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ABOUT LAW AND VALUE WITH SPECIAL REGARD ON JUSTICE

Sofia POPESCU*

Abstract: *Law is a mediator between value and behaviour. There are human permanencies through which values are inherited from one generation to another. There are fundamental universal values, mutual for the whole humanity, such as life, peace, ideals of justice, truth and freedom. Supporting the necessity of the interdisciplinary research of justice, we have taken into account the contribution of the philosophy of law and of legal sociology, as auxiliary sciences of the legal sciences.*

Keywords: *law, universal values, justice, legal systems, legal sociology*

I. Law is a main instrument for transmitting and preserving the values, for controlling their selection and for making a hierarchy of them[1]. This characteristic is reflected in the first article of the Romanian Constitution of 31 October 2003, which stipulates that „Romania is a lawful, democratic and social state, in which human dignity, the citizens' rights and freedoms, the unconstraint development of the human personality, justice and pluralism represent supreme values".

Law is a mediator between value and behaviour. There are human permanencies through which values are inherited from one generation to another. There are fundamental universal values, mutual for the whole humanity, such as life, peace, ideals of justice, truth and freedom.

As a legal value with universal dimension and perennial character, justice represents an integrative part of the common base of the different legal systems. In the same capacity, justice penetrates the legal cultures and is incorporated in the principles of law and its importance cannot be denied without denying or neglecting the defining features of law.

The major legal changes require a superior vision on justice, according to the standards of the advanced legal cultures representations, evaluations and criteria for justice do not differ only from one individual to another, but also from one legal culture to another.

In the view of a prestigious French specialist[2], the force of law and its compliance by the recipients depend, to a great extent, on its quite tight

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[1] About the law-value aspect, in general, see Ioan Ceterchi, Sofia Popescu, „Droit et valeur", in *Revue roumaine des sciences sociales*, Série de sciences juridiques, No.1/1984, pp. 14-16, p.18.

[2] François Terré, *Introduction générale au droit*, 4e édition, Dalloz, 1998, pp. 13-15.

connections with justice. Nevertheless, the same specialist reveals the fact that the profound connection of law and justice is accompanied with hesitations, determined by the two elements of this relation.

On the one hand, justice can be understood in various ways. On the other hand, the position of law as regards justice knows three variants. The first is characterized by indifference, in the sense that there are some legal norms that are not appreciated reporting to justice. On the contrary, the second is characterized through a tight connection, in which case law expresses and prolongs the need of justice, detailing the moral precepts with the completions and specifications required by the law in the society. The third situation is characterized by the conflict between law and justice, in which case the fight in the advantage of the latter is competed with the inherent necessity of law to preserve not only justice, but also order, legal security and peace. The need of security can turn law away from justice. Under these circumstances is recommended the recourse to equity, as a remedy, especially when written law is too rigid, remedy that has the capacity to attenuate the distance between law and justice.

Analyzing the relation between justice, law and equity, in the Romanian literature has been made the following nuanced statement: „being aware of the legal values or admitting the values in the other areas of the relations in the society is carried out through indicating the legal purposes. Any rule that concerns law or that takes the form of a legal norm is relevant, only through establishing the correspondences that should confirm that there is no LEX INJUSTA NON EST LEX![3]

As Peter Murphy mentioned[4], there is not a single justice in the society, but multiple justices coexist (sometimes in relations of hostility, other times in relations of friendship) and when we judge and decide we should take into account the claims of the rival models of justice.

According to the same opinion, we cannot anymore play, in the context of the postmodernism, the game of the Illuminist modernism, trying to exclude the claims and the values of other models, and in the postmodern worlds we cannot count on a single criterion of judgment, but we have to judge on multiple criteria.

II. Supporting the necessity of the interdisciplinary research of justice, we have taken into account the contribution of the philosophy of law and of legal sociology, as auxiliary sciences of the legal sciences.

The Scandinavian sociologist of law, Vilhelm Aubert insists upon the idea that law should exercise a moral and philosophical function, associated normally with making justice.

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[3] Mihail Constantin Eremia, *Justiția, dreptul şi echitatea (Justice, Law and Equity)*, in The Annals of the University of Bucharest, Law, 2001, p.5.

[4] Peter Murphy, *Postmodern perspectives and Justice*, Thesis Eleven 30(c), 1991, Massachusetts Institute of Technology, p. 117, p.122.

Supporter of the scientific positivism, Léon Duguit pleaded for the foundation only on data of experience, on facts, admitting at the same time that the sense of justice coexists with the social sense of solidarity, in the human spirit, which involves a study different from the empirical one. Consequently, he considered that the philosophy of law is the one that should answer the questions: „What is justice and what does justice consist of"?; „Which are its conditions and the feeling it refers to?"[5].

The well-known philosopher of law, Ota Weinberger, in his work regarding the law and the institutions, initially published in German (1987) and later translated in English (1991) dealt with the role of the theory of justice, answering the question: what can the theory of justice offer us? Maybe the scientific investigation of the problems of justice in order to ensure the validity of the definitions it provides? Is it possible that, through a scientific analysis, the argumentation which uses the terms „just" and „unjust" as an instrument of persuasion be turned into an argumentation truly rational? The answer contained the specification that the scientific analysis of the problem of justice makes sense, only if we conceive it not as a means of persuasion, but as a rational analytical and critical process. In conclusion it results that the theory of justice has the modest and general duty to „attack" the problem of justice, as an immanent problem of the human existence.

Elena Cobianu[6] treats also from the philosophic perspective the correlation of the value of justice with the value of equality, in the context of the globalization, reaching the conclusion that the elimination of inequality and discrimination requires justice, and a contemporary analysis of the principle of justice should highlight the position of the world nowadays, related to the desiderate of justice, how close or how far from this world this desiderate is.

In the spirit of the tradition of the Italian school of legal sociology, represented by the regretted professor Renato Treves[7], who initiated and completed researches on the relation between judges and the Italian society, inclusively on the judges' attitudes towards society, in a persuasive work published in 1995, in Italy[8], remarked the increase of the interest for the issue of the legal sociology, proved for example by the fundamental and empirical researches carried out in this country, regarding: the public opinions about justice, their formation, the factors that influence it, the social dimensions of law and justice, the injustice, the social fundaments of submission and rebellion, the role of justice and the social

[5] In this regard see Ioan Hatmanu, *Istoria doctrinelor juridice (The History of the Legal Doctrines)*, Editura Fundației România de Mâine, Bucharest, 1997, p.116.

[6] Elena Ciobanu, *Cultura şi valorile morale în procesul globalizării (Culture and moral values in the process of globalization)*, Editura Grinta, Cluj-Napoca, 2008, esp. p.254.

[7] Renato Treves, *Giustizia e giudici nella società italiana. Probleme e ricerche di sociologia del diritto*. Editore Laterza, 1973, *Cap.III.- L'ideologia profesionale dei magistrati* (pp.39-58); *Cap. V. - Gli atteggiamenti del publico verso giustizia*, pp.71-80; *Appendice II- Per una ricerca sui giudici e la societá ialiana*, pp. 143-152.

[8] A se vedea Vincenzo Ferrari, *Giustizia e diritti umani. Osservazioni sociologico giuridice, Appendice metodologice di Mario Boffi*, Sociologia del diritto, Franco Angeli, Milano, 1995, esp. pp. 15-20, p.22.

interaction, justice and society, the reason of justice and the social behaviour, the social perception about the principles of justice, the options referring to the criteria of making distributive justice – equality, merit, need.

As regards the specificity of the social and legal investigation in the field, it has been emphasized the special interest in considering the legitimacy of law and legal culture, as well as the effects of the public opinion about justice, on the legislative activity.

III. As we are not able to include in a communication, not even very briefly, the position of all the trends of legal thinking towards the legal and moral value of justice, – representing a stringent problem through its implications on law legitimacy and efficiency, on its application in the social reality of the ideal of justice, – we will present only a few examples, which we consider relevant[9].

Starting from the various theses concerning the feeling of justice, we should mention that in the view of the German legal science of the interests, it represents an instinctive, spontaneous form of the legal knowledge, which helps unconsciously the judge to find the appropriate solution for a certain case. The founder of the legal science of interests, Philipp Heck considers that the feeling of justice has to be subject to a reflection, like any unconscious action, so that it could be done a rational reflection, and that it cannot be accepted as a source of law in the traditional sense of the legal science. For Heck, the legal system means the concretization of the values and of the value judgments that the judge has to comply with and to take into account on the whole, the law-maker being connected to the interpret through interests-values[10].

In his fundamental work dedicated to the revised legal thinking ("Legal Thinking Revised"), the representative of the Scandinavian legal realism, Wilhelm Lundstedt considered that it is wrong to state that law is inspired by the feeling of justice and rights, as in fact law and the way it is applied are those that control and orientate the spirit of justice.

We can add that law does not always express the feeling of justice as well as it does not always satisfy the need of justice, granting priority to the legal order or to the legal security, oscillating between utility and justice.

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[9] In detail on the different trends of legal thinking seen from the perspective of the specific theses reagrding justice, see Emilian Ciongaru, *Teoria justiției (Theory of Justice)*, Ph D thesis at the „Acad. Andrei Rădulescu" Institute of Legal Researches of the Romanian Academy, Bucharest, 2011, chap. II, şi chap. III; Emilian Ciongaru, *Teoria justiției din perspectiva şcolilor dreptului (Theory of Justice from the Perspective of the Schools of Law)* in vol. „Justiție, stat de drept şi cultură juridică" (Justice, Lawful State and Legal Culture), Editura Universul Juridic, Bucharest, 2011, pp.126-135.

[10] For a general presentation of the Interessenjurisprudenz trend, Sofia Popescu, *Ştiința juridică germană a intereselor*, *analizată în Elveția şi Italia (German Legal Science of Interests Analyzed in Switzerand and Italy)*, in Romanian Review of Philosophy of Law and Social Philosophy, No.8 (2)/2008.

Turning to the position of the legal positivism, we should mention the fact that this has been reproached that appreciates as just only what is in conformity with law and unjust what is not in conformity with law, that it places the reason to be of law and justice not in reality, in the field of people's real necessities, but in the field of form, promoting the formalism, in the area of theory of justice. The legal positivism is criticized for the request that the stipulations of the positive law should be complied with for themselves, without taking into account their material content, as the laws in force should be complied with for the mere reason that they are laws, and not for what is at their basis. Thus, it happens that laws that are extremely unjust and arbitrary are blindly obeyed with, not for their value, but for their form, appreciated as superior to the value that in fact it affects[11].

As regards Rudolf Stammler's opinion[12], which is more rarely invoked when justice is analyzed, we should specify that he sustained that law is justified only to the extent to which its purposes are just. Yet, – and this is his original contribution – the law that is just *per se* can be only a part of the positive law, effectively applicable. Consequently, the conclusion is that cannot be established precise contents of an eternal law, but only eternal conditions of a just law[13].

The German philosopher of law, Gustav Rudbruch, emphasized that only the just law and the unjust law belong to the field of values and not the law in itself. As any value corresponds to a goal, in the case of law searching for the goal means searching for its value, sense, justice.

As concerns Michel Villey's statement, according to which making justice has always been the defining purpose of law and its autonomy depends upon the capacity to ensure the balance between utility and justice[14], we should also mention that the regretted and remarkable Anita Naschitz[15] has drawn attention upon the fact that law has to satisfy both the narrow utilitarian needs and the axiological requirements that are at the basis of the regulations and which do not have only social utility, but are also justified from the point of view of values.

IV. The last aspect we aim at examining very succinctly is that of the relation between justice, legality and lawful state. For the beginning we remember two Romanian contributions concerning this issue. Thus, the Academician Andrei Rădulescu published at Bucharest in 1932 the work „Legalitate şi dreptate.

[11] In this regard, Manuel Jacques, *Legalismo y derechos humanos, un desafio par el uso alternativo del derecho*, in Sociologia Juridica en America Latina, Oñati Proceedings, No.6/1991, esp. pp. 214-218, p.221, pp. 226-228.

[12] Ioan Hatmanu, *Istoria doctrinelor juridice (History of the Legal Doctrines)*, Editura Fundaţiei România de mâine, Bucharest, 1997, pp. 117-118.

[13] *Idem*, pp. 121-122.

[14] M. Villey, *Philosophie du droit. Définitions et fins du droit*, Paris, Dalloz, 1975, p.51.

[15] Anita M. Naschitz, *Teorie şi tehnică în procesul de creare a dreptului (Theory and Technique in the Process of Law Creation)*, Editura Academiei, Bucharest, 1969, pp. 190-191.

Cunoaşterea dreptului. Siguranţa dreptului"[16] ("Legality and Justice. Knowing the Law. The Safety of Law"), and Eugeniu Speranţia[17], among the „natural" and special laws of the law evolution that he tried to reveal, mentioned also law, on whose basis the state represents an assembly of independent functions, serving at the creation, application and preservation of the order of the lawful state, the activity of the state being limited to the existence of the lawful order, to which it should obey, being in the service of justice.

In the view of the Spanish author Elias Diaz[18], the lawful state represents the legal institutionalization – within the framework of a specific system of legality – of the criteria of legitimacy and justice which should always be consolidated by this state.

Also relevant for the thesis that the lawful state cannot be reduced to legality is the Gianluigi Palomella's specification that legality does not guarantee the fact that power complies with the criterion of justice[19].

Jeremy Bentham emphasized that the lawful state represents only the premise of making justice and that its most important function is to establish the limits of our actions meant to reduce the injustice.

Dedicating to justice a whole chapter of his treatise of the general theory of law and characterizing it as a primary value of law, Ion Craiovan[20] notices that there is the possibility of a contrast between justice and legality, the former representing an inexhaustible source that serves to covering the inevitable faults of the latter.

As concerns the model of lawful state implemented in Germany in 1949, it has been pointed out that it complied with the condition of being a just state and a state of the judges[21].

It is interesting to remember that as regards the Anglo-Saxon variant of the rule of law, it has been sustained that law has to ensure the equal access to the means of correcting the injustice[22].

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[16] Emil Moroianu, *Puterea judiciară, în opinia Academicianului Andrei Rădulescu, fost Preşedinte al Academiei Române (Legal Power according to the Opinion of the Acad. Andrei Rădulescu, ex President of the Romanian Academy,* communication within the Workshop „Dreptul ca sistem informaţional, de la entropie la riscul haosului" (Law as Information System, from Entropy to the Risk of Chaos), at the Conference with the topic „Dreptul într-o societate de risc" (Law in a Society of Risk), organized by Comitetul de Cercetare pentru Sociologia Dreptului al Asociaţiei Internaţionale de Sociologie (RSCL of IAS), Milano-Como, 2008.

[17] Eugeniu Speranţia, *Introducere în filosofia dreptului (Introduction to the Philosophy of Law)*, 3rd edition, Tipografia Cartea Românească, Bucharest, 1942.

[18] Elias Diaz, *Legalidad – legitimidad en el socialismo democratico*, Editorial Civitas S.A., 1978, pp. 150-151.

[19] Gianluigi Palomella, *Legitimità, lege e costitutione*, in Sociologia del diritto, No.1/1993, p.138.

[20] Ion Craiovan, *Tratat de teoria generală a dreptului (Treatise of the General Theory of Law)*, *chap.III*, Editura Universul Juridic, Bucharest, 2007, p.506.

[21] Claudia Gilia, *Teoria statului de drept (Theory of the Lawful State)*, Editura C.H. Beck, Bucharest, 2007, pp.128-129.

[22] Richard Abel, *Capitalism and the Rule of Law Precondition or Contradiction*, in „Law and Social Inquiry", No.4 Fall, 1990, The University of Chicago Press, p.690.

In the Romanian literature after 1989 it has been drawn the attention upon the fact that the political power grants priority to order, while the legal instances grants priority to justice, which represents the most profound, still unnoticed source of the potential distortions between the two fundamental factors of the state structure[23].

In the preamble of the Charta of the European Union Fundamental Rights it is stipulated that Union, aware of its spiritual and moral wealth, has at its basis the indivisible and universal values of the human dignity, liberty, freedom, equality and solidarity, the principle of democracy and the principle of the lawful state, that by the foundation of the European Union citizenship and by creating a space of freedom, security and justice, the European Union contributes to the preservation and development of these mutual values, respecting the cultures and the traditions of the European peoples, the national identities of the Member States and the organization of the public powers at the national, regional and local level.

In the conditions of Romania's post-adhesion to the European Union and implicitly of the continuation of the European integration in the field of law, are necessary not only legislative and institutional changes, but also concerns for the progress of national legal culture, taking into account the fact that it includes, beside the legality of the state activity, the position of justice and the attitude of the population towards law and justice.

[23] Octavian Căpățână, *Les Commandements de la Justice face au pouvoir politique*, in Revue roumaine des sciences juridiques, No.2/1993, p. 132, p.135.

THE ENFORCEMENT OF THE SPANISH LAW ON THE PROMOTION OF PERSONAL AUTONOMY AND CARE FOR DEPENDENT PERSONS, IN THE CONTEXT OF AN ECONOMIC CRISIS

Pedro FERNÁNDEZ SANTIAGO*

Summary: *We have gone from a capitalist society based on the production of goods and services to another kind of society based on speculation. Social policies, a „founding characteristic" of the different European Welfare States, are subject to the political-economic interest of the individual States, as well as market fluctuations; the achievements and improvements of the State, by and for citizens, are not as paramount as the more recalcitrant neoliberalism. In this context, the intent was to implement the Law on the Promotion of Personal Autonomy and Care for Dependent Persons, what Spain has taken to call the „Fourth Pillar of the Welfare State". The economic crisis we mention makes it impossible to properly implement it, as well as the null provision of the current legislature to economically provide a law that carries a high level of investment.*

Keywords: *Economic crisis, speculation, policy, welfare state, democratic society, citizens.*

Introduction

Even in these times of uncertainty and economic crisis, I still feel like a Hispano-European citizen and, though I keep the memory alive of the transition from a dictatorship to living the dream of a democratic society, I carefully read the words of the great thinkers who advocated the securing of a Federation of European States; I shared with the rest of my fellow Spanish citizens the necessary social-economic adjustments to be able to access what in those times seemed to be the „*great realisation of the European dream and the abandonment of a sad history*" as the single currency was implemented and consolidated; I was thankful for the unconditional support of my European *fellow citizens and/or partners* in consolidating the infrastructures and many other things my country needed at the time; I have made it clear that all of this economic aid has to do with fiscal loads, contributed to by each and every citizen who formed part of the European Union at that time.

In another vein, stating that: the definitions are often interesting forms of „clearly, accurately and precisely establishing the meaning of a word or the nature of the person or thing". Given their importance which for this chapter has the

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nature of „*power*" and continuing with „*political*" acceptance, we could argue in an interesting way that politics are a tool that uses power to play upon one's interests and to control anyone who might be a threat to them in certain situations, an art, a tool, a provision of ways to establish and maintain relationships between diverse components and diverse social structures with conflicting interests. Control as a synonym of power, which Max Weber defined as *Herrschaft*, refers to the relationship established between this and subordination.

