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AMNESTY AS A TURNING POINT FOR TRANSITIONAL JUSTICE IN THE LIGHT OF DEMOCRATIC TRANSFORMATIONS - ALGERIA AS CASE -

Belouadah Tayeb*

Abstract

Within the recent democratic transitions, countries suffer from inflation in the newly penal legislation, but this inflation did not reduce crime, and it did not take into account the purposes of applying reform laws. So the desired goal of reform is the return of the offender to the normal behavior. For this purpose, penal legislations – as in Algeria – adopted Amnesty as one of the methods of reform.

Key words: *amnesty, concord, reconciliation, transitional period, justice, democratic transformations, Algeria experience*.

Introduction

The article sheds light on the most effective means of achieving the goal sought by the law and society which is reforming the offender and reducing the crime wave. The goal then is to make reform an effective means of punishment by giving the offender the opportunity to return to normal social behavior. Therefore; amnesty seems to be one of the methods of reform for combating crime and rehabilitating the offender. In this context, can we consider amnesty as a necessary attitude to reduce the rate of crimes? In this paper, focusing on the case of Algeria as a model, we shall discuss amnesty laws according to the Algerian reconciliation in the light of the democratic transformation of society.

1 - Amnesty as a Recent Criminal Penalty

To study of amnesty as a system of reform and as a legal system designed to combat crime and to rehabilitate the offender, we need first to give an idea about pardon and its types, and then we should address its procedures in the following manner: We need to discuss the definition of amnesty from different angles, and then display its types.

Amnesty is a pardon or a measure by which the convicted shall be exempt from the performance of penalty that he had to spend in the penal institution. Amnesty was an old measure that existed throughout history that had often provided the interaction between human beings as a reflection of a sense of humanitarian feeling, and as an alternative to retaliation and revenge. It is in this humanitarian way that amnesty supporters deal with the offender being a human being capable of change if given the chance of course, and if he finds himself in the circumstances of reform.

In fact, we can distinguish two types of amnesty: amnesty or pardon for punishment and another for the crime, and both represent a manifestation of state sovereignty as the owner of the right to punishment. We notice that our society often passes through tremors that might threaten the unity and permanence; the thing that makes the various kinds of amnesty primarily intended to protect both the individual and society. Focus then shall be on amnesty as a social and legal way to achieve reform.

Amnesty for punishment is to relieve the convicted person from the punishment of all or some or commutation of his sentence by one that can be lighter than the original one[1]; this

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type of amnesty is often called the convention of pardon or simple amnesty, and it is the prerogative of the executive branch. The right of pardon allows giving a second chance to correct judicial decisions that may have been marred by judicial errors that could not be corrected, or to address the cruelty and severity of the penalties[2] to match the gravity of the crimes and seriousness of offenders according to the new social conditions.

The simple amnesty often takes three forms: Total Amnesty is often intended to exempt from all punishment, while the partial amnesty concerns either a reduction of sentence or exemption from a penalty in the case of multiple penalties in addition to conditional amnesty in which the law lays down certain conditions for the possibility of benefiting from amnesty.

Amnesty for the crime is one of the oldest forms of criminal amnesty[3] and known to be a sort of the social entities' waiver for all or some of their rights caused by the crime[4] and it is meant that the community decides the oblivion of some of the crimes[5] committed in bad social conditions. It is then a decision issued by the State for a waiver for the right to punish the offender[6]. The major purpose in this case is that the public authorities in the State can recover the security, stability, and harmony in order to achieve peace, justice, and public interest.

The general amnesty is an amnesty for the crime itself and the oblivion of the criminal behavior in all its forms, and is also an exception from the criminalization text; it benefits from the non-application of that text for an act that issued the pardon, stopping the proceedings or indelible sentence on it[7], as well as omitting all the sanctions which were original.

Amnesty and pardon takes two real meanings: granting amnesty for crimes that included whether it was committed by the adult or a juvenile, a beginner or a repentant, whether national or foreign, a principal actor or contributor, and amnesty which is granted for a certain class of people whose past makes them really deserve this amnesty.

We know that the general amnesty is a legally issued as an extraordinary legal action by the legislative authority under which the authorities remove the committed criminal conduct in the special circumstances of the State in order to restore security and stability.

The wisdom of amnesty appears in that it is often exercised in case of political conditions and state circumstances during which stability should be resorted like the *coups* which aim at the establishment of a certain political regime in the place of another, as was the case in the general amnesty issued after Algeria's independence under the Ordinance No. 6the 2-2, dated 10.7.1962. And is the subject of amnesty for political crimes, as usually is the case for full amnesty issued under Law No. 90-19 of 08/15/1990 which singled out crimes and misdemeanors committed by force against persons and property during or on the occasion of

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[1] - Ramses Bahnam, *The Theory of Criminality in the Criminal Law,* Alexandria, facility knowledge, Egypt, p. 203.

[2] - Abdullah Suleiman, *The Explanation of the Algerian Penal Code*, Part II, Office of University Publications, Algeria, 2002, p. 520.

[3] - The system of amnesty has been known since ancient times and in different eras and known civilizations namely Greek and Romanian ones, and it has been applied by the French law; the old amnesty was broadly applied under the term "avoidance", and at the beginning of the eighteenth century, the term "amnesty" as a legal action was used by the public authority of the state in conditions of social and political uprisings to bring political and social coexistence. See more details: Merle et Vetu, *Traité de Droit Criminel*, Droit Pénal Général, CUJAS: 2nd edition, 1974, p. 943.

[4] - Mahmoud Mahmoud Mustafa, *The Explanation of the Penal Code* - General Section, Eighth Edition, p. 636.

[5] - Abd al-Malik Eljoundi, *Criminal Encyclopedia*, Part III, Science for all Library, Beirut, Lebanon, a revised and expanded edition, 2005, p. 591.

[6] - Ahmed Fathi Sorour, *The Mediator in the Penal Code*, General Section, Revised sixth edition, Dar El Nahda El-Arabia, Cairo, Egypt, 1996, p. 657.

[7] - Ramses Bahnam, Op. cit., p. 204.

violent rallies or gatherings that you have defined in Algeria the period between 1980 and 1988. But there is nothing to prevent the issuance of non-political crimes or for a particular crime and to disrupt the amnesty provisions of the Penal Code in connection with the incident, which it cannot be covered but under the law issued by the competent legislative authority.

In this paper, we study the action of amnesty in terms of the donor of the general amnesty of any competent authority, and as well as the beneficiaries of amnesty.

The identification of the competent authority entitled to grant amnesty is generally affected by political systems. In liberal systems, it was the Parliament that was associated with this procedure, but in the dictatorships amnesty is often the job of the President of the State, while most of the resulting laws and constitutions [8] in the world today amnesty is part of the competence of the legislature as long as it comes out of the act of a scale model of the criminal action though it matches it, and is the abolition of the rule of law which is the prerogative of the legislature. [9]

And like the great bulk of the constitutions in the world, the Algerian Constitution stresses [10] the material from 122/07 to grant the jurisdiction of issuance of general amnesty to the parliament.

The amnesty, contrary to pardon, cannot be granted only to persons convicted previously, but also granted to convicts released in their former special amnesty, to convicts who had carried out their sentences, to people who tuned penalty, and even for persons who committed crimes, but they were not follow after by law. In general, the general amnesty can be granted to all categories of offenders, since it addresses the behavior of the perpetrator and not the perpetrator of the crime.

Amnesty can be issued in any category of crimes set forth in the Penal Code; despite the fact that most applications are still limited to political crimes as one of the exceptional laws issued at special occasions and for reasons of public interest. For this purpose the legislature may exclude certain categories of crimes or the perpetrators of the Amnesty Act according to the degree of the gravity of the criminal act. [11]

2. Amnesty Laws in the Light of Reconciliation during the Algerian Democratic Transformation

In fact, amnesty as an alternative reform that was enacted by modern legislation in order to reduce the criminal phenomenon. The latter that characterized the Algerian social life since the early nineties of the last century after the arrest of the electoral process, and the

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[8] - As did the Jordanian legislator when he was granted the right to issue a general amnesty in Article 50 of the Penal Code No. 12 of 1960. And the Egyptian legislature when he gave the authority of the legislative (Parliament) the right to issue the amnesty law and in Article 141 of the Constitution promulgated on 22 October 1930, it was the power to adopt laws and criminalize acts and establish penalties for it and it is they who have to disable a text and its abolition on the basis of reasonable grounds and for putting at first the interest and security of society, therefore, the authority prescribed texts and set them disabled; it owns the right of their cancellation. This is also referred to in Article 149 of the constitutional amendment to Egypt for the year 2011 and which stipulates that the President of the Republic has the right to pardon or commute a sentence, and amnesty shall not be granted except by law.

[9] - Mahmoud Najib Hosni, *The Explanation of the Code of Criminal Procedure*, Arab Renaissance Publishing House, Cairo, 1988, p.192.

[10] - The Algerian Constitution (the constitutional amendment of November 28th, 1996, *the Official journal* No. 76 on December 8, 1996. And the constitutional amendment law No. 02/03 of April 14th 2002 and Law No. 19/08 of November 15th, 2008).

[11] - The law of Civil Concord in Algeria No. 99-08, enacted in July 13th, 1999, is a comprehensive amnesty to contain the second quarter from the exemption of the follow-ups for a particular type of crime, and may be excluded under articles 03-04 from the perpetrators of the crimes stipulated in Article 87 of the Algerian Penal Code; it also excludes those involved in violent crimes, rape, and the use of explosives in public places.

result was destruction of the structures and colossal casualties as well as the disintegration of social structures and cracking in the path of the democratic building. This has been handled by the Algerian authorities at the legislative level. In fact the Algerian government has sought legal frameworks through which it could achieve security and push the wheel of development forward.

There is no doubt that much of the principles of reconciliation can be the result of the analysis to the case study of South Africa, which began testing the establishment of "Committee for Truth and Reconciliation", the latter was entrusted to achieve the task of developing a full picture of the past as much as possible and ensure the availability of public memory through the documentation for the subsequent generations[12] and the Committee was part of a project State of South Africa's new constitutional democracy. The achievement made by the Commission is still continuing and its effects have been credited in the establishment of a more humane political system at the ruins of the A partied.

The term reconciliation means the restoration of the state of the peaceful relationship in which no party can cause damage to the other; it is also the safe state in which everybody is waiting for an access to a new situation. The thing which revenge cancels from the list of available options[13]. It is also to face the unwanted truth in order to support harmony among the conflicting views and outstanding differences in an environment of understanding[14].

Algerian legislators have produced numerous legal texts through which they tried to restore security and stability after the security crisis that the country has witnessed[15]. In this article, I shall try to study and analyze these texts.

- The Law of Mercy

Mercy measures came under the Presidential Order No. 95-12 (dated 25/02/1995) and was based on the provisions of Article 87 bis 3 of the Penal Code, which provides amnesty for those involved but have not killed people or caused permanent disability for them or used explosives to harm the lives of persons and property.

In fact, the law intended to address the class involved with belonging to terrorist groups that rebelled against the general regime of the state. In the light of this law, this section can benefit from the opportunity of not being judicially pursued if have not committed crimes of blood, honor or bombings with a requirement of a declaration of repentance and a promise not to commit any other crimes that had the intention to engage in. This after recognition of their deeds in order to guarantee not to be followed -up and also will benefit from these measures all those who surrendered their weapons and explosives automatically to administrative bodies and competent security authority.

Among the basic measures that are enshrined in the law of mercy, we find essentially the following:

- To reduce the term of imprisonment a death sentence to 15 to 20 years imprisonment.
- If the penalty is life imprisonment it would be reduced to the imprisonment of between 10 to 15 years.

In other cases, the penalty is reduced to half and set all of these provisions in article 4 of the Act. Despite the fact that the law of mercy is an extraordinary law the beneficiary of its

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[12] - Jaco Barnard-Naude, *For Justice and Reconciliation to Come*: the TRC archive, big business and the demand for material reparations in: F. du Bois and A. du Bois-Pedain (edit) p. 172.

[13] - Joanna Santa-Barbara, «Reconciliation» in Webel, Charles and Johan Galtung edits, Handbook of Peace and Conflict Studies. Simultaneously published in the USA and Canada: Routledge, 2007, p. 174.

[14] - Yaacov Bar-Siman-Tov (edit), *From Conflict Resolution to Reconciliation,* Oxford University Press New York, 2004, p. 12.

[15] - The Republic of Ghana also saw the Reconciliation Act (National Reconciliation Act: Act No. 611. of the Parliament of the Republic of Ghana entitled National Reconciliation Commission Act of 2002. Date of approval was January 9th, 2002).

measures will not be deprived from the amnesty measures stipulated in the Constitution (Article 5).

- The Policy of Civil Concord

The development of this policy and the Civil Concord Law from the statement issued by the Presidency of the Republic in 06 June 1999, which cost the government the preparation of this project and presented to the Parliament for discussion before ratification on 8 June 1999 by an absolute majority in the lower house (National People's Assembly) on 11 July in the upper room an absolute majority and also based on the version that was the Civil Concord Law (No. 99-08 issued on July 13, 1999) to be put to a popular referendum in line with the President's determination to give political constitutional cover and this law has three kinds of measures for the benefit of this category which are: exemption from Follow-ups, dependence on the delay[16], and the easing of sanctions.

- Charter for Peace and National Reconciliation

Charter for Peace and National Reconciliation[17] was an effort to supplement the Civil Concord, and it concentrated on the following principles:

A - Abolition of prosecutions for religious militants surrendered to the authorities concerned after the expiry of the period for repentance in the context of the Civil Concord (13 January 2000). Involved in collective massacres, the perpetrators and violators of privacy and users of explosives in public places are excluded from these measures.

B - for the benefit of the amnesty:

- Individuals who are sentenced and held in solitary as punishment for perpetrators of activities supportive of terrorism.
- Individuals who are sentenced and held in solitary as punishment for having committed acts of violence with the exception of the perpetrators and violators of the collective metaphor of privacy and users of explosives in public places.
- The replacement of sanctions or the exemption of part of it for the benefit of individuals who do not hand them over the previous procedures mentioned whether they wanted or sentenced, in the sense not to close the door in front of groups involved in collective massacres, rape, and bombings in public places not covered by the amnesty measures and render follow-ups, but awarded the opportunity to take advantage of easing sanctions if the peace of its members themselves to the competent authorities.
- The integration of the beneficiaries of the repentant civil Concord and raise their harassment.
- Approving the text of the Charter as the prevention of political practice and those who abuse religion to advocate jihad against the state and involved in acts of violence and holding them responsible for the crisis.
- Adoption of the Charter on the need to resolve the missing files their inclusion of the national tragedy victims and compensates them financially.
- Advocacy for the families of terrorists and ensure their inclusion among the victims of the tragedy in the framework of actions to strengthen national cohesion.

In order to achieve these goals, values, and principles as well as to achieve the spirit of national reconciliation, it had been issued a number of the Executive texts in February

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[16] - I mean here the temporary postponement of follow-ups during a specified period ranging between three and ten years as a maximum to ensure the full integrity of the person as provided in Article 6.

[17] - Issued on August 14th, 2005 and approved by the people by an absolute majority in the referendum organized on September 29, 2005 increased by 97.38 percent.

2006, from the Government Order 06-01 (February 27, 2006), which demanded the implementation of actions aimed to restore peace, as issued on February 28, 2006 namely:
- Decree 06-93 on compensation for victims of the national tragedy.
- Decree 06-94 on the state subsidy of disadvantaged families that have plagued one of her relatives were involved in the crime of terrorism.
- Presidential Decree 06-95 concerning the ways of delivering agents involved or implicated in terrorist acts, weapons, ammunition and materials used in terrorist operations before the end of the of time allocated to it, (6 months), which ended at the end of August 2006.

In fact, we can notice that in the legal documents for reconciliation in Algeria there is a real desire and genuine will to resolve the crisis. Though its start has been slow because admission by the victims of the crisis was not easy, they finally opted to forget and therefore to forgive. And it seems that the pardon and its acceptance as a value of humanity is rooted in Algerian society and in our Arab societies in general, for it is necessary to seek peace and security and to build the country with a sound basis.

Conclusions

Reality shows that the Algerian experience through the legal frameworks that have led to the adoption of national reconciliation and human security, has provided through these laws the reintegration of armed repentant in the community and offered the various groups affected by the crisis the opportunity of social integration especially those individuals who have taken the route of crime and were in a precarious situation, as the policy of amnesty for insurgents who according to the seriousness of what they had done, thousands were allowed to return to their families and to the community to reintegrate them socially and professionally in order to reform and rehabilitate criminals and this is the ultimate desired goal of modern criminal policy. To promote the culture of reconciliation, we need to build a political system taking into account the law, promote and protect the human rights, put amnesty in the context of democratic reform, and adopt the principle of truth before reconciliation to satisfy all parties in conflict.

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THE MINOR'S CONTRACT IN THE AGE OF CONSUMERISM IN ITALY

Daniela Di Sabato[*]

Abstract

The Consumer Code provides for major protection of the consumer, namely the weakest contracting party, not overlooking the under-age consumer. There are several regulations showing that the legislator is aware of the possibility that the consumer relationship involves minors. On the other hand, according to Italian law, minors have no legal capacity to enter into any contract. This essay explores on this contradiction and seeks to demonstrate the Italian law is in great need for timely and appropriate intervention.

Key words: *contract, minors, Consumer Code, rights, capacity, parents*.

Introduction

According to Italian law, minors have no legal capacity to perform juridical acts or to enter into any contract. However, it is a fact that today a large slice of the market is devoted to minors: indeed, producers and retailers consider the latter as an interesting opportunity to increase sales. That is why, from a strictly commercial viewpoint, no one denies the existence of commercial relationships involving minors having a major impact on the market.

In this essay, I will seek to critically examine what actually happens in the consumer market and, by contrast, what is presently provided for the Italian law: namely, that any contract is invalid if one of the parties is a minor, unless his/her parents act as legal representatives.

