responsible for standardizing masculinity and femininity in society, and for assuming gender and not biological heritage. Aggression, like other forms of social behaviour is also

[1] Muntean, Ana, Munteanu, Anca, *Violenţă, Traumă, Rezilienţă,* Ed. Polirom, Iaşi, 2011.
[2] http://www.loc.gov/exhibits/mead/field-sepik.html.

acquired through social learning. In the process of socialization, aggressive responses are acquired either through direct learning, following rewards or punishments, or by observing and imitating the behaviours and consequences of others. Bandura (Petcu 1999 according to Bandura) initiates the social learning theory of aggression, proving the adult's role of model in the case of children who acquire aggression. He made an experiment: an actor performed a show in a kindergarten. During the show he behaved violently, assaulting a large plastic doll. Children then had to play with a series of toys including that doll. They also behaved aggressively, as opposed to children who did not attended the show. Moreover, it was found that aggression increased when the behaviour was rewarded. Hence, although children are not exposed to aggression, they learn from their own experience by reinforcing the important people or those with authority. This is explained by the *theory of aggression transfer and the aggressive model theory* (Mihaela Tomiţă apud. Bandura, 1968, Ranschburg, 1971).[1] Bandura believes that the most common aggressive behaviour patterns can be found in: social environment, in cultures in which aggressive behaviour patterns are accepted and admired and aggression is easily spread to new generations; the media, especially television by almost daily offering patterns of physical and verbal aggression. By formulating the social learning theory of aggression A. Bandura shows that this is learned through several ways: directly or by rewarding or punishing certain behaviours; by observing pattern behaviours of others, especially those of adults (according to S.Chelcea, Jderu Gabriel. „ Psychosociology,- *Theories, research, applications*", 2008).[2]

R. K. Merton, A. Cohen, quoted by (V. Preda, 1998)[3] state that in the development of an aggressive behaviour, the culture or subculture to which an individual belongs have a large contribution. Once a subculture that approves violence has been established, social learning becomes the main factor of spreading it. Contemporary psychology and sociology provide conclusive evidence on the role of learning in building an aggressive behaviour. Various forms of aggressive behaviour are learned either by observing or by personal experience. Indirect learning, observational, and direct learning through personal experience entwine in different proportions in shaping aggressive behaviour. It was observed that most aggressive children and youngsters come from families in which parents or other family members display aggressive behaviour. Social learning theory explains the processes by which: 1) a behaviour or a sequence of behaviour is acquired; 2) behaviours are to initiated; 3) patterns of behaviour are maintained (Păunescu, 1994). According to this theory, social behaviour is not innate but learned from appropriate models. The emphasis lays on individual learning experiences that can be direct or indirect. Through socialization, the child learns the aggressive behaviour as he is rewarded directly, or he notices that others are rewarded for aggressive behaviour. The concept of imitating behaviour was introduced by Skinner and it pointed out that we only imitate behaviours which are rewarded (C. Havârneanu, 2001)[4]. Considered a learned behavioural dimension, aggression undertakes a more optimistic view (Baron) in the way in which, if learned, it can be easier to control and prevent, reducing violence. Specialists from various fields of addressing aggression, ethologists, psychologists, sociologists, criminologists have given a more nuanced interpretation of the phenomenon. Thus, Eibl-Eibesfeldt (1998) emphasizes the multiple biological, psychological and social determination of the aggression phenomenon. Aggression is the behaviour characterized by brutal, destructive reactions, attack, primarily displayed by intimidating others; verbal reactions (insults, threatening

[1] Mihaela, Tomiţă., *Influenţa relaţiei părinte-copil asupra fenomenului delincvenţeijuvenile,*www.adoptiiromania.ro/files/interes/29_int_Revista%20nr%2024%20RO.pdf
[2] Chelcea, S., Jderu G., *Psihosociologie – Teorii, cercetări, aplicaţii,*Bucharest, Ed. Polirom, 2008.
[3] Preda, V., – *Delicvenţa juvenilă,* Cluj-Napoca, Presa Universitară Clujeană, 1998, p. 33-34.
[4] Şoitu, L., Hăvârneanu,C., *Agresivitatea în şcoală,* Iaşi, Institutul European, 2001.

words); physical reactions (hitting, beating, harming). "Aggression is not generated by a single cause; it is the result of complex interactions between physiological, psychological and various circumstances: brain diseases, metabolic disorders, male gender, alterations of CNS, free access to weapons, exposure to violence, etc." (Laurenţiu Şoitu according to Eleanor Guetzloe – 1997 p.92).