Nevertheless, I believe that the political nature of the human being is a different question of the application of politics, being understood as a form of domination by one group (always smaller) over a much larger group. The republic led by scholars has become a republic led by speculators, and power and politics seem to lay more in the hands of those who possess economic power and seek greater wealth (which makes them feel powerful), than in those of the leaders who seek the welfare of the citizens and society as a whole. For some, the political class could be the new bourgeoisie, and the middle classes and the impoverished (the gap between classes becomes wider every day), the new proletariat.

I believe that the real issue during these times is our own democracy and social peace; the news of riots in the streets, the necessary integration of human beings moving through a globalised world in search of a future for them and for their children, the cutting off of rights that were conquered through the long and arduous fight of the citizens, the apparent victory, at least for now, of the hot money over „*politics*" seem to indicate so.

We cannot apply laws that favour the coverage of social needs without the joint participation of the whole society, headed by leaders chosen democratically by the citizens, and who are at the same time free from the bonds of undemocratic economic servitude. We cannot continue being citizens anchored in the fear of losing the privileges that developed countries have enjoyed up to now; development and the fight for a free, just and democratic global world cannot and should not be seen as being threatened by struggles due to economic interests that seek to profit from the blood of citizens, and we can not again allow them to be imposed as a consequence of the inequalities and Cainite struggles in the name of God, if that is his name.

The threats on Social Policies and the Spanish Welfare State

Generalising can be odious; nevertheless I would like to present a general opinion on the political parties and their proposals. They promise to govern for all without distinction of those who voted under one party or another; they come to power with a framework agreement embodied in the various electoral programs, which is then never fulfilled, and which people never read (and as a result they do not know about the proposals); abstention increases, distrust of politicians increases and in the rest of the participating electorate, the vote seems to go more

towards a party that in many cases is based on likes and dislikes, (in our country a certain degree of family history of our bloody past history endures). This may indicate a commitment to the parties rather than with the ideas and proposals. It does not mean that the people are „stupid"; the only thing people want is to move „forward" in an increasingly competitive society, raising their children in situations of health, economic advancement and learning, and this is impossible without an intervening political system, to regulate and redistribute the wealth of the state and intervene in the major challenges that the globalised world is bringing about, trying to move from what is now a threat to the safety and welfare of the world population, to a path that all citizens can follow in the hope of moving forward and not back in the inalienable rights of all human beings.

We now know „*apparent economic prosperity*" was built into a giant with feet of clay; in Spain we spoke of full employment, advanced social policies developed, we obtained surplus in the Social Security accounts, we took on and tried to integrate numerous immigrant populations, the pensions were expanded, laws on equality were implemented, that is to say, in short, a giant step toward integrative social policies was taken and with it the basic mark of the welfare state, the great challenge and dream that brought us closer to the other countries around us, making Jose Luis Rodriguez Zapatero our Prime Minister, who declared in 2004 that he would rule for the weak, and in 2008 that he would govern thinking of those who do not have everything.

After great hesitation and negotiations, on 7 May 2010 the leaders of Eurogroup, the International Monetary Fund and the financial markets caused the Spanish social democratic president to announce a terribly unpopular adjustment plan: five million pensioners, three million officials, hundreds of thousands of dependents and half a million expectant parents suffered cuts greater than hitherto known in our country, and consequently, and given the proposals and actions subsequent to 22 March in the regional and municipal elections as well as the proposed cuts in the current conservative government and the ones they possibly have to keep taking, the dream of social welfare, which, according to Briggs [1] we could define as: *„that in which the organised power deliberately used (through politics and administration) mechanisms to modify market forces in three important directions: firstly, ensuring minimum income for individuals and families; secondly, eliminating levels of insecurity and preventing individuals and families from reaching a certain degree of „social contingency" (i.e. disease, ageing and unemployment) that will allow them to avoid potential crises; and thirdly, ensuring that all citizens without distinction of status or social class receive the best possible levels of social services",* began to falter.

[1] Briggs, A., The Welfare State in Historical Perspective, en Pierson, CH, y Castles. F.G., The Welfare State Reader, Blakwwell. Cambridge, 2002

In the current moment we could place the crisis[2] „*not as the inevitable result of the instability of the deregulated financial markets, but as the effect of the lack of honesty, as well as the irresponsibility of some financial agents who were poorly controlled by the public powers (...) Financial integration has led finances to the zenith of their power by having unified and centralised capitalist property worldwide. From this moment, they are the ones that determine the profitability standards required for any capital. The plan was for the financial markets to replace financing in the form of investments. But this failed, since today businesses worldwide are the ones that finance the shareholders, and not the other way around"*.

Speculative activity also carries risks for the speculator; it could be that some kind of speculation is impossible, even negative, to avoid, in that there should be speculation about the corporate interests that are capable of dragging entire countries into the abyss of poverty. In many cases we have seen politicians, ideological references of said corporations, look the other way while claiming to be taking steps to alleviate this situation. Possibly, the only way to avoid excessive speculation is through the regulation of markets and competition, more bidders and lower prices. Price control creates shortages and closure of manufacturing companies, further monopolising the market, thus stimulating the excessive speculation.

The welfare state is threatened by the speculation that takes place in what have been called „markets", possibly with the intention of not putting its own name on speculators, and the inaction of politicians and representatives of citizens that make up large G8 groups (group membership is not based on a single criterion, since they are neither the eight most industrialised nations, nor those of higher per capita income or those with a higher gross domestic product); the G20 is constituted by the G8, plus eleven newly industrialised nations, the so-called emerging nations from all the regions of the world, and the European Union as an economic bloc; the latter group has been meeting since 1999 through the heads of state (or government), central bank governors and finance ministers. In these meetings it may seem that the concept of „*every man for himself*" takes precedence over the general interest of the world population.

„*When speculation intensifies, there is not a central bank that can endure the draining of currencies"*[3]. On 17 September 1992, the Minister of Economy, Carlos Solchaga, had to explain to Congress the onslaught that had brought him to knock on the door in Brussels and argue for hours until achieving an agreement to devalue the peseta. It was the day after a black Wednesday with a devastating war report: the peseta, devalued; the British pound and Italian lira, out of the European Monetary System (EMS), and a crack in the plans of the European economy. The peseta was devalued two times more in the following months and a quarter, the last in history, in 1995.

[2] Askenazy, P; Coutror, T.; Orléan A.; Sterdyniak, H., Manifiesto de economistas aterrados. Madrid, 2011.
[3] Mars, A., El ataque que ganaron los especuladores. La tormenta financiera de los noventa llevó a una mayor cooperación monetaria, El PAIS, 1/100/2011

Continuing with the article by this author, *With this culture broth, the Hungarian-born investor George Soros went on to sell over 10 billion pounds sterling and forced the devaluation of the currency on that Wednesday, 16 September, the day he made 1 billion dollars. While he forged the operation, he publicly announced that the pound would lose value. A legion of investors rivalled him and the British currency effectively sank. Soros was put before a movement that had been coming and gave him a final push. The Bank of England spent as much as 50 billion dollars in the currency markets to defend the pound unsuccessfully. The operation turned Soros - now considered a philanthropist for his social work - into a symbol of speculation at the time. For Solchaga, a blow like this today „has no chance, because neither Soros nor his friends have enough money to sink the exchange rate of the entire euro zone."*

I ask myself if these „*blows that do not have chance*" do not have something to do with the situation of Ireland, Grace and Portugal, as well as the threat that is sifted on Spain, Italy, Belgium and France, in short, on the single European currency: the euro. I doubt, in the hope that the terms are not construed as derogatory, that our „*leader*" Angela Merkel and her „*champion*" Sarkozy, have the same concern for the European economy as they do for the economy of their countries and their possible defeat in the next elections for leadership. In the nineties, free investment funds known as *hedge fund*s became popular; these are mutual funds that are barely subject to regulation, and that, precisely for this reason, have played a crucial role in virtually every financial crisis since the nineties, and, taking advantage of the current situation, continue to act for the benefit of the „*private pockets*" of those who hold them, to the detriment of the countries and populations that compose them.

The moral misery of this type of activity gets to the point of speculating in commodities and agriculture, leading to starvation for millions of people, regardless of whether this „*blood money*" swells the ranks of a few. The intention is to suppress the smuggling of weapons and drugs, prevent the unjust enrichment of a small group of people at the expense of the death of others, and let other dealers of money who define themselves as philanthropists to do as they like, bringing poverty, pain and death to millions of people, all based on concepts like „freedom and capital."

A new capitalism is installed[4], even more brutal and conquering. *It is a new category of vulture funds, private equity funds, rapacious investment funds with the appetite of an ogre and huge capital available (...) The phenomenon of these funds came about fifteen years ago, but fuelled by cheap credit and the creation of increasingly sophisticated financial instruments, gaining an alarming dimension in recent times. The principle is simple: a club of fortunate investors decides to buy businesses and later privately administer them, far from the Market and its coercive norms, and without having to yield accounts to nitpicking shareholders. The idea is to avoid the very principles of capitalism ethics, betting exclusively on*

[4] Ramonet, I., La Crisis del Siglo. El fin de una era del capitalismo financiero. Icaria Mas Madera, Barcelona 2009

the laws of the jungle (...) While personally earning insane fortunes, the leaders of these funds unscrupulously practice the four principles of streamlining business; reduce employment, compress wages, increase the pace and go offshore.

The civil function of politics should be demanded, activity to look for the common good of the population it „*governs*" without undermining the „*integrity*" of the people who compose it. A corrupt politician is not the same as one who is not, they can not be generalised with appropriate attempts to negotiate social change for social and economic progress, with those who only seek personal gain in exchange for the „*crumbs of corruption*" to their own and subordinates.

Social policy can be conceived as mediation between what is appropriate from a political standpoint and what is possible by economic calculation, always under the monopoly of public action. From the economic point of view, maintaining the welfare state is linked to the justification of the public sector's participation in the economy.

The economic crisis increases poverty and marginalisation, while reducing the resources needed to finance social policy. The social benefits and welfare services are compressed and reduced, and strong mental preparedness campaigns are produced, which are not foreign media and whose main message is dismantling and questioning the system itself.

It is possible that since its creation as a means to escape the dilemma of poverty or revolution, the social welfare state is in crisis, although it served at the time and continues to serve; since there is no society in which social justice prevails, without social policy to take action to achieve it, the laws are useless without the possibility of its application.

1. The Context in which the Law on Autonomy and Dependence in Spain develops

In Spain, as in the remainder of the western countries, a high percentage has been confirmed of people with dependency and/or difficulty of access to adequate personal autonomy. The neighbouring countries are developing and, in some cases, implementing laws related to the personal autonomy of their citizens, adapting them to their special circumstances as well as profiles of social welfare agreed upon by social policies and implemented as determined.

Since the consolidation of democracy and the establishment of our Constitution, our country has been making serious efforts to establish and strengthen the welfare state that it recognises as a right of citizens.

Despite the situation of serious economic crisis that has engulfed Spain, our country has consolidated and formed a society among those with the lowest birth and mortality rates; as a result, our population is ageing rapidly and now these rates are improving thanks to the immigrant population.

The establishment and implementation of a social policy related to dependence and/or personal autonomy has large effects on our society. In the cities of any

autonomous community it is easy to see elderly people cared for by immigrant women, and this image seems to reflect that the attention to the small tasks in the daily life of the elderly (Home Care) is being given mostly by women and generally immigrants.

It was expected that the Law on Personal Autonomy and Dependency, in its total development expenditure, represented 1% percent of the gross domestic product (GDP), and will benefit 1.5 million families by creating 300,000 jobs, while today we know that these figures have not been reached.

On the other hand, in our country, as we have mentioned before, we are experiencing phenomena similar to those in surrounding countries. Measures for the maintenance and expansion of the social state are being developed and implemented, but in turn the population ages, Spanish birth rates decrease, the Spanish woman is trying to access a more extensive integration into the labour market...these and other reasons that are producing situations of illness, old age and disability, which until now were being treated by the native population left in the present work spaces that our population does not cover and that at the same time needs to be covered.

As a result of our ageing population and the impact it has on the dependence of our elderly citizens, as well as the care of persons with disabilities, the Spanish government has decided to legislate in this matter by taking on one of the greatest challenges that our social policy has undertaken since the establishment of democracy.

The Law for the Promotion of Personal Autonomy and Care of Dependent Persons, in its statement of reasons, gathers that *„attention to the needs of people in dependency situations is one of the challenges of social policy in every developed country today which requires a firm response by the government. The challenge is simply to serve people who, finding themselves particularly vulnerable, need support in exercising their rights as citizens, accessing social benefits and developing the essential activities of daily living; along with this it is indicated that the combination of demographic, medical and social factors has increased the needs of the care system in our country".* Similarly, we refer to the 9% of total population with disabilities in Spain.

Our elderly population scattered throughout the territory of the State, however, represents high percentages in rural areas, and even many of our towns are inhabited only and exclusively by elderly population, as young people moved to cities to reach the development they desire, leaving the rural areas.

2. Difficulties in implementing the Law on Autonomy and Dependence

Proper implementation of what was intended as the fourth pillar of the welfare state in our country requires numerous efforts by the government, among many others, the appropriate training of those responsible for caring for dependent

persons, and likewise the establishment of ways to know in advance about the needs and appropriate agreements necessary for implementation and consolidation.

The Law on the Promotion of Personal Autonomy and Care of Dependent Persons, as one of the most significant ones pertaining to social policy that have far have been approved is having difficulties with implementing what has been called the „*Fourth Pillar of the Welfare State*." The difficulties which to my understanding may be the most important are as follows:

1. The limits.
2. Those related to coordination between the different managing bodies involved at different levels: regional, state and local.
3. Those generated by an inadequate solution to user participation in decision-making.
4. Those connected to the maintenance of the system and budgetary security for the equal treatment of dependent persons, residing in the Spanish territory, autonomous community, rural or urban space, the Town Hall, and so on.
5. Those related to the regulation of appropriate financial compensation for families who previously received contributory or non-contributory pensions and who carry out activities in the field of dependence.
6. Those aimed at developing uniform and adequate training and qualification of professionals and care staff for users.
7. And at this moment, the economic crisis plaguing our country and its surroundings.

They are resolved in the same way as these and other difficulties that are emerging in the implementation underway, and this law is aimed at the consolidation of what our Constitution states in the preliminary title and in its article 1.1: „*Spain is a social and democratic state of law which advocates freedom, justice, equality and political pluralism as the higher values of its legal system".*

As these pages should show, the willingness of the legislator to intervene in the realm of disability is now unquestionable; there is a clear willingness to integrate and obey and enforce laws for the purpose approved, and something else very different is that the implementation of this will meet the real needs of the population to which it is addressed. Perhaps, it should be noted, it can't be counted on and, if you do count on it, the changes proposed involve arduous negotiations in which some measures could be abandoned, and they should not be because of their importance. Priorities, opportunity, political situation and budgets tend to be the topics of discussion.

The concepts of priority, opportunity, favourable circumstances, economic times, a favourable political situation, and much more, get in the way of the adequate implementation of the necessarily holistic measures of the needs to be met. It is clear that any legislative implementation in the realm of social policy involves public spending, and legislation without first having the tax burden or economic resources is „*an ode to the sun*". It may seem that the vision of the legislator does not fulfil the necessary globalising vision and is aimed at the broader spectrum of the population

and not to the whole of the same; this seems to shed the unregulated compensatory measures between rural and urban populations and those arising from the necessary monitoring and evaluation of results and investment between our country's different autonomous communities and municipalities.

We legislate, favouring integration, we want to take care of everyone, but we don't consider all citizens, and much less all of the needs of these citizens; perhaps if they didn't depend on it, perhaps if they depended on those who were closer, those who take care of and recognise their needs, life circumstances and singularities, the measures to be taken would be addressed to all persons from the perspective of integration, while evaluating the capacities and the necessary individualised care for each of them. Globalisation, yes, but from the perspective of comprehensive care for all, taking into account that global care is particular, individual, the difference, what makes this society not monotonous but attractively complex and different.

To begin considering some of the difficulties that the implementation of the law in our country is facing, the CERMI[5], in the improvement proposals endorsed by the National Executive Committee on 2 December 2009, states that: „*From the entities that represent and group persons with disabilities and their families, we have observed how the launch of the SAAD*[6] *is generating the loss or dilution of the disability profiles that are so absorbed in a nebulous and diffuse consideration, to be enshrined in the new concept of dependency, which lacks clearly recognisable limits (...) The CC.AA.s*[7] *are growing empty of resources to the social service system to address dependency situations. Therefore, we lose substantivity, our own weight, diluted in a somewhat forced new configuration group"*.

This situation has already become evident, and we fear it conditions the immediate future of the realisation of new investments, embodied in the construction of „multi-purpose" centres for the care of this heterogeneous group that integrates dependency, and that would return to schemes that are not only obsolete, but also harmful and now happily in the past.

A consequence of this situation will be the depletion of resources for people with disabilities that will not involve the recognition of dependency, but, since they are in seriously lacking economic or social situations and, therefore, in positions of extreme vulnerability, are in danger of being unprotected.

It is therefore necessary, in all the autonomous communities, to define, develop and implement a uniform protocol for the promotion of rights and care for persons with disabilities to ensure the continuity and coordination between the systems involved: health, social services (general and specialised) and dependency which should be implemented from the start of the assessment procedure.

[5] CERMI: Comité Español de Representantes de Personas con Discapacidad – Spanish Committee representing Persons with Disabilities

[6] SAAD: Sistema para la Autonomía y Atención a la Dependencia – System for Autonomy and care for Dependency

[7] CC:AA.: Comunidades Autónomas – Autonomous Communities

3. Definitions according to The Law on the Promotion of Personal Autonomy and Care for Dependent Persons

Under this law we find definitions that summarise and provide an overview of the subject of treating dependency, and that are developed through broad concepts as detailed below:

1. *Autonomy:* the ability to control, face and take, by one's own initiative, personal decision on how to live under the norms and own personal preferences as well as carry out basic daily activities.
2. *Dependency:* a permanent state of being regarding persons who, for reasons unrelated to age, illness or disability, and related to the lack of or loss of physical, mental, intellectual or sensorial autonomy, require the attention of others or special assistance in carrying out basic daily activities or, in the case of persons with intellectual disability or mental illness, other support for their personal autonomy.
3. *Basic Daily Activities:* a person's most basic tasks that enable him/her to function with minimal autonomy and independence, such as: personal care, basic domestic activities, essential mobility, recognition of people and things, orientation, understanding and execution of orders or simple tasks.
4. *Support needs for personal autonomy*: those required by persons with intellectual or mental disability in order to ensure a satisfactory degree of personal autonomy within the community.
5. *Non-professional care*: care given to dependent persons in their residence, by relatives or neighbours, and people in general who are not linked to a professional care service.
6. *Professional care*: care provided by a public institution or entity, both for profit and not for profit, or self-employed individuals, whose purpose is the provision of services to dependent persons, whether at home or in a facility.
7. *Personal assistance*: service provided by a personal assistant who performs or assists with tasks in the everyday life of a dependent person, in order to encourage independent living, promoting and enhancing their personal autonomy.
8. *Non-profit or third sector:* private organisations arising from citizen or social initiatives, under different modalities that respond to criteria of solidarity, for the purpose of general interest and the absence of profit, that encourage the recognition and the exercise of social rights.