1. According to the Italian Consumer Code, the consumer or user is the natural person who is acting for purposes which can be regarded as outside his trade or profession or who buys a product for purposes that do not fall within the sphere of his commercial or professional activity. This definition does not constitute an innovation in the Code, since it had already been employed by the Community consumer law and Italian law. Only the innovation of the reference to "user" is to be recorded, which however has little relevance for the objectives that are of interest here. Likewise disputes would prove misleading, albeit now considerably reduced in numbers, concerning the exclusion of juridical persons from special protection on the one hand, and those operating for professional reasons on the other.

The Consumer Code makes provision for contractual protection on behalf of the consumer, as well as for protection outside the terms of the contract. In some cases, in fact, the regulation assumes the existence of a contractual relationship, and the solutions provided for act within the sphere of the contract. In other cases, in contrast, the protection does not take into consideration the existence of a contractual relationship between the parties: this is the case, for example, of the regulations having as object the responsibility for the product itself, which has as its objective the indemnity for the damage incurred by the injured party, disregarding the fact that the latter is also the purchaser of the damaging product.

In the Consumer Code, moreover, useful reference is also made to what are defined as the consumer's basic rights: in this case the subjective viewpoints are acknowledged for the consumer understood as a general category, apart from the effective establishment of a

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consumer relationship. These basic rights, in fact, regard consumer potential and hence, any juridical subject whatsoever, in view of a possible and non-obligatary establishment of a consumer relationship[1].

In sum, it may be said that the concept of consumer today is utilized as a synonym for the weak contracting party, as synonym for the injured party and as synonym for the subject of law endowed with the capacity for consumption in general.

2. The trend indicated above for acknowledging the absolute subjective concept of consumer, which implies moreover the reference to a more general obligation of correct procedure in performing the economic activity, is certainly to be considered positively.

On close examination, in order to obtain satisfactory outcomes in consumer protection, attention cannot be restricted to contractual law; conversely, the consumer's right should assume the features of a "citizen's" right in an ever more evident way.

The considerations to be examined herein, however, will reinforce this conviction as they are directed towards evidencing the inadequacy of contractual protection if a subject involved in the consumer relationship is a minor.

Minors are not ignored by the Consumer Code which devotes to them more than one explicit provision. One may consider, just giving a few examples, art. 25, for instance, regarding deceptive advertising, which considers advertising messages aimed at children and adolescents, as a sort of threat to their security and try to prevent anyone from taking advantage of their natural credulity and lack of experience; art. 31 where provision is made that remote-selling must not induce minors to stipulate purchasing contracts or to lease products or services; must not cause moral or physical prejudice to minors and must respect certain criteria protecting minors; art. 103 n. 4, regarding the safety of the products, where it is established that the obligation to determine the safety of a product needs, amongst other things, to take account of the categories of consumers who find themselves at risk when employing the product, more especially minors and the elderly.

In many other circumstances the Consumer Code deliberately avoids using the term 'consumer' preferring to make reference to the "natural person", with the clear intention of extending recipients of the regulation so as to include anyone even outside the consumer relationship. This is the case of art. 5 which states that the general obligations of information are for the benefit of the consumer, the user and any physical person to whom the commercial information is addressed. An analogous expression is also found in art. 18 which defines the sphere of application of the discipline of the advertisement. More precisely in this case the law considers as consumer or user "also the natural or juridical person to whom the commercial communications are directed, or who incurs the consequences thereof". The reference to the natural person also appears in art. 20 letter b, which considers advertising to be deceptive if it is in any way apt to mislead the natural or juridical persons to whom it is addressed. With regard to advertising, therefore, also juridical persons are considered as recipients of protection, but this is not the place to examine this aspect of the regulation in any depth.

All in all, the Italian Consumer Code does not overlook the under-age consumer but, rather, the legislator's awareness regarding the possibility that the consumer relationship involves minors directly or indirectly emerges from several regulations, showing that the

[1] G. A lpa, *La codificazione del diritto dei consumatori. Aspetti di diritto comparato,* in *Nuova giur.civ.comm.,* 2005, II, p. 241 ss.; ID., *Nuove prospettive della protezione dei consumatori,* in *Nuova giur. civ. comm.,* 2005, p. 101 ss.

legislator is well aware of the possibility that the consumer relationship involves minors directly or indirectly[2].

Despite the presence of such regulations of the purport indicated, which are generically devoted to the consumer, without any consideration of their age wheter children or adults, or which are specifically devoted to minors, doubts arise regarding the adequacy of the protection that our legal system assumes on behalf of the minor. More especially, it is doubtful whether the minor is able to take advantage of the contractual protection that the Consumer Code predisposes in favour of the consumer, understood as part of a consumer contract.

3. Today a large slice of the market is devoted to this category of consumers. Entrepreneurs are aware both of the direct consumer capacity of minors and their capacity for influencing the consumer choices of adults. Our children are increasingly being targetted by advertising messages that induce them to purchase goods that are specifically aimed at them, or which induce them to urge their own parents to purchase goods destined for adults. Minors are consumers who are able to choose whether to purchase and which products to consume. Thus, from the economic commercial viewpoint no one doubts that minors may enter into a consumer relationship. Indeed, for entrepreneurs they represent a category of highly desirable consumers on account of their natural credulity which makes them readily inclined towards purchasing[3].

Today in his daily life the minor personally establishes without anyone's mediation, a consistent amount of trade relationships; one may think not only of goods such as gadgets, magazines, comics, picture-cards, games, etc., but also of services, such as transport, hotels, telephones, entertainment, sport services, etc. This is undisputedly the situation which we all witness daily. It is necessary to ask whether the law can be considered adequate for this situation, and whether the juridical relationships which the minor in fact establishes receive direct adequate juridical treatment.

The minor for the Italian Legal System has rights, but without the capacity of acting. The capacity of acting, or of performing acts productive of juridical effects, such as binding contracts, is acquired when he reaches the age of eighteen years (age of majority); before this time the minor is subject to his parents' authority. His parents' sphere of competence in the exercise of their power is theoretically general, yet there are instances in which the legal system acknowledges the minor's capacity to carry out certain acts. In the first place, if his capacity to work is acknowledged, then his capacity is also recognised to have his rights associated with his work relationship enforced by law (art. 2 c.c.); likewise the minor admitted to contract matrimony may lend consensus for certain acts; the minor, moreover, may be recognised as an author, and have his rights enforced connected and recognised by the law for copyright/royalties (l. 633/1941). There are other instances in which the Civil Code attributes capacity to the minor aged 18: art. 273 c.c. provides for the consensus of the minor who has reached the age of 16 years to promote or prosecute the action of a judicial declaration of natural paternity or maternity; there are also numerous instances in which the minor must be heard (e. g. art. 348 co.3 c.c. referring to the nomination of a guardian for a minor who has reached the age of 16 years, art. 10 l. 4 maggio 1983 n. 184 referring to the declaration of adoptability of a minor who has reached the age of 12 years, etc.).

Today this right is expressly disciplined also in relationship with the procedure to the dissolution of matrimony. art. 155 sexies c.c., in fact, prescribes that, before the emanation of provisional measures, the judge must arrange for the hearing of the minor who has reached 12

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[2] G. Taddei Elmi, *sub art. 25 Bambini e adolescenti,* in *Codice del consumo,* a cura di G. Vettori, Padova, 2007, p. 174 ss.; F. BASSON, *Sub art. 25 Bambini e adolescenti,* in *Codice del consumo commentario,* a cura di G. Alpa, L. Rossi Carneo, Napoli, 2005, p. 226 ss.

[3] S. Ironico, *Kids Marketing*, *Come i bambini diventano consumatori,* Bari-Roma, 2010.

years of age or who is also less than 12 years of age, but who is nevertheless capable of discernment.

The minor's right to be heard moreover is also consacrated by the Convention on the Rights of the Child and by t**he European Charter of Fundamental Rights** (art.24).
There are moreover, those who consider that the minor may be acknowledged to have a capacity for discernment relating to sexual freedom, to the extent that those who couple with a minor who has reached 16 years of age cannot be prosecuted.

The possibility is still under discussion that the tutelary judge may authorize the interruption of a minor's pregnancy without hearing the parents (art. 12 l. 22 maggio 1978 n. 194 on interrupting pregnancy). However, the constitutional legitimacy of the law for this part has on several occasions been subject to examination by the Constitutional Court, which has judged the question inadmissible. (Trib. Catania 7.11.2002 in fact states that the authorization is not necessary for the interruption on grounds of health beyond 90 days.)

The question of the definition of the degree of the minor's incapacity is obviously more delicate in the absence of a specific rule which attributes the capacity for implementing individual acts to the minor; in that case it is not easy to strike a balance between the exercise of the minor's educational function and his freedom of discernment[4].

Parental authority, in fact, must consist above all in carrying out the minor's educational function that is directed towards favouring an increase in his autonomy, which therefore cannot be completely denied, but the attribution of full freedom of choice to the minor implies the negation of the function itself. It is necessary therefore, to balance the parents' freedom to adopt the educational methods (v. also art.14 co,3 European Charter of Fundamental Rights) which they consider more in keeping with the minor's personal freedom and the protection of his basic rights.

In the light of the previous considerations, there are some who, having taken into account the various hypotheses in which the law authorizes the minor to carry out individual acts or considers the minor's decisions determinant a/o influential, have considered the possibility of identifying various age-ranges reaching which it is possible to recognize a limited capacity. Yet, such a position is not convincing as it is without any normative foundation. In absence of a provision of law specifically attributive of capacity to carry out certain juridical acts, infact, the minor must be considered incompetent to all effects and purposes.

4. The minor is legally incapable of performing juridical acts; parents carry out the function of legal representatives. In the Italian law the parents' authority includes in fact the power of representation: the regulation is dictated with regard to the custody of his property (ordinary, extraordinary administration), but the power of acting in the name of, and on behalf of, the minor is extended to all the acts for which representation is admitted. It is excluded therefore only for the very personal acts (wills and testaments, donations, recognition of offspring).

Clearly, it is a matter of a necessary representation which derives directly from the law and not from an act of private autonomy: power is assigned by law in the exclusive

[4] P. Perlingieri, *Profili istituzionali del diritto civile,* Camerino, 1975, p. 176 s.; A. Cicu, *La filiazione,* in *Trattato dir. civ. it.,* dir. Vassalli, Torino, 1969, p. 366 ss.; A. Bucciante, *La potestà dei genitori, la tutela, l'emancipazione,* in *Tratt.dir.priv.,* dir. Rescigno, vol. 4, tomo III, Torino, 1982, p. 479 ss.; A. Trabucch, *Il "vero interesse" del minore e i diritti di chi ha l'obbligo di educare,* in *Riv.dir.civ.,* 1988, I, p. 717 ss.; M. Bianca, *Diritto civle,* II, Milano, 1985, p. 241 ss.; L. Ferri, *Della potestà dei genitori,* in *Comm.cod.civ. Scialoja Branca,* a cura di Galgano, Bologna, 1988, sub. artt.315-317, p. 9 ss.; F. Ruscello, *La potestà dei genitori,* in *Cod.civ.comm.,* dir. Schlesinger, Milano, 1996, sub. artt. 315-319, p. 31 ss.; M. Sesta, *La filiazione,* in *Tratt.dir.priv.,* dir. Bessone, Torino, 1999, p. 197 ss.; G. Giacobbe, *Libertà di educazione, diritti del minore, potestà dei genitori nel nuovo diritto di famiglia,* in *Rass.dir.civ.,* 1982, p. 728 ss.

interest of the minor, and parents are obliged to exercise it, whenever necessary, to safeguard the interests of the person represented.

The activity which parents perform in the name of the minor, therefore, is nevertheless due on account of the investiture which derives to them from the law. Therefore the parent's position is not very different from the representative who derives his power from an act of private autonomy, such as a mandatory contract. Yet parents are completely exonerated from the obligation of account-rendering which, instead, falls on the proxy agent and also on the guardian nominated by judge in the event parents cannot for any reason exercise the authority on the part of both the parents (artt. 343, 385 c.c.).

The patrimonial effects of parents' acts fall within the minor's own juridical sphere, but for the obligations assumed they are responsible for any default. The sanction for the act brought about in violation of the norms on representation is not inefficacy, as happens for representation in general and, moreover; ratification of the act would not be possible on the part of the represented, which, in the specific case is incompetent. The act is therefore voidable at the instance of the parents themselves exercising their authority; of the son or of his general heirs or having cause (art. 322 c.c.).

The extent of the power of representation is defined by art. 320 c.c., which identifies the acts for which the authorization of the tutelary judge is necessary; law prescribes that the judge has to ascertain that the act is of necessity and of evident utility. Basically law distinguishes three categories of acts: i) those of ordinary administration for which acting separately is justified for the single parent; ii) contracts with which a personal right of enjoyment is conceded to third parties, which through the express indication of the law must be underwritten by both parents; iii) those of extraordinary administration for which authorization of the tutelary judge is required.

In fact art. 320 c.c. contains a list of acts specifically classified as 'extraordinary', but it also makes reference to "other acts exceeding ordinary administration": so also acts, which are not classified as extraordinary by the law may require the authorization. Authorization is always necessary for the collection of capital in reference to which it will be up to the tutelary judge also to indicate the subsequent use. Even the continuation of the commercial business is subject to the authorization of the tribunal which makes a decision on hearing the tutelary judge.

5. The minor is incapable of entering into a contract[5]; should they be made, contracts are considered invalid in accordance with art. 1425 c.c. The action directed towards the invalidation may be brought by the minor, who in the meantime has reached the age of majority or by his parents' previous authorization given by the tutelary judge. The judge moreover must not make an evaluation regarding the expediency of the act made by the incompetent minor. In this case, in fact, it is not required for the invalidation to verify whether the act gives rise to a serious prejudice against its author.

In application of the regulations illustrated, therefore, a contract with a minor is validly concluded only if parents act as his legal representative.

The civil code moreover takes into consideration the possibility that the minor has deceived his counterpart regarding his age; in this case the contract cannot be considered invalid. Yet it is required however that the deception is the result of deceptive stratagems and trickery brought about by the minor to the detriment of the other contractor; it is not sufficient therefore that minor has lied about his age, he must have deliberately made an effort to have caused the error.

[5] A. Cicu, *La filiazione,* cit., p. 371 ss.; M. Bianca, *Diritto civile,* vol. II, cit., p. 247 ss.; M. Sesta, *La filiazione,* cit., p. 261 ss.; L. Ferri, *Della potestà,* cit., p. 62 ss.; A. Bacciante, *La potestà,* cit., p. 554 ss.

As can be seen the Italian law at present appears far from reality[6]; in fact, it is evident that the minor establishes a considerable mass of contractual relationships in his daily life, and that many consumer goods are specifically destined to very young children who are directly urged to buy them. Nothing would thus seem to remain apart from acknowledging that to take note of the fact that a slice of consumer relationships exists which are set up and that take place regularly, but which for the Italian law are invalid. It is true that the sanction that the law inflicts is cancellation; hence until the sentence intervenes the act has full validity[7]. Yet, one cannot fail to consider that the Order inflicts cancellation in consideration of the presumed lack of discernment of a subject who in fact realizes the acts that would be forbidden quite frequently and showing to possess a competence to choose regarding purchases in no way inferior to that of adults. Naturally this inadequacy of the normative datum is extremely risky if one considers that we are dealing with minors, or with subjects that the order considers especially in need of particular protection. However, awareness of and attention towards this particular category of consumers emerges from the same regulations contained in the consumer code.

In addition, there could also emerge an instance of certainty of the business relationships of which the entrepreneurs could make themselves bearers, who at present run the risk of undergoing the annulment of the contracts which they make directly with the minors. In fact this exigency of certainty does not emerge with determination, as in fact the risk entrepreneurs runs is very remote; indeed controversies having as objective the annulment of consumer contracts on account of the contractor being under-age are non-existent. This fact moreover, is justified solely on account of the low value of the contracts that the minors generally make which renders setting up judgments hardly convenient. Thus the conviction is confirmed, which cannot fail to alarm that we find ourselves facing relationships which in fact exist in great numbers, but do not receive an adequate discipline on the part of the Order.

Those who are in favor of considering the contract stipulated by the minor as valid[8] have claimed that the latter would in fact act as representative of the parents or guardian, who making a certain sum of money available to him, implicitly confer on him a special authority for its purchase. In our legal system, in fact, competence of the represented party who give to someone else the power to act in his name and on his behalf is required, whereas the competence of the representative is not required. The non-competent minor, therefore, would act as representative of his own parents invested with legal representation and would in this way be able to act involving the represented party legitimately. This contorted set up, in fact, conceals a truth that is present in the circumstance that if parents entrust the minor with a certain sum of money, they take upon themselves the risk of discharging the acts that fall into that denomination. On the other hand, this solution not only has the shortcoming of not being very linear, but would permit only to avoid the invalidation of a limited category of contracts. What is more, it does not appear to keep due account of the fact that the power of representation conferred on the parents regarding authority constitutes a necessary function, and hence is hardly liable to be transferred to others.

Some alternative solutions may be identified that are aimed at avoiding the absurdity of considering the minor's contract invalid. More especially, certain categories of contracts could be singled out in reference to which a limited competence to act could be acknowledged to the minor. Above all, albeit not having the competence to act, the minor is

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[6] M. Cinque, *Il minore contraente,* Cedam, Padova, 2007

[7]. M. Cinque, *Il minore contraente,* cit., p. 19 ss., F. D. Busnelli, *Capacità e incapacità di agire del minore,* in *Dir. fam. e pers.,* 1982, p. 60 ss..

[8] G. Alpa, *I contratti del minore. Appunti di diritto comparato,* in *Contr.,* 2004, p. 517 ss.; M. Cinque, *Il minore contraente,* cit., p. 106.

however made competent to exercise his basic rights, and therefore is able to demonstrate his will to participate: hence the minor's belonging to sports clubs or non-profit-making associations may be considered as valid.

The possibility could also be envisaged of allowing the minor to enter low-value contracts acknowledging to the minor a limited competence to act in reference to low-value contracts, which does not involve an excessive part of patrimony: that would imply considering as valid all his current purchases from the sanction of cancellation, which are also the contracts which the minor mainly makes.

An object of similar treatment could then be allowed for those the contracts having as their objective essential primary goods: in this case the minor would make a compulsory choice for the purchase which does not require a special competence for discernment.