3. GENETIC TRANSMISSION OF AGGRESSIVE PREDISPOSITION

Genetic model. In the scientific presentation "*Aggression and violence or on the noble savage myth*", Doctor Sever Oană and psychologist Melinda Boroş, reach surprising conclusions citing the study of Andreas Reif *Nature and Nurture Predispose to Violent Behavior: Serotonergic Genes and Adverse Childhood Environment*.[1] Violence genes are highlighted by the short alleles of the MAOA gene (monoamine oxidase A gene) and represent an independent risk factor for violent behaviour, by adjusting homovanilic acid level in CSF. Short alleles of 5HTT (5-hydroxytryptamine transporter) predispose to violence. In this case it seems that the insufficient expression of the serotonin transporter prevents it from being taken over from the synaptic areas of anterior cingulated cortex, thus bringing the subject to a predisposition to anger and aggression. Researchers estimate that up to 30% of men have at least one of the two genetic anomalies or both. Genetic anomalies lead to violent behaviour if the child is raised in a violent environment, but does not lead to this if the child is raised in a gentle and affectionate environment. The presence of long alleles and that of both genes has therefore a protective value against impulsive and violent behaviour. The carriers of heredity are germinative cells, namely chromosomes and genes, which, through fertilization, give birth and develop a new being who receives the parents' characters. (Săucan, Liiceanu, Micle, in *Violation of law as lifestyle,* 2009).[2] These characters transmitted from parents to children represent the *hereditary dowry*. Hereditary is what is transmitted through all the traits. *Hereditary characters* are transmitted from parents, grandparents through genes, the rules of hereditary transmission being of 50% from the father and 50% from the mother. Some characters of the parents are dominant and obvious, others are recessive, hidden, and the latter do not appear in the first generation but only in the second, the third. Research on the role of heredity on aggression was made by several methods, namely*: chromosomal research method, genealogical method, method of studying twins.* (Pătraşcu Denisa, 2010)[3].

Conclusions

Innate and/or acquired or learned character of aggression is the subject of scientific controversy which engaged specialists in biological, ethological, psychological, sociological, criminological sciences, etc. From the analysis of these controversies it can be inferred that, like other human traits, aggression is a result which entwines elements transmitted and triggered through biological mechanisms and undeniable influences of social environment. However, at a causal level it seems that the frustration is found in significant cases as generating aggressive behaviour in most acts of unacceptable behaviour. Aggression is also a cultural product, both at the level of emotions and that of behaviour. Cultures, respectively community subcultures can develop different combinations of aggression, fear, hatred, which, under certain conditions, are prerequisite onsets of certain deviant behaviours.

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[1] Oană, Sever-Cristian, Boroş, Melinda, *Agresivitatea şi violenţa, sau despre mitul "bunului sălbatic", "*Nature and Nurture Predispose to Violent Behavior: Serotonergic Genes and Adverse Childhood Environment", Andreas Reif, Michael Rosler, et al. Neuropsychopharmacology (2007) **32**, 2375–2383, 2011.

[2] Săucan, Doina., Liiceanu, Aurora., Micle, M., *Încălcarea legii ca stil de viaţă. Vulnerabilitatea adolescenţilor la criminalitate,* Editura Academiei Romane, Bucharest, 2009, p. 40.

[3] denisapatrascu.wordpress.com/2010/02/13/studiu-criminologic-privind-cauzele-delicventei-juvenile/ consultat la data de 27-1-2011

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BRIEF CONSIDERATIONS ON THE REGULATION OF COMBATING TRAFFICKING IN HUMAN BEINGS IN THE EUROPEAN UNION

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Abstract

Trafficking in human beings represents a serious violation of the fundamental human rights and dignity, involving cruel practices, such as the use of violence and threats. For combating this phenomenon in the European Union was drawn up a series of relevant judicial instruments namely, the Council Framework Decision 2002/629/JHA on combating trafficking in human beings, the Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or the European Parliament Resolution of 10 February 2010 on preventing trafficking in human beings.

Key words: *trafficking in human beings, criminal sanctions, vulnerable categories.*

Introduction

Trafficking in human beings represents a major problem in nowadays Europe. Each year, thousands of persons, mostly women and children, are victims of trafficking for sexual exploitation or for other purposes, either in their own country, or abroad. All indicators point an increment of the number of victims. The European Commission stated its objective in fighting trafficking in human beings by preventing this phenomenon, offering protection for the victims and trialing the culpable.