Dependent persons, based on the above definitions we have made, have been evaluated and are consequently considered dependent. Nevertheless, all of these people belong to different groups with different aetiologies and different care needs.

For proper understanding of the scale of dependence, refer to the Schedule of dependence assessment to determine the degree of dependency situations: grade I

moderate, grade II severe, and grade III high dependency; each of these grades need a certain type of aid.

Moderate dependencies need aid perform various basic daily living activities, at least once a day, or have intermittent or limited support for their personal autonomy needs; this type of dependency is rated from 25 to 49 points. Dependency is considered severe when the person needs help in performing various basic daily living activities two or three times a day, or extensive support for personal autonomy needs; this type of dependency rates from 50 to 74 points. People are considered highly dependent when they need help in performing various basic daily living activities several times a day, with the total loss of physical, mental, intellectual or sensory autonomy, a need for the necessary and ongoing support of another person or general personal autonomy needs.

The majority of autonomous communities has established a procedure that establishes two distinct phases or administrative procedures and therefore requires two different administrative decisions which are obviously conditional upon each other: the first to recognise the degree and level of dependency, and to complete and sign this, and the other for the implementation of an Individualised Assistance Plan (PIA)[8]. This articulation of the process affects, among other things, the length of the time limits set in their own forecasts of regional regulations, which are breached in almost all territories as well, which is assuming that applicants have to wait as much as two years to get their PIA, and according to recent agreements the current waiting period is no more than six months.

4. Features of the System for Autonomy and Care for Dependents

The Law on Promotion of Personal Autonomy and Care for Dependent Persons in *Article 15* of said law cites the following benefits:

1. Remote assistance.
2. Home aid.
3. Day and evening care centres.
4. Residential care.
5. Precautionary measures and promotion of personal autonomy.

As in *Article 16*, paragraph two of the aforementioned law, the financial benefits are as follows:

1. Financial benefits related to said services
2. Financial benefits for care within the family home
3. Financial benefits for personal assistance

The law establishes two different yet non-contradictory and complementary strategies; such strategies are set out in the title of the law itself: the promotion of personal autonomy and care for those in situations of dependency.

[8] PIA: Programa Individualizado de Atención – Individualised Assistance Plan

The following benefits may be offered in relation to the degree of disability

- Access to means of employment for people with disabilities
- Workplace adaptations
- Adaptations to employment tests
- Early retirement
- Access to housing for public protection
- Grants and/or individual assistance: rehabilitation treatments, supportive care products, home accessibility adaptations, etc.
- Rehabilitation support and assistance
- Educational support and resources
- Pension without contributions for disabled persons
- LISMI (Social Integration of the Disabled Act) services: Healthcare and Pharmaceutical Services, Mobility Allowance and Compensation for Transportation Expenses
- Family benefits: economic allowance for each minor child or foster child, or child over 18 years of age with an equal to or greater than 65% degree of disability
- Extension of maternity leave in case of disability of child or foster child
- Admission to Centres or other institutions
- Tax benefits: Assistance from third parties to travel to work, reduced mobility, need for adapted housing, etc.
    - Individuals' Income Tax
    - Companies' Income Tax
    - Inheritance and Gift Tax
    - Value Added Tax
    - Excise duty on certain means of transport
    - Motor Vehicle Taxes
- Parking card for persons with reduced mobility
- Taxi cards
- Reduced-price public transportation

Other grants and services offered to persons with disabilities may be established by agencies responsible for social services whether private or at the municipal, regional or state level.

The Law on Promotion of Personal Autonomy of and Care for Dependent Persons arguably rests on such benefits established by social services; as such the law may be without objection defined as a „*Fourth Pillar of the Welfare State*" when fully put into practice.

It is expected that the Promotion of Personal Autonomy should rest fully in the benefits derived from social services, but it is much more questionable that attention towards situations of dependency must solely rest upon such services. We have seen the complexity of the disorders needing treatment, most or all of which having components strongly related to the fields of physical and mental health.

The last aim of the law is to provide global and universal services along with individualised treatment. The reality of dependency has a markedly bio-psycho-social component while the law seems to provide only for social services. As a result, my proposal serves to extend coverage to state and regional public bodies directly related to health and social services; by that meaning the Ministry of Health and Consumer Affairs as well as the various Ministries of Health Services of the Autonomous Communities.

It makes little sense to carry out treatment for those with marked socio-medical needs exclusively from one area – in this case „*social*" care. If more health care were incorporated into the managing bodies of this Act, structures making use of appropriate intervention protocols with regard to care of dependent persons could be developed. As in Law 13/1982 of 7 April, Social Integration of Disabled Persons (LISMI) under Part Four of Disability Diagnosis and Evaluation, *Article 10* states, „*multi-disciplined teams acting in assigned sectors will be established to ensure integration of dependent persons within the socio-community environment, guaranteeing attention to each patient. The groups' composition and functions are to be established by regulation within a maximum of eighteen months from the date of effect of this law."* Article 20 of the same law states, „*The rehabilitation process is established within specific institutions fostering a close relationship with recovery centres where patients may avail themselves of care and, if necessary, continue with at-home treatment by way of mobile units of professional caregivers."*

This socio-medical care system may result in new measures of coordination, planning and multi-disciplinary management to provide a technical and global view of personal autonomy and dependency. The managing bodies of such system should use the support and technical reports of planners, architects, telecommunications and computer experts, economists, etc. In order to carry out a more appropriate intervention in a sensitive area of social services, the big picture as well as all the fine details regarding the reality of the situation must be considered.

This may look much clearer if we consider the International Classification of Functioning, Disability and Health (ICF)[9] which, at the First Level, sets forth a list of classifications of great importance to understanding the scope and requirements of training and the need on a case by case basis for specialists or general care providers. Also in the First Level are described the functions, structures, activities and environmental factors of disability through a list of chapters with analyses.

At the first layer of analysis: descriptions of mental and/or sensory functions and pain, functions of voice and speech, functions of the cardiovascular, haematological, immunological, metabolic, endocrine, genitourinary, reproductive, respiratory and digestive systems, functions, neuromusculoskeletal/movement functions and functions of the skin and related structures.

Bodily structures: descriptions of the nervous system, eye, ear and related structures, structures involved in voice and speech, the cardiovascular, immune and

[9] ICF: International Classification of Functioning, Disability and Health

respiratory systems, structures related to digestion and metabolism, the endocrine glands, structures related to the genitourinary and reproductive systems, skin and other related body parts.

Activities and participation: all activities related to learning and application of knowledge, general tasks and demands, communication, mobility, self-care, domestic life, interpersonal interactions and relationships and other areas of life derived from the community, social and civic interaction.

Environmental factors: products and technology, the natural environment and its changes resulting from human activity, support and relationships, attitudes and services and systems and policies.

The ICF describes such classifications in greater detail within Levels Two and above. As shown in this preliminary classification, there is a great need for knowledge about dependency and disability; as such the importance of participation by experts and specialists with extensive knowledge on these matters is essential.

As previously stated it is within the family – and most often weighing upon the shoulders of women – that the burden of care for dependents rests without any type of external support. This Law seeks to respond to these and other needs of families as well as the dependents themselves. The vulnerable situation of all parties involved requires the attention and understanding of both general care providers and specialists; in other words, care must be „professionalised."

The requirements as established in 2007 by IMSERSO[10] and regarding the importance of attention for mental health diseases as well as the criteria and collective needs of those affected by serious mental illness are as summarised below:

- Access to basic services of the State, noting that such services must ensure that the dependent person's needs are attended to while supporting inclusion within Community through the standard resources of such.
- Treatment, which should include a broader set of measures to help patients break free of their symptoms, cope with their disabilities and maximise their opportunities.
- Psychosocial Rehabilitation Techniques in areas such as social skills, daily living activities, conflict resolution, stress and symptom coping exercises, family interventions and support for families.
- Financial support not only in areas necessary for survival, but also those offering a better degree of human dignity.
- Support for social inclusion and maintenance of patients in social networks to avoid isolation and the progressive social deterioration that accompanies it. This includes support for leisure activities, membership to clubs and associations, mobility, etc.
- Housing: patients should live in comfortable environments of their choice (where possible).
- Access to employment and job training services.

[10] IMSERSO: Social Security Administration Body for Older and Dependent Persons

- Defence of their rights including legal protection, access to services and information regarding their health and treatment, etc.
- Support for families including information, professional services, counselling programs and material resources

Caring for persons with severe mental disabilities is quite possibly one of the greatest challenges of caring for those with disabilities in this country. The Law for the Promotion of Personal Autonomy of and Care for Dependent Persons will act as a tool for responding to the needs of those with serious mental illnesses and their families as well as a means to pay attention to such patients outside the realm of the existing closed psychiatric settings in which whole families take responsibility for continuity of drug treatment the without necessary and proper qualifications – which are basic and necessary for any type of treatment – and which are clearly insufficient for the proper care and social integration of such persons.

5. Difficulties facing the successful implementation of the Law for the Promotion of Personal Autonomy of and Care for Dependent Persons

The difficulties manifested at the moment of enactment and subsequent implementation of the Law may be described by a push and pull of figurative light and shadow – push regarding its very enactment and implementation with pull regarding, in my perspective, direct opposition to its enactment by way of use in partisan politics and other laws.

Another shadow hanging over the Law is the unequal application that is taking place in Spain – due to the aforementioned reasons among others – and more dramatically, the lack of coordination among Public Institutions responsible for planning and implementation of such, pleading competency issues.

This Law has become a subsystem lying in seventeen different Social Services laws. Attention and services geared towards dependents may be in the nature of services and financial benefits, making the first two priorities. Such benefits and services set forth by the Law Unit are integrated into the Social Services Network of the Autonomous Communities within the areas of competency that the same communities have undertaken.

The CERMI (Committee of Representatives of Persons with Disabilities) position paper on the Promotion of the Personal Autonomy of and Care for Dependent Persons subject to revision as per law 39/2006 dated 14 December brings up a basic, fundamental right: that the System for Autonomy of and Care for Dependents must guarantee the same rights it is called upon to recognise.

CERMI's position with respect to the profiles of disability in the law is that it remains „*absorbed by a more nebulous and diffuse consideration. Its inclusion within the new concept of dependency, which lacks clearly recognisable boundaries for the establishment of a new breed of administrative system for its application as well as the commitment of greater budgetary resources, leads us to*

a situation that we begin to consider negative and appraise as dangerous, seeing as it may jeopardize the progress and achievements attained in relation to the determination of specific supports for each unique disability. Additionally, at some point, it may involve the dismantling of the Spanish social welfare system for failure to consider the care needed, based on the type of disability or other social factors rather than the degree and level of dependency (...). The autonomous communities are draining resources from the social welfare system to address situations of dependency. We lose, then, identity, our individual importance, diluted in a newly configured group that feels a bit forced. The subjective rights that the law creates cannot be left at the mercy of budgetary allowances or means (...). Those who meet the precise requirements to be recognized as dependent persons must access benefits and services according to their corresponding degree and level of dependency instead of allowing this to be determined by the budgetary means resulting from the annual bilateral negotiations between the central government and each of the regional authorities. Lastly, it should be emphasized in this section that the law recognizes the dependent person's right to personal autonomy. For this reason, the financial assistance in the third additional provision to support the person with assistive devices or the tools necessary in the normal course of everyday life of the person, or to facilitate accessibility and adaptations in the home that allow for an improved ability to function in the dwelling and its immediate surroundings, must be guaranteed in the same way as the rest of the services included in the disability services directory established by law. Consequently, they cannot be funded as discretionary allowances but rather as real rights, with adequate economic resources and enforceable as such."

Similarly, the disability services detailed in Article 15 of the law take priority and will be provided through the social services network's public offering by the respective autonomous communities through duly accredited public or private, state-supported facilities. Priority access to services will be determined by the degree and level of dependency, and by the same token, the applicant's financial circumstances. Until SAAD's service network is fully in place, dependent persons who cannot access services by implementing the priority system mentioned will be entitled to an economic benefit tied to the service. Furthermore, beneficiaries will participate in the cost of services, according to the type and cost of these services and the beneficiaries' personal financial circumstances.

The network of centres will be made up of public facilities run by the autonomous communities and local authorities, state-run referral centres to promote personal autonomy and care of dependent persons, as well as duly accredited private, state-supported facilities, in accordance with the conditions established by each of the autonomous communities, with those facilities in the third group warranting particular attention.

Privately-funded facilities that provide services for dependent persons must have the proper accreditation from the corresponding autonomous community.

Given the structure of the Spanish state, which is composed of seventeen autonomous communities, possibly one of the most notable consequences of this arrangement is that a subjective right, as guaranteed by this law, is defined using seventeen different sets of criteria to meet the same need. It reveals the lack of coordination, duplication of services and benefits, and the squandering of public funds that the aforementioned implies.

In order to support these claims, I would like to use as examples the three autonomous communities with the largest populations, which among them represent 47.41% of the country's population. These autonomous communities are Andalusia (17.76%), Catalonia (15.99%) and Madrid (13.66%). According to the Statistical Information System for Autonomy and Dependent Care, current as of January 1, 2010 from the Institute for the Elderly and Social Services (IMSERSO), the first of these regions has made 286,057 determinations representing 3.45% of its population, the second has made 173,164 determinations that account for 2.32% of its population, and the third has made 60,362 determinations that represent 0.95% of its population.

With respect to the applications filed in these communities, Andalusia has received 29.45%; Catalonia, 15.38%; and Madrid, 5.34%. Andalusia has made 286,057 determinations, representing 85.7% of the applications, of which 39.51% are Grade III and 30.21% are Grade II, representing 69.72% of applicants entitled to benefits. Catalonia has made 173,164 determinations, representing 98.95% of applications, of which 46.49% are Grade III and 29.03% are Grade II, for a total of 75.53% resulting in favourable determinations. For its part, Madrid has made 60,362 determinations, representing 98.95% of applications, of which 51.73% are Grade III and 30.06% grade II, with 81.79% of applications resulting in a benefit award.

If we link the beneficiaries and the benefits awarded in these three autonomous communities, taking into account that some people may receive more than one benefit, we find that the average ratio of benefits per recipient is 1.15. Andalusia registers above average at 1.31, while Catalonia and Madrid come in below average at 1.13 and 1.02, respectively. Each of the communities utilizes some benefits more than others. For example, in Andalusia, 22.26% of beneficiaries receive Telecare services and 46.43% get family care benefits; in Catalonia, 16.81% receive residential care and 58.88% get family care benefits; conversely, in Madrid, 59.91% receive residential care and 19.14% get family care benefits.

At present, it may be relevant to mention some of the rights proclaimed in our Constitution: „*Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance. Spaniards have the right to choose their place of residence freely, and to move about freely within the national territory. Citizens have the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage. The right to health protection is recognized. It is incumbent upon the public authorities to organize and safeguard public health by means of preventive measures and the*

necessary benefits and services. The law shall establish the rights and duties of all concerned in this respect. The public authorities shall promote health education, physical education and sports. Likewise, they shall encourage the proper use of leisure time. The public authorities shall carry out a policy of preventive care, treatment, rehabilitation and integration of the physically, sensorially and mentally handicapped who shall be given the specialized care that they require, and be afforded them special protection in order that they may enjoy the rights conferred by this Title upon all citizens."

Likewise, it states that: „*The public authorities shall guarantee, through adequate and periodically updated pensions, sufficient financial means for senior citizens. Likewise, and independently of the obligations of their families towards them, they shall promote their welfare through a system of social services which shall provide for their specific problems of health, housing, culture and leisure. The State guarantees the effective implementation of the principle of solidarity vested in Article 2 of the Constitution, safeguarding the establishment of a just and adequate economic balance between the different areas of Spanish territory and taking into special consideration the circumstances pertaining to those which are islands. The differences between the Statutes of the different Autonomous Communities may in no case imply economic or social privileges. All Spaniards have the same rights and obligations in any part of the State territory. No authority may adopt measures that directly or indirectly obstruct freedom of movement and settlement of persons and free movement of goods throughout the Spanish territory."*

In my opinion, and according to the implementation of the Law for the Promotion of Personal Autonomy and Care of Dependent Persons, I think the application of these articles of our constitution can be questioned, given that in our country, citizens living together for reasons of birth or residency may have various economic means and access to resources. In the case of the autonomous communities we used as reference, if one is dependent and Andalusian, one has a greater chance of receiving a favourable determination, with roughly equal percentages of grade III and grade II. Similarly, one may receive Telecare and family care benefits. If one resides in Catalonia, there is a decreased chance of being granted benefits; however, there is a far greater possibility that one's benefits will include residential care services or family care benefits. However, in Madrid, one has still less of a chance of receiving benefits, and one will almost certainly receive a benefit for residential care or adult care centres offering day programs and night respite care.

One questions the reasons for these different orientations when benefits are awarded. Is it a question of funding? Are the benefits the best fit for the person's limitations? Did Andalusia receive more money from the state than Catalonia or Madrid to serve the dependent population? Whom do we call upon to demand equal rights for all Spanish citizens?

6. Conclusions

It is easy to legislate without adequately developing the budgets that will implement and maintain these laws. Legislation is passed without repealing earlier laws containing provisions that remained unfulfilled or unaddressed in subsequent legislation. Legislation is passed without taking stock of the number of users and beneficiaries of such laws. Citizen participation in these tasks focuses on the opportunity to vote every four years. Coordinating bodies among the different public administrations are scarce if not non-existent, and at best, it becomes a desperate struggle to defend partisan political viewpoints. Powers are transferred to the autonomous communities without the obligation to properly indicate what said administrations will need to earmark for the adequate implementation and maintenance thereof.

After a long, dark period in its history, Spain has achieved, through the adoption and implementation of our constitution and the transition from a centralized government to an autonomous Spain, the most extended period of social peace in our history. While this may seem to the reader like a criticism of the autonomous government we have established, the opposite is true. We advocate for yet another decentralisation, one that would transfer authority from the autonomous communities to local governments.

This last proposal is made in a context of globalisation that runs counter to democracy, as it forces national governments to try to justify their democratic practices, actions and pressures of the so-called „speculative markets" and/or „interests of the speculators," which in turn are not subject to the choice of citizens who suffer the consequences. This means that democracy and national governments are „quite simply" puppets in the hands of interests beyond those of the citizens they claim to represent. Based on this type of situation, no one is surprised at the public's high degree of dissatisfaction toward politicians and the representative bodies, nor at the rise of nationalism and the growth of racist, xenophobic-populist parties.

In the context of Spain, at a time of crisis like we had not seen before, President Mariano Rajoy won the Spanish elections by an overwhelming majority with some ideas embodied in a „framework program" (right now, perhaps not all European governments have a president who would win so convincingly at the polls). The crisis and justification of the same, „market orders," „the interests of Merkel and Sarkozy," and so on make the „kick-off program" to steer the fate of Spain turn into a „totally different sort of government program." In this situation, it is easy to argue the need that some Spanish and European citizens have expressed for active democratic participation in the elections from which politicians emerge who will govern countries and destinies, establish government bodies and develop social policy, and care for and maintain the welfare system that we provided

ourselves with following the bloodshed of millions of Europeans produced by the two world wars that gripped us.

No one should find it odd that as European citizens we are asking for active democratic participation in Germany's and France's elections, since they seem to be the two nations that govern the fate of the various countries that compose the European Union.