However in consideration of the changes in habits and life-styles of contemporary youth in the times and life-style led by today's youth, there is no specific impediment from deciding to lower the limit for the age of majority, or to establish certain age-ranges within which performing some contractual activity is allowed the competence to perform certain acts is recognized.

Alternatively, one might intervene on the type of sanction, and establish for example, that the stipulated contract involving a minor binds the competent adult contractor, while the minor is at liberty to free him from the contractual bond he has taken on himself.

Conclusions

Any of the solutions envisaged and critically examined calls for the legislator's intervention: indeed none of the interpretive efforts brings to the conclusion that the answers might be considered implicit in the legal system. It only remains therefore for us to put our hope in the timely intervention of the legislator who is specifically in charge of contractual issues involving minors as a possible counterparty.

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INDIVIDUAL OR COLLECTIVE RIGHTS AS RIGHTS OF THE NATIONAL MINORITIES

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Abstract

The present paper is based on the doctrinal and legal approach to the minority rights in terms of two possibilities of exercising them, namely together with the individual one, or with the others.

The legal issues presented in the paper is of a strong political nature and created difficulties both in defining the term "national minority" and in framing its rights into individual or collective rights.

Key words: National Minorities, Human Rights, Individual Rights, Collective Rights.

Introduction

The issues of the national minorities' rights are very current and controversial. The preoccupation for the minority rights became a topic of constant concern in the international law only after World War I, although the issues of the existence and protection of the minority groups came out in the16th century. These problems increased after World War I ,by the treaties concluded between the Allied and Associated Powers (USA, United Kingdom, France, Italy and Japan) and the defeated states or those that got their territories reintegrated and also got minorities in these territories. Thus, until 1934, the regulations relating to the national minorities were given by: the peace treaties concluded in the Paris Peace Conference with Austria, Hungary, Bulgaria, Turkey, special treaties also called The Minority Treaties concluded within the Peace Conference from Paris, with Poland, Greece, Czechoslovakia, Yugoslavia and Romania. The statements about the minorities, made in front of the Council of the Nations Society by the member states: Albania, Estonia, Finland, Latvia, Lithuania; the mutual agreements between states.

After the Second World War, the international community began to focus on the human rights and their international protection. In 1945 the United Nations Charter came into force. Although it did not contain specific provisions on the minority rights, the Charter proclaimed the universal principles of the observation and protection of the human rights, and the principles of equality and non-discrimination. Article 1, Paragraph 3 states that one of the purposes of the Organization is "to achieve international cooperation... in promoting and encouraging the observation of the human rights for everybody without any relation to race, sex, language or religion." Thus, by including the principle of non-discrimination in The Charter, which is one of the traditional aspects of minority protection, this principle was considered as a principle of the United Nations.

There have always been issues about the human rights and the fundamental freedoms, but now they take a special form, mainly the legal protection of minorities. However, in order

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to understand the issues about the minority rights, under the current international law,we consider as appropriate to refer to the difficulties encountered in defining the term ”national minority” in a generally accepted definition and this is because it is actually the lawful subject, the beneficiary holder of the rights confirmed in the international and national documents related to different existing ethnic groups.

On the interpretation of the regulations on the protection of the members belonging to the national minorities, Article 3 of the ”Framework Convention for the Protection of the National Minorities” provides that:

1. Any person belonging to a national minority has the right to freely choose whether to be treated as such or not, and no disadvantage shall result from such an exercise of the choice or of the related rights.

2. The members belonging to the national minorities can exercise their rights and freedoms stipulated in the principles of the Framework Convention, individually or jointly, with the others.

As the expressions "with the others" and "jointly with the others" caused various problems of interpretation, it requires a brief description of their contents. In the international documents they are used in the context in which discrimination is prohibited no matter of the national race, religion, sex, etc.. The recognition of the freedom to exercise their rights "in common with the others" or "with the others" has its basis in the inherent nature of some of the activities of human solidarity. The terms "with the others" and "jointly with the others" know a very broad interpretation and refer both to the members of the national minorities and those belonging to other minorities and to persons belonging to the majority. The use of these expressions has a different meaning from what the concept of collective rights signifies. They concern the way in which the rights can be exercised and the nature of these rights.

Most experts in the field argue that the rights of the persons belonging to the national minorities are individual rights, because they are part of the broader category of human rights - widely recognized as individual rights.

Moreover, it is considered that the concept of collective rights for the minorities was used by its promoters in trying to give them a particular legal personality to the national minority, as a final purpose, both within the states and internationally. Hence, the most important target of the concept of collective rights is the right to self-determination for the minorities. Quasi-unanimously the contemporary international law does not recognize the status of holder of the right to self-determination, to a national minority, because the minority as such is not an issue of lawful subject neither to the inner state laws nor to the international laws. The international law accepts, however, the quality of people's entitlement to self-determination, which is recognized as a subject of international law. The acceptance of self-determination for the minorities would therefore be subject to the recognition of the international law for the national minorities.

The recognition of self-determination for the minorities is contrary to the international stability and this because in the world, with very few exceptions, there are no ethnically pure territories. On the territory where the minority lives, there are usually one or more other minority ethnic groups in relation to the first group. The exercise of the self-determination by these groups, if we simulate an unlimited process, can lead to the atomization of the contemporary territorial arrangements, which is contrary to the imperatives of international stability. The reasons for which the collective rights are not accepted either by the doctrine, or by the contemporary international law instruments, are multiple. Among the arguments (besides those already listed), it is alleged that the collective rights are substantially too vague, and, in terms of procedure, they are not practical, a human right must have a clear, well identified owner, in order to exist as such and to be exercised and protected, which the nature of collective rights does not allow.

In exchange, we find the possibility of exercising some rights both individually and as "together / jointly with others" in the international documents. The fact that certain rights of the members belonging to the national minorities (individual rights) can " be exercised with the others" better reflects the reality and does not constitute an accreditation / acceptance of the concept of collective rights for the minorities.

This formula is used by the most relevant international documents. Former UN special rapporteur on minorities, F. Capotorti, shows the effect that this provision "does not refer to the minority groups as formal owners of the rights described by them, but rather emphasizes the need for a collective exercise of their own. It is therefore justified to conclude that a proper construction of this rule must be based on the idea of double effect – both protecting the group and its individual members." Moreover, as we previously mentioned the Framework Convention of 1994 provides expressly, clearly, in its Explanatory Report (official document adopted together the Convention), that this document does not intend and does not imply recognition of the collective rights for minorities, even if it states the exercise of some of them together / jointly with the others. In the commentary to Art. 1, the Explanatory Report notes that, in the conception of the Framework Convention, the protection of the minority is done by the protection of the rights of the members belonging to the minority of the individuals belonging to the minority, so it is a concept which indicates that no collective rights are taken into consideration for the minorities. However, the commentary to Art. 3 of the Convention, which provides the possibility of exercising some rights, together / jointly with the others, it is clearly showed that the possibility of exercising with the others is distinct from the notion of collective rights.

Moreover, many fundamental rights, not only rights of the national minorities, are exercisable with the others: the right of association, right to education, profession and religious practice, without thereby losing the quality of individual rights. They are only exercised together, the holder still being the individual owner and not a collectivity. Each holder which is part of the minority may choose to exercise the right or not, the joint exercise cannot create a supra-individual holder of individual rights.

Romania was constantly against the collective rights for the minorities: the political treaties with Hungary and Ukraine contain explicit references, accepted by those States, against the idea of collective rights.

It is an obvious fact that the Reform Treaty of the European Union from Lisbon introduces a key provision, namely Article 1. on the values of the Union, stating that " the Union is founded on the values of respect for the human dignity, freedom, democracy, equality, the ruling of the law and the respect for the human rights including the rights of persons belonging to the minorities."

There have been attempts both in the literature and in practice some states to impose the concept of collective rights of the national minorities but this concept was rejected by most of the countries and authors in the field of the human rights. The states were categorically against the recognition of the collective rights because their actions give legitimacy to ethnic segregation and it is threatening their integrity. The rule was firstly imposed and the concerns for preservation of the identity should not afterwards lead to increased conflicts in the society.

The segregation can also lead to difficulties in the exercising of the human rights by excluding certain categories of persons from the public life, and this is contrary to the purposes of international standards. It is undeniable that the exercise of the rights of the persons belonging to national minorities is better if these people are sufficiently integrated into the society they belong to. In this respect, the right to participate in taking the decisions of public interest as citizens and the decisions that affect them directly as a minority, are guaranteed to these people.

Promoting the rights of persons belonging to the national minorities cannot be in contradiction with the general policy of the states. Therefore, it was determined that the protection of the national minorities and the taking of appropriate measures will be operated in accordance with Art. 5 (2) of the Framework Convention, "without bringing any prejudice to the measures taken under their policy (by the States) of general integration....” Article 6 of the Framework Convention and Paragraph 36 of document of the CSCE Meeting from Copenhagen emphasizes the need to strengthen the social cohesion, to promote tolerance and intercultural dialogue to remove the barriers between people belonging to the ethnic, cultural, linguistic and religious groups. For this purpose, there will be encouraged those organizations and movements seeking to promote intercultural respect and mutual understanding and to integrate these people into the society while maintaining their identity. The states will promote mutual respect, understanding, solidarity and cooperation between the people living on their territory "regardless of their ethnic, cultural, linguistic or religious identity.” Problems will be solved through dialogue abiding to the ruling of the law.

It is thus recognized that the cultural diversity is seen as a source of spiritual wealth for the whole society and not as an agent of division. The states must take the necessary measures to avoid isolation and segregation of the society on the ethnic basis.

Conclusions

In conclusion, we can state that the issue of the minority rights is, and will continue to be, a controversial one and that the efforts should be collective and effective in order to reduce if not to eliminate the arising conflicts.

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THE CONCEPT OF DAMAGE AND RIGHT OF REDRESS IN THE EUROPEAN CONTEXT, REGARDING MINORITIES

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Abstract

The concept of discrimination refers to the assembly of behaviors and attitudes, by which the same rights and opportunities are denied to a category or group of people, meanwhile are being granted to others within the same political society. Discrimination is an individual action and the national authority designed to investigate, find and punish this kind of acts conventionally is called The National Committee against Discrimination.

Key words: *prejudice, discrimination, liability, causal, minorities, fault.*

Introduction

The legal liability which also means the correction of the damage concerning the committing of such acts, which by their concrete content and by their means of manifestation, are circumscribed to the name of discrimination, can be found in three forms: minor liability under the provisions of article 19-20 of the O.G. no. 137/2000, tort liability for its act, implemented by means of the article 998-999 form the Civil Code, which makes the basis of establishment of the general conditions of liability, and the existence of material or moral damage, the existence of illegal acts, the rapport of causality between unlawful act and the injury and the guilt of the one to cause the damage, meaning the intention, neglect or imprudence by which he acted on.

The function of any social establishment, as Hans Kelsen shows, is to instill certain behavior of people obeying this order of establishment, to determine them to omit some damaging actions and to act in a way considered useful to the society. Such motivational actions can be determined by the created image of the norms which order or prohibit different human actions. In the essence of social establishment, completed by the construction of different normative systems (where the judicial outstands the others in being the most efficient), lies liability and penalty. Basically breaking the judicial norms brings liability of the guilty in front of the law.

In judicial literature it has been shown that "liability means the complex of right and obligations attached, which-by the law- is born as a consequence of committing illegal acts, and which makes up the environment for exertion of constraint by the state by means of applying judicial penalty for achieving the goal of fair social rapports and the correct guiding of members of the society in the spirit of obeying the legal order". Defined as so, liability cannot be mistaken for penalty, the two, even though being two sides of the same social phenomena, make as two different things, because judicial liability makes the judicial environment for the penalty.

Civil liability comes with its own specific features, which makes it particular in the mechanism of judicial liability; the specificity of civil liability consists of the obligation of full repair of the damage, which must come from the author of the damage or the one called

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by the law to do so. Civil liability, by its principles, conditions and functions, forms the common right in response to the liability which goes by the norms owned by the other sides of the private right.

In judicial literatures are being discussed two functions of civil liability: the preventive-educational function and the reparatory one.

The preventive-educational function

Civil liability, as all the other kinds of liability, has, evidently, a preventive-educational function by the influence exercised upon the conscience of people and along with that on their behaviors.

The reparatory function.

The essence of civil liability consists of the idea of reparation of damage. As soon as a legal right or a legitimate interest of a person has been broken, provoking damage, the author or anyone called by the law is obliged to assume the responsibility.

The civil right knows two forms of liability: tort liability and contract liability, both being dominated by the fundamental idea of the repair of a personal damage produced by illicit act made by another person.

Tort liability.

It refers to the obligation of a person to repair a caused damage, for which this person is called in front of the law to do so.

Contract liability.

It refers to the duet that one has by a signed contract to repair a caused damage, by not executing the duties he signed for.

Tort liability makes the common right of civil liability, meanwhile contract liability has a special function, an exempted one, so that anytime that we don`t confront with a contract liability in our civil right, we will apply the ruled regarding tort liability. Romanian Civil Code assigns liability to different judicial regimes, as the tort or contract one is.

The regulation of tort liability is stated in the article 998-1003 of the Civil Code. Regulations are as come: Liability for own act (art. 998-999), liability for another person`s act (art. 1000), liability for objects, buildings and animals (art. 1000, line 1, art 10001, art 1002). Aside from the dispositions made by The Civil Code, in our law system there also are judicial norms which can mean special hypothesis for tort liability: art. 97 and others form The Aerial Code from 30 December 1953 and art 1, line 1, Law no. 554/2004.

From the analysis of articles 998 and 999 results that judicial civil liability for own act (as the tort civil liability in general), means achieving the following conditions: damage, unlawful act, the causal link between unlawful conduct and damage guilt (guilt). We`ll give some more details about each one, and then we will debate in detail the concept of "damage", because it represents the main subject of the present paper.

Unlawful act, in what concerns tort civil liability, can be defined as that act by which, braking the objective right norms, subjective rights or legitimate interests of a person are being attacked, the person being caused a damage. The unlawful act can be committed, consisting in an action, positive action (like injuring a person, or violation of goods belonging to someone else), or it can be committed by omission, consisting of not going through with obligations, or not respecting some measures which the law provides (for example not keeping a dangerous animal under observation). The causes that can make the illicit character of the act go away are: own defense, necessity, fulfilling with a required, permitted by law or imposed activity, the consent of the victim, the exercise of a subjective right.

For civil liability to be invoked it is necessary that between the illicit act and the damage to exist a link. This link is a general condition of the civil liability, without making differences between tort or contract liability. This cause-effect rapport in what tort civil liability concerns, has an objective trait, fact which does not mean that the analysis of this

rapport, regarding the establishment of its existence, must start with the moment of exterior manifestation of will, going down to its last consequence. The simple act of conscious, affect, or will, never being put into action, is not a subject of civil liability.

In practice, in many cases, it is easy to establish the cause between the illicit act and the damage. For example in the case of destroying or damaging a good belonging to someone else, it is distinguishable that the latter is suffering damage by not being able to use the object anymore. On the other hand, there are enough cases where the cause-effect link between the illicit act and the damage is harder to establish, not being able to distinguish correctly the determining factors. Without sub estimating or neglecting the fact that in the cause-effect link interfere, with an important role, physical, medical, biological, chemical factors, etc., we must show that, here we are interested firstly in the persons action, for the reason that not only he can be responsible and liable for the damage.

For putting under light the difficulties in establishing the cause-effect rapport, we will show some more practical examples:

The owner of a property did not take all the safety imposed measures to prevent fire, fact which lead to he`s contravention penalty. Another person uses, unconventionally, a welding machine and he sets fire on his property. The cause of the damage is not respecting the regulations concerning protection against fire or the way the other person used the welding machine?

A driver, drives on public roads with a machinery producing sparks, and burned the crops of wheat of a cereal producer. It is claimed that the producer has postponed the harvest, and the driver supposed the crops shouldn`t have been there still. If the owner of the crops would have made the harvest on time, the damage would not have been caused. Is the way the driver was transporting the machinery producing sparks, still relevant?

Because of spoiled food consumed in a known restaurant, a tenor gets sick and he is not available for the shows of the local opera. The opera suspends the shows and has to make a refund on the tickets I the restaurant`s owner responsible for the damage caused to the opera?

A driver committed to transporting a known sports player to a championship. On the way there, the car suffers a glitch, which the driver cannot fix because he does not have the proper instruments that a driver should have in his car. The sports player misses the championship and he`s club loses the game. Is the driver to be held responsible for the sports player’s moral and material damage?

Concluding, it can be observed that the cause-effect relationship is present between very different domains of activity, each having its particularities, and being made subject to specific regulations. Some of the above-mentioned situations would not have caused damage by themselves, although they have offered the possibility of the damage to be produced. We should keep in mind that, sometimes, the invoked situations are determined by different persons. As we found out earlier, the determined situation of one or the other triggers the liability or responsibility of a certain subject of right. Moreover, it is important to know that, having given the circumstances, a damage chain is formed. We ask ourselves the question: Which is the value extension of the initial action?

Fault, error or guilt is a necessary condition that appears within the tort civil liability process. Therefore, art 998 of The Civil Code refers to the liability of the one who`s mistake produced the damage, and the article 999 of the Civil Code refers to liability of the one which by neglect of imprudence, caused the damage. From here it results that the obligation of repairing the damage exists in the case of intended guilt as well as in the case of neglect or imprudence of the author of the illicit act. So, for invoking the Civil Liability it is necessary for the illicit action which provoked the damage to be attributable to the author. We must mention that the liability for own action is an essentially subjective liability which cannot be

invoked unless it can be proven that it came from the neglect or imprudence of the author. According to our judicial doctrine and judicial practice, fault or error/mistake is necessary only in some cases of tort civil liability. Its applicable domain is, clearly the own act liability, where the condition of fault must be proven by the one pretending to have suffered a damage.

The damage.