I. International judicial instruments on the phenomenon of trafficking in human beings

In the international context of the preoccupation for combating trafficking in human beings, the EU has launched a common anti-traffic program, resulting in different normative acts, declarations, conventions and recommendations for the European institutions. In this regard, we note as relevant judicial instruments[1] the Council Framework Decision

[1] Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography – OJ L 13/20.01.2004, p.14; Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings – OJ L 203/1.08.2003, pp.1-4; Council Decision 2001/87/EC on the signing, on behalf of the European Community, of the United Nations Convention against transnational organized crime and its Protocols on combating trafficking in persons, especially women and children, and the smuggling of migrants by land, air and sea – OJ L 030/1.02.2001, p.44; Council Decision of 29 May 2000 to combat child pornography on the Internet – OJ L 138/9.06.2000, pp.1-4; Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims; European Convention on the Compensation of Victims of Violent Crimes (Strasbourg, 24 November 1983); Recommendation No R(85) 11 on the position of the victim in the framework of criminal law and procedure; Communication of the European Commission "Crime victims in the European Union – Reflections on standards and action" (14 July 1999); Green Paper "Compensation to crime victims" presented by the European Commission (28 September 2001) .

2002/629/JHA of 19 July 2002 on combating trafficking in human beings, the Council Decision 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, the Council Framework Decision 2001/220/JHA[1] of 15 March 2001 on the standing of victims in criminal proceedings, as well as the European Parliament Resolution of 10 February 2010 on preventing trafficking in human beings.

In the same context, the Protocol[2] to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime (hereinafter called "Palermo Protocol") established the international action against trafficking in human beings.

Considering that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being, and that the victims' rights and protection and the fight against trafficking in persons must represent primary objectives, the Council of Europe adopted the Convention on Action against Trafficking in Human Beings[3] of 3 May 2005, opened for signing and signed by Romania in Warsaw on 16 May 2005, and ratified this convention by Law No 300/2006.

Private life and identity of the victims of trafficking in human beings are also protected by special laws with criminal provisions, the victims having the right to physical, psychological and social recovery[4]. Member States shall establish strategies and apply measures for the prevention and combating of trafficking in human beings especially since the elimination of internal borders more offences are unnoticed[5].

The detection of the activity of criminal groups in action and the planning of an appropriate answer of the society assumes the knowledge of the profile, reasons and way of operation of the offenders[6].

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[1] Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings; this decision, based on Title VI of the Treaty of the European Union, allows victims of offences to request damages from the offender during criminal proceedings.

[2] Romania signed on 14 December 2000, in Palermo, the United Nations Convention against Transnational Organized Crime and its two Protocols adopted in New York on 15 November 2000, namely the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime and the Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organized Crime; these international instruments were ratified by Law No 565/2002.

[3] In the elaboration of the convention were considered the The Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and its five Protocols, but also the following recommendations of the Committee of Ministers for the Member States of the Council of Europe: Recommendation No R(91) concerning sexual exploitation, pornography, and prostitution of, and trafficking in, children and young adults; Recommendation No R(97) 13 concerning intimidation of witnesses and the rights of the defense; Recommendation No R(2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation; Recommendation No R(2001) 16 on the protection of children against sexual exploitation; Recommendation No R(2002) 5 on the protection of women against violence; Recommendation (1325) 1997 on traffic in women and forced prostitution in Council of Europe member states; Recommendation 1450 (2000) on violence against women in Europe; Recommendation 1545 (2002) on the campaign against trafficking in women; Recommendation 1610 (2003) on the migration connected with trafficking in women and prostitution; Recommendation 1611 (2003) on the trafficking in organs in Europe; Recommendation 1663 (2004) on domestic slavery: servitude, au pairs and "mail-order brides".

[4] Elena-Ana Mihuţ, *Metodologia investigării infracţiunilor,* Agora University Publishing-house, Oradea, 2007, p.35.

[5] See in this regard Elena-Ana Mihuţ, op.cit., (case study), pp.37-39.

[6] Ghe. Oşvat, N.Iancu, *„Investigarea criminalităţii transfrontaliere. Aspecte generale"* in *Criminalitatea transfrontalieră la graniţa dintre prezent şi viitor, (*coord.: Ovidiu Predescu, Elena-Ana Mihuţ, Nicolaie Iancu), T.K.K. Publishing-house, Debrecen, Hungary, 2009, p.200.

II. Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings

The present framework decision contributes in preventing and combating trafficking in human beings by completing the series of instruments[1] already adopted in this area.

The area of this framework decision is represented by the identification and sanction of a category of offences, which are, according to Art 1 “Offences concerning trafficking in human beings for the purposes of labor exploitation or sexual exploitation”. The following offences committed in the following circumstances are part of this category: *the recruitment, transportation, transfer, harboring, subsequent reception of a person, including exchange or transfer of control over that person*, where:

(a) Use is made of coercion, force or threat, including abduction, or

(b) Use is made of deceit or fraud, or

(c) There is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or

(d) Payments or benefits are given or received to achieve the consent of a person having control over another person

- For the purpose of exploitation of that person's labor or services, including at least forced or compulsory labor or services, slavery or practices similar to slavery or servitude, or
- For the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.

Considering the vulnerability of the category in relation to which are incident the provisions of the present framework, on one hand, and on the other hand the recognition and classification as a serious penal offence of trafficking in human beings, Art 1 Para 2 of the decision states that the consent of a victim of trafficking in human beings to the exploitation, intended or actual, shall be irrelevant where any of the means above mentioned have been used.

Children[2], considered to be part of a special category are more vulnerable and exposed to a higher risk of becoming victims of trafficking in persons. In this regard, the European co-legislator incriminates the offences stated by Art. 1, namely *the recruitment, transportation, transfer, harboring, subsequent reception of a person, including exchange or transfer of control over that person*.

Each Member State shall take the necessary measures to ensure that an offence referred to in Art. 1 is punishable by effective, proportioned and dissuasive penalties, likely to lead to extradition. Specifically, the offences shall be punishable by terms of imprisonment with a maximum penalty that is not less than eight years where it has been committed in any of the following circumstances:

(a) The offence has deliberately or by gross negligence endangered the life of the victim;

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[1] Joint Action 96/700/JHA of 29 November 1996 of the Council establishing an incentive and exchange program for persons responsible for combating trade in human beings and the sexual exploitation of children (STOP), Joint Action 96/748/JHA of 16 December 1996 of the Council extending the mandate given to the Europol Drugs Unit, Decision 293/2000/EC of the European Parliament and of the Council of 24 January 2000 adopting a program of Community action (the Daphne program) (2000 to 2003) on preventive measures to fight violence against children, young persons and women, Joint Action 98/428/JHA adopted by the Council on the creation of a European Judicial Network, Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union, Joint Action 98/427/JHA adopted by the Council on good practice in mutual legal assistance in criminal matters.

[2] In the meaning of this Framework Decision, “child” shall mean any person aged less than 8 years.

(b) The offence has been committed against a victim who was particularly vulnerable. A victim shall be considered to have been particularly vulnerable at least when the victim was under the age of sexual majority under national law and the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including pornography;

(c) The offence has been committed by use of serious violence or has caused particularly serious harm to the victim;

(d) The offence has been committed within the framework of a criminal organization as defined in Joint Action 98/733/JHA, apart from the penalty level referred to therein.

Art. 4 of the decision states the liability of legal persons[1] for one of the penal offences above mentioned committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

a) A power of representation of the legal person, or

(b) An authority to take decisions on behalf of the legal person, or

(c) An authority to exercise control within the legal person.

A legal person held liable pursuant to Article 4 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:

(a) Exclusion from entitlement to public benefits or aid,

(b) Temporary or permanent disqualification from the practice of commercial activities,

(c) Placing under judicial supervision,

(d) A judicial winding-up order,

(e) Temporary or permanent closure of establishments which have been used for committing the offence.

Each Member State shall take the necessary measures to establish its jurisdiction over an offence referred to in this decision where:

(a) The offence is committed in whole or in part within its territory,

(b) The offender is one of its nationals,

(c) The offence is committed for the benefit of a legal person established in the territory of that Member State.

III. Provisions inserted in the Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate[2] illegal immigration, who cooperate with the competent authorities

The purpose of this Directive is to define the conditions for granting residence permits of limited duration, linked to the length of the relevant national proceedings, to third-country nationals, who are or were victims of trafficking in human beings[3], even if their

[1] For the purpose of this Framework Decision, "legal person" shall mean any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organizations.

[2] "Action to facilitate illegal immigration" covers cases such as those referred to in Articles 1 and 2 of Directive 2002/90/EC.