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Abbreviations

CERMI: Committee of Representatives of Persons with Disabilities
SAAD: System for Autonomy and care for Dependency
CC.AA.: Autonomous Communities
PIA: Individualised Assistance Plan
CIF: International Classification of Functioning, Disability and Health
IMSERSO: (social security administration body for benefits of older and dependent persons)

THE PRINCIPLE POLLUTER– PAYS AND THE CIVIL LIABILITY RELATED TO THE ENVIRONMENT

Livia MOCANU*

Abstract: *The analysis of the liability resulting from the effects on the environment involves also the reference to the principle the polluter – pays. This principle imposes to the operators the cost of the preventive measures and action against the pollution resulting from their activities independently of any fault. It laid the foundation for a special liability regime instituted at the communitarian level by Directive no. 2004/35/CE regarding the environment liability in order to prevent and repair ecologic damages, transposed into the Romanian law by G.U.O. no. 68/2007 concerning the environment liability with reference to the prevention and repair of the prejudices on the environment. The present study has as object the analysis of the foundations of this special regime and complex of engaging and realizing the operator „liability", as well as the extent to which this liability system represents a corollary of the principle polluter – pays.*

Keywords: *polluter, responsibility, environment.*

1. Introduction

The classical mechanism of civil responsibility forces the author of an illegal fact to repair its damageable consequences, as long as there is a causative relation between generating factor and prejudice. The responsibility based on fault represents the general principle of delictual civil responsibility in regulation art. 1357 of the new Civil Code.

The social realities, the increase of danger for anonymous accidents, with serious and irreducible effects, determined a reformation of civil responsibility, emphasizing fault objectivation[1]. A new consolidation of delictual civil responsibility justifies the engagement of the obligation to repair the damage, considering first of all the victim's interest to re-establish the previous situation by repairing the damage suffered.

The objectivation of responsibility law corresponds to the transition from fault responsibility to responsibility aiming, before anything, at repairing the damage, the fault being presumed or in the absence of any mistake[2]. This phenomenon is not only specific for environmental law, it can be observed in responsibility law in general.

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[1] For details, on the objective consolidation of delictual civil responsibility in the contemporary period see, Lacrima Rodica Boilă, *Răspunderea civilă delictuală obiectivă,* C.H. Beck Publishing House, Bucharest, 2008, p. 37-96.

[2] Agathe Van Lang, *Droit de l'environnement*, Thémis droit, Paris, 2002, p. 270.

2. Principle *„polluter pays"* and civil responsibility

The principle *polluter pays* constitutes a synthesis of some economical and juridical aspects, conjugated by the imperative of environment protection and conservation. Until present, it was juridical expressed, especially at communitarian level and tends to acquire a universal recognition[3]. This principle imputes the cost of prevention and removal measures for the pollution caused by their activities, independent of any fault to the polluters. The obligation to compensate is based on an objective fact, production of noxious substances; here the principle finds its fundament in the notion of created risk. But, by following the internalization of the negative „externalities" cost (of pollutions) triggered by many economical-social activities, the principle does not aim at appointing any responsible, simply a payer able to support the compensation under the form of taxes, for instance.

It is rather a question of insurance system, based on the mutuality of all polluters, of covering the damages caused to the environment, including for the purpose of removing the pollution effects and repair the damaged spaces[4]. Though with an important juridical content, the principle *polluter pays* exceeds the framework of juridical responsibility for the damage caused to the environment, and one cannot deduce a civil responsibility system from this principle.

Certainly, engaging civil responsibility supposes the cumulative accomplishment of several conditions, like: the deed, prejudice and the causality relation[5], conditions that are completely foreign to the principle *polluter pays*. Considered literally, the principle could only be the source of an absolute or ineluctable responsibility. Absolute responsibility, which originates from the U.S.A. (*absolute responsibility*) supposes un mechanism of automatic compensation, none of the exoneration causes being able to remove it[6].

Nevertheless, the Lugano Convention on the civil responsibility for the damage caused by running activities that are dangerous to the environment[7], the Green Paper (Green Paper/Livre vert) on the environmental responsibility of the European Commission (May 1993) and the White Paper regarding responsibility for ecological damages (Bruxelles, February 1999), which establish a no-fault responsibility regime, show it as the way to ensure the application of the principle

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[3] See, Michel Prieur, *Droit de l'environnement,* Dalloz Publishing House, Paris, 1991, p. 170-181; Ernest Lupan, *Dreptul mediului,* Lumina Lex Publishing House, Bucharest, 2001, p. 61-62; Mircea Duțu, *Tratat de dreptul mediului,* 3rd Edition, C.H.Beck Publishing House, Bucharest,2007, p. 271.

[4] Marilena Uliescu, *Dreptul mediului înconjurător,* Publishing House of „România de Mâine Foundation „, Bucharest, 1998, p. 25.

[5] For details, see, Constantin Stătescu, Corneliu Bârsan, *Drept civil. Teoria generală a obligațiilor",* 3rd Edition, All Beck Publishing House, Bucharest, 2000, p. 145-202; Simona – Maya Teodoroiu, *Răspunderea civilă pentru dauna ecologică,* Lumina Lex Publishing House, Bucharest, 2003, p. 25 – 45.

[6] Agathe Van Lang, *op.cit.,* p. 271-272.

[7] *Convention sur la responsabilité civile des dommages résultant d'activités dangereuses pour l'environnement,* Conseil de L'Europe, 1993

polluter pays[8]. The explanatory report of the European Council Convention states that the financial charge represented by this responsibility has repercussions on the products and services that the polluter (*l'exploitant responsible)* produces or supplies, according to the principle *polluter pays* [9].

In this context, the French doctrine considered that deducing a civil responsibility system from the principle *polluter pays* is a contestable approach, as long as putting the cost of pollution on a potential polluter and appointing a responsible for the pollution, forced by this title, to repair the damages caused, represents two different things[10].

3. Directive regarding environmental responsibility in order to prevent and repair environmental damages

After a series of previous actions, on the 23rd of January 2002, the proposal of the European Parliament and Council regarding environmental responsibility in order to prevent and repair the ecological damages which was modified on the 26th of January 2004 was published, and a final text was reached on the 21st of April 2004, in the form of Directive no. 2004/35/CE on environmental responsibility regarding the prevention and repair of damages caused to the environment. As shown in the first article, the directive aims at establishing a common framework for the environmental responsibility, based on the principle *polluter pays.*

Therefore the directive does not escape an amalgam between civil responsibility and the principle *polluter pays*. The result is a complex repair regime, but an unsatisfactory one. In the statement of reasons one shows that according to the principle *polluter pays (pollueur – payeur)* an exploiter causing a serious damage to the environment or creating an imminent threat of such a damage, must, as a principle, bear the cost related to the necessary prevention and repair measures (point 18). Though ostentatiously invoking the principle *polluter pays*, the directive does not put in the polluters' charge neither the pre-existent pollutions nor the obligation to insure or to contribute to a compensation fund; it does not institute the presumption of the causality relation between their activities and the ecological damages they generate. That is why one stated that the directive does not apply the principle *polluter pays* but marginally, as one cannot find here the origin of a regime to prevent and repair the ecological damage imputing mainly to the State the

[8] For details, on the content of these documents see, Simona – Maya Teodoroiu, *op.cit.,* p. 154-159, p. 183-188.

[9] Agathe Van Lang, *op.cit.,* p. 271.

[10] C. Larroumet, *La responsabilité civile en ma tière d'environnement. Le projet de convention du Conseil de L'Europe et le Livre vert de la Commission des Communautès européennes,* Dalloz, Paris, 1994, p.101; X. Tunis, *Le droit de la responsabilité civile en ma tière écologique : entre relecture et création,* în *Quel avenir pour le droit de l'environnement,* F. Ost et S. Gutwitrh, Presses Universitaires de Saint – Louis, p. 355.

charge of repair or of a civil responsibility regime, a hybrid one, „keeping a surprising part to the fault responsibility"[11].

Certainly, the directive establishes a mechanism of administrative policy, conferring an essential part to the public authority, called in the directive „the competent authority" (l'autorité compétente).

The directive actually mentions that the exploiter must bear the cost of the prevention and repair actions, in accordance with the principle *polluter pays*.

The directive leaves to the States the faculty of not to cover the completeness of the born costs when the expenses necessary to this effect are superior to the stake or when the exploiter cannot be identified. The exploiter is exempted of his financial obligation if he can prove that the damage was caused by a third party or was caused by the non-observance of an order or an instruction emanating from a public authority (art. 8 – 3). Finally, the member States have the possibility to stipulate other exoneration causes especially if the exploiter shows that he did not commit the damage by mistake or negligence and that the damage is caused by an emission or an expressly authorized event or it corresponds to the development risk[12]. One stated that article 8 operates 'a curios distinction between juridical and financial responsibility' the exploiter benefiting of a repair exemption without being exempted of his responsibility[13].

As for „the financial security"of the new system, that is the effective coverage of the financial obligations resulting from this, one must also note a lack of coherence. The issue is to stress a breach between the Commission, Parliament and the NGO's on the one hand, favourable for the institution of a compulsory regime under the form of an insurance, and on the other hand certain States, industrials and insurance media, estimating it as premature, while considering the difficulty of measuring the probability to realize the risk and the ecological damage estimation risk.

Essentially, the directive installs a regime of hybrid responsibility, keeping objective responsibility for those professional activities presenting a risk to health or the environment, and which are stipulated in annex III. Thus, it confirms the classical relation between risk and no-fault responsibility and it joins the direction of Geneva and Lugano conventions.

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[11] Agathe Van Lang, *op.cit.,* p. 273. On the characteristics of the regime instituted by the Directive, see: Michel Prieur, *La responsabilité environnementale en droit communautaire,* Revue europeénne de droit de l'environnement no. 2/2004, p. 129; *Estudios sobre la Directiva 2004/35/CE de Responsabilidad por Danos Ambientales y su Incidencia el el Ordenamiento Espanol,* special number of the Magazine „Aranzadi de Derecho Ambiental", 2005.

[12] On the development risk,: Constantin Teleagă, *Armonizarea legislativă cu dreptul comunitar în domeniul dreptului civil. Cazul răspunderii pentru produsele defectuoase,* Rosetti Publishing House, Bucharest, 2004, p. 216-224; Juanita Goicovici, *Riscul de dezvoltare,* in magazine Dreptul no. 6/2005, p. 13-46.

[13] C. Jarlier – Clement, M.A. Gautier – Sicari, *La directive sur la responsabilité environnementale: originalités et incohérences d'un régim juridique novateur,* BDEI, 2004, nr. 4, p. 10.

For those activities that are not listed in annex III, considered to be harmless for the environment, the directive constitutes an easy special regime: the exploiters' responsibility is not engaged unless they committed a mistake or a negligence and only for those damages suffered by species and inhabitants.

4. The Government urgent Ordinance no. 68/2007

The Directive of 21st of April 2004 was transposed in the internal law by the Government urgent ordinance no. 68/2007 regarding environmental responsibility referring to preventing and repairing the environmental prejudice[14].

According to article 1, environmental responsibility is based on the principle *polluter pays* in order to prevent and repair the environmental damage, which expresses a faithful repetition of the correspondent text in the communitarian regulation.

In this context, the normative document conception is based on the idea that the operator must bear both the cost of prevention measures adopted by the public authorities to prevent causing a damage, and that of its repair, when it took place. Determined are the event which originated the prejudice and the nature itself of the damage caused to the environment. As a consequence, the ordinance establishes the professional activities which originated the damage caused to the environment[15] and defines the notion of damage caused to the environment[16].

The environmental responsibility regulated by the Government urgent Order no. 68/2007 is characterized by directing responsibility towards the operator of the activity, as he has technical knowledge, resources and the operational control of his activity and is best placed to assume the devolving risks.[17]

In the ordinance conception, the main part in preventing and repairing damages caused to the environment is attributed to the public authorities.

At the same time, the ordinance establishes a mechanism of control and survey, as well as a punitive system for non-observing the stipulated obligations, made up of offences and crimes (see, art. 40 - 42). Together with internal control, the ordinance also stipulates'a mechanism of external control' granting certain physical or juridical entities, including non-governmental organizations 'the right to action' so they can ask the public authorities to act or to contest the way of

[14] Published in the Off. G. no. 446 of 29th June 2007.

[15] In annex no. 3, 11 categories of professional activities are considered, viewed as dangerous for the natural protected species and habitats, water and soil, like: functioning of the installations subject to the integrated environment authorization, activities of dangerous or non-dangerous waste administration, evacuation in the internal surface or underground waters, evacuation or injection of pollutants into these, transportation of dangerous merchandises etc.

[16] In art. 2 pt.13, the law distinguished three categories of prejudices caused to the environment: those caused to the natural protected species and habitats, caused to waters and respectively to soil, by prejudice understanding a measurable negative change of a natural resource or a measurable deterioration of a service related to natural resources, which can occur directly or indirectly".

[17] Mircea Duțu, *op. cit.,* p. 497.

action (or the absence of action) from their part. More generous than the communitarian legislator, the national legislator recognizes the determined subjects the right to transmit observations and to demand them to take preventive and reparatory action (not just a simple „authorization").

All these points of internal regulation lead to conclusions that are similar to those accompanying the comment on Directive 2004/35/EC, in the sense that the environmental responsibility instituted by these norms is rather a repair than a responsibility in the classical meaning of common law.

5. Conclusions

The principle *polluter pays* constitutes a synthesis of some economical and juridical aspects, determined by the need to protect and conserve the environment.

The relation between civil responsibility and the principle *polluter pays* is emphasized by two distinctions, opposing for one chronic and accidental pollution, and for the other potential and real pollution. The principle *polluter pays* was conceived to impute the cost of chronic pollutions, whose particular features (diffuse and progressive damages) come with difficulty to the conditions of engaging civil responsibility. This means that the repair of accidental damages can be related to a civil responsibility system.

At the same time, if applying the principle *polluter pays* supposes paying pollution taxes or royalties, before any damage occurred, by those susceptible to produce it, which are the potential polluters, by civil responsibility only the real polluters have to support the repair, once the damage was caused. Hypothetically, potential polluters are more numerous than real ones.

Consequently, the reasoning determining civil responsibility in the matter of ecological damage interferes but not overlaps completely the objective polluter pays.

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THE RIGHT TO INFORMATION IN HEALTH CARE: The right to physical integrity or the right to health protection?

Rafael JUNQUERA de ESTÉFANI[*1]

Abstract: *This article provides a general introduction to the subject of patients' access to information, for which I will begin by explaining, in the first place, what I understand by right to information and whether the right that concerns us in this chapter is a specific right or whether it fits within a general right to communicate our ideas or receive the ideas of others. Secondly, I will analyse the peculiarities of information in the area of health care and how it derivates from a broader right. Thirdly, I will analyse the figure of the patient as a holder of rights and specifically, as the holder of this right, to conclude by relating the right to information with the provision of consent for all actions that have to do with the health of individuals. Lastly, I will present a Sentence of the Spanish Constitutional Court, confirming some of the ideas I have defended throughout the text. I will study all this in the light of the Law of Patient Autonomy, some basic international texts, and the application of bioethics principles.*

Keywords: *Patient rights, information to the patient, informed consent.*

1. THE RIGHT TO BE INFORMED IN HEALTH CARE

When we say within the context of health care that the patient has the right to information it could be understood that we are referring to a manifestation of a fundamental freedom such as the freedom of information. From this point of view it would be included within the right to freedom, which is one of the *manifestations of one's own identity*[2] and which also comprises the *freedom of opinion and expression*, the *freedom of press*, and the *freedom of communication and information.*

The latter two, *freedom of communication* and *freedom of information*, are usually proclaimed in combination, which means they have a content that is closely related and that goes further than manifesting an opinion and expressing one's self: it refers to the right to obtain information. In case-law[3] this right includes not only the mere expression of opinions, but also the ability to listen to other opinions. It

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[1] Part of this text has been developed within the collective work: *Información al paciente crítico y su familia,* Barcelona, Edikamed-Ediciones Médicas, 2012. The subject has also been dealt with more broadly in the book *Libro Homenaje al Profesor Benito de Castro Cid* (pending publication).

[2] DE CASTRO CID, B., „Los Derechos de libertad" in DE CASTRO CID, B. (dir.), *Introducción al estudio de los Derechos Humanos,* Madrid, Universitas, 2003, pp. 289-291.

[3] *Ibidem*, p. 291.

refers to the exchange of information between human beings and its recognition and legal protection.

The right of the patient to information does not seem to be included in the generic right to information, because the latter is a derivation from the freedom to express and communicate ideas, whilst with regards to the patient what is being recognised is his/her right to know what disease he/she suffers, what diagnostic and therapeutic techniques can be applied and what effects they produce, what are the possibilities of healing, what risks there are, etc. It consists in very specific information that is relevant to all the actions that affect the patient's physical integrity. Therefore, it can be stated that the legal interest protected is different in both cases: in the first we are talking about the ability to express ideas freely and everything this entails; and in the second case, it is the access to important information for the protection of one's own health. Below we will go further into the nature and the content of the right to health care information.

2. INFORMATION AND HEALTH PROTECTION

Having differentiated it from the generic right to information our task is now to analyse what the right to information in the field of health care consists of.

If we look at human rights declarations, we see that in them two basic rights are stated: the right to life and the right to physical integrity[4]. According to what was stated in the previous section, I consider that these are both closely linked to the content of the patient's right to information. The aim is to make sure that when undergoing any action that affects their physical health in any way (health, physical integrity, etc.), individuals receive sufficient information. This connection can lead us to think that it derives from these two rights (life and physical integrity). However, in reality this right which we are referring to is joined directly to the *health* of the individuals, which is why the link is clearer with the right to *health protection* which is an entity in its own right in the declarations and legal texts[5].

The right to health protection belongs to the so-called social rights which are eminently related to health care and whose ultimate aim is to apply the principle of equality in its respective areas, in this case the area of health care.

[4] Article 15 of the Spanish Constitution. Articles 3 and 5 of the *Universal Declaration of Human Rights,* etc.
[5] Article 25 of the *Universal Declaration of Human Rights* and article 43 of the Spanish Constitution.

If we focus on national Spanish law, for one sector of the case-law[6] the right recognised in article 43 of our Constitution[7] has two dimensions: a) on the one hand, the right to the integrity of one's own health; and b) on the other hand, the right to access public health protection services. The first dimension implies that the rest of the individuals must abstain from harming the health of their fellow citizens. The second supposes that the public authorities must create the necessary infrastructure to protect the health of the members of society, which in turn is materialised in two aspects: establishing a health care organisation, and determining the health care services that will be available to individuals.

We can therefore conclude by differentiating three aspects of the right to health protection: a) the negative aspect, which is manifested in that the State and society must abstain from harming the health of citizens; b) the positive aspect, which will materialise in that the State must carry out a number of actions; and c) the egalitarian aspect, which consists in the obligation of the public authorities to allow access to all citizens to health care services and compensate for economic inequality.