The damage is an essential element of the tort Civil liability and it represents the negative consequence (patrimonial or non-patrimonial) suffered by a person, as an end of the illicit act committed by another person, action by which a subjective right or a legitimate interest. As the definition shows, the damage must be the result of the breaking of a subjective right or a legitimate right. Evidently, the tort liability will take action in the case of a damage is the consequence of breaking a subjective right (for example the breaking of any real right, the right to integrity, etc.) It is questionable if the tort liability can be engaged for breaking a legitimate interest. Our judicial literature has a positive response to this question, showing nonetheless, that there must be met the following two conditions:

The situation must have a stability trait, and in practice it has been admitted that, an underage child, being taken care of by a relative (in the absence of any legal obligation of economic maintenance), has a right of being compensated in the case of that relative being a victim of some sort of accident.

Concerning the damage of a legal and moral interest.

One of the most important classifications of damages (concerning civil right) makes a distinction between the moral and the patrimonial damage. The criterion of classification consists of the possibility of pecuniary evaluation of the damage.

Therefore, we can state that the patrimonial damage is that which can be evaluated in money (for example the destruction of a good, loss or diminution of work capacity, etc).

All the contrary, the moral damage cannot be evaluated in money and result in a breaking of personal rights, without any economic content. The problem of the means of repairing the moral damage has made a controversial subject in practice and in doctrine. The difficulty of the problem refers to theoretical considerations, as well as to a certain ideological and political evolution which our society has achieved after the Second World War. From a theoretical point of view it is not easy to explain how you can compensate for something that you cannot value in money.

The theoretical difficulties have been well overcome as to the ideology that has set its mark, firstly on the first phase, by after war jurisprudence. The evolution of the problems discussed has seen 3 major steps. Before the First World War, the patrimonial reparation was admitted without reserves in our courts. The second phase is located between the moment of the instauration of the communist regime and the 1989 revolution. Shortly after the instauration of the communist regime, in practice was decided that "there can`t be awarded any material reparations for moral damage", because "the main source of money is labor" (The decision of guiding of The Supreme Court`s Gathering, no 7, from 29 December 1952).

Step by step our jurisprudence started to meet the possibility of patrimonial repair of the moral damage, especially in those situations where the existence of some damages being at the verge between patrimonial and non-patrimonial. Two situations especially have been taken into account:

- Recreational damage consisting of damage to the victim unable to irreversible consequences of its participation in society on the same conditions as was previously a damage;

- Damage consisting in the extra effort that a person who has suffered a diminution of its capacity you should submit work to achieve the same performance, and therefore the same income.

After 1989 the practice of providing (economic) compensation for moral damages was resumed, being adopted laws that make explicit reference to this possibility: Law no. 11/1991 on combating unfair competition Law. 48/1992 Broadcasting, Law no. 544 / 2004 on administrative court (which was repealed by Law no. 29/1990 on the same regulatory field).

For compensation must be met two conditions: the loss and damage is certainly not have been previously repaired by a third person or entity. The injury means damage that is definitely safe both in terms of the existence and terms of its scope. Damage must also be of actuality, something which already has occurred. But the fact is all the damage that will occur and certainly in the future and is capable of evaluation (e.g. reducing future income by reducing its ability the victim of employment). Possible damage, lack of certainty should not be confused in any way with future injury. Certainty of future damage refers both to the existence and extent of it. Unless there is full scope, the court will be limited to reparation order clearly stated and evaluated (it may return but to give due compensation for the damage became clear after the pronouncement). The second condition, the damage was not repaired yet, be explained by the concern not to damage a source of enrichment of the victim without a legitimate basis.

Shall have regard to where such a person or entity other than that required to meet, to pay the victim, by deed, a sum of money which has some connection with the injury suffered. Thus considering the following circumstances: the victim receives a payment from a third party, the victim receives a pension from Social Security, and the victim receives money from the insurer. When the victim receives a payment from a third party must be examined for performance. If the third party interest paid author, claim victim goes off. However, if the third party charged with intent to gratify victim, you help him with some money, then it retains all rights to claim damages from the perpetrator illegal act. When the victim receives a pension under the social security system, is allowed an opportunity instituting tort liability claims against the author of his unlawful act, but only for the difference in damage not covered by pension granted. When the victim receives a pension under the social security system, is allowed an opportunity instituting tort liability claims against the author of his unlawful act, but only for the difference in damage not covered by pension granted. When the victim receives a payment from the insurer must distinguish between several hypotheses:

• if the author of an illegal act himself has the quality of being assured, the victim can obtain compensation directly from the insurer (unless the author has committed the unlawful act with intent). Also, the victim is entitled, after payment made by the insurer to seek redress from the perpetrator remained illegal act uncovered the extent of the damage.

• if the victim has the quality of being an insured person, then you need to distinguish between people and the provision of goods. If insurance people, the amount received by the victim can be assured of compensation due to cumulative damage of the author. In case of property insurance, the amount received by the insurer can no longer be added to the compensation due to victims by copyright, with only the possibility of coercing it through subsequent civil action, to cover the difference between compensation and injury insurance. The insurer, making a disposition for the client, in the amount paid, he represents the rights of the victim, and he is entitled to regress against the author of the harmful act.

When the foregoing conditions, the damage must be repaired. Most authors found that there are three basic rules to be followed to repair the damage. Thus, to establish actual damages for repair of damage to the victim are taken into account the following:

- procedure prior to repair potential damage by conventional, full compensation for the injury, repairing the kind of injury. Damage can be done primarily by treaty, by mutual agreement. The court, if asked, will take note of the bargain the parties if not unlawful, immoral, or not prejudice the interests of third parties. In this case, between the author of the unlawful act and victim compensation is determined both the extent and manner of payment

thereof. According to the principle of freedom of contract, but the parties may establish any other clauses. Is full compensation, that is subject to both repair the damage actually caused (damnum emergence) and lost profits (lucrum cesans) un-fulfillment if this was caused by the unlawful deed. This does not take into account the wealth of the victim, that fact is not irrelevant in the amount of compensation, but only to establish procedures for payment of compensation.

Unlike criminal law, in civil damage must be repaired in full in any form or degree of guilt. There is therefore irrelevant that the injury is the result of intentional, negligent or reckless, it must be fully repaired. Only if the degree of culpability common fault is taken into account in determining the extent of damages to everybody.

And last but not least, bear in mind that the tort liability, compensation for damage not only predictable, but unpredictable injury, or damage including the occurrence of which the author is unable to predict the date of his unlawful act was committed (were given adequate compensation and health consequences or bodily injury occurring during hospitalization after the victim, that his unlawful act of the author).

One of the most important rules in terms of an undertaking analysis is that the victim - that is creditor - is entitled to compensation, is entitled to compensation in the nature of the injury suffered. The legal redress for damage resulting from the nature of art. 1073 Civil Code, which states that "the creditor is entitled to acquire the exact fulfillment of the obligation." If you cannot repair the kind of damage it can do the equivalent with equivalent compensation can be done either through a lump sum or periodic benefits by setting all the way successive cash temporarily or even lifetime. In this case the court will consider, first, the nature of the damage. It is preferable, in the case of a damage consisting of hospitalization expenses, incurred by the victim, for the perturbation factor to pay a global sum, while in the case of damage consisting in extra effort made to achieve the same result can be repaired by establishing successive benefits, spread throughout the period in which the victim bears the effects of harmful act. In determining compensation by considering equivalent, depending on circumstances, several situations: firstly, when the damage is assessed is considered one of his generations, but at the judgment court in some cases, secondly, later, when we can see an increase of the compensations, is accustomed to keep in mind the price of delivery of the first decision. And finally, if there special provisions concerning compensation for the equivalent of injury, the latter.

In conclusion, we can talk about three principles of liability undeniable: the principle of full compensation for the injury, the principle of prompt repair of damage and repair in principle liable to damage.

The principle of full compensation for the injury is to remove the harmful consequences of illegal acts in order to bring the victim in the previous situation (restitutio in integrum). The principle is implicitly enshrined in Art. C.civ 998-999. ("Every human act that causes another injury, which requires that the error was incurred, the fix" and "Man is responsible not only for the damage caused by the act, but also one that caused by to negligence or recklessness ").

Practice had an important role in enshrining the principle of full compensation and making the injury, it is not explicitly referred to as such in any legal text.

The principle of compensation in kind of injury. Compensation in kind of injury is a physical activity or operation, reflected in: the return of misappropriation, replacing damaged property with another of the same type, remedy the damage caused to a thing so. It may be in a legal operation, such as ignoring the unexpected court dismissal of an offer to contract and the decision finding that the contract was concluded with the moment of the reception of the acceptance.

In the absence of express provision of the Civil Code, a merit in enshrining this principle of jurisprudence that it is the solutions given, highlighted the benefits they have to repair in-kind compensation by cash equivalent. The best way of implementing the principle of full compensation to repair its damage is very likely.

Given the above presentation of the injury and the right to repair, conservation and development of human rights and fundamental freedoms by European bodies, leading to the achievement of greater unity between its members to promote the ideals and principles which are their heritage common.

Protection of national minorities is essential to stability, democratic security and peace of the continent. We say this because a democratic society must respect the ethnic, cultural, linguistic and religious identity of every person belonging to national minorities and to create appropriate conditions enabling them to express and develop this identity.

Making a tolerant and prosperous Europe depends on the cooperation between states, but also cross-border cooperation between local and regional authorities to respect the constitution and territorial integrity of each state. Minorities should be guaranteed the right to equality before law and equal protection of law to maintain and develop their culture, religion, language, traditions and cultural heritage.

In the second paragraph in Article 1 of the Romanian Constitution stipulates: "The constitutional provisions on rights and freedoms shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, the covenants and other treaties Romania is a party" and in Article 14 European Convention of Human Rights states that "Exercise of rights and freedoms set forth in this Convention shall be secured without discrimination based particularly on gender, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property , birth or other status".

The Romanian State through the Government Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination in Article 2, paragraph 1 stated that the discrimination is any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social class, belief, gender, sexual orientation, age, disability, no contagious chronic disease, HIV infection belonging to a disadvantaged category, and any other criterion which has the purpose or effect the restriction, removal of recognition, use or exercise on an equal footing of human rights and fundamental freedoms and rights recognized by law in the political, economic, social and culture, or in any other areas of public life.

Under Article 2, paragraph 4 of Government Ordinance no. 137/2000 republished, that any active or passive behavior, the effects they generate unduly favor or disadvantage, or subject to unfair treatment or degrading a person, group of persons or a community to other individuals, groups of people or communities, attract minor responsibility, if not covered by criminal law.

Representative in this area of damages to national minorities in Romania is the regulatory framework and its development on restitution that belonged to religious orders and communities, citizens belonging to national minorities.

Totalitarian communist regime, according to its ideology in economic and social improperly took part in religious communities and ethnic goods in Romania, based on replacing the free market economy with an economic system controlled exclusively, or as a result of response to manifestations of opposition to the regime or as a means of persecution and discrimination on ethnic or religious.

Private property development in Romania post-December led to the return of state taken or repair damage caused by the takeover taking into account the protection of property rights and the need to repair the damage caused.

We mention here, the emergence of O.G. no. 94/2000, Law no. 501/2002, Law no.10/2001, Law no. 247/2005 on property and justice reform and some accompanying measures and the Government Emergency Ordinance no. 81/2007 to expedite the procedure for granting compensation.

Conclusions

In a democratic society must be respected ethnic identity, cultural, linguistics and religious and in the same time to exist appropriate conditions for expression and development of this identity for all persons belonging to national minorities.

The minorities should have guaranteed the right to equality before the law, to maintain and to develop the culture, religion, language, traditions and cultural patrimony.

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The decision of guiding of The Supreme Court`s Gathering, no. 7, from 29 dec. 1952;

The Civil Code.

THE EXTINCTIVE PRESCRIPTION ON INTERNATIONAL MERCHANDISE SALES, ACCORDING TO THE NEW YORK CONVENTION OF 1974

Floroiu Mihai*

Abstract

In order to facilitate global trade and help international businesses to develop, general rules were needed in order to ensure clear terms of prescription in the area of international sales. Those rules were set up by a Convention, signed in New York in 1974 (NY Convention).

Key words *– international sales, prescription, New York Convention.*

Introduction

The NY Convention, signed on June 14th. 1974, under the auspices of the UN[1], is divided into four sections – Title I on General Dispositions, Title II on Application Measures, Title III on Declarations and reserves and Title IV on Final Dispositions. The main objective of this convention, as stated on its preamble, is to facilitate the development of global trade, by establishing general rules in terms of prescription of international merchandise sales, having in mind the fact that international trade could be an important factor for promoting friendly relations between States.

The Convention was amended by the Protocol signed in Vienna on April 11th. 1980, with the scope to ensure its harmonization with the dispositions of the UN Convention on International Merchandise Sales Contracts, signed on the same date and place. It entered into force on 1 August 1988 and there are presently 20 States parties to this Convention, out of which 14 were also parties to the amending Convention.

As per article3 paragraph 3 of the Convention, it has a suppletive character, as it does not apply when the Contracting Parties decided to avoid its application in their relations. Although from the dispositions of the Convention one might conclude that the Contracting Parties have the possibility to avoid it's application only by their express will, this disposition being thus more restrictive than the one of the article 6 of the Vienna Convention (1980), we consider that such a derogation can only be direct (via inclusion of a specific clause in the contract) but also indirect, by acceptance from the Contracting Parties of different clauses in relation with the Convention.

I. Fields of application

A. Temporal field of application

The application in time of this Convention is determined by article 33, according to which, each State will start implementing the Convention to contracts concluded after the

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[1] INCOTERMS regulations were published in 1990 in a bilingual edition (English and French) on a CCI Paris Brochure (no. 460). A Romanian translation was done by CCI Romania.

Convention entered into force in relation to the respective State. There will be, therefore, an application only for the future (*ex-nunc*), based on the non-retro-activity principle.

B. Personal field of application

As in the Vienna Convention of 1980, the NY one applies only if one of the following conditions are met, as stipulated at article 3, paragraph 1, lett. a) and b):
a) at the contract signature moment, the Contracting Parties are head-quartered in different Contracting States;
b) private international law rules make applicable to the contract only the law of one of the Contracting States.

C. Material field of application (object of the convention)

The *rationae materiae* field of application of this Convention is stipulated at article 1, paragraph 1. According to its text, the Convention determines the conditions under which the reciprocal rights and actions of a buyer and a seller, issued from an international contract or related to a fault in its application, the end or the annulment of the same, cannot be invoked after a period of time, designated by the Convention under the term of *prescription*. Therefore, the main object of this Convention is the term of prescription of the right to action in the field of international merchandise sales

II. Duration of the prescription terms

According to article 8, the term of prescription is of 4 years. By a special disposition, that has no correspondent in the Romanian law, the Convention establishes, (under article 23), a general limitation of this term of prescription. The text stipulates that, with disregard to any disposition of the Convention (especially of article 13-21 stating an interruption or a suspension of the prescription period and the ones of article 22 paragraph 2, giving the possibility to prolong the period for the party in debt), all prescription terms cannot be longer than 10 years after the starting point of the prescription period, as per article 9 to 12 of the Convention

A. End/interruption of the period of prescription

Under the terminology aspects, the Convention uses the notion of "*end of the prescription*" which corresponds to the moment of interruption of the prescription in the Romanian law, as the causes are quite similar.

Thus, the Convention stipulates three causes (clauses) allowing the end of the prescription term:
1) Introduction by the lender of any kind of procedure against the debtor;
2) Achievement by the lender of any other procedure that has as effect the interruption of the prescription period according to the law of the State where the debtor is head-quartered;
3) Recognition by the debtor of the obligation towards the lender.

B. Prolongation of the period of prescription

The Convention uses the notion of prolongation in a similar way to the suspension in the Romanian law. According to article 21, the prescription period is prolonged (before expiring) under the following conditions:
a) the facts are not imputable to the lender;
b) the lender could not have avoided nor defeat them;
c) the lender is in impossibility to cease the course of the prescription.

C. How to calculate the period of prescription

Under article 28 and 29, the Convention stipulates the methods on how to calculate the periods of prescription, as follows:

-according to article 28 paragraph 1, the prescription period is calculated in a way that it would expire at midnight of the day corresponding to the day on which it started. In application of the text, for example, a 4 years term started on January 22nd. 2006 would expire at midnight on January 22nd. 2010. When a corresponding date is missing, the prescription period expires at midnight on the last day of the last month of the period (article 28, paragraph1). At the same time, the prescription period is calculated with reference to the place where the procedure is started, as per (article 28, paragraph 2), based on the *lex fori* principle;

-according to article 29, if the last day of the prescription period is a holiday or any other legal vacation day, preventing thus the start of the procedure within the jurisdiction where the creditor intends to start it or to claim a right (article 13-15), the prescription period is prolonged in such a manner that it would include the first viable day following the last day of the prescription period.

Conclusions

Generally speaking, the two Conventions, the initial one and the amending one signed in Vienna in 1980, determined a clear and uniform set of rules governing the period of time within which legal proceedings arising from an international sales contract can be started. In simple terms, the initial and the amending Conventions set up a code of legal rules on the formation of international sale of goods contracts, obligations of both buyer and seller and solutions in case of breach of contract.

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STATE'S RESPONSIBILITY FOR INTERNATIONAL ILLICIT ACTS

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Abstract

International Law, as all other legal branches, needs a system able to guarantee its application and to sanction all entities that would violate applicable international regulations, thus correcting also their possible effects. This is the system of international juridical responsibility of States or other international law subjects for international illicit acts.

***Key words** – State responsibility, international illicit act.*

Introduction

The concept of responsibility is inherent to any legal system, „a necessary corollary of law"[1]. International responsibility has been initially related only to States, as it appeared at a moment when the international community was formed only by States. Once international relations increased, allowing the creation of other kinds of international entities than States, this institution started to apply both to States and to any other entities that function within the international society, including individuals, provided they act as a subject of international law.

The International Law Commission drafted a series of conditions regarding this concept, by diving it into five fundamental elements:

1. *International illicit act as generating element* – violation of an international law regulation ;
2. *Act imputable to a subject of international law*;
3. Existence of a *prejudice* and a causality link between the act and the prejudice;
4. *Prejudice* suffered by another subject of international law;
5. Obligation to *repair*.