[3] "Trafficking in human beings" covers cases such as those referred to in Art. 1, 2 and 3 of Framework Decision 2002/629/JHA.

entrance on EU territory was illegal and who cooperate in the fight against trafficking in human beings or against action to facilitate illegal immigration[1].

For the purpose of this new European regulation, the categories of subjects[2] for that are applicable its provisions are the third-country nationals who have reached the age of majority, as stated by the Member State's legislation. By derogation, Member States may decide to apply the present directive for juvenile persons in the conditions stated by their internal legislation.

Member State's competent authorities shall notify the third-country national who is considered to fulfill the conditions stated by this directive. Member States guarantee that third-country nationals are the beneficiaries of a reflection period that will allow their recovery and to avoid the influence of the offenders, so that the third-country nationals may decide totally aware whether they cooperate or not with the competent authorities.

During the reflection period and until a decision is given by the competent authority, third-country nationals have access to treatment, the Member State concerned not being able to take any action against it, unless it is proven by the competent authorities that the person has actively, voluntarily and in his own initiative renewed contacts with the offenders[3] or for reasons concerning public order and national security[4].

In applying this directive, Member States shall consider the needs for protection and safety of the third-country nationals, so that are guaranteed minimum life conditions for those who cannot support themselves, as well as access to emergency medical care, emphasizing the special needs of vulnerable persons by granting free psychological, language or juridical assistance.

After the expiry of the reflection period[5], or earlier, the competent authorities, in order to issue the residence permit[6] shall consider:

a) The opportunity presented by prolonging the person's stay on its territory for the investigations or the judicial proceedings,

b) Whether the person has shown a clear intention to cooperate

c) Whether the person has severed all relations with those suspected of trafficking in human beings.

The residence permit is valid for at least six months, renewable if the conditions of its granting are continuously satisfied.

The residence permit can be withdrawn at any time if the issuing conditions are not satisfied. The residence permit can especially be withdrawn in the following cases:

a) If the holder has actively, voluntarily and in his own initiative renewed contacts with those suspected of committing the offences referred to in this directive

b) If the competent authority believes that the victim's cooperation is fraudulent or that his/her complaint is fraudulent or wrongful; or

c) For reasons relating to public policy and to the protection of national security; or

d) When the victim ceases to cooperate; or

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[1] Art. 1.

[2] According to Art. 2 of the directive "unaccompanied minors" means third-country nationals below the age of eighteen, who arrive on the territory of the Member State unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they have entered the territory of the Member State.

[3] Art. 2, point b) and c).

[4] Art. 6, para. 1-4.

[5] Especially, Member States may extend the reflection period if they consider that it is in the best interest of the child.

[6] According to art. 1 of the directive "residence permit" means any authorization issued by a Member State, allowing a third-country national who fulfils the conditions set by this directive to stay legally on its territory.

e) When the competent authorities decide to discontinue the proceedings[1].

During the benefit of a residence permit the beneficiary is authorized to enter on the labor market, professional training and education. This access is limited by the validity of the document, and the conditions and procedures for authorization of the access to labor market, professional training and education are established by the competent authorities, in accordance with the national legislation of each Member State.

To the same extent, third-country nationals have the right to access programs and schemes[2] established by Member States, non-governmental organizations or associations who have concluded special agreements with the states, whose objective is the return of those third-country nationals to a social normal life, including, based on the situation, to courses for the improvement of their professional skills or the preparation of the assisted return in their origin state.

Conclusions

Conclusions on the trafficking in human beings mentioned by the European Parliament by Resolution of 10 February 2010 on preventing trafficking in human beings.

The European legislator emphasizes the European and international reality of the trafficking in human beings. In this regard, MEPs have concluded that future measures must start from an integrated approach reuniting prevention and combating, as well as protection, support and assistance offered to victims, including the consolidated cooperation between all stakeholders. On the other hand, measures taken against trafficking in human beings cannot be limited only to legislative ones, but must be accompanied also by non-legislative measures, especially by the evaluation of the application of adopted measures, collecting and transmission of information, cooperation, partnerships and exchange of good practices.

Not least, cooperation and partnership between European Union, Council of Europe, UN and third-countries, especially countries of origin of the victims, as well as United States of America, as country known as destination, are essential in the protection of the fundamental rights and in efficiently combating trafficking in human beings.

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Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings;

Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.

[1] Art. 14.

[2] When a Member State decides to establish or apply programs and schemes, it can condition the issuance of the residence permit or its renewal by the participation to the above mentioned programs and schemes; see in this regard art. 12 Point 1.