This right has been developed in a number of Spanish state laws and other autonomous community laws. First, it was developed in a framework law such as the *General Health Care Law*[8]*,* followed by the publication of the *law of medication*[9], and later on the so-called *law of autonomy of the patient*[10]. This regulation has been developed by royal decrees and autonomous legislation. The health care and medication laws were required to be adapted to the *European Convention for Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*[11] (of the Council of Europe, based on the present day Oviedo Convention) and this need motivated the enactment of the *Law of autonomy of the patient,* cited above, and that completes provisions of the Law of Health Care as general principles, reinforcing and underlining the right to autonomy of the patient.

The Convention cited above establishes as a general principle that all health care interventions may only be carried out with the consent of the person affected

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[6] JERÓNIMO SÁNCHEZ BEATO, E. y MARTÍN VIDA, M. A., *Los Derechos Fundamentales en las relaciones sanitarias*, Madrid, Grupo Editorial Universitario; 2002, pp. 27-28.

[7] Art. 43 of the Spanish Constitution:

1. The right to health protection is recognized.
2. It is incumbent upon the public authorities to organize and watch over public health and hygiene through preventive measures and through necessary care and services. The law shall establish the rights and duties of all in this respect.
3. The public authorities shall foster health education, physical education, and sports. Likewise, they shall facilitate adequate utilization of leisure.

[8] Law 14/1986 on General Health Care.

[9] Law 25/1990 on Medication.

[10] Law 41/2002, basic law regulating the autonomy of the patient and the rights and obligations in terms of information and clinical documentation.

[11] Signed in Oviedo on the 4th of April, 1997, for the Council of Europe.

after receiving the appropriate information[12]. From this moment onwards the bioethical principle of autonomy of will, in the sense of not being allowed to act upon the health of a person without their consent, is laid out in an international document. Likewise it is established that all people have the right to obtain all the information on their health[13]. Here the right to information of the patient is laid out. It even requests the signing States to adapt their legislation to these principles[14], which become authentic rights for the patients.

3. THE RIGHT TO RECEIVE HEALTH INFORMATION

The physician-patient relationship must be based on mutual trust. It is counterproductive to the good functioning of public health to have relationships based on technical and professional arrogance from the health practitioner or on the aggressive and incisive demand for rights on the part of the patient. Both situations generate pathologies marked by excessive paternalism, a spiral of complaints and accentuated defensive attitudes[15]. Nowadays the patient appears as a subject of rights and responsibilities who is freed from dictatorial submission to the techniques and professional practices of the health practitioners. As in the rest of the aspects of his/her life, when it comes to the area of healthcare, the citizen preserves his/her status as subject owning certain rights. Thus, the *General Health Care Law* acknowledges the following rights in articles 9 and 10: to be informed of his/her rights and responsibilities; to be respected in his/her personality, dignity and privacy; to not be discriminated; to be informed of the health services he/she has access to and the requirements to do so; to the confidentiality of all the information related to him/her; to be informed on whether the procedures applied to him/her may be used for academic or research purposes; to be assigned one doctor as single interlocutor with the assistance team; to participate in the healthcare activities; to use the methods for claims and suggestions within the established term frames; to choose his/her doctor and other health practitioners according to the legal conditions; to obtain medication and healthcare products that are deemed necessary for his/her health. These rights are complemented by the *Law of autonomy of the*

[12] Article 5:
An intervention in the area of health care may only be carried out after the affected person has given his/her free and unequivocal consent.
Said person must previously receive adequate information about the purpose and nature of the intervention, as well as its risks and consequences.
At any time the affected person may freely revoke their consent.

[13] Article 10.2.

[14] Article 1:
…Each party shall adopt the necessary measures in their internal legislation to apply the provisions set forth in this Convention.

[15] JERÓNIMO SÁNCHEZ BEATO, E., and MARTÍN VIDA, M. A., *Los Derechos Fundamentales en…*; op. cit., 2002, pp. 43-44.

patient which contains the acknowledgement and development of the following rights (arts. 4-23): the right to healthcare information: the right to privacy; the right to respect of the autonomy of the patient; the right to access clinical history; and the right to receive the discharge and the complementary clinical documentation.

As you can see, the list of rights is very broad, but the one this essay will be focusing on is the patient's right to information.

The Oviedo Convention is already established as the general principle of the applications of biology and medicine that the patient, before authorising an intervention, must receive adequate information on the purpose and nature of said intervention and the risks and consequences it entails[16]. This principle is also set forth in the *Universal Declaration on Bioethics and Human Rights*, which was later created[17]. Further on, the Convention cited above declares that every person has the right to know all the information about his/her health, respecting the right to not be informed if he/she so requests[18]. From the text of this document we can deduce that two rights are acknowledged: the right to be informed, and to not be informed. Within the right to be informed a distinction is made between: global information concerning the health information of an individual and concrete information concerning an intervention that is to be carried out on an individual. In the first case we are referring to the circumstance of the health information records of a patient and the fact that he/she has the right to know them. In the second case we are talking about the case of an individual on whom a therapeutic or diagnostic intervention will be applied, and there is the obligation of providing explanatory information on the technique that will be used, its purpose, risks, consequences, etc.

In the General Health Care Law, four kinds of information to which a patient has access are distinguished:

a- *General information* on his/her rights and obligations[19].

b- *Information on services:* what services the patient has access to and their requirements for access[20].

c- *Information on the academic or research use* of the prognostic, diagnostic and therapeutic procedures applied[21].

d- *Information on the identity of the patient's interlocutor:* who is responsible of informing the patient within the medical team caring for him/her[22].

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[16] Art. 5 *Convention on Human Rights and Biomedicine*.

[17] Art. 8 of the *Universal Declaration on Bioethics and Human Rights*, approved by UNESCO on 19 October 2005:

Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information.

[18] Art. 10.2, *Convention on the Rights*…, op. cit.

[19] Art. 9 *General Health Care Law*.

[20] Art. 10.2, Ibidem.

[21] Art. 10.4, Ibidem.

[22] Art. 10.7, Ibidem.

The rest of the information is left to be regulated by the *Law of autonomy of the patient*, the main objective of which is to regulate two basic rights of the patient[23]: autonomy and information. When recognising and protecting the autonomy of the patient we are contemplating the patient's need to be informed to be able to make decisions concerning his/her health[24]. In this way, information and consent are linked. I will deal with this further in the next section. On the other hand, the legal text dedicates an entire chapter, containing three articles, to the right to information[25]. Previously, clinical information has been defined as „any information, in any form, or of any kind or type, that allows to acquire or expand knowledge about the physical state and health of a person, or the way of preserving it, taking care of it, improving it, or recovering it"[26]. As we can see, in the legal definition itself there is a gross mistake: the action of informing is being identified with the object of the information. It cannot be said that clinical information is „any information…" Information will be the action of making known „any information…" to another individual. But, if instead of this, we stick to the definition stated, the right to information can be classified in the following typology, in my view:

a- *Information for consent*[27]
b- *Healthcare information*[28]
c- *Epidemiological information*[29]
d- *Information regarding academic or research use*[30]
e- *Information on services*[31] and
f- *Information for selecting a doctor and health centre*[32]

We have already stated that the right to *information for consent* will be referred to in section 4 of this article and we refer to it.

As for *healthcare information*, article 4 of this norm recognises a double right of the patient (the positive and the negative aspect): the right *to know* all the information about his/her health with the purpose of any action that may be carried out on it; and the right *to not know*, that is, to be respected in the decision to not receive any information as long as the individual requests so. This information must meet certain requirements[33]: a) it shall be verbal (as a general rule); b) it shall be documented in the patient's medical history; c) the patient shall understand at least the purpose, nature,

[23] Art. 1 of the *Basic law regulating the autonomy of the patient and the rights and obligations in terms of information and clinical documentation*.
[24] Art. 2.2, 2.3, y 2.6; and art. 8.1, Ibidem.
[25] Chapter II, arts. 4 to 6.
[26] Art. 3, sixth paragraph.
[27] Art. 2 cited above.
[28] Arts. 4 and 5.
[29] Art. 6.
[30] Art. 8.4.
[31] Art. 12.
[32] Art. 13.
[33] Art. 4.1 and 2.

risks and consequences of each intervention; d) it will form part of all healthcare actions; e) it shall be true; f) it shall be reported in an intelligible way and appropriate to the needs of the patient; and g) it shall help the patient make decisions. From all these elements we can deduce some practical conclusions. In the first place, we need to get rid of the idea that information must be written – the law provides for verbal information as the general rule. It is sufficient to inform the patient verbally with the simple requirement of making a note of this in the patient's clinical history. In the second place, the minimum information to be explained to the subject is: what purpose there is in the professional action and what it consists of; what risks it entails; and what are the likely consequences. In the third place, the information must be true and will accompany all the actions that fall upon the patient. It goes without saying that false information does not meet this requirement and may lead to liabilities. In the fourth place, it needs to be adapted to the patient's needs and be intelligible so that it helps him/her make decisions – a requirement that is not usually met in day to day clinical activity. The information presented to the individual who is to undergo a therapy or intervention usually consists of a list of consequences and possible risks of the action, although, in most cases, these are very remote. We could say this information is *defensive* of the healthcare professional but does not take away his/her responsibility in the case of malpractice or the duty of information. In practice it is a list of direct or collateral effects, in a technical and laborious language, that doesn't meet the requirement of „intelligible and appropriate" to the needs of the patient and therefore does not help him/her make decisions, but it seems more directed towards dissuading him/her from undergoing the intervention in question. In these cases there is a serious and direct breach to the responsibility contained in the judicial law.

The individual who is bound to guarantee this right to healthcare information shall be the doctor responsible for the patient. Previously the law has defined what *doctor in charge* means: the professional coordinating the information and health care of the patient, acting as his/her main interlocutor. Likewise, it is stated that the rest of professionals caring for the patient or applying a technique or procedure are also responsible for informing the patient. Here the question arises: how far does responsibility go when it comes to the information of each professional? It seems that the law tries to centralise the informative process in one *doctor* coordinating the care, but it later decentralises it by placing the responsibility on each professional practicing on the patient throughout the clinical procedure. It would have been preferable that the individual that the law defines as main interlocutor (doctor in charge) would be the person in charge of the communication and information to the patient, notwithstanding the fact that the other professionals might assist in the task[34].

Another question that arises is, who must the information be given to? who is the subject of this right? It seems clear that[35]: in the first place, it is the interested

[34] For everything referred to in this paragraph see article 4.3 and art. 3 (definition of doctor responsible).
[35] Art. 5.1.

individual him/herself (the patient); and in the second place, it is the people close to him/her (family members or partner), as long as the patient consents to this expressly or tacitly. The family members do not necessarily have the right to receive the information, but attention must be paid to what the patient expresses or his/her reactions towards the family member. In many cases the patient has more trust in someone close to them, such as a friend or other loved one, than in the family. If a patient comes to the health centre accompanied by another person, it can be deduced that the patient has placed his/her trust in that person, except when the contrary is expressed. But it would be advisable to ask the patient, if possible, who are the people he/she trusts in to receive the information. The most difficult problem appears when the patient is not capable of receiving the information: should he/she be informed? who should be informed?

If the patient is not capable of receiving the information, even so, he/she must receive it adapted to his/her „abilities of understanding". In these cases, the legal representative must also be informed[36]. It seems that the law is designed for situations in which the patient is considered *incapable* by Law[37] and, for these individuals, it is necessary to find out who their legal representative is (family members or loved ones is no longer sufficient), because this is the individual who must receive the information and make the decision.

If the legal representative considers from his/her point of view that the patient is unable to understand the information, then it should be communicated to the patient's family members or loved ones[38].

However, this healthcare information has a *limit*: the accredited *existence* of a state of *therapeutic necessity*[39]. The same law states that therapeutic necessity means „the ability of the doctor to act professionally" without informing the patient *when the knowledge of the situation itself could be seriously detrimental to the patient's health.* To apply this limit to the obligation of informing, the following requirements must be met: that the state of necessity is documented, with written explanatory notes on the circumstances of the case in the medical history; and to communicate the decision to the relatives or partner of the patient.

Epidemiological information is a right that corresponds to the citizens as such, that is, to individuals as members of a social community. This right means knowing the health care problems of the group when they suppose this is a risk to the collective health or individual health. The requirements that this information must meet are as follows: it must be true; and it must be communicated in intelligible terms which are appropriate for health protection. These are the same requirements for healthcare information.

[36] Art. 5.2.
[37] Minors or people with mental disabilities, for example.
[38] Art. 5.3.
[39] Art. 5.4.

What has been denominated *information on academic or research use* refers to the right that every patient has to be warned of the possibility that the „prognostic, diagnostic and therapeutic procedures" applied to him/her may be used for academic or research purposes[40]. The use of these procedures for academic or research purposes does not entail an additional risk to the health of the patient. It is a right to information that is regulated within informed consent, which implies that as a previous requirement to providing consent on the part of the patient, the intention of use for academic or research purposes must be communicated.

The right to *information on services*[41], is also set forth and it recognises the right to receive information on the services and units available, their quality and requirements for access.

Finally, the right to *information for selecting a doctor and health centre* makes reference to the ability to access the necessary information to be able to choose a medical professional and health centre according to the conditions established by the health care systems[42].

Having presented the different aspects of the patient's right to information recognised by this law, we shall also talk about what is contemplated and regulated as an obligation on the part of the professional[43].

And to complete this epigraph, I will talk about *the right to not be informed*. As mentioned above, the patient can renounce to this right and it is even recognised as a right that must be documented[44]. For this, the renunciation of the patient may be limited due to various reasons: the interest in the health of the patient him/herself; the health of third parties, collective health; and the therapeutic requirements of the case. In these cases what is at stake is the interests not only linked to the patient, admitting that the renunciation of the patient to know the information about his/her health may not be taken into account. But it is the exceptions which should be interpreted restrictively and not the right to not know.

4. CONSENT AND INFORMATION

From the legal point of view, for the granted consent to produce any effect, in any aspect of the Law, it must be preceded by all the required information to support decision making and granting of relevant authorisations to be able to act. Therefore, the consent may be informed or not, because in such case it has no validity. The law has also contemplated it in this way when referring to the right to information when it talks about consent.

[40] Art. 8.4.
[41] Art. 12.
[42] Art. 13.
[43] Art. 2.6.
[44] Art. 9.1.

Therefore, when the *law of autonomy of the patient* declares that all actions on the health of the patients require the free and voluntary consent of the patient, it adds that this action requires having received the healthcare information to help asses the options available in that case[45] and, to further underline this, it declares that the patient must have sufficient information on any surgical, invasive and high-risk procedures applied and their consequences[46].

This information, valued by the same law as basic, which must be offered before gathering the consent, shall cover the following points[47]:

- *Important consequences occurring with certainty.* Note that what is being referred to is that these consequences must be relevant or important and they must be foreseeable as being produced with certainty. It is not enough that it is possible they are produced.
- *Risks related to the personal or professional circumstances* of the patient. Refers to the risks that the patient is undergoing due to his/her own personal and particular circumstances. These are not risks for any person.
- *Probable risks in normal conditions*, according to experience and the state of scientific knowledge or directly related to the type of intervention to be performed. This is a more generic clause. The patient must be informed of the probable and more immediate risks. Experience, the state of scientific knowledge, the type of intervention and the conditions applied by the intervention, will give the indication of what „most probable risks" means.
- *The contraindications* inherent to the action on the health of the patient.

These information requirements complement those set forth by the article on healthcare information, and I would also like to underline that the content of the information required by law does not correspond to everyday practice, in which information is used defensively. Reference is made to any effect, however remote, to prevent any possible gaps in the information.

The *Oviedo Convention*, in the same sense as the regulations studied above, links both: consent and information. And this must be directed to the purpose, nature, intervention, risks and consequences[48].

In both documents there is a reference to the content of the information. A good information system must make a distinction between the aspects differentiated in our basic law: *important and certain consequences; risks related to the specific case; probable risks and counter-indications.* It goes from the most certain to the possibility. But what does not reflect a good information practice is offering a long catalogue of possible risks and consequences without referring to the probability of occurrence in each one, and even, citing some risks whose possibility of happening is extremely remote.

[45] Art. 8.1.
[46] Art. 8.3.
[47] Art. 10.1.
[48] Art. 5 of the Oviedo Convention.

On this point, after the analysis made, we can say that the patient has the right to receive full and true information. Information that must be exercised, on the one hand, before the public authorities, and on the other, before the healthcare professionals. To be able to demand from the public authorities that they offer the information necessary for each citizen to know what services he/she has access to, which are the conditions, which are his/her rights, how he/she must go about choosing the doctor and the centre to go to, and which are the collective healthcare problems that may affect him/her. And to be able to request from the professionals in charge of the care true information on the state of health, therapeutic, predictive or preventive techniques and procedures that will be applied, as well as the risks they entail. This information must be as simple and direct as possible. We are not talking about a „technical report." We must think of it as more of a „layman's report" that facilitates the full and easy understanding of all the data provided and helps the patient make timely and necessary decisions for his/her personal and physical well-being. This information must avoid any superficial information that strays from the direct interest of the patient. To make sure that the information meets the legal requirements and intended purpose, the information to the patient must always be structured as follows:

a- clear and concise explanation of the state of health of the patient (disease or diseases)
b- possible aetiology of his/her state of health (direct or indirect causes)
c- possible approaches considering the different alternatives (both the existing ones and the ones that the medical team is willing to apply) and their consequences. Reference to the diagnostic and therapeutic procedures as well as the results expected from both and the risks they entail including probability (in general and for the specific individual). Must contain a simple and succinct explanation of the procedures (what they consist of) and any discomforts they may cause.
d- as for the risks it would be convenient to specify the following points: in the first place, which are the most likely and direct in the application of the procedures; and in the second place, which are the most unlikely or remote risks that could occur, and if possible, specify the probability of them occurring.

Offered in this way, the information will clearly perform its function. On the other hand, we must not forget the possibility of the patient expressing his/her wish to not be informed. In this case the patient's wish must be respected except if in cases outside our control we are advised against doing so (as set forth in the law).

As a corollary of everything stated here, I will now to present a recent sentence from the Spanish Constitutional Court in relation to Informed Consent, in which some of the thesis that I have exposed above are confirmed, and some are contradicted.

5. CONSENT AND INFORMATION IN THE CONSTITUTIONAL COURT[49]

Our Constitutional Court recently faced in one of its sentences an explicit link between these two rights: the right to consent and the right to information.

The facts were as detailed below. An individual entered the Accident and Emergency room of a Health Care Centre. He presented „precordial pain" and was submitted to „cardiac catheterisation via right radial" (right arm). The diagnosis was severe coronary injury. A covered stent was placed. The results of the intervention were optimal. However, the patient was never informed of the consequences of this intervention and his consent was not requested either. Later, there was injury for the patient: he suffered total loss of function in his right hand. The patient filed a lawsuit against the medical team requesting indemnification, which was dismissed by the Court of First Instance and the Hearing. Despite this, in both dismissal sentences, it is recognised as a proved fact „that the informed consent of the patient was not requested prior to the intervention." The dismissal from the Court of First Instance was based on the fact that „the condition itself that took the claimant to the emergency room, the fact that years before he had received an intervention of the same type and the relative urgency of the intervention, not to mention the patient's age" which made the court consider that the claimant had not really been deprived of the information. The Hearing similarly argued that the patient „had already suffered another intervention of the same nature, although that time through the groin (via the femoral) which to the expert… represented a higher risk…", (…) and „because the test was also performed (…) in a moment in which there was a vital risk in the situation which lead him to the emergency room and which was alleviated". The patient filed an appeal before the Constitutional Court claiming a violation to the right to freedom and the right to physical integrity, because both judicial resolutions „deny the right to indemnity despite they consider proven that no medical information was given prior to the intervention". Thus in the appeal it is considered that there was a violation of the obligation to inform on the „habitual relevant consequences of any medical intervention".