I. The International illicit act

By international illicit act one would understand any action or lack of action allotted to a State and which represents a violation of an international law regulation, no matter of the origin[2]. Despite this ambiguous definition of the international illicit act, its three elements result clearly from it, as follows:

- Violation of international law;
- Act imputable to a State ;
- The illicit character of the act should not be eliminated by an exclusion circumstance.

With all this in mind, the most important aspect is that the international illicit act is autonomous in relation to the internal law, its qualification being made solely by the

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[1] ICJ - Barcelona Traction case, 1970.

[2] CPJI : Fausse Fat case, 1938 (Morrocco) / Arbitral Court : Rainbow Warrior case, 1970 : „*toute violation par un Etat d'une obligation quelle que soit sa source engage sa Responsabilite Internationale*".

International Law[3]. Thus, the international illicit act is classified according to two distinct criteria:

- according to the situation in time;
- according to how illicit the act is.

A. The situation in time

A distinction must be made between the character and the duration of the act, the international illicit act having an instantaneous, continuous or mixt character, as follows:

- the violation of international law by acts that have a punctual, non-continuous character, starting to produce consequences from the first the moment of the violation of international law, even if it's effects continue to last for a longer period;
- the violation of international law by acts that have a prolonged, continuous character, is considered to last during the entire act, or as long as the act is not lawful in respect to an obligation under the international law;
- the violation of international law by disrespect by the State of an obligation to prevent some violation of international law, is considered to last during the entire act.

B. The illicit character

Although this is one of the most important innovations of international law, it has not been maintained by the International Law Commission, as Robert Ago's project had a highly criminalistics content, which let the possibility to an important interpretation margin. Despite all this, there is quite an interest about the distinction between crimes and felonies, being recently taken into account by the concept of criminal international responsibility of the individual.

This character results from two factors:

- *Violation of an international obligation* – action or lack of action from a State, violating thus an international obligation, in force and binding, no matter of the origin, conventional or customary[4].
- *Behaviour attributed to a State and not imputed to that State*. The international illicit act is attributed to the State when this results from the behaviour of its agents or organs under effective authority of that State, even if they go beyond their normal functions or achieve their obligations on a bad manner[5]. The main rule in this case is that the State recognizes and admits that behaviours as his own, in order to have its responsibility engaged[6]. In other words, the responsibility of a State cannot be engaged for private individuals' actions, except if that private individual, even if he/she is not an agent of that State, acts as a *de* facto organ of the same, situation in which the responsibility could be engaged.

A specific situation arises if the illicit acts are committed by insurgents or other entities that are susceptible to become authorities of that State:

- any illicit act committed by a group of insurgents, engages international responsibility of that State only in the case that movement becomes a new authority of the State, based on international law. At the same time, if the respective movement succeeds to create a new State on a part of the territory of a pre-existing State, or on a territory submitted to its previous authority prior to the creation of the new State, is is

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[3] Cf. Wimbledon case: „*Un acte interne contraire au Droit International sera illicite en Droit International indépendamment de sa conformité au droit interne. Le fait international illicite est apprécié à l'égard du Droit International*".

[4] Cf. Nagymaros case.

[5] The *ultra virens act* theory.

[6] ICJ - Teheran case, 1979.

considered that the act is attributed to the newly created State, being possible to engage it's international responsibility ;
- if the insurgent movement fails, the State is responsible only up to the limit of the acts committed by its own agents, not also for the insurgents' acts. This situations is however un-equitably gets responsible for international illicit acts.

II. Circumstances excluding the illicit character

A. The consent given by the State

The valid consent of the State, allowing another State to have a specific behavior, excludes the illicit character of that behavior. However, there are some conditions that have to be fulfilled in order to the consent to be considered a responsibility excluding circumstance, as there is a risk of fraudulent use of this principle and thus exclude the illicit character only by simple will of the parties :

1. the consent must be freely expressed;
2. the consent must be clearly established;
3. the consent must be effectively expressed by the State;

B. Legitimate defense

The international responsibility of a State for an illicit act under international law can be exonerated if that State proves it acted on legitimate defense, under art. 51 of the UN Charter.

C. Counter-measures generated by an international illicit act committed by a third State

An act which is not compliant with International Law, loses its illicit character if it represents a legitimate measure meant to counter-act an illicit act of a third State or other subject of international law, although those counter-measures present the risk of transforming themselves into measures of a decentralized, "private justice" let to the States' free will.

In order to eliminate those risks, the UN Charter imposed a series of restrictions and conditions of use of the counter-measures[7]:

- *Material conditions* :
  - the counter-measures cannot violate principles and imperative rules of international law, such as the interdiction of use of force or humanitarian law;
  - the counter-measures have to be proportional to the prejudice.
- *Procedural conditions* :
  - the State author of the counter-measures have to open a negotiation path between passing to actual measures, in order to allow the faulty State to pay its debts ;
  - the measures must end at the moment when the international illicit act ceases or the case is submitted to be solved by an international judicial or arbitral court.

D. *Force majeure*

The illicit character of an act is eliminated by the force majeure, defined by the International Law as the action of an irresistible force or external unpredicted event, which escapes to the State's control and generates an un-voluntary behavior, which makes impossible to engage its responsibility.

[7] See articles 49-53 of the UN Charter.

In order to avoid some series of abuses, this rule does not apply in the following situations:

- if the force majeure is due, directly or indirectly/partially to the behavior of the State claiming-it;
- if the State took the risk of such a situation occurring.

E. State of danger

The illicit character can be excluded if the State had no other possibility of acting in a given context, in a dangerous situation, the incriminated act being the sole possible and reasonable mean of action. This situation is different from the force majeure in the sense that this act is voluntary, compared to the force majeure. In order to avoid any risks of abuses and general motivations based on the protection of the general interest of the State and nation, this exoneration does not operate in two situations, when the dangerous situation is due to the behavior of the State claiming the force majeure, directly or indirectly and if that act is likely to generate an even more dangerous situation.

F. State of necessity

The State must be able to prove the following, in order to be exonerated for the illicit character of an act committed in violation of international law:

- that act was the only mean of action for the State to protect it's essential interests against some serious and imminent risk;
- that act does not prejudice essential interests of other States or of the international society as a whole ;
- the international obligation which has not been fulfilled allows to claim the state of necessity as a mean of being exonerated of the international responsibility;
- the act did not contribute to the state of necessity.

There is, therefore, a negative approach regarding the exoneration, as this is established in a restrictive way, being possible to claim-it only in case of protection against an important threat to the State's essential interests.

Claiming any of the above mentioned means of exoneration, does not allow, however, that the interested State continues performing the illicit act, the latter having also the obligation of repairing all prejudices caused by its behavior to all other States or other subjects of international law.

III. Consequences of the international illicit act

As per general principles of law, an illicit act means the obligation of the faulty State to repair totally all prejudices and to fulfill correctly and lawfully the respective obligation(s), guaranteeing that it would not commit any other similar acts. The issue here is related to the obligation to repair, as in what concerns the other aspects the legal principles are quite clear.

Even regarding the obligation to repair, there is a general principle according to which any prejudice must be repaired by the one responsible. The issue is that in International Law, this principle has been confirmed by the IPCJ even at the beginning of the last century[8], as the prejudice is defined as the total amount of damage suffered as consequence of an illicit act performed by a State, should it be moral or material.

There are three main ways to repair totally such a prejudice, as follows:

- *restitution*[9] : it operates in case of a material prejudice and consist in returning something to the victim State, when and where it is possible. This is the ancient principle of *restitutio in integrum*, through which are erased all international illicit

[8] IPCJ - Chorzow case, 1928.

[9] ICJ - Texaco – Calasiatic case, 1979 : „*La restitution în integrum constitue la sanction normale de l'inexécution d'une obligaţion contractuelle*".

effects of an act, in order to return to the original state of play - *status quo ante*. Even so, there are some limitations of this principle :

- material impossibility to do so;
- higher costs in relation to the prejudice;

- *Compensation*[10] *: it operates* when the consequences of the illicit act are irreparable, the only mean of repair being the compensation by equivalent measure. This is the most common mean of repair used by International Law, as it covers all prejudice that can be quantified financially, including future losses, if they can be determined;

- *Satisfaction:* it operates especially in case of moral prejudice and has a complementary character to the above mentioned means of repair of material prejudice. This mean of repair is used in inter-State relations, where the honor and image of a State have suffered prejudices. There are many means of action, the most common ones being official excuses presented by the Chief of State, as well as internal measures to punish the faulty agents the fundamental condition is that satisfaction should not be in disproportion in relation to the prejudice and should not be humiliating for the responsible State.

An important element of this type of action are the interests that have to be paid when necessary in order to ensure total repair, those interests, being calculated for the whole period, since the moment on which repair is due, until to the moment on which final effective payment is made. In order to quantify the repair, there must be also taken into account the contribution of the victim State to the prejudice, which can be materialized either by an action, a lack of action or even neglect of an agent or entity of the said State.

IV. Specific regime of violating *jus cogens*

Violating *jus cogens*, as imperative rules of international law, is very serious for a faulty State and has specific consequences as the, on the one hand, States must cooperate in order to eliminate any risk of such a violation, having the obligation to not admit or recognize such a situation and in the other hand, the difference towards a regular situation of violating the rules of international law, being the fact that in the case of a *jus cogens* violation, not only an international court would be competent to engage the international responsibility of the faulty State, but also any other State, as this violation is directed against an *erga-omnes* rule.

Conclusions

After more than forty years of discussions, the UN International Law Commission managed to finalize the analysis of this important topic. The resolution 56/83, adopted on December 12, 2001, recommends to all governments to be very attentive to the conditions that can engage international responsibility for their acts within international society, as they treat fundamental concepts, such as imperative rules and obligations towards the international society, showing thus, how international law went from a purely bilateral approach of international responsibility to a multilateral approach, based on general interest of the international society.

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ASPECTS REGARDING THE RIGHT TO A FAIR TRIAL

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"The life of the society depends on the individual rights."
(Herbert Spencer)

Abstract

This article analyses one of the most important principles of the law that is, the concept of the right to a fair trial. The article emphasizes the importance of the European Convention of the Human Rights upon the national laws, regarding the necessity of applying its provisions into the national trials when the national laws tend to restrict the litigants' rights. Therefore, everybody has the right to be judged within a reasonable time, by impartial judges and on the base of accurate legal provisions.

Key words: *fair trial, human rights, reasonable time, judge, courts.*

Introduction:

Any democratic state wants their legal system to represents an essential element of the civilization and the social development. Therefore, the idea of a fair trial leads to the idea of the Law State. Any democratic state has as prior objectives the possibility the offer some procedural guarantees, that of defining the balance between the safety of the fundamental rights and other state interests.

The concept of the fair trial is almost impossible to define because of the way it appeared between the constants of rights and the fundamental rights in the contemporary legal systems. But the concept of the fair trial is an extremely complex one incorporated into more components, such as: the free access to justice; examination of the case in a fair, public and within a reasonable time; examination of the case by an independent, impartial and established by law court; the publicity of the sentencing.

The concept of a fair trial is often used by the courts from Strasbourg for appointing the assembly of the rights of the litigants according to art.6 from the European Convention of Human Rights, which means the assembly of the procedural guarantees which enable the value of the rights protected by the Convention.

As a guarantee for the human rights, the Convention provides in article 6 (1) the right of any person to a fair trial: "Any person has the right to have his/her trial fairly exanimate, publicly and within a reasonable time, by an independent and impartial court, established by the law, which will decide either upon the violation of the civil rights and obligations or upon the thoroughly of any criminal charges against him/her. The decision has to be given in public, but the access in the meeting room may be forbidden to media and audience during the entire time or only a certain period of the trial in the interest of morality, public order or national security in a democratic society, when it is necessary for the interests of the minor or

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the safety of private life of the litigants or when the court consider it is necessary when the publicity may prejudice the interests of the justice, because of some special circumstances."

In European law doctrine[1] the right of access to a court is known as a concrete and effective right which means that the litigant benefits by a real and concrete possibility to determine the violation of his/her rights.

Starting from the premise that the fundamental rights have to be guaranteed in a concrete and real way and not an illusive and theoretical one, the impossibility for any litigant to appeal the court means the violation of his/her right of access to a court[2].

The State is obliged to offer to its citizens all the legal possibilities in order to be able to appeal a court.

In most of the European countries the access to justice has a constitutional value. Therefore, it appears in the Constitution of Finland (art.16), the Constitution of Germany (13, 14), of Greece (art.8), of Italy (art.24, 25), of Luxembourg (art.13), of Holland (art 17), of Portugal (art20) or Spain (art. 24, 25). The free access to justice is also recognized as a fundamental right in the Constitution of Romania according to the art. 21.

The Romanian Civil procedure Code provides which are the procedural means for appealing a court: the summons (art.109) and the ordinary and extraordinary means of appeal (appeal –art.282, second appeal – art.299, appeal for annulment- art. 317 and art. 318, motion for revision – art. 322)

These procedural means offer to the interested parties the access to the court which has the legal jurisdiction in civil.

But the right of access to a court is not an absolute one, it implies some restrictions. It is important that these restrictions are not abusive but proportionate to the aim pursued. One of these restrictions is to order the litigants to pay the tax stamp in order to cover the costs for the trial, as it is a service provided by the State.

Even nowadays there are certain discussions upon the idea if Law no.146/1997 regarding the judicial tax stamps violates the litigants' right of access to justice. Both the European Court of Human Rights and the Romanian litigants think that obliging the litigant to pay the tax stamp before starting a trial limits his/her right to access to justice, it violates the provision of art.21 (2) from the Constitution and at the same time affects the right to defense, as part of the right to a fair trial, because the part doesn't have the possibility to defend his/her claims or to disprove the claims of the opponent within the trial if there will be ne, or has to admit all the claims of the opponent if he can't pay the tax.

We think it is necessary to analyze the amount of stamp tax in relation to the income of the Romanian litigants, because the big difference between the incomes and the amount of the stamp tax leads to the impossibility of paying this tax and as of course to the violation of the right to justice, of the right of private property guaranteed by art. 44 (1) of the Constitution and art. 1 of the Additional Protocol to the Convention, as well as the right to inheritance guaranteed by art. 45 of Constitution.

With respect to another requirement provided by art. 6 (1) of the Convention, regarding a case which has to be examined fairly, means that the fundamental rights of any

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[1] Jean Francois Renucci – *Treaty of the european law of the human rights,* Publishing Hamangiu 2009, pag. 267.

[2] European Court of Human Rights, Airey Decision cited in R. Chirita – *European Convention of Human Rights* – comments and explanations, Publishing C.H.Beck 2008, pag. 254.

trial must be respected. These fundamental rights are: the adversarial principle and the principle of right to defense, both of them assuring total equality between the parties.

The adversarial principle means that the parties can participate actively and equally at the presentation, argumentation and probation of their rights during the trial, as well as the possibility to express their opinion upon the intentions of the court in order to establish the truth and to deliver a legal and thoroughly decision.

The right to defense has in the Romanian law the value of a constitutional principle, taking into consideration that art.24 (1) of the Constitution establishes that the right to defense is guaranteed and art. 24 (2) provides that during the entire trial the parties have the right to be assisted by a lawyer chosen by them or an appointed lawyer. The right to defense includes both the rights and the procedural guarantees, which offer to the parties the opportunity to defend their interests and the right to take a lawyer.

Another element which forms the principle of the fair trial is the examination of the case done by an independent, impartial and established by law court.

The independence consists in two sides, that is the independence of the courts and the independence of the judge.

The independence of the courts means that the system of the courts is not dependent on the executive and legislative. The provisions of art. 126 (3) of the Romanian Constitution stipulates that the judges are independent and are subject only to the law.

The impartiality, as element of the fair trial, reprezents the confidence of the litigants into the judges and the institutions in which they work and the justce is accomplished.

Last but not least, a fair trial includes also another element, that of the publicity of the judge's decisions.

This aspect let the litigents to know the judge's decision, immediately after the panel's deliberation.

The Convention requires each trial to be examinated within a resonable time, but this requirement should be analysed according to each individual case, taking into consideration the duration of the proceedings, the nature of the claims, the complexity of the case, the behaviour of the parties, the difuculty of the debates, the court congestion and the usage of means of appeal.

The celerity of the trial is not expressly stipulated into the national lagislation, only in a small number of litigations, for example in the trials dealing with the restitution of proporties confiscated during the communist period established by Law no. 10/2001 or in trials regarding the adoption established by O.U.G. no 25/1997 ratified by Law no. 87/1998.

Also, the Civil Procedure Code includes a various number of provisions which ensure a resonable time for solving the cases, no matter their nature.

The main purpose in solving the case within a resonable time is to eliminate the uncertainty of the parties and re-establish the violated rights and the legality which should govern all the relationships in a state of law; this means the guarantee of a fair trial.

Therefore, the European Court of Human Rights represents the natural bount between the fundamental freedom of the individual and the demands of a democratic society. The Court of Strasbourg emphasising for several times „the essential place of a fair trial in a democratic society". At the same time, the European Court of Human Rights declared that: "

the aim of the Convention is not to protect the non-theoretically and illusive rights, but the actual and real ones."

Conclusions

In conclusion, in order to respect the fair nature of a trial, a number of constitutional provisions regarding the actual deployment of a trial and certain procedural guarantees that offer the necessary framework at an international level, have to be observed, correlated and respected.

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THE LEGAL PROTECTION OF THE MINORITIES UNDER THE EUROPEAN CONVENTION ON THE HUMAN RIGHTS

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Abstract

The rights of the minorities were a great concern of the authorities at the beginning of the twentieth century with good results after World War I, by the treaties concluded between the Allied and Associated Powers (USA, United Kingdom, France, Italy and Japan) and the defeated states or those that got their former territories reintegrated together with the minorities now living in these territories.

Key words: *Protection of the minorities, the Framework Convention for the Protection of the National Minorities, the European Convention on the Human Rights*

Introduction

The protection of the minorities is one of the main priorities of the Council of Europe. In addition to the special mechanisms created for the minorities, the protection of the national minorities is an important issue in the active work of the legislative bodies.

Although the issue of the minorities became a topic of constant concern in the international laws only after World War I, the problems regarding the existence and protection of the minority groups were obvious since the 16th century. The religious wars that followed, as a consequence of the Reformation generated concern within the international community of the time, on the differences between the various religious groups who lived in the same territory in the states that acknowledged only one official religion. From the Edict of Nantes (1598) to the Treaty of Berlin (1878) a long series of international treaties established an early international system of minority protection.

The treaty of Augsburg (1555) stated that the Protestants and Catholics "shall live together in peace and quiet", and the peace Treaty of Westphalia (1648) stated the principle of religious freedom and equality and accepted it as part of the" European public law. " In 1815, at the Congress of Vienna, the participating states confirmed this principle. However, even if the principle of religious freedom and equality was included in other treaties subsequently concluded, we can state that they remained only on papers. Particularly, in the Ottoman and Austro-Hungarian empires, the conflicts arising from the religious differences went on.

The international community became aware of the seriousness of the problems regarding the existence of the minorities only after the World War I. Following the collapse of three great European empires: the Austro-Hungarian, Ottoman and Tsarist, new states emerged on the political map of Europe: Poland, Romania, Czechoslovakia, Yugoslavia, Greece and Bulgaria. Ethnic, religious and linguistic groups were living on the territory of

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these states, which were different in terms of culture, religion and language than the main segment of the population.

The protection of the national minorities was on the agenda of the Council of Europe, ever since the beginning of its activities, but this issue received considerable importance with the increasing collapse of the communist regimes and with the increasing extreme nationalism in some parts of Europe. Ethnic violence and hostility in the former Yugoslavia and the former Soviet Union showed very clearly that the protection of the national minorities is not only a crucial element of the human rights but it is also essential for the stability, security and peace in Europe.

Currently, the protection of national minorities is one of the main priorities of the Council of Europe. This commitment resulted in a series of real achievements. The Council of Europe developed unique legal standards and effective monitoring mechanism and joined the target activities of cooperation. This stimulated real improvements in the protection of the minorities throughout Europe, and was a central factor in bringing stability to those Member States which have only recently exceeded the war period and ethnic hostility.

Besides the special mechanisms made for the national minorities, the protection of the national minorities is an important issue in the activity of some European authorities, such as the Parliamentary Assembly, the Congress of the Local and Regional Authorities of Europe, the Venice Commission and the European Committee of Social Rights under the European Social Charter. This guarantees the existence of appropriate tools for each emergency challenge in various fields of the minority protection. The European Convention on Human Rights is relevant to the protection of the minorities and its potential in this area has become much stronger with the recent entry into force of a Protocol extending the purpose of the non-discrimination guarantees. The European Court of Human Rights solved a number of cases involving the Roma minority members and of other national minorities.

Sometimes these cases involved alleged discriminations, but they also undermined the other Convention rights such as the freedom of human association and the right of privacy.

The European Commission against Racism and Intolerance (ECRI) also provides a significant contribution to the fight against discrimination, that the national minorities take advantage of. The Framework Convention for the Protection of the National Minorities (CCMN) is the most comprehensible multilateral treaty meant to the protection of the national minorities. Together with its 37 States parts, it is a real pan-European instrument, which establishes principles to be observed in the media, education and other relevant areas.

The CCMN monitoring mechanism, made in 1998, combines the expert assessments of the Advisory Committee of independent experts with the political weight of the Committee of Ministers. The members of the Advisory Committee examine the reports of the states and other information paying visits to different countries in order to achieve a constructive dialogue with the authorities and civil society. The result of this activity is reflected in the Opinions of the Advisory Committee and the Resolutions of the Committee of Ministers, which is supported by the implementation of innovative and inclusive activities subsequently undertaken in the Member States.

In many situations, the CCMN monitoring mechanism becomes an important factor for the improvement of the dialogue between the governmental agencies and the national minorities and also for the real improvements of the legislation and practice on various topics. It is thus stimulated the adoption of a new legislation on the protection of national minorities and encouraged the Member States to improve their legislation and practice related to discrimination.

The Framework Convention for the protection of national minorities and the opinions of the Advisory Committee were central factors of reference in the works of other

international structures, including the OSCE High Commissioner on National Minorities and the European Commission, which often refer to the Framework Convention when they examine the implementation of the criterion stipulated at the Copenhagen Meeting regarding the national minorities.

The European Social Charter guarantees the rights of the minorities in social and economic fields. In the context of the surveillance mechanism, the European Social Charter focuses on the social equality issues of the migrants and the Roma and Sinti populations, such as, for example, the discrimination in accessing to jobs, education, family state financial support and living conditions.

The next convention with a major relevance to the minorities is the Charter for Regional or Minority Languages which focuses, in more details, on the actions taken to ensure the protection and promotion of the languages of the minorities, in particular, that crucial element of cultural heritage. It has direct effect on the ability of the minorities to use their own language in the public life. The application of the Charter is monitored by an independent committee of experts who base their conclusions and proposals made by each Member State on a detailed procedure of collecting information through a system of generating reports, of prompt visits and dialogue with the local national and regional authorities, and with the NGOs.

Basing their reports on the results of the Committee, the Committee of Ministers subsequently addresses official advice to the state concerned.

The Charter entered into force in 1998, and it claimed a number of real achievements to the Member States

The implementation of the CCNM (The Chart of the Committee for the National Minorities) and the European Charter for the Regional or Minority Languages is encouraged through extensive awareness activities in several Member States of the Council of Europe. Romania is seen, at least through the statistics, as a politically primitive country with a population marked by religious and sexual intolerance as regards the ethnic minorities. A country where the elderly have no social role and the Gypsies are not sure of their future. For the first time since the beginning of the negotiations with the European Union, the state prepared, at least at the declarative level, a detailed project to fight against discrimination of all kinds and the first test will be the European integration of Romania. As an external image, most of the people declared as Romanians will depend heavily on the minority rights, according to the strict criteria of the Union.

After the revolution of 1989, the rights of national minorities in Romania were promoted in several areas of public policy: the institutionalization of various ways of participation in the executive and legislative activity, that by the help of various legal, institutional measures designed to ensure the protection, preservation and development of various dimensions of the identity peculiarities (political, cultural, linguistic, educational and administrative) of the minorities in Romania. As language is a major component (even central) to the ethnic identity, a considerable part of these policies focused on providing institutional reproduction and public use of the minority languages in Romania.

In comparison with the first half of the 90's the legal standards that make possible the reproduction of the institutional and regular use, in official contexts, of another language than the language of the majority population of a country, became more permissive, with more legal-institutional opportunities, of learning and using the languages of the minorities.

The international treaties, the regional and national standards strongly defend the principles of non-discrimination and equality in front of law. They state that racial or ethnic discrimination violates the human rights, the fundamental moral principles and prevent the positive social interaction and the well functioning of the public institutions. The international authorities and courts, both regional and national, clearly stated that the

provisions on discrimination apply not only to the civil and political rights but also to the economic, social and cultural rights.

Different European agreements, mutual declarations and directives prohibit racial or ethnical discrimination. In the recent years, the European governments and inter-governmental bodies attempted to clarify which of the policies and procedures are discriminatory or not and how they can be proved. The standards against discrimination incorporated into treaties on the economic and social rights are highly relevant to the understanding of how different governments ensure the access of the minority groups to the public services as compared to the population of the majority.

The Romanian Constitution stipulates the recognition and guarantee of "persons belonging to national minorities, to preserve, develop and express their ethnic, cultural, linguistic and religious identity."

An appropriate indicator of the linguistic identity is the degree to which various ethno-linguistic groups are identified with their native language, namely the extent and time dynamics of overlapping the ethnic and linguistic identity, which we considered as an indicator of language vitality. By the linguistic vitality of a group we understand the ability to preserve the distinctive characteristics of the language in a multilingual environment.

The understanding of the linguistic rights should start from the official language institution (the language of the state) which involves the imposing of a hierarchical functional differentiation between the languages codes used in one state. The language which becomes the official one is usually the language of:

- ✓ the oral communication used in government offices, in the discussing official business (meetings, hearings, etc.).
- ✓ the written communications between the various levels and branches of the government;
- ✓ issuing official documents, of a legal and administrative value;
- ✓ writing the original laws, or other regulations;
- ✓ different forms of administrative and legal value being printed(eg. Tax Statement);
- ✓ various documents under private signature (civil contracts, wills, etc.) possibly becoming evidence in the court cases, etc.

The concept and the practice of the language rights can be understood stating from multiple implications (political, cultural and aspects of equality, social equity and justice) of the asymmetry between the dominant linguistic groups and those with less influence.

Politically, we can mention the role of the language rights of the minority in reducing the ethno-political nature conflicts. This happens because one of the objectives of the politicized ethnic groups is the renegotiation of the political and social status by trying to promote the linguistic rights, asking for the extension of the use of language that this group is identified with.

In such a context the language policies of the states, the guaranteeing of language rights to the minorities can function as means of relaxing the ethnic, even conflict relations of tensions. The fact is that, in Romania, the act of promoting the minority language rights (in education and administration) had a significant positive contribution in the relations with the Hungarian minority, in particular.

Conclusions

The minorities often feel themselves as being disadvantaged in their countries as compared with the majority of the population, due to subjective or objective causes. They can also cherish feelings of devotion to the motherland where the related ethnic group lives. For all these reasons, we are entitled to believe that the minorities are less identified with the country whose citizens they are and more with Europe, a super-state where the borders are

less important and where they feel more powerful. We expect that the persons belonging to the main ethnic group to identify it less with Europe, against those of the ethnic minorities and thus we created a new variable in the aggregate sample, merging the ethnic majority, in each country, into a group opposition to the minority.

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AGENT SUBSTITUTION AND SUBCONTRACT

Dana Lucia Tulai[*]

Abstract

The attempt to disclose the juridical nature of agent substitution has led to the outlining of two opinions in the classic law doctrine: subcontract or assignment of contract. However, we find it worthy of discussing a third hypothesis, that of a multiple, „sui generis" identity, since we consider the unitary identification of various cases of substitution to be inaccurate.

Keywords: *agent, substitution, subcontract, assignment of contract.*

Introduction

Reading of certain juridical writings could lead to the conclusion that agent substitution is simply a typical case of subcontract, a "sub-agency" contract, to be more precise. It is true that this operation, which is always secondary to the initial agency agreement, shows some apparent subcontract features. Therefore, we consider a comparative study between agent substitution and subcontract to be called for, in order to check if the comprehensive hypothesis of agent substitution match the subcontract identification.

Agent Substitution and Subcontract – Doctrinal Similarities and Case Law Withholdings

Traditionally, legal doctrine binds contractor substitution to the theoretical concept of subcontract. The intermediary contractor entrusts a third party (the subcontractor) with performing a part of their obligations towards the primary contractor, which supports this identification of agent substitution as a subcontract. Therefore, most authors assimilate agent substitution with the sub-agency notion. For example, Mr. Philippe Petel, Professor at the Faculty of Law in Montpellier, identifies in well-defined terms agent substitution with subcontract, pointing out that it could be compared to private sub-enterprise: "agent substitution is for the agency contract the same thing that private sub-enterprise represents for the private enterprise contract"[181].

Modern doctrine is following in the steps of an earlier view[2], which was dominant in the late 19th century – early 20th century legal writings, even though there were also authors[3] of that time who suggested a differentiated identification of this operation, which could be analyzed, as appropriate, either as a subcontract, or as an assignment of contract.

Case law has been more reluctant than doctrine in addressing this matter, avoiding to firmly solving this issue. As a result of studying the French case law[4], which is more consistent than the Romanian one on this matter, we ascertain that judges have usually avoided the use of „sub-agency" or „subagent" expressions, preferring to adopt a neutral

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[1] P.Petel, *Le contrat de mandat,* Dalloz, Paris, 1994, p. 70.

[2] G. Baudry-Lacantinerie, A.Wahl, *Traite theorique et pratique de droit civil, TomeXXIV, Des contrats aleatoires, du mandat, du cautionnement, de la transaction*, Sirey, Paris, 1907, p. 578: "The agent who entrusts a third party with performing their mission becomes a subprincipal towards the substitute."

[3] F.Laurent, *Principes de droit civil francais, Tome XXVII*, Bruxelles-Paris, 1887, p. 487.

[4] Cass.com. 8 nov. 1983, B.T. 1984, n.556; Cass. com. 8 iul.186, Bull.IV, n.153;Cass. com. 10 oct.1989,B.T. 1990, n.220; Cass. com. 19 mar. 1991, Bull.IV, n. 102.

terminology, which derives from the word „substitution”, that is used by the Civil Code, as well. Such an example could be a ruling of the Court of Cassation of France, dated the 20th of June 1995.[5] The debate concerned the difference between commission agency contract and agency contract and in appeal, they claimed that the Court of Appeal had unjustly considered as unimportant the identification that had been given to the contract that bind the principal and the principal commissionaire, as well as that which had been given to the so-called „subcontract” between the principal commissionaire and the substitute. The Court of Cassation responded to this argument by using the phrase „substitute agent”, in other words, avoiding using the term „subcontract” when referring to substitution. Therefore, we can assess that case law opted for a more relaxed attitude on this matter of specifying the juridical identity of agent substitution, insisting rather on analyzing article 1994, paragraph 2, of the French Civil Code, whose vague character imposes the necessary enunciation of the rules that govern the legal regime of this operation.

Similarities between Agent Substitution and Subcontract

By analyzing the theory that dominates juridical writings, which assimilates agent substitution to subcontracting, we have succeeded in identifying several elements that match both concepts.

First of all, the chronology of the contracts matches that of the unit formed by the primary contract and the subcontract, being given the fact that agent substitution is always made after the primal agency agreement has been concluded. The substitute agent is given the task to fully or partially perform the obligations of the primary agent towards the principal. If the primary agent entrusts the substitute agent with a mission other than the one they themselves had been given by the principal, then we are not dealing with agent substitution, but with a second agency contract, which is independent from the first one and which involves other contracting parties.

Secondary, the initial agency agreement provides the agent substitution with its object, the substitute agent being entrusted to fulfill, at least partially, the same mission that their counterparty was charged with by the principal. It is possible that the substitute agent should only be given a substantial task, whereas their counterparty's mission has an indispensable intellectual character. However, such a difference does not carry great significance, as long as the subcontract derives its object from the main contract, as it always happens in the case of agent substitution. In all cases, the object of the subcontract is the completion of a task which is also part of the object of the main contract, should it be making a thing available or performing a service.

Thirdly, the initial agency agreement determines in principle the duration and the extent of agent substitution. Should it be that the agency contract becomes obsolete or void, that would determine the correlative eradication of the substitution, which does not have an existence of its own. The primary agent cannot entrust the substitute agent with more duties or rights than they themselves had received; otherwise, the primary agent assumes the responsibility themselves for this breach of warrant of authority and is held responsible for their own fault.

Another characteristic of subcontract is the existence of a legal relation between the extreme parties Doctrine and case law agree on the existence of a subcontract in the presence of a direct action in law between the extreme parties (the main contracting party and the subcontractor). Agent substitution does not contradict this rule, with article 2023, paragraph 6 of the Romanian Civil Code expressly providing the possibility for the principal to claim

[5] *Revue de jurisprudence de droit des affaires*, 1996, n. 56.

directly against the substitute agent, this action in law being given bilateral character by case law.[6]

Differences between Agent Substitution and Subcontract

Comparative analysis of agent substitution and subcontract reveals, along with some elements of similarity between the two concepts, also several very important criteria of discrimination.

First of all, there is the matter of the necessity of a permission given by the primary contracting party for the conclusion of a subcontract. The thing that should be determined is whether the primary contract is an „intuitu personae" contract or not, since in the first case an explicit permission is necessary, whereas in the second case, the lack of an explicit ban would be sufficient. Being given the fact that the agency contract is an „intuitu personae" contract, that would imply that agent substitution, in order to be identified as a subcontract, should only be validly concluded with the explicit permission of the principal. But what is it that really happens in the hypothesis of agent substitution? Article 2023 paragraph 2 of the Romanian Civil Code stipulates that the agent can be substituted by a third party „even in the absence of an explicit permission, (…), if: a) unforeseen circumstances prevent them from fulfilling their mandate; b) it is impossible for them to notify the principal in advance about these circumstances; c) one can presume that the principal would have approved of the substitution had he known the circumstances that justified it." More so, case law and almost the entire doctrine have opted for an even more radical solution, in advance of the legislative clarification of this matter, by appreciating that agent substitution is licit as a principle, except for the particular cases in which it is forbidden. In this spirit, the Court of Cassation of France even admitted the validity of the office bearer and that of a white office.[7]

We consider that another element which contradicts the idea of identifying agent substitution as a subcontract is the responsibility of the primary agent towards the principal, with specific features that vary depending on the circumstances in which the substitution occurs, not always matching the liability of the intermediary contracting party for the subcontractor's conduct.

The intermediary contractor is, as a principle, responsible towards the main contracting party for the subcontractor's behavior. What happens in the case of agent substitution?

The primary agent's liability which has been established by the Romanian Civil Code is complex. The latitude of the primary agent to entrust a third party with a part of their mission, even without an explicit permission given by the principal, does not exempt them from liability, quite the contrary. Article 2023 of the Romanian Civil Code clarifies this issue: "(4) If substitution were not authorized by the principal, the agent is responsible for the acts of the substitute as if they had performed those acts themselves. (5) If substitution were authorized, the agent is only responsible for the duty of care in choosing the substitute, as well as in instructing them on performing their mission."

We consider that agent substitution could be identified as a subcontract at the most in the case in which the substitution was neither authorized, nor forbidden by the principal, in which case the agent is responsible for the acts of the substitute as if they had performed those acts themselves, which matches the legal regime of the liability of the intermediary contractor for the acts of the subcontractor. In other cases, in which substitution was authorized by the principal, the primary agent is not responsible for their substitute's

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[6] R. Demogue asserted that there was an obvious connection between the sub-agency identity and the direct action in law that concerned the principal and the substitute agent. (*Traite des obligations en general,* Tome VII, Paris, 1933, p. 996).

[7] Cass.civ.28fev.1989 *Bulletin des arrets de la Cour de Cassation*, n. 98.

administration; they will only be responsible for their own fault in selecting the substitute, as well as in performing their own duty of monitoring and assisting the substitute. The primary agent's liability is in this case based on their personal fault and it is identified as responsibility for their own acts, not as vicarious liability.