Presented with these facts, the Constitutional Court dismisses, firstly, all references to the right to freedom (art. 17 CE) because „pursuant to established case-law of this Court (SSTC 126/1987, 22/1988, 112/1988 and 61/1990, to cite the most recent) the personal freedom protected by this precept is „physical freedom". The freedom against arbitrary detention, condemnation or incarceration, without being included in it a general freedom of action or a general freedom of individual self-determination". Therefore, according to the high Court, the problem addressed is circumscribed to „whether the intervention carried out on the claimant without previously informing him about his risks and possible consequences has

[49] See the Sentence of the Constitutional Court 37/2011. The texts in quotation marks are cited from it.

meant or not a detriment to his right to physical and moral integrity, a right autonomously laid down in art. 15 CE".

In the jurisprudence of this Court it has already been ascertained that the right to physical and moral integrity is violated also in those cases in which „a health care practitioner is imposed against their will" (SSTC 120/1990, of 27 June, FJ8 and 137/1990, of 19 July, FJ6). The Court asks whether the omission of informed consent in this case has meant for the claimant an attack on his right to physical integrity. The guarantee of this right in the area of health care means „that any action affecting the personal integrity, to be compliant with such a right (…) must be consented to by the subject owning the right or must be constitutionally justified".

Therefore the position of the Constitutional Court is different to that maintained by me in the third epigraph of this chapter: the right to information is linked to the right to physical and moral integrity, whilst in said epigraph I have maintained that it derivates from the right to health protection. I refer to the argument developed therein.

On the other hand and in relation to the rights to information and informed consent, to further emphasise the ideas developed above, I would like to point out the following declarations from the Court:

- the consent of the patient to any intervention made on him/her is inherent to the fundamental right to physical integrity. This faculty may not be limited without justification.
- consent and information appear as two rights which are closely linked. The exercise of one depends on the possibility of exercising the other, therefore if the correct information is omitted it is avoiding the possibility of consenting or not consenting to a given medical intervention, which „is inherent to the fundamental right to physical and moral integrity".
- the above information may be considered as a procedure or mechanism to guarantee the effectiveness of the principle of autonomy of will of the patient.
- that information must be guaranteed by the doctor in charge of the patient and the professionals caring for the patient during the healthcare process or applied a specific technique or procedure.
- the deprivation of information is equivalent to a deprivation or limitation of the right to consent to or reject a given medical intervention, inherent to the fundamental right to physical and moral integrity.
- the only exception is informed consent in exceptional cases provided for by the law.
- the regulation of consent and prior information is not limited to „imposing to the practitioners a set of obligations, but also, from a positive aspect, providing a guarantee for their own professional intervention."

- it is not admitted as sufficient that the patient has received information in another similar intervention (but not the same: catheterisation by via another artery) which he/she underwent years earlier.
- "it is not enough for there to be a situation of risk to omit informed consent, but the situation must be assessed in terms of immediacy and severity".
- when not meeting the right to provide consent it can be said that the care received violated the fundamental right to physical integrity (art. 15 CE).

This constitutional case-law corroborates the points I defended above about providing any information to the patient.

Finally, I would like to emphasise once again that information should never be used for defensive purposes by the health care professionals. We must not forget that quality information will help the patient collaborate with the medical team and will make their job easier. To loose the fear to inform is the first step to achieve a good communication with the patient and be able to freely comply with the obligation of information that accompanies all healthcare professionals.

MODERN AND TRADITIONAL INSTITUTIONS IN THE LABOUR CODE OF 2011

Dan ȚOP*

Abstract: *The Labour Code regulations concerned the work relations through the existing social-economic situation at the moment of their elaboration, being able to distinguish the take-over of some traditional institutions of the Romanian work culture and the reference to modern institutions, determined by the dynamics of work relations. In this study we submit a short review of the main modifications in the Labour Code of 2011, through tradition and modernity.*

Keywords: *work relations, traditional institutions, modernization tendencies in the Labour Code.*

The regulation of social work relations has constituted a permanent codification concern in 20th century Romania. Thus, a first complete and unitary regulation[1] of the employment contract has been given in 1929 and, in the form of a Labour Code, the first was the Labour Code of 1950[2], followed by the Labour Code of November 23rd 1972[3] which has been applied, with large modifications, until 2003, when the law 53/2003[4] came into effect. This last regulation was modified and gradually completed in 2005[5], 2006[6] and 2011[7].

All these regulations concerned the work relations through the existing social-economic situation at the moment of their elaboration, being able to distinguish the take-over of some traditional institutions of the Romanian work culture and the reference to modern institutions, determined by the dynamics of work relations.

In this study we submit a short review of the main modifications in the Labour Code of 2011, through tradition and modernity.Among the modernization tendencies in the Labour Code we can remind:

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[1] Dan Țop, *Dreptul muncii - Dreptul securității sociale*, editura Bibliotheca, Târgoviște, 2012, p. 12

[2] Publicat în Buletinul Oficial nr. 50 din 8 iunie 1950.

[3] Publicat în Buletinul Oficial 140 din 1 decembrie 1972.

[4] Publicată în Monitorul Oficial al României, Partea I, nr. 72 din 5 februarie 2003.

[5] Ordonanța de urgență a Guvernului nr.65/2005, publicată în Monitorul Oficial al României, Partea I, nr. 576 din 5 iulie 2005.

[6] Ordonanța de urgență a Guvernului nr.55/2006, publicată în Monitorul Oficial al României, Partea I, nr. 788 din 18 septembrie 2006.

[7] Legea nr.40 din 31 martie 2011, publicată în Monitorul Oficial al României, Partea I, nr.225 din 31 martie 2011.

The reformulation of paragraph 1 article 1, where „the individual and collective labour relations" are not mentioned, the Romanian legislator evincing consistency because it regulates only[8] the individual labour relations, for others being only specifications as a level of principle and references to particular laws.

By the specification made in article 16 paragraph 1, that the written form is mandatory for the valid signing of the contract, the possibility to presume, in absence of a confirming document, that such a contract is concluded on indeterminate period is abolished[9], on the other hand we consider that the written form is imposed as a ad validitatem condition, and not ad probationem, the lack of the written form leading to the inexistence of the labour report.

The regulation in article 2 is congruent to the purview in the Government Decision no.161/2006 regarding the elaboration and completion of the General Register of Employees, in paragraph 3 it is stipulated that „the employer is obliged that prior to the beginning of the activity to hand in the employee a copy of the individual employment contract", it is not shown how the employer can prove the pursuance of this obligation. We consider that, based on the copy that is left to the employer, the employee can mention under signature and by specifying the date that he received a copy of his individual employment contract.

The insertion in the content of article 17 of a clause that regards one of the aspects that the future employee must be informed about – clauses that will be found in the individual employment contract. Although it was said that, in fact, the performance criteria could have been introduced before, without other modifications of the Labour Code, we consider that in absence of such an elaboration, the incompletion of these criteria could not constitute a legal reason to dismiss the employee, but we agree that even with this modification, the criteria can exist or not, according to the employer's will, and that nothing and nobody stipulates that these performance criteria are mandatory to be specified in the contract, but, if they exist, must be communicated to the employee, and if they exist and are communicated before the signing of the employment contract, it's obvious that they can also be negotiated, like any optional clause from the individual employment contract.

It is stipulated that „any modification of one of the elements mentioned in paragraph 2 during the execution of the individual employment contract imposes the signing of an additional act to the contract, in 20 working days from the date of the modification, except the situations when such a modification is expressly stipulated by law".

By the modification of paragraph 4 it is extended[10] the information framework that an employer can obtain regarding the individuals who require employment

[8] Ionel Petrea, Ana Cioriciu, *Noul Cod al muncii(I) - prea mult zgomot pentru* ....modificare , www.avocatnet.ro.

[9] Dan Ţop, *Codul muncii, modificat şi completat prin Legea. nr. 40/2011 din 31martie 2011 – Comentarii*, Editura Bibliotheca, Târgovişte, 2011, p. 18

[10] Iulia Stoianof, Isabela Iurea*, Newsletter privind aspect de dreptul muncii*, ianuarie 2011, www. bulboaca.com.

from their former employers – information regarding all the activities accomplished can be required, not only regarding the job held.

The trial period for verifying the employers' skills was increased in order to offer the employer more time to evaluate if the employee corresponds to the job that he was employed, and the employee the chance to prove his/hers skills and to keep his workplace.

As it was appreciated in the doctrine[11] in the new form we don't have an imperative disposition regarding the number of days, only the maximum duration of the period is mentioned. Actually, the length of the trial period is understood in the individual employment contract, at the moment of negotiation of clauses.

The testing of professional skills in the employment of disabled persons is made exclusively by the modality of a trial period of maximum 30 calendar days, disposition interrelated to Law no.448/2006[12] regarding the protection and promotion of the rights of the persons with disabilities.

Given that, since January 1st 2011, the employment card has ceased to exist, the employment record is made only through the General Register of Employees, it can be assessed that the regulation of the completion in the register of some elements of the individual employment contract aim to integrate a large number of undeclared employees in formal economy, as well as the reduction of the risk generated by the phenomenon of illegal work for all the economic and social fields.

It was given up the prior formulation of functions plurality which had to be understood at large as „job" in general[13], the new regulation mentioning the plurality based on many employment contracts, irrespective of their type. It is very useful the specification that the right to cumulate more employment contracts can take place at the same employer too, in order not to invoke other interpretations, as it used to happen in the doctrine[14].

The completion made by the article creates the possibility for the employer, after consulting the syndical organizations or the employees' representatives, to establish objectives and performance criteria for their own employees. This measure can help to the increase of competence and the employees' degree of expertise.

It is expressly[15] stipulated the employer's right to set the performance objectives of his employees and evaluation criteria for their accomplishment, criteria which will underlie the employees' professional evaluation, being able to justify, if it's not accomplished, the dismissal for reasons of professional discordance of the employees. These individual performance objectives and their evaluation criteria will be able to be set either in the content of the individual employment contract or in the job description.

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[11] Ionel Petrea, Ana Cioriciu Stefanescu, *loc.cit.*
[12] Publicată în Monitorul Oficial, Partea I, nr. 1 din 3 ianuarie 2008.
[13] Dan Ţop. *Tratat de dreptul muncii*, editura Wolters Kluwer, România, Bucureşti, 2008, p. 205.
[14] I. T.Ştefănescu, *Tratat de dreptul muncii,* editura Wolters Kluwer, România, Bucureşti, 2007, p. 44
[15] Iulia Stoianof , Isabela Iurea, *loc.cit.*

Prior it was not specified that the employee's agreement is needed in order to extend the measure and neither the possibility to refuse without being exposed to the risk of disciplinary sanction. It was appreciated[16] that there is the risk that the employee to be permanently delegated, the employer having the possibility to force his agreement because the delegation disposed on maximum 60 days could be extended not only once, for a supplementary period of other 60 days, but unlimited, from 2 to 2 months.

Congruent to the idea of work flexion, during the suspension, the cases of ceasing the individual employment contract will prevail and produce effects. This modification will solve certain absurd situations in which, although the employer ceases the activity (for example, in case of dissolution), he is strictly legal in the impossibility of ceasing the employees' employment contracts found in one of the situations which led to the suspension of their employment contracts.

A new case of abatement of the individual employment contract is added, but the formulation is quite ambiguous, the term of 6 months is since the date the notices, authorizations or the necessary attestations expire or, especially in cases of professions of high-degree risk, where the 6 months term is very long.

The insertion of paragraph 3 only offers the possibility for employers to establish the compression of the working schedule without setting another period, giving rise to different interpretations regarding the rectification of the situation that determines such a measure.

The possibility of the employer to suspend the individual employment contracts of his employees in case of a temporary interruption of the activity is stipulated, especially for economic, technologic, structural or similar reasons (the so-called technical unemployment), the employer having the obligation to pay the employees, from the salaries fund, an allowance of at least 75% from the basic salary. It is important to be specify that the interruption of the activity is no longer limited.

The main criteria considered in the procedure of collective dismissal will be the performance and accomplishment of objectives in subsidiary, and for tie breaker, the social criteria will be considered. The criteria regarding the evaluation of professional performances will be prevalent, situation that scares the employees, sometimes being unable to reach the performance criteria discretionary settled by the employers. It was emphasized[17] that a necessary completion was imposed – the performance criteria must prevail over the social criteria.

Unlike the previous regulation specifying a useful time, this time it is expressly specified a term of 3 working days that the Territorial Labour Inspectorate has in order to inform the employer and the syndicate or the employees' representatives, as appropriate, about the reduction or extension of the period of 30 days (calendar days, not working days), as well as the reasons for this decision.

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[16] Ovidiu Jurcă, *Consideraţii privind Decizia Curţii Constituţionale nr.1276/2010 şi unele propuneri de modificare a Codului muncii*, în Revista română de dreptul muncii nr. 1/2011, p. 44

[17] Iulia Stoianof , Isabela Iurea, *loc.cit.*

The introduction of a new paragraph in art.78 represents a reflection of the principle of availability concerning the work dispute, in the way that the request to be reset in the previous situation, that is the reintegration in the previous workplace, must be done at the same time with the complaint against the dismissal decision, another request is inadmissible subsequently, the employment contract being considered ceased in law.

It is expressly established that the employer is obliged to register the employee's resignation, without any other sanction, taking account of the protection of the outgoing employee, who can use any means of probation to prove that he has registered his resignation. In the context of the worldwide economic crisis, this measure stipulated in paragraph 4 could have benefic effects for both the employee and the employer. On the one hand, if the employee is dismissed, he will have more time to find a new workplace (taking into consideration that, at present, the labour market registers a continuous syncopation). On the other hand, the employers will have a much longer recruitment period, avoiding stagnation or the decrease of the activity caused by lack of personal.

The notice period is extended to 20 and 45 days working days, not calendar days (which, under the old regulation, created an unjustified difference towards the notice in case of dismissal). It was pointed[18] that there is an obvious lack in dealing with the employees' rights, the modification would abridge the right to initiative of the worker who wants to cease the individual employment contract. In conclusion, the suggested modifications practically create a reduplication of the notice period which must be granted by the employee in case of resignation.

The period for which an individual employment contract on determined period can be signed increases from up to two years to three years. The important thing is that such a contract will be extended after the period is expired, „for the period of a project, programme or piece of work". It was pointed[19] that, by extending the period for which an individual employment contract can be signed, as well as by all the other modifications regarding the legal system of the individual employment contract on determined period, the legal framework necessary for the effective implementation and usage of these contracts on determined period is created, without other constraints that made them, for the most part, impossible to implement in practice.

The modifications of the stipulations regarding the working time took account of the dispositions of Directive no.2003/88/CE for certain aspects of the working time organization. Thus, the reference period increased, as it is regulated in the directive. By these submitted modifications, the aim is to align in full concordance the national regulations for the working time to the community provisions, that is to the provisions of Directive 2003/88/CE of the European Council and Parliament of November 4th 2003 with regard to the working time organization.

[18] O.Jurcă, *art.cit*, p. 46
[19] Iulia Stoianof , Isabela Iurea, *loc.cit.*

By the modification of art. 123, the night employee benefits from an increased gain from 15% to 20% by the new regulations. From the point of view of the substance of the submitted modification, this is not favourable to the employees because it throws aside the possibility of option between the compensation with free time and the pay rise, which should be negotiated at individual/collective level between the employer and employee.

The reformulation of paragraph 1 has as a consequence the enforcement of the signing of an additional act as mandatory, which must stipulate the period in which the employees who have benefited from a course or a professional training internship can't have the initiative to cease the individual employment contract. It is obvious that this period can be superior to that of minimum 3 years in the previous regulation.

It is excluded the situation of the representation by a syndicate which has one employee in one unit, without being recognized by the rest of the employees. This modification was appreciated as an anti-syndical[20] intercession, given that representativeness is extremely hard to obtain and the collective employment contracts will be negotiated by the employees' representatives, who will replace the syndicates. The paragraph 1 modification in art.225 makes possible that, among the employees' representatives to be individuals who turned 18, irrespective of their seniority, and the abrogation of paragraph 2 is natural because the seniority on employer has no relevance in this case. This time it is not specified a maximum number of hours monthly for the fulfillment of the employees' representatives mandate, but the number of hours from the working schedule of their activity to be stipulated in the applicable collective employment contract or by direct negotiation to the company's manager. So it is the option of the halves to decide a certain period which can be bigger or smaller than the one initially regulated.

It is specified that the regulations concerning the employers are the object of a special law. The content of art.238-247 from the Code, which is abrogated by the new form of law, have a correspondent in Law no.62/2011 of the social dialogue.

It is taken account of a broader definition of industrial dispute, discarding the other definitions made in the other two paragraphs of this article.

It is remarked that the „I" letter was introduced, which regards the introduction of criteria and procedures of professional evaluation of employees, a necessary completion for the emphasis of the competence importance in the development of the activity. Anyway, we appreciate that, from the abundance of modifications, but especially from the specification of the important role that it has, the internal regulation will be reconsidered at the level of each employer.

It was shown[21] that the sanction of disciplinary suspension should be mentioned because it is offered a much higher margin of maneuver regarding the suspensions. It

[20] O.Jurcă, *art.cit*.
[21] O.Jurcă, *art.cit.*

was also emphasized[22] that the abrogation of „I" letter was submitted as a consequence of the submitted modification with regard to the possibility to suspend the individual employment contract as a disciplinary sanction.

It is remarkable that the application of such a sanction was very rare in practice, so the lack of interest could be a cause which determined the elimination among the applicable disciplinary sanctions.

The suggested modifications open the possibility of an agreement between the employer and employee with regard to the amount of the prejudice and its term of payment. In the absence of this agreement, the employer can only bring to trial/prosecute in order to recover through salary confinements the prejudice caused by the employee.

The specification in art.4 according to which the counter value of the prejudice recovered through the agreement of the halves cannot be higher than the equivalent of 5 gross salaries, which practically limits the quantum of the prejudice that could be recovered through the agreement of the halves, can only delimit the possibility of payment commitment, which could not go beyond this amount.

It is stipulated that the penalties for the illegal work should be tighten up. Hereby, the reception at work up to 5 individuals without signing an individual employment contract will be sanctioned with fine from 10.000 lei to 20.000 lei for each identified person. By adding the „e" letter, the work performance of a person without signing an individual employment contract is sanctioned with fine from 500 to 1.000 lei. The novelty is that not only the employers who use work without legal forms will be punished, but also the employees who work without an employment contract.

The fines for those who employ illegally are tripled or prison if there are several employees. If you use illegal work, you no longer have the possibility to use European or public funds, to participate in auctions or public acquisitions. In this way, the complete discouragement of those who intend to use illegal work without an employment contract is wanted. There have been introduced two supplementary contraventions that can be sanctioned according to the Labour Code. By these two suggested modifications, it is aimed on the one hand, to protect the resignation right and, on the other hand, to ensure the appropriate registration (and, as such, the remuneration) of supplementary work performed by the employee.

It is incriminated the act of a person who repeatedly sets salaries under the level of the national minimum gross salary guaranteed in payment for the employees employed on the basis of the individual employment contract, will constitute infraction and will be punished with prison from 6 months to one year or with penal fine. The infraction for the repeated refuse of a person to allow, according to the law, the access of the labour inspectors in any of the unit spaces or to offer any requested documents will be sanctioned in the same way.

[22] Iulia Stoianof , Isabela Iurea, *loc.cit.*

In Romania, undeclared work is the most important problem in the work relations field. Therefore, the Government has elaborated in this respect a strategy[23] to combat illegal work for the period 2010-2012, taking account of the encouragement of the halves to sign an individual employment contract, regulated by specific legal norms, which will ensure the employees' protection inclusive by using the coercive measures. To this effect we have the regulation in art.3 according to which the reception at work up to 5 individuals, irrespective of their citizenship, without signing an individual employment contract constitutes infraction and is sanctioned with prison from 1 to 2 years or with penal fine. It is important to remember that the sanction is available irrespective of the citizenship of the person used in work.

In paragraph 4 there are specified, for the first time in the Romanian labour legislation, four complementary penalties in case of committing such infractions, as follows: the partial or total loss of the employer's right to benefit from performances, assistances or public subventions, including European Union's funds managed by the Romanian authorities, for a period up to five years; the interdiction of the employer's right to participate in the assignment of a public acquisition contract for a period up to 5 years; the partial or complete recovery of performances, assistances or public subventions, including European Union's funds managed by the Romanian authorities, assigned to the employer on a period up to 12 months before the commitment of the infraction; the permanent or temporary closure of the work centre or centres where the infraction was committed or the permanent or temporary withdrawal of a license of development of the professional activity in cause, if this is justified by the gravity of the breach.

Without specifying the nature of the measure in paragraph 5, it is shown that the employer will be obliged to pay the amount representing: any owing remuneration owed to the individuals illegally employed; the quantum of all taxes and contributions to the social insurance that the employer would have paid if the person had been legally employed, including the delay penalty and the appropriate administrative fines; the expenses determined by the transfer of the owing payments in the country where the person illegally employed came back by himself or has been sent back under the law.

By art.6 it is established the solidary or substitutive responsibility for the subcontractor who knew that the subcontractor employed foreigners in situation of illegal residence.

The modification text of the Labour Code brings important edifications regarding the meaning of notions „corporations manager", in the way that the application domain

[23] Hotararea Guvernului nr. 1024/2010 pentru aprobarea Strategiei nationale privind reducerea incidentei muncii nedeclarate pentru perioada 2010-2012 si a Planului national de actiune pentru implementarea Strategiei nationale privind reducerea incidentei muncii nedeclarate pentru perioada 2010-2012 a fost publicată în Monitorul Oficial al Romaniei, Partea I, Nr. 740, din 5 noiembrie 2010.

of art.294 of the Labour Code has been limited[24]; by the expression „general managers and managers, deputy general managers and deputy managers" (from the corporations), the law text doesn't refer[25] to the corporations managers whom the board of directors delegated management attributions, thus the meaning of the collocation „speciality manager" should be expressed in the internal regulations of the employer among new others which shouldn't contain the term „manager".

As for the maintenance or recurrence to traditional institutions, it is appreciated that the stipulations regarding the working at home are sustained, with the specification that the modification of paragraph 2 art. 107 is an illustration of the negotiated character of the individual employment contract content, among the specific conditions being the telework[26].

The Labour Code of 2003 has omitted to regulate the rehabilitation of the employees disciplinary[27] sanctioned, being inconceivable[28] that the rehabilitation to be legally regulated, for any penal permanent condemnation, but not to be stipulated in any way in the case of disciplinary sanctions.

The art.248 paragraph 3 of the Labour Code republished in 2011[29] expressly stipulates that the disciplinary sanction becomes unavailable in 12 months from the application, if the employee is not applied a new disciplinary sanction in this period, so that the employer will not be able to use the stipulations of art.61 letter a of the Labour Code, if 12 months pass from the application of a disciplinary sanction and the employee commits another misbehavior „lacking a great gravity"[30].

The insertion of this paragraph was imposed with great necessity given that the rehabilitation had disappeared from the Labour Code of 2003, insistently submitted by the doctrine[31] on the reason that „It was inconceivable that the rehabilitation to be legally stipulated, in certain conditions, for any permanent penal condemnation, but not to be stipulated in any way in the case of disciplinary sanctions".

It also must be specified that it was present in numerous personnel statutes – for example, Law no.188/1999 regarding the Statute of public servants.

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[24] Ion Traian Ştefănescu, Şerban Beligradeanu, *Natura raportului juridic dintre societăţile comerciale şi administratorii sau directorii acestora*, în Dreptul nr. 8/2008, p. 66.

[25] Alexandru Ticlea, Tiberiu Ticlea, *Particularitati ale contractului de mandat comercial al directorilor societatilor comerciale pe actiuni* in „Dreptul", nr. 8/2010, p. 151-159.

[26] B. Vartolomei, *Telemunca — o nouă formă de organizare a muncii*, în „Dreptul", nr. 2/2008, p. 68-69.

[27] Alex. Ţiclea, *Contractul individual de muncă.*, Editura Lumina Lex, Bucureşti, 2003, p. 292.

[28] I.T. Ştefănescu, *Tratat teoretic şi practic de dreptul muncii.*, Editura Universul Juridic, Bucureşti, 2010, p. 734.

[29] Republicat în Monitorul Oficial al Romaniei, Partea I, nr.345 din 18 mai 2011.

[30] Alexandru Ticlea, *Tratat de dreptul muncii,* Editia a IV-a, Editura Universul Juridic, Bucureşti, 2010, p. 624.

[31] Alexandru Ticlea, *Tratat de dreptul muncii,* Editia a IV-a, *op.cit,* p. 891.

Under this new denomination of radiation[32], it is considered that the employee whom a new disciplinary sanction was not applied in 12 months is rehabilitated by law, by written decision of the employer, the latter being unable to use the stipulations of art.61 letter a of the Labour Code if 12 months pass from the application of a disciplinary sanction and the employee commits another misbehavior „lacking a great gravity"[33].

We consider that the lack of the decision doesn't have as a consequence the taking into no consideration of the radiation of the disciplinary sanction, the written form being asked only ad probationem. It was said[34] that, in case of dispute, the employee will be able to ask the court the employer's obligation to issue the decision in this direction.

As it was shown[35], the mentioned institution produces effects only toward a single employer – the one with whom the employee has had working relations for 12 months – and not toward other employers that the employee would have had working relations in the same period, the disciplinary regime being unique, specific to each employer.

[32] Dan Țop, *Une institution „réhabilitée „ par le Code du travail – La radiation des sanctions disciplinaires*, în Revue Européenne du droit social nr.4 (13)2011.

[33] Alexandru Ticlea, *Tratat de dreptul muncii,* Editia a IV-a, *op.cit,* p. 624.

[34] Ionel Petrea, Ana Cioriciu Stefănecu, *Noul Cod al muncii şi reabilitarea disciplinară (VI) - prevederi*
favorabile salariaților, www.avocatnet.ro.

[35] Ibidem.

EUROPEAN PUBLIC SERVANTS LIABILITY

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Abstract: *Public administration isn't anything but a sum of human communities which organize some activities for other people. European or national public officials, must fulfill their tasks, not because it's required to do so, but for they's convinced that is theirs professional purpose. The most important for the public servant is to fulfill their tasks with a conviction arising from his rational understanding. Their liability is dominated by the principle which says that public servants aren't solely responsible for those damages caused to institutions, for wrongful acts, so-called anonymous, but for all personal offenses caused by an agent if it is in the exercise of duty.*

Keywords: *European public servant, public administration, disciplinary offense, disciplinary liability, disciplinary sanction, The European Public Servant Statute.*

Liability forms for public servants

Community servant legal status also includes provisions regarding their liability, which consists in sanctioning all the offenses committed by them. Liability has three functions: preventive and also a punitive one. Another purpose is the educative one, which includes prevention, but they don't overlap. Public official, national or communitary, must fulfill his tasks, not because it's required to do so, but for he's convinced that is his professional purpose. The most important for the public servant is to fulfill his tasks with a conviction arising from his rational understanding. We distinguish the following forms of liability:

- a pecuniary administrative liability of the public servant towards community, which consists in his obligation to repair all the damages caused by serious misconducts he committed on duty or in connection with it;
- a criminal liability;
- a disciplinary administrative liability.[1]

General principles governing disciplinary liability of European public servants

General principles governing disciplinary liability of European public servants should be considered in the context of their overall Communities liability. Their

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[1] Verdinas.V., Calinoiu C. – Statute of European Public Servant, IInd edition, Ed. Universul Juridic,Bucharest, 2007, p.170-172.

liability is dominated by the principle which says that public servants aren't solely responsible for those damages caused to institutions, for wrongful acts, so-called anonymous, but for all personal offenses caused by an agent if it is in the exercise of duty.

The principles of disciplinary liability are:

a) disciplinary liability is a consequence of committing a disciplinary misconduct, notion that includes any breach of obligations imposed by the Statute of European Public Servant; it's very important is that the offense can be committed by both officials and former officials; Community law doesn't necessarily require the existence of a public function relationship, the existence of active public servants.

b) another principle says that to an offense can't be applied more than one sanction;

c) preliminary disciplinary investigation: disciplinary sanction can be imposed only after a disciplinary investigation was made;

d) the principle of sanction individualization requires to take into account all the circumstances of offense, its subjective and objective side, of its consequences and of the general behavior of the public servant, including his history; the sanction can vary, from simple warning, to the most drastic one – dismissal, and can be with or without an additional sanction (reduce or abolish the right to pension age);

e) notifying principle – communication rule is essential in case of European public servant liability.

Any decision taken according to the statute, shall be immediately notified in writing. Complains against a public servant must be motivated. It will be notified to the person in question the decision itself and also the entire file which led to that decision.

The civil servant has the right to obtain notifying of all the case file and he can make a copy of any document related to disciplinary procedure. The file contains all the documents that reflect and motivate sanction, but also the personal file of the public servant which can be relevant and could help his defense.

In each institution shall be formed one or more discipline boards, depending on the number of public servants. Disciplinary board is vested to conduct disciplinary procedure and its role is to protect civil servant against arbitrary or abusive decisions. Another concern is to protect community by sanctioning guilty institutions in case they violate obligations they have.[2]

f) the authority vested to name in a job is the one entitled to sanction the civil servant;

g) recognition of the right of defense for public servants.

In order to defense himself, the civil servant has to be notified about the allegations against him. The defense suppose notifying the allegation file,

[2] Verdinas.V., Calinoiu C. – Statute of European Public Servant, IInd edition, Ed. Universul Juridic,Bucharest, 2007, p.182-184.

providing a period to prepare his defense, the right to be assisted in front of the disciplinary board and also to call witnesses.

h) civil servant has the right to bring proceedings to court. This right is recognized to civil officials, by respecting the following conditions:

- obtaining the necessary notice from the authority vested to name in a job;
- addressing is done hierarchical;
- contested act to affect the public servants rights or interests.

i) principle of deleting disciplinary sanctions.

The public servant has the right to ask the erase of its sanctions from his personal file. This right shall become effective at different intervals of time, depending on the disciplinary sanction which deleting is required. The public official can request deleting penalties as warning or reprimand in 3 years term since the sanction was established. In other cases, except dismissal, the period is 6 years. We aren't talking about a legal deleting, but a requested one, which is decided by the authority vested to name in job.

Disciplinary sanctions for public servants[3]

Disciplinary sanctions for public servants are grouped into several categories:

a) moral sanctions (warning, reprimand);
b) sanctions that affect the career;
c) pecuniary sanctions (suspension of the right to pension as an additional penalty to dismissal);
d) complex sanctions (which equally affect officials career and financial matters, reducing step by step the salary, demotion).

In terms of their character, we can distinguish:

a) principal sanctions (warning, reprimand, temporary suspension of hierarchical advancement, revocation and dismissal by reasons of professional unsuitability);
b) complex sanctions (suspension of pension rights).

In terms of their effects, disciplinary sanctions can be:

a) sanctions that result in job termination (dismissal by reasons of professional unsuitability);
b) sanctions that don't result in job termination;
c) sanctions that determines job interruption (suspension of a public servant from its job).

[3] Ibidem, p.184-191

The main sanctions applicable to European civil servant are:

- Warning

Warning has mainly a moral character; its role is to put the offender in a position of awareness his act and to determine him not to repeat it in the future; in this case prevails preventive role.

- Reprimand has mainly a moral character and follows the same procedure as warning.
- Temporary suspension of hierarchical promotion

This sanction is a complex one, because it affects both career and financial rights, as promotion implies an increase of salary.

- Reduction of degrees

Unlike previous sanction which includes an interruption in promotion, reducing the salary is a descent on inferior pay scale. This sanction has the same features as salary reduction, meaning that both affect career and wage. Both penalties occur when committed offenses, by their danger degree, deprive the employee by its right to defense and by a certain degree in the hierarchy.

- Demotion

Unlike the two last penalties, which affect not only the degree, but also the level in the hierarchy, demotion means loss the degree itself. Demotion shall be applied to those who aren't at the first disciplinary offense, circumstances and history that give a highly dangerous character. Demotion is a sanction that affects career, wages, having an important moral impact since the public servant loses for a period the hierarchical position. He has the possibility to work during the sanction, for people who are on a lower level.

- Classification in a lower function group, with or without demotion.

This is a new penalty introduced in the Civil Servant Statute. In this situation, the employee leaves the group of administrative functions and descent in the group of assistant functions. He keeps the same professional degree or acquiring one below. This penalty draw complex implications, pecuniary, social, of career and prestige of the public servant.

- Suspension from office is a traditional for public office or public dignity and it's also found at European civil servants. This penalty prevents the offender to exercise his powers for a certain period of time. It occurs in cases of serious misconduct when the officer is guilty on an infringement of his professional or an ordinary criminal offense. In these cases, the competent authority may immediately suspend the public servant.

Suspension decision must contain the following clauses:

- indication that the public servant has his pay unaffected during the suspension;
- if there is a deduction of wage, the decision shall provide the percentage.

Suspension decision is a temporary measure and must be completed within 4 months after it was taken.

- Removal from office is the most serious sanction, next to dismissal by reasons of professional unsuitability. As a specific, they finally put an end to a particular function. Removal can be taken next to suppression of the right to retirement pension, without having any effects on other civil rights.
- Dismissal for professional failure

It is possible that a person who applied or was selected for a public function, to prove in time that she doesn't have necessary training to maintain the position. In these situations, the public servant will be dismissed for professional failure.

This penalty includes following elements:

a. sanctioning may occur when there is evident a professional failure;
b. when the authority that the official is unable to fulfill his duties, there are two possibilities:
   - to dismiss the public servant;
   - to propose a transition to a lower post.

The authority has the right to dismiss the officer or to give him a post which he considers appropriate for it, but inferior to position he occupied before.

Appeals against disciplinary or administrative sanctions[4]

The right to petition is guaranteed to any person entitled to protection of that right under the Statute, the more European Public servants. On this basis, the person entitled may require the authority vested with power to name in function, to take certain decision on it. When the person concerned is a European public servant, this will be addressed through hierarchical head. Exceptions are those situations in which the request aims a superior official. In these cases, the request is addressed directly to the authority vested with power to name in function. The authority has two options:

1. to rule on the petition that was submitted;
2. not to rule on this petition; in this case the authority's refusal to rule within the stipulated period worth itself rejection of the petition and bear the right to special appeal (the person's right to address to the authority vested with power to name in function when she considers that an act was unjustified).

Free access to European jurisdiction is guaranteed for public servants, but also for any person to whom the Statute is binding.

The access to jurisdiction is preceded by preliminary procedure. First, the person in question is bound to appeal to the authority vested with power to name in

[4] Verdinas.V., Calinoiu C. – Statute of European Public Servant, IInd edition, Ed. Universul Juridic,Bucharest, 2007, p.191-197.

function, and then, if she's dissatisfied with its decision, she can address to European Court of Justice.

The access to European jurisdiction can be determined by two situations:

1) when the public servant is dissatisfied with the decision of the authority vested with power to name in function;
2) when it was issued an injurious act for the public servant, in other conditions than those provided before.

Through European jurisdiction, the civil servant may appeal those documents issued by European authorities that have individual character.

These can be contested by their recipient and by any person, other than the recipient, who was damaged by that individual document.[5]

The authority vested with power to name in function can issue a reasoned decision within four months. This period shall begin on the day the complaint was submitted to the administrative.

The person may address to the European Court of Justice if he considers itself damaged, whether or not the decision was issued.

In order to appeal to the European Court of Justice, there must be fulfilled the following conditions:

a) to be covered preliminary proceedings;
b) the intimation to be lodged within;
c) the authority vested with power to name in function to have issued an express or implied decision;
d) in order to suspend the enforcement of the contested measure, there is a derogation from the period.

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[5] Article 90 (8)(96), Paragraph 2 of the European Civil Servant Statute.

DIVERSIFICATION OF RECOVERABLE DAMAGES IN THE NEW CIVIL CODE

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Abstract: *European Private Law is more and more concerned with the inequitable situation of the victim suffering material or moral damages, sine qua non condition of any and all hypotheses of delictual liability. The new Civil Code is integrated to this evolution and allows damages a much more detailed regulation, considerably enlarging its recoverability. This research is meant to pinpoint some provisions highlighting this process.*

Keywords: *loss of chance, recoverable damages, legitimate interest, wrongful life, wrongful birth.*

The structure of delictual civil liability, juridical mechanism placed at the disposal of the victim trying a prejudice, goes through a continuous re-orientation, from classic civil law according to which the premise of any hypothesis of liability is the faulty action of the person, the one which imposed penalizing guilty behavior of the offender, to modern civil law in which prejudice or damages become the sole hypothesis of the whole civil liability, the imperative recoverability being therefore more and more visibly detached from the idea of fault as an origin of liability[1]. The principle of liability, as thought by French codifiers in 1804 and resumed later on by all codifications, among which our old Civil Code, was no longer able to meet with new challenges of an increasingly technological society, which, in addition to the comfort offered to people, creates new risks as to occurrence of some more and more harmful, anonymous and devastating damages. However, concomitantly and subjectively, encouragement of man's fundamental rights determines a new „ideology of the victim"[2], a victim who is less and less resigned to own destiny, more and more aware of own rights and more demanding in relation to constitutional state. Yet, this evolution creates nowadays an unprecedented phenomenon of multiplication of damages for which compensations are demanded. The fundamental reasons of such continuous expansion are believed to relate to the objective complicity of two different logics: on the one hand, the logic of man's rights which determines a propensity of the law not only to the needs of the victim

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[1] Fr. Terré, Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, Êd. Dalloz, 1999, p. 626
[2] J. Flour, J.L.Aubert, É. Savaux, *Droit civil. Les obligations. 2. Le fait juridique*, 13-éd. Éd. Sirey, Paris, 2009, p. 78

but also to his or her desires, rendering all „individual frustrations prejudices which resort to a responsible person"[3]; on the other had, „the market logic leads to a multiplication of the assets subject to assessment... meaning that liability becomes one more merchandise on the insurance market"[4].

1. „Inflation of Recoverable Damages"

It is the ascertainment made by the author of a monograph dedicated to recoverable damages in Civil Liability Law[5], according to which, in addition to classic asset-related damages, the „bounce" damages are proliferated; the jurisprudence recognizes more often a series of moral damages which compose a real „inflation of personality rights"6: juvenile damages, sexual damages, esthetic damages, AIDS or C hepatitis contamination damages etc., phenomenon characterized by the doctrine as „man's self-destruction by inflation of subjective rights"7. According to the same author, one witnesses a genuine „psychosis of recovery", since there are actions filed for compensations related to damages suffered as a result a child being born. The progress in bio-technique has been feeding a logic of the desire to avoid any risk inherent to the existence.

Among such risks, there are two categories of highly debated damages, mainly from medical and legal perspectives: the first targets the birth of an unwanted child while the second aims the birth of a disabled child[8]. In such cases, the term of damages arise difficulties and it is impossible to establish whether it relates to its existence, certainty or legitimacy[9].

1.1. Damages caused by birth of an unwanted child (wrongful birth).

The jurisprudence has faced up to actions by which parents requested compensations for the damages caused as a consequence of failure to voluntarily interrupt a pregnancy due to faults made by medical staff. The French jurisprudence mentions that „a child's birth, even though the result of an unsuccessful interruption of pregnancy, does not generate a prejudice of such nature so as to entitle the mother to a right of reparation by hospital". The Court of Cassation judged in a lawsuit held on June 25 1991 that „the existence of a child

[3] L. Cadiet, *Les métamorphoses du préjudice* in *Les métamorphoses de la responsabilité, sixième journées René Savatier*, Presses Universitaires de France, 1998, p. 37
[4] Ibidem.
[5] X. Pradel, *Le préjudice dans le droit civil de la responsabilité*, Êd. Librarie Générale de Droit et de Jurisprudence, Paris, 2004, p. 85
[6] Ibidem, p. 123.
[7] J. Hauser, *Observations sous Civ. I, 26 March 1996*, Revue trimestrielle de droit civil, 1996, 871
[8] C.E., 2 juillet 1982, D. 1984, p. 425
[9] P. Jourdain, *Les principes de la responsabilité civile*, Éd. Dalloz, 6th edition, Paris, 2003, p. 130

may not, in itself, represent a recoverable damage for the child's mother, despite the fact that the birth occurred after an unsuccessful intervention made with the purpose of interrupting the pregnancy"[10]. The solutions were welcomed by the doctrine, using the motivation that the resort to moral is indispensable since one asserts the intrinsic value of life and its superiority[11]. Even though one may speak about damages, they may not be considered legitimate in relation to the right to life of the child who come into this world under such circumstances.

The courts in Canada and USA showed more generosity to mothers who considered themselves victims of an unwanted delivery. In „Cooke" case, the Court of Appeal in Montreal forced the doctor accused of contraception error to pay 30 000 euro in expenses incurred with child's support and upbringing up to adulthood, observing that „a pregnancy which the mother wanted to interrupt may constitute recoverable damages"[12]. Since 1960, the North-American jurisprudence has admitted the *wrongful conception* actions, while the Court of Appeal in California granted compensations for the birth of the 10th unwanted child.

A special situation is that of a child conceived as a result of a rape, where the damages are not connected to the actual birth, but to the moral damages claimed by the mother whose interest of the child not having been born in such circumstances have to be perceived as legitimate.

1.2. Damages related to birth of a disabled child (wrongful life).

The birth of a disabled child is the subject matter of a most dynamic dispute, both in the medical and legal environment. The discussions are mainly focused on ethical implications connected to „the chance of not being born"[13], word combination which in itself arises most nuanced reactions.

In France, such discussion was triggered by the Perruche action, the most important forerunner who marked the evolution, both doctrinaire and jurisprudential, in this matter[14]. 4-month pregnant, Josette Perruche discovered she had rubella symptoms and decided to interrupt her pregnancy in order to avoid a potentially disabled child. Subsequent to some specialty tests, the doctor assured the mother to be that this medical condition would not affect the fetus's health. On January 14 1983, little Nicolas was delivered suffering from the Gregg syndrome, a series of anomalies made up of neurological disorders, deafness, ocular problems, cardiopathy and motion defects. The Perruches filed two actions": the first, *wrongful birth*, by which they demanded compensations for birth of an unwanted

[10] Civ., I, 25 juin 1991, D. 1991, p. 566, notes Ph. le Tourneau
[11] G. Viney, P. Jourdain, *Les conditions de la responsabilité*, 2 édition, Éd.1998, nr. 249-2
[12] R.J.Q. 1995, p. 2765, apud X. Pradel, *op. cit.,* p. 147
[13] P. Jourdain, *Du droit de n'est pas naitre. À propos de l'affaire Perruche*, Revue trimestrielle de droit civil nr. 2/2002, pp. 407-409
[14] généthique.org/doss_theme/dossiers/l-arrêt perruche.htm

child due to the disability; this action was admitted by the court based on the motif that „medical errors induced them the wrong belief that the mother is immunized and the child would e normal" and the second, *wrongful life* (*loss of expectation of life*), filed on behalf of the child, also admitted on the grounds that „since the errors committed by the doctor and the laboratory while performing contracts concluded with Mrs. Perruche have prevented her from exercising her right to interrupt the pregnancy in order to avoid birth of a disabled child, the latter may claim recovery of damages caused due to disability and errors mentioned above"[15].

Recognition of a „right not to be born" in Perruche case has arisen a series of contrary reactions, coming both from civil society and the medical and legal community. Therefore, the French Group of Disabled Persons has made public an announcement by which they qualify the solution of compensation for disabled birth as „a double assault to dignity of all those who live with deficiencies, because it talks about their right to life and ignores the human dimension of all disabled persons"[16], position adopted by other organizations as well. Well-known French authors have affirmed that the solution means nothing more than recognition of"compensation without liability", since one may not really say there is a causality relationship between the doctor's action, the medical laboratory's actions and the disability of the new born. The only authentic cause is the rubella caught by the mother during her pregnancy[17].

An argument of ethical nature raised against this decision was the one according to which there is no actual prejudice under judgment; under contrary circumstances one would take the risk of considering „life, living, as damages, and this would not be acceptable"[18].

A highly virulent reaction came from inside the medical community according to whom „the judgment ruled in the Perruche would leave a single solution to the practitioners: i.e. to be morally responsible for death so as not be civically responsible for life. If one speaks about the right to a normal life, one will have to define normality, to establish where it starts and where it finishes. Who and with what right may one tell us that retrenchment of life is more valuable than a disabled life?"[19].

Under this media assault, the response given by the French Court of Cassation did not take long and rendered the discussion even more vivid: „where is the genuine respect to the person and to life? In the abstract refusal of all and any compensations or, on the contrary, in its acceptance, which will allow the child to live, at least from a material point of view, in conditions compliant with human dignity, without being abandoned to risks related to family, private or public help".

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[15] Apud L'Ainès, *Préjudice de l'enfant né handicapé: la plainte de Job devant la Cour de Cassation,* Éd. Dalloz, 2001. chron., p. 492, *L'action de vie dommageable*, JCP, 2000, I, pp. 2275 -2280
[16] Ibidem
[17] O. Cayla, Y. Thomas, *Du droit ne pas naitre. À propos de l'Affaire Perruche*, Éd. Gallimard, Paris, 2002
[18] http://www.academon.fr/
[19] Ibidem

No matter how seducing the arguments brought by the Court of Cassation may have been, its point of view was not the one imposing in the end. As a consequence of the energetic protest of the doctors, on 4 March 2002 Law no. 2002-303 regarding the sick's rights and the quality of health system was voted. Art. 1 provides for the principle that „nobody may make use of damages based on the simple fact of his or her birth".

As for the birth of a child having a disability which was not discovered during pregnancy as a result of a medical fault, the same law stipulates that parents may demand compensation only for the damages they suffered, without including subsequent tasks involved by such disability during the entire life.

2. Atypical Damages Devoted to the New Civil Code

The new Civil Code fully undergoes this new evolution. Without renouncing the guilt, the „great lady of the civil liability", as it is metaphorically called by the lady author of some relatively recent studies concerning civil delictual liability[20], the new provisions regulate recovery of some damages ignored by the classic liability law.

2.1. Damages consisting of interest harming

Pursuant to art. 1359 NCC, „the author of the illegitimate action is forced to recover the damages caused even if such damages are resulting from prejudice brought to some one else's interest, if the interest is legitimate, serious and if it creates, by its manifestation, the appearance of a subjective right".

The normative text above mentioned provides the following requirements to meet by the harmed interest: to be legitimate, to be serious, and to create, by its manifestation, the appearance of a subjective right".

- The person's *legitimacy of interest* harmed was first spoken about in the context of concubinage relationships. The discussion actually originated in the illegitimate character of concubinage which led to compensations claimed by one of the concubines, representing the moral damage resulted from death of his or her partner, being considered as the expression of some illegitimate rights. This is the reason why a refined Romanian author rightfully states that, in terms of legitimacy, „interest" is „mistaken for" „status" for action, as recipient of the rule by which virtue the victim of damages is in some ways entitled to recovery"[21]. Viewed only sequentially, the assertion is impeccable; yet legitimacy is not to be seen in this context only, as doctrine still inexplicably does, but as a principle, for all and any

[20] L. R. Boilă, *Objective Delictual Civil Liability*, C.H. Beck Publishing House, Bucureşti, 2008

[21] I. Deleanu, *Civil Procedure Dissertation*, vol. I, 2nd edition, C.H.Beck Publishing House, Bucureşti, 2007, p. 221

hypothesis of liability, as devoted to in some European codification project on private law which will be referred to below.

Viewed in time, even though some authors place the discussion on legitimacy in 1960, in the context of the claim filed by the lady concubine for the moral damages suffered as a result of her partner's death[22], the controversy is somehow older and it starts in 1937, when the Civil Chamber of the French Court of Cassation rules the solution in the Métenier case by which interrupts the practice of compensation requested by one concubine, motivating that, according to art. 1382 French Civil Code, „not only simple damages are to be justified but also harming of some legally protected legitimate interests"[23]. In the same motivation of the court, one claims that, in the absence of a legal relationship between the two partners, the affiliation established as part of concubinage may not be legitimate. A new Pandora's Box is therefore opened, this moment representing the starting point of a long doctrinaire and jurisprudential debate which came next and which focused on the legal effects of concubinage.

As the concept of legitimacy penetrates in the substantial liability law, the jurisprudence proves to be more and more restrictive. The moment triggering a new stage in the evolution of the jurisprudence is 1937 when the Civil Chamber of the French Court of Cassation interrupts the practice of compensation requested by one concubine, motivating that, according to art. 1382 French Civil Code, „not only simple damages are to be justified but also harming of some legally protected legitimate interests"[24]. In the same motivation of the court, one claims that, in the absence of a legal relationship between the two partners, the affiliation established as part of concubinage may not be legitimate.

A third stage in the evolution of the jurisprudence regarding legitimacy of the interest harmed starts in France on February 27 1970. This is the day when, in the Dangereux case, the French Court of Cassation ruled in the sense of unifying the solutions on compensating moral damages, maintaining the restriction only for the homosexual concubinage using thus the motivation that „concubinage may only be the result of a stable continuous relationship creating the appearance of a marriage, but only between a man and a woman"[25]. It was still to be discovered whether the adulterine relationships may also benefit from the same favor. This is an issue to which the jurisprudence gave contradictory solutions and granted at first compensations only for some concubinage relationships which „offered the guarantee of stability and had no delictual nature", namely did not involve adultery[26]. Later on, as a consequence of the Law dated July 11 1975 decriminalizing the adultery as offence, such claims of the lady concubine were admitted also for

[22] Ph. Malinvaud, *op. cit*., p. 404
[23] Civ. 27th of July 1937, S. 1938-1, Dangereux, case apud X. Pradel, *op. cit*., p. 31
[24] Civ. 27th of July 1937, S. 1938-1, Dangereux case, apud X. Pradel, *op. cit*., p. 31
[25] Cass. 3-e civ, 17 dec. 1997, D. 1998, III
[26] Cass, ch. Mixte, 27th of February 1970: D 1970, 201 quoted by Ph. Malinvaud, op. cit., nr. 551, p. 403

adulterine concubinage, going as far as compensating both the wife and the mistress, in a competition[27] which arose the reaction of the doctrine according to which such jurisprudence encourages bigamy and even polygamy, contrary to public order.[28]

The Romanian jurisprudence joined this tendency as early as 1960[29], decriminalizing both the lady concubine and the children born out of wedlock, providing they were provided for by the victim and such support was stable; these solutions were approved of by the doctrine[30].

The most liberal opening moment in this evolution is represented by art. 515-8 French Civil Code introduced by Law no. 99-944/November 15 1999, by which the Civil Solidarity Pact was introduced. This Pact institutionalized concubinage. According to this text, concubinage is „an actual union, characterized by a common life led in stability and continuity, between two people of the different sex or the same sex, living as part of a couple". The doctrine penalized this new vision of the French lawmaker in connection with homosexual relations, and classified it as „a violation of what should be the constant of legitimacy"[31], asserting that „the permissive contemporary society makes these notes disappear and allows liberties in a society of pleasure, sub-products of the industrial society of which exercising risks to keep exploitation and humiliation of the person"[32]. Compensation of such damages only affects the consistency of the legitimacy concept. Their list is escalating and tends to include at least questionable hypotheses of civil delictual liability.

- Another condition related to interest harmed is *seriousness*. Semantically, this new exigency may be understood both in qualitative terms, aiming an interest worth of legal protection, opposite to frivolous interest, and quantitative terms, an interest which is sufficiently consistent, which is significant. Since the first condition imposed by the text is the legitimacy, feature including seriousness seen as quality, it remains for one to consider that the new regulation aims to the second meaning concerning the gravity of the damages suffered by the victim. However, in such interpretation, the condition of seriousness considers the damages suffered and not the interest harmed. Irrespective of how legitimate the interest may be, one will witness a case of liability only if its breach caused serious damages which, by their gravity, impose recovery.

The „seriousness" of damages was tangentially called upon in the context of assessing some traditional additions to civil law, among which also the one asserting that the praetor is not concerned with little things (*De minimis non curat*

[27] C.A. Riom, 9th November 1978, JCP, 1979-II, nr. 19107, apud X. Pradel, *op. cit*., p. 142
[28] Y. Lambert-Faivre, *op. cit*. p. 284
[29] Supreme Court, Civil College, resolution no 971/1964, L.P. no. 12/1964, p. 80, Penal College, resolution no. 446/1964, J.N. no. 2/1964, p. 152
[30] C. Bîrsan, Civil Law. *General Theory of Obligations*, 9th edition, revised and supplemented, Hamangiu Publishing House, Bucureşti, 2008, pp. 146-147
[31] X. Pradel, *op. cit*., p. 138
[32] Ph. Malaurie, L. Aynès, *Traité de droit civil. Les obligations*, Cujas, 10-e éd. 2000, nr. 525

praetor[33]). This saying is then analyzed from a sociological perspective of what Jean Carbonnier calls „the non-right"[34]. This author affirms that „all that is not serious is a non-right"[35]. The great author admits however that there are situations when law has to focus on some minute matters, which would translate into the opposite *De minimis curare debemus*[36]. The lack of reaction of the law in front of some insignificant damages has been criticized by other authors who warn that „refusal of access to justice may be deemed as denial of justice"[37]. On the other hand, there are currently frequent situations in the consumer's law in which damages, considered from an individual perspective, lack significance, while collective damages, considered from the perspective of the consumers' associations and without including individual damages, renders liability law enforceable. In terms of moral damages, harms which apparently lack consistency prove to be devastating for human sensitivity, the latter being a value which may not be measured or compared, leaving aside the practice of the symbolic franc contradicting the theory of the non-right.

For these reasons, we believe that the new condition of the seriousness of the interest harmed only complicates things in an unjustifiable way, inexplicably worsens the unfair situation of the victim and leads to most various interpretations in a matter in which normative expression has to be clear. If one understands that legitimacy in this matter stands for conformity between interest and law, public order and good manners, the condition of seriousness of damages seems included in this new concept and also useful to the delictual liability law.

-The interest has to create the appearance of a subjective right. This new provision allocates solutions to the jurisprudence by which both damages caused by harming interest and damages caused by harming a subjective right were subject to recovery. The most frequent cases in which one meets with the matter of the simple right are related to loss of maintenance due to some actual and not rightful situations. The law itself sometimes devotes to such situations, namely art. 87 former Family Code according to which „the spouse who contributed to the provision of the other spouse's child is forced to continue supporting the child as long as he or she is a minor, providing his or her natural parents died, are missing or in need". Therefore, if the spouse who contributed to supporting the other spouse's child dies, the child provided for may demand compensation from the person who caused the death, i.e. support of which he or she was deprived as a result of such death. If the example above takes into consideration a child with a legally-recognized subjective right, there are also many other situations in which beneficiaries of provision allowed gratuitously (parents, children, elder people,

[33] E.H. Perreau, *Technique de la jurisprudence en droit privé*, Librairie des sciences politiques & sociales, Paris, 1923, pp. 180-182

[34] J. Carbonnier, *Flexible droit. Pour une sociologie du droit sans rigueur*, 10-e édition, Éd. Librairie Générale de Droit et de Jurisprudence, Paris, 2001, pp. 25-52

[35] Affirmation taken over by X. Pradel, *op. cit*., nr. 155, p. 190

[37] A. Sériaux, *Questions controversées: la théorie du non-droit*, R.R.J. 1995, apud X. Pradel, *op. cit*., p. 191

concubines, persons closed to direct victim) may aspire to recover their „bound" moral damages resulted from losing provision, without related legal grounds. Nevertheless, in order to be subject to recovery, such support should have been continuous enough and not limited to sporadic or insignificant support. The solution finds its motivation in the idea that, even though such support is not granted on the basis of a kin relationship imposing the obligation of support, even though, from the supporter's point of view, it is a simple favor, from the supported person's point of view it is a right gained, „a permanence sufficient enough to justify the assumption that it would have continued in the future"[38], which makes „the interest of the beneficiary of support to come close in contents to a genuine subjective right"[39], which, once lost, entitles him or her to demand recovery of damages hence suffered.

2.2. Damages caused by loss of chance

Loss of chance becomes legally relevant only when it is the result of a faulty behavior of another person, through which one interferes in an evolution or a procedure and removes the possibility of occurrence of an event favorable and expected by the victim, materialized in a gain or in avoidance of a loss by actions such as: failure to file in due time the appeal or some other documents relevant to the cause, by lawyers, leading thus to loss of litigation for which such lawyers were retained by the victim; the doctor's failure to have complied with his or her obligations to take care of the patient and causing or favoring therefore the latter's death or a disability; the faulty action of a third party who prevented participation to a competition to which the victim may have been among the winners etc. Waste of chance due to own attitude not to participate to a competition or due to own decision not to appeal a visibly illegitimate judgment, not to