In which concerns the subcontract, it is governed by the principle of vicarious liability, the intermediary contracting party being held liable for the subcontractor's acts. Therefore, it is obvious that agent substitution involves a regime of the agent's liability which is different from the responsibility of the intermediary contractor in subcontracts.

Conclusions

Agent substitution, which has been often presented in doctrine as a typical example of subcontract, does not satisfy the features of this legal institution, except for some of its singularities, concerning the chronology of contract conclusion, their object, duration and extent or the existence of a direct action in law between the extreme parties.

An essential criterion of differentiation between the two legal concepts is the absence, in some cases of substitution, of the agent's liability for the acts of the substitute; they are only held responsible for their own fault and do not have a contractual vicarious liability, as the intermediary contactor does in the case of subcontracts.

In conclusion, we think that agent substitution does not meet the legal regime of subcontracts in all of its aspects. We consider it to be a "sui generis" legal institution, with singularities of its own, which vary with the specific circumstances in which agent substitution takes place.

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AGENT SUBSTITUTION AND ASSIGNMENT OF CONTRACT

Dana Lucia Tulai*

Abstract

The juridical identity of agent substitution is a matter that has not yet been fully clarified by legal doctrine. However, two classic opinions have been formed concerning the identification of this legal operation: one considers agent substitution to be a typical example of subcontract and the other one assigns to it the characteristics of an assignment of contract.

Keywords: *agent, substitution, subcontract, assignment of contract.*

Introduction

As we have shown in another study',[191] we consider that identifying agent substitution as a subcontract is only justified in those cases in which substitution is neither explicitly authorized, nor forbidden by the principal. Therefore, we intend to clarify whether in other cases, which do not match the subcontract description, agent substitution could be identified as an assignment of contract. To support this approach, we have the new regulations in the Romanian Civil Code, precisely articles 1315-1320, which, for the first time in our legislation, establish a legal regime for the assignment of contract, as well as article 2023 of the same code, that regulates agent substitution.

Juridical Identity and Legal Regime of the Assignment of Contract

Doctrinal controversy subsists in which concerns the juridical identity of the assignment of contract. Hereby, some authors admit without hesitation the existence of an authentic assignment of contract, having translate effects, but there are others[2] who consider this operation to simply mean the conclusion of a new contract between the "assigned contractor" and a third party.

There is no doubt that a contract represents more than the set of claims and liabilities that form its object. First of all, it is an expression of the common will of the parties who conclude it. Therefore, the idea of expressing the will to assign the concluded contract seems to make common sense, this implying the transfer of the contractual position of one party to a third party. Thus, the third party will take the contractual place of the party who desires to leave the contractual relation. Therefore, for numerous authors, the recognition of the assignment of contract is undoubted; they consider the contract as being transferable on its own, as a wills agreement of the contracting parties, with the assignee taking the place of the assignor and becoming the assigned contractor's new counterparty. It is one and the same contract that survives, with just one party (the assignor) leaving it for the benefit of a third party (the assignee), who undertakes to perform their obligations and who is entitled to exercise the rights of the assignor. Thus the importance of this juridical operation, which is often used as an alternative to contract termination.

Still, the identity of the assignment of contract remains an issue that does not find an unified solution. Most authors agree that it represents a solution for further contract, in spite of replacing one contracting party with a third party. As for the purpose for which the

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[1] Dana Lucia Tulai, *Agent Substitution and Subcontract*, Agora IJJS 1/2011, Oradea.

[2] J.Ghestin, *Traite de droit civil.Les effets du contrat*, LGDJ,1994, n.687

operation is performed, we can find different points of view. Some consider that the assignment has as a goal the achievement of the object of the assigned contract, other authors[3] express the opinion that the aim is to accomplish the assignor's discharge of duties and their replacement by the assignee; there are also some authors who consider that this operation is made in order to reconcile the interests of the assignor with those of the assigned contractor.[4]

Various definitions proposed by doctrine for the assignment of contract show some common elements: it achieves a transfer of debts and liabilities from the assignor to the assignee, it allows to form a direct contractual bond between the assignor and the assignee.[5] and it is only possible in the case of successive execution contracts.

The common law regime of the conventional assignment of contract results from the Civil Code regulations, articles 1315-1320. The bond between the assignor and the assignee derives from the conclusion of the assignment contract, by which the contractual position of the assignor is being transferred to the assignee. The latter will perform the assigned contract in the place of the assignor and the assignor will guarantee for the validity of the contract; in the hypothesis in which the assignor guarantees for the performing of the contract, they would be liable as a guarantor for the assigned contractor's obligations. The bond between the assigned contractor and the assignee derives from the assignment of contract itself: the assignee becomes a party to the assigned contract that will produce its effects, from now on, between the assignee and the assigned contractor. The assignee becomes party to the assigned contract by replacing the assignor and therefore they are being vested in with the rights and the duties of the assignor; thus, they become debtor and creditor within the relations deriving from the assigned contract, but this effect only regards future contractual bonds. Relations between the assignor and the assigned contractor imply that the latter can continue to enforce the contract against the assignor for as long as they are not discharged from their duties, whereas the assignor can no longer claim against the assigned contractor once the assignment is done, because they had given up this right in favor of the assignee.

Doctrine addresses the problem of the assigned contractor's role in the assignment in a fairly wide manner, most authors agreeing that their intervention is essential for the assignment to produce its full effects and most of all the consequence of the assignor's discharge of duty. In the matter of validly concluding the assignment contract, the law establishes as a principle the need for the assigned contractor's approval, but it also recognizes some exceptions (article 1315 of the Romanian Civil Code). As for the issue of the assignor's discharge of liability, the legislator provides that it can be denied by the assigned contractor: "In the case in which they declare that they will not release the assignor, the assigned contractor is entitled to enforce the contract against them, should it be that the assignee does not perform their contractual duties. In this case, the assigned contractor must notify the assignor about the assignee's not performing their obligations within a period of 15 days of non-execution."[6]

Similarities and Differences between Agent Substitution and Assignment of Contract

The problem of determining the legal nature of agent substitution has not yet found an unequivocal explanation within the legal systems of various countries. European legislators

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[3] P. Malaurie, L.Aynes, *Droit civil.Les oligations*, Tome VI, Ed. Cujas, 1999, n.694; J. Neret, *Le sous-contrat*,LGDJ, 1979, n. 57.

[4] C. Larroumet, *Les operations juridiques a trois personnes*, Bordeaux, 1969, n.105; P. Malaurie, *La cession de contrat*, Repertoire du notariat Defrenois 1976.

[5] P. Malaurie, *La cession de contrat*, Paris, 1976, p. 200.

[6] *Romanian Civil Code*, article.1318, paragraph. 2.

are mostly reluctant to give an exact identification to this operation. As for doctrine, it is also divided in addressing this issue. This approach is more complex, as the legal regime of agent substitution varies depending on the hypothesis taken into account.

A priori, an analogy between agent substitution and assignment of contract is not contradictory. The substitution, that is to say the replacement of a person by another, seems to determine the transfer towards the substitute agent of the mission that the principal initially entrusted the primary agent with. Thus, a transfer of rights and obligations occurs, just as it does in the case of the assignment of contract. Just like in the assignment, a contract (of substitution) is concluded between the primary agent and the substitute agent, with the latter being bound to perform the provisions of the original (agency) contract in their counterparty's place. Similarly, the substitute agent becomes the future debtor and creditor of the principal, in which concerns the liabilities derived from the original agency contract; the principal has got the right to file a direct action in law against the substitute agent, in case of a conflict. Therefore, agent substitution could match the assignment of contract, at least in some aspects of its legal status.

However, detailed analysis of the legal regime of the two notions leads to disclosure of important differences that could exclude identifying agent substitution as assignment of contract in several cases. Hereby, we can distinguish at least two problems: the nature of the legal action that the principal can file against the substitute agent, as well as the absence of the primary agent's discharge of duties in the case of substitution.[7]

The action in law that the principal can file against the substitute agent is, as identified by article 2023, paragraph 6 of the Romanian Civil Code, a direct action in law. Therefore, is it possible to identify certain cases of agent substitution as assignment of contract, knowing that a direct action in law is admitted by the legislator in all cases of agent substitution? The concepts of direct action in law and assignment of contract are mutually excluded. Assignment of contract implies the existence of a contractual bond between the assigned contractor and the assignee, even though the assignor has not yet been released from their liability towards the assigned contractor; meanwhile, direct action in law is characterized precisely by the fact that it is designed to benefit a third party, which does not have a contractual bond with the party against whom they claim. Numerous authors[8] reveal this contradiction between direct action in law and assignment of contract in the particular case of agent substitution.

On the other hand, we must address the issue of the primary agent's disappearing from the substitution operation. One of the essential purposes of assignment of contract is obviously that of allowing the assignor to be released from their contractual duties. In the case of agent substitution, the legislator imposes upon the primary agent to be held liable towards the principal: “If substitution were not authorized by the principal, the agent is responsible for the acts of the substitute as if they had performed those acts themselves. If substitution were authorized, the agent is only responsible for the duty of care in choosing the substitute, as well as in instructing them on performing their mission.” (article 2023, paragraphs 4-5 of the Romanian Civil Code). However, in all cases of agent substitution, the primary agent is held, in one way or another, liable towards the principal: he is either liable for vicarious (for the acts of the substitute agent), or he is responsible for his own fault that he committed in substitution (in choosing the substitute agent, in supervising them, in assisting them, in being responsible towards the principal or in informing them). Therefore, since the primary agent is held liable towards the principal, one cannot consider their release from the contract , in the manner in which this happens in the assignment of contract.

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[7] B. Mallet-Bricout, *La substitution de mandataire*, Ed. Pantheon-Assas, Paris, 2000, p. 411.

[8] C. Larroumet, *Les operations juridiques a trois personnes*, Bordeaux, 1968, p. 198; F. Ouedraogo, *La responsabilite civile du mandataire*, Nancy, 1991, p. 219.

Conclusions

Following the analysis that we have performed, we consider that agent substitution cannot be identified as an assignment of contract, except maybe for the case in which personal responsibility for their own acts is imposed upon the primary agent by the law: it is the hypothesis of the substitution authorized by the principal, in which case, the primary agent is guilty for improperly performing their “duty of care in choosing the substitute and instructing them on performing the agency contract.”[9] In the case in which the principal had not authorized the substitution and the primary agent would be held liable towards the principal, along with the substitute agent, for performing the contract[10], one cannot speak of the primary agent's disappearing from the operation. However, the existing similarities between agent substitution and assignment of contract that have been highlighted by doctrine are justified by the resemblance of the two legal institutions. We consider that the legal identity of these complex notions will be fully clarified by doctrine in consideration of the new regulations found in the Romanian Civil Code.

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[9] *Romanian Civil Code*, article 2023, paragraph 5.

[10] *Romanian Civil Code*, article 2023, paragraph 4.

FOUNDERS, JUDGES AND MODESTY

Venudhar Routiya[*]

Abstract

The most momentous, controversial, even frightening power of the federal judiciary--the one in greatest tension with democracy and federalism--is the power to invalidate federal and state statutes that in the opinion of the judges are inconsistent with the federal Constitution. This power, which lawyers call "judicial review," has often been regarded as the invention of a handful of free-wheeling late eighteenth- and early nineteenth-century American lawyers, notably Chief Justice John Marshall, whose opinion in Marbury v. Madison in 1803 is often thought to have created ex nihilo the "American doctrine of judicial review." The distinguished constitutional scholar Alexander Bickel called the power of judicial review "Marshall's achievement."

For the Constitution does not say that federal courts can invalidate a statute. Article VI, the "supremacy clause," describes the Constitution, along with federal statutes and treaties made under federal authority, as "the supreme Law of the Land," and states that "the Judges in every State shall be bound thereby." But it says nothing about federal judges being empowered to invalidate statutes, whether federal or state. ("Judges in every State" could not include Supreme Court justices, since the Constitution authorized and envisaged the creation of a district--it became the District of Columbia--that would not be part of any state.) In describing federal statutes and treaties as part of the "law of the land," Article VI could be understood simply to be commanding state judges to acknowledge the supremacy of federal law. Article III confers the "judicial Power of the United States" on the Supreme Court and such lower courts as Congress decides to create, and the power expressly includes the power to decide cases arising under the Constitution, as well as under other federal laws and under treaties--but at most this only implies a power to adjudicate constitutional challenges to federal statutes. "Any explicit grant of this power," in Robert Jackson's words, "was omitted... [the power] was left to lurk in an inference."

Key words: "*Law and Judicial Duty, Founders, Judges and Modesty, Constitutional Thought in USA*".

Introduction

The main purpose of Philip Hamburger's book is to counter this account of the rise of judicial review by tracing the history of the practice all the way back to the Middle Ages and ending with the Constitution of 1787. Hamburger is an accomplished and assiduous legal historian, and his book is a work of imposing scholarship. But he is not just an antiquarian. The idea that he has set out to overthrow--that judicial review was invented in order to enhance the power of the Supreme Court--has implications that disturb him. "If judges established their power of review on their own authority," Hamburger remarks, "they would appear to have control over the character and exercise of the power, and this would seem to leave them with an extraordinary discretion over the liberty of their fellow Americans." Hamburger believes deeply in judicial modesty. He argues that what has come to be called

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judicial review was intended to exemplify rather than to reject judicial modesty, which is why the framers of the Constitution took the power for granted, and so felt no need to talk it up in the constitutional text.

Hamburger's argument pivots on a few key terms. One is the "law of the land. " This phrase in Article VI is of medieval English origin. Originally it referred to the actual, existing law of England, as distinct from either natural law--the law of God, knowable by the exercise of human reason--or "academic" law, constructed by scholars out of the best laws of different countries and the best ideas about what law should be. The early English judges thought it presumptuous for judges either to interpret natural law or to create law. The modest judge interpreted and enforced existing English law, period. The judges were not disrespectful of natural law--they agreed that they were answerable to God, and they took their oath of office with utmost seriousness; but they conceived their divinely imposed duty to be to enforce human law. This conception of the judicial function was transmitted to England's North American colonies, thence to their successors the states, and finally, when the Constitution was written, to the federal government, though of course the relevant "law of the land" in Article VI was American rather than English law.

The next key term is the "office of the judge." Judges derived their concept of judicial duty from the judge's "office," or, as we would be inclined to say, the judge's role, jurisdiction, or "job description." The judge's duty that derived from his "office" was to apply the law of the land to the decision of cases. Deciding cases became distinguished from other tasks that a judge might undertake, such as rendering advice to a legislature, but that would be outside the judge's office. When the judge was deciding actual cases presented to him, he was speaking with the authority of his office, and in that capacity he could nullify even a king's command. Moreover, the duty fell on every judge, however lowly, for the duty "came with" the judicial office. In short, as Hamburger writes, "the evidence reveals the importance of the common law ideals of law and judicial duty. It shows that these two ideals, taken together, required judges to hold unconstitutional acts unlawful."

We also need to understand Parliament as a "court," and the concept of a "customary constitution" as distinct from a written one. Although an English judge could countermand a royal command and invalidate local legislation in the performance of his duty to decide cases on the basis of the law of the land, he could not (despite occasional suggestions otherwise) invalidate acts of Parliament. Parliament, which dated from a time before courts and legislatures were clearly separated, was deemed a court--indeed, the highest court in the land. (Indeed, until recently, a committee of judges in the House of Lords was England's highest court.) Moreover, England's constitution, conceptualized as "the law by which a people simultaneously authorized their government and limited it," was not a single document, like the U.S. Constitution, but a conglomeration of customs, common law and equitable doctrines, and acts of Parliament. When Parliament enacted a statute, this was tantamount to amending the constitution; and a judge could no more countermand an act of Parliament than he could amend the constitution.

It was the fact that English courts could not invalidate acts of Parliament that has given rise to the idea that the "American doctrine of judicial review" represented a break with England. Not so, Hamburger argues. The legislatures of Britain's North American colonies were not supreme courts, like Parliament; they were subordinate bodies--subordinate, in fact, to Parliament. Their enactments thus corresponded to local legislation in England, and so could likewise be challenged as inconsistent with the British constitution--and they were. The Crown actually encouraged the creation of powerful judicial courts in the colonies as a check against the colonial legislators, who were more populist and less loyal to the Crown than the judges.

When the United States was formed, the colonial legislatures became state legislatures and the colonial courts became state courts. The British constitution was not an appropriate model for a state constitution, so most states wrote their own constitutions. Since the judges were already accustomed to using constitutional law as a trump when statutory law was inconsistent with it, they made a smooth transition to treating the written constitution of their state as the supreme law, trumping inconsistent statutes. This made it natural for John Marshall to treat the Constitution as trumping any federal or state statute that was inconsistent with it. So natural was this assumption of authority, on the basis of British, colonial, and state precedents, that there was no felt need to spell it out in the Constitution.

It does seem odd, though that so little of this history is mentioned in Marshall's very long opinion in *Marbury*. He takes great pains to justify judicial review, and so one might have expected him to refer to the helpful colonial and state history. But the exercise of judicial review of national statutes by a national court was such a large step beyond its exercise by a colonial or state court that maybe the colonial and state experience would not have been terribly persuasive. So maybe the Supreme Court's exercise of judicial review was a Marshallian innovation after all. Hamburger disagrees. He argues that, properly understood, judicial review of statutes, whether federal or state, for conformity to the Constitution is not innovative, awesome, usurpative, or political at all. In fact, it exemplifies judicial modesty, because it requires that judges conform their decisions to the "law of the land," which simply happens to include the Constitution as well as the subordinate law created by statutes. Marshall argued in *Marbury* that it would be lawless for judges to disregard the limits that the Constitution placed on legislative and executive power.

Judges had always known, as Hamburger acknowledges, that the scope of a statute, a constitutional provision, or a common law doctrine was often uncertain, and this fact might seem to invite or even to necessitate the exercise of judicial discretion in some cases. But he disagrees, arguing that the judges believed that the mental faculty requisite in a judge was not creativity but discernment. The object to be discerned was the "intent" of the law. "One way or another, intent had to be discerned, for it was the source and measure of the obligation of law." If it could not be discerned, the law imposed no obligation at all. So legislatures and constitutional conventions had better write clearly, because otherwise the judges might treat their enactments as nullities.

Hamburger does not explain what this interpretive methodology, applied to constitutional issues that have arisen since the Constitution was adopted, would yield in the way of a body of constitutional law. Yet he intimates that it would be a smaller body than what we have. Judicial review, as he understands it, was not a judicial innovation the contours of which the inventing judges and their successors had to draw. The power had existed since medieval times. But it was a power grounded in a deferential conception of judicial duty. Judges could not make law; they could only find (that is, discern) it. Precedents did not create law, they clarified or particularized it; and only because "the exposition of law belonged to the office of judgment rather than of will [did] the opinions of the judges in the exercise of their judgment ha[ve] the authority of their office." Fortunately, a constitution of principles would be clearer than one of rules or precedents, because principles "are fixed and immutable." A judge would therefore be able to decide a constitutional case by laying the constitutional text alongside a statutory text alleged to be inconsistent with the former; if comparison revealed that the two texts were inconsistent, the statute, being less authoritative, would be extinguished.

Hamburger argues that this ideal of judicial self-restraint was attainable because the duty to enforce the law of the land, including the constitution, being inherent in the office of the judge, rested on every judge and applied in every case. "The generality of the duty was what gave strength and balance to their constitutional decisions, for it authorized and bound

the judges with the same ideals that elevated and confined them in their more mundane decisions. Their duty thus anchored an otherwise extraordinary power within the quotidian exercise of their office, and the result was a judicial power both more authoritative and less dangerous than that which prevails today."

In January this year in Tucson Arizona, an obviously disturbed young man shot a number of people, killing among others a Federal Court Judge and a nine-year old girl. A Member of Congress was seriously wounded. There was some speculation in the media that this incident might reawaken public debate in the U.S. about the ready access to firearms allowed in that country. That speculation has proved to be groundless; there has been no public debate about that issue. No US politician seems to want to take the issue on. And to be fair to those politicians, any debate would be a waste of their own and the public's time.

In 2008, in *District of Columbia v Heller*[1] the Supreme Court of the United States had to decide whether a federal law passed in 1975 forbidding possession of handguns, loaded rifles and loaded shotguns within the District of Columbia, was in violation of the Second Amendment to the US Constitution. The court ruled by a majority of 5-4 that it was. The opinion for the majority was written by Scalia J.

In 2010 in *McDonald v Chicago*,[2] the Supreme Court, in an opinion written for the majority by Alito J, extended *Heller* to strike down most gun-control laws in the States as well.

The state of affairs brought about by these very recent decisions is remarkable: it is not vouchsafed to the collective wisdom of American citizens of the present generation, alone of all the peoples of the earth, to determine whether there should be legal limits upon the general availability of firearms in their country. I thought it might be opportune this evening to reflect upon the circumstances whereby this generation of the American people came to be so diminished, and upon what these circumstances might say to those of us who admire, and may even be disposed to emulate aspects of, American constitutional arrangements and jurisprudence.

As to the circumstances which led to this state of affairs, the decisions in question seem to be a triumph for the originalist approach to constitutional interpretation. Justice Scalia is the Court's leading originalist. Originalism is, of course, the theory of constitutional interpretation which looks to interpret the text of the Constitution by reference to evidence of what the Framers really meant.

There are some general difficulties with originalism as an approach to constitutional interpretation. It may seem a little optimistic to look to extraneous expressions of the attitudes of men, who lived at the very beginning of the Industrial Revolution, to derive a definitive understanding of how national life should be organized two hundred years after their death. There is reason to think that they did not have such a grand ambition but were much more modest in their expectations.

In *M'Culloch v State of Maryland*[3], Chief Justice Marshall described the Constitution as "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Some might think that the not infrequent massacre of ordinary citizens and the nobler politicians by troubled souls would qualify as a "crisis of human affairs".[4]

At the other end of the political spectrum at the time of the founding, Chief Justice Marshall's distant cousin, and sworn political enemy, Thomas Jefferson, when he was the US Ambassador to France, wrote to his friend James Madison less than two months after the fall

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[1] 128 S. Ct. 2783 ('*Heller*').
[2] 130 S. Ct. 3020.
[3] 17 US (4 Wheat) 316 (1819).
[4] Ibid at 415.

of the Bastille: "No society can make a perpetual Constitution or even a perpetual law. The earth belongs always to a living generation."[5]

Further, it seems unduly optimistic to assume a level of unanimity among the Founders about matters on which some did not express a view outside the Constitutional text on a given subject. Indeed they may even have had views contrary to those expressed in the text which they deliberately suppressed for the sake of reaching a workable consensus.

Benjamin Franklin said as much in his remarks to the Federal Convention before the adoption of the Constitution in 1787. Franklin said: "For having lived long, I have experienced many instances of being obliged by better Information, or fuller Consideration, to change Opinions even on important Subjects, which I once thought right, but found to be otherwise."

Franklin said that he hoped: "that every member of the Convention who may still have Objections to it, would with me, on this occasion doubt a little of his own Infallibility, and to make manifest our Unanimity, put his name to this Instrument… Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best."[6]

Finally on this point, the principal draftsman of the US Constitution, the redoubtable Governor Morris, rejected the idea of trying to resolve uncertainties by looking at the contemporaneous views of the Founding Fathers outside the constitutional text. In 1803 he wrote the following in a letter replying to a query about the intent of the Framers of the US Constitution on a particular point:

"It is not possible for me to recollect with precision all that passed in the Convention while we were framing the Constitution; and, if I could, it is most probable that meaning may have been conceived from incidental expressions different from that which they were intended to convey, and very different from the fixed opinions of the speaker."[7]

Anyone who has experience of the process of producing a document in committee will appreciate the force of what Morris wrote.

The originalist approach has previously led to results which seem, to us at least, distinctly odd. Thus in 1998 in *Grupo Mexicano de Desarrollo SA v Alliance Bond Fund, Inc* [8] Scalia J, delivering the opinion of the Court, over the dissent on this point of Stevens, Souter, Ginsburg and Bryer JJ, held that US Federal Courts have no power to grant *Mareva* injunctions or *Anton Pillar* orders because the content of the equitable jurisdiction of the Federal Courts was fixed in 1789 when US law ceased to be tied to that of England at which time the Court of Chancery had not yet exercised any such power.

To conclude that wholesome developments of equitable jurisdiction, such as the *Mareva* injunction, were thereby forever denied to US Federal Courts seems a little extreme. On this approach, the Chancellor's foot was not merely measured; it was amputated and then kept in formaldehyde.

These general difficulties aside, an examination of the two recent Supreme Court cases on the Second Amendment provides particular reason to doubt whether an originalist approach to Constitutional interpretation can, in truth, sustain the interpretation placed upon the Constitutional text by the majority.

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[5] Thomas Jefferson, *Letter to James Madison from Paris*, September 6, 1789.

[6] Lepore, "*The Commandments: The Constitution and its Worshippers". The New Yorker*, January 17, 2011, 70 at 75.

[7] James J Kirschke, "*Gouverneur Morris: Author, Statesman, and Man of the World*", (2005), at 256 – 257.

[8] 527 US 308 (1998) at 332-333.

The Constitutional Text

Let us look at the Constitutional text. The Second Amendment says:

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The minority of the Supreme Court judges in *Heller*, Justices Stevens, Souter, Bryer and Ginsburg were of the opinion that the right conferred by the Second Amendment was conferred, not upon individuals, but upon the People, to ensure the maintenance of a well-regulated militia.

One might respectfully observe that their Honours' opinion seems to reflect the plain meaning of the text. The right conferred by the Second Amendment is expressly said to exist for the purpose of facilitating the existence of a militia. That militia is itself to be "well-regulated"; not, be it noted, "well-armed" or "well equipped", but "well-regulated". I take it as obvious that regulation of the militia would extend to regulating the use of firearms by the members of the militia as such: their officers could, for example, expect to be obeyed if they ordered them to lay down their arms. It seems odd that on the authority of these recent decisions, the use of firearms by members of the militia may be regulated, but not the use of firearms by individuals outside the militia.

More importantly, the right to keep and bear arms is expressed to inhere in the People. It is "the People" who brought forth and announced the establishment of their new system of government in the Constitution. The US Constitution expressly proceeds on the postulate, stated in Article 1, Section 2, and the First, Second, Fourth, Ninth and Tenth Amendments, that "the People" exists as a community organized and functioning as such in their town halls, churches and village greens, in the several states, anterior to the arrangements put in place by that People for the government of the United States.

To put the point directly, the Constitutional text does not suggest that a law which prohibits the possession of firearms, otherwise than in accordance with a state law regulating its militia, abridges the People's right to keep and bear arms.

To support the conclusion that the language of the Second Amendment is, as a matter of its original intent, apt to guarantee the keeping of weapons by individuals as an end in itself, Scalia J, who wrote the majority opinion in *Heller*, referred to the writings of Blackstone. It is not surprising that those who accept the originalist premise should look to Blackstone to discover the original intent. In 1999, in *Alden v Maine*,[9] the US Supreme Court described Blackstone's work as "the pre-eminent authority on English law for the founding generation".

Scalia J, writing for the majority in *Heller*, said of Blackstone:

"By the time of the founding, the right to have arms had become fundamental for English subjects. See Malcolm 122-134. Blackstone, whose works, we have said, 'constituted the pre-eminent authority on English law for the founding generation,' cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. See 1 Blackstone 136, 139-140 (1765). His description of it cannot possibly be thought to tie it to militia or military service. It was, he said, 'the natural right of resistance and self-preservation,' *id*., at 139, and 'the right of having and using arms for self-preservation and defence,' *id*., at 140; see also 3 *id*., at 2-4 (1768). Other contemporary authorities concurred. See G. Sharp, Tracts, Concerning the Ancient and Only True Legal Means of National Defence, by a Free Militia 17-18, 27 (3d ed. 1782); 2 J. de Lolme, The Rise and Progress of the English Constitution 886-887 (1784) (A. Stephens ed. 1838); W. Blizard, Desultory Reflections on Police 59-60 (1785). Thus, the right secured in 1689 as a result of the Stuarts'

[9] 527 US 706 at 715.

abuses was by the time of the founding understood to be an individual right protecting against both public and private violence."[10]

Blackstone

The irony of invoking the support of Blackstone for this "natural right" can be seen first by noting that in 4 *Commentaries* 55, Blackstone recognized that this supposedly fundamental natural right was not so fundamental or natural that it could not sensibly and lawfully be abridged in the case of English Catholics convicted of the heinous crime of not attending service in the Church of England. Thus Blackstone saw the right to bear arms as limited to his people, principally, the loyal Protestant yeomanry.

We can be confident that the framers of the US Constitution, slave-owners and non slave-owners alike, had the same view. They certainly did not intend that the right to keep and bear arms be guaranteed to each of the millions of black people who were enslaved in the US at the time.

I respectfully suggest that Blackstone does not afford satisfactory support for the view that when the Second Amendment speaks of "the People" it means "each individual".

And, it would also not be entirely flippant to say that, if the proponents of originalism were consistent, the only arms which the Second Amendment could be taken to permit are muskets, knives, swords, pikes and muzzle-loading cannon, not automatic rifles or pump action shotguns.

That the words of the Second Amendment guarantee of the possession of firearms by unregulated individuals was not, until these very recent decisions, a view supported by the Court's decisions. It was not an article of legal faith even on the part of conservative lawyers.

In this regard, in 1989, Robert Bork, a leading proponent of originalism, acknowledged that the Second Amendment serves "to guarantee the right of states to form militias, not for individuals to bear arms."[11]

The argument that the Second Amendment guarantees the right of individuals to bear arms seems to have first come to prominence, not in the Court's own precedents, but as a result of agitation by the National Rifle Association in response to gun control laws passed in reaction to the assassinations of John Kennedy, Martin Luther King and Robert Kennedy. This campaign led the former Chief Justice Warren Burger to say in 1991 that the NRA's campaign on the Second Amendment was "one of the greatest pieces of fraud, I repeat the word 'fraud', on the American public by special interest groups that I have ever seen in my lifetime".[12]

Visions of Nationhood

How then can we understand the majority judges reading of the text? How did they come to interpret the text as they did?

The Chief Justice of the United States, on his visit to Australia in July last year, gave a speech in which he made the point that the Bill of Rights was very much the product of historical circumstances of the founding of the United States. The Chief Justice was, of course, a member of the majority in each of the decisions under discussion. His speech may afford some insight into the cultural lens through which the majority viewed the constitutional language. He said: "America's first colonists were strong-willed individualists who chose to start a new life in an unknown land. Most were English subjects who came

[10] 128 S. Ct. 2783 at 2798-2799.

[11] Lepore, "*The Commandments: The Constitution and its Worshippers*", *The New Yorker*, January 17, 2011, 70 at 75.

[12] Lepore, "*The Commandments: The Constitution and its Worshippers", The New Yorker*, January 17, 2011, 70 at 75.

from a heritage of English liberties reaching back to Magna Charta. They brought a conception of individual rights with them. For example, the first charter of the colony of Virginia, written in 1606, provided that colonists and their descendants 'shall have and enjoy all liberties, franchises and immunities as if they had been abiding and born in this our realm of England'. The American writer Ralph Waldo Emerson stated early in our history that Americans began with freedom. As he put it 'America was opened after the feudal mischief was spent and so people made a good start, we began well'."

Roberts CJ went on to say: "But we did not begin content. The American colonists did not arrive on new soil satisfied with the status quo. Some of America's first colonists, like the Pilgrims, the Puritans and the Quakers, came to America seeking broader religious liberty. Others sought the opportunity to own land, to escape a rigid class structure, or to seek out in an undefined way a life better than the one they had left. They came, in the candid words that would appear in the Declaration of Independence, 'to pursue happiness'. Their notions of liberty thus arose not only from their English background, but also from widely shared personal aspiration. Those notions took root and flourished without formal efforts at cultivation in the untamed new world environment. …

The American colonists began to consider the theoretical basis for their rights, and they naturally gravitated toward John Locke's theory of social compact. That theory rested on a political perspective that was very easy for the New World colonists to visualize. People existed before governments and people in the state of nature entered the world with god-given natural rights that they may curtail or surrender to government only by free consent."

We may note that the Chief Justice refers to 'people', not to 'The People'. He speaks of people being born with natural rights, but not, it would seem, with companions.

Chief Justice Roberts went on: "The King of England did not share that perspective. But for the generations that were born in America, the monarch must have seemed distant and his divine rights and abstraction far removed from their experience. The land that the colonists had entered was far closer to Locke's state of nature than the one they had fled. By the mid 18th Century a succession of generations had tamed wild lands and constructed farms, villages and town halls with their own hands. Those Americans had no difficulty embracing the notion that people also created government and that government existed only by virtue of a compact expressing the consent of the governed."

The Chief Justice's speech affords a compelling statement of the individualist vision of the gestation of the US Constitution. But like all visionary statements, the resonance of the statement depends on the time, circumstances and experience of the audience. The notion of "the People" does not figure prominently in this vision that is the People as a civilized community which organizes militias and wages war, not with sticks and stones, but with sophisticated weapons which can only be produced by civilization and the organized division of labor which civilization supports.

For many Americans, it may be that the vision of a man and his musket carving his own happiness out of the state of nature where opposition, natural or human, is something to be overcome is a compelling vision of the individualist foundations of the United States: it is, after all, a vision that inspired two generations of Wild West movies. But many modern Americans may be disappointed to known that they are governed under the Constitution according to "The Man Who Shot Liberty Valance."

Many city dwellers of the 21st Century, imbued with the bourgeois values of non-violence, civic mindedness and peaceful co-operation, may not be persuaded or inspired by that vision. They may see this vision as part of the national myth, of some value to sure, but not an indispensible part of the Founders' legacy by which their existential choices should be curtailed.

Something of this perspective was recently expressed by the satirist Jon Stewart who commented that North America was "settled remarkably quickly thanks to the extermination of one race, the enslavement of a second, and the can-do attitude of a third".

Many modern Americans may query whether this reading of the Constitutional text by the light of the claims of the 17th Century for the individual in the state of nature reflects the state of nature conceived by Locke, who shared, or perhaps more correctly, inspired, Blackstone's postulate of a "polite and commercial people" which, in America, joined together to make their own political arrangements, or that much bleaker state of nature conceived by Thomas Hobbes: the war of all against all where life is "solitary, poor, nasty, brutish and short".

I am not suggesting that the skeptics would be right, or even that those who hold these views are in the majority of American citizens. It is simply that it is a remarkable state of affairs that their views don't matter even if they do happen to be in the majority; and it is a state of affairs that the Constitutional text does not demand.

Conclusions

Arnold Toynbee discussed the differences in the scope for interpretation between a sacred text and a sacred tradition guarded by priesthood. He said: "An authoritarian scripture suffers…from a weakness from which an authoritarian (priesthood) is exempt. The possibility of re-interpreting a written text to meet a changeless human nature's every-changing situation is more narrowly circumscribed than the possibility of a re-interpreting the unwritten lore of a hierarchy or a body of doctors or fathers claiming to be inspired by a Holy Spirit, which, like the wind, 'bloweth where it listeth".[13]

The Supreme Court's decisions illustrate that, even with a sacred text, Toynbee was correct only insofar as the ethos of the guardian priesthood is effective to constrain it to recognize that it is less powerful than the sacred text. Otherwise, subjective and contentious reinterpretations may develop a life of their own drifting free of the sacred text.[14] And because those reinterpretations have the force of the Constitution, the possibility of a different outcome is foreclosed to the People.

If we accept that, as Jefferson thought, a Constitution exists to serve each living generation, these cases afford a salutary reminder to those who regard the United States with deep and abiding affection and their scholars and judges with admiration, of the need to accord pre-eminence to the constitutional text, and of the need for respect for the precedents which have settled its interpretation.

In the absence of relevant precedents it is important to have a modest appreciation of the value of one's own historical insights about the intent of the Founders. That modesty must include a willingness to resist the exhilarating belief that one is the first to reveal a great truth. And it should be not less than that exhibited by the Founders themselves.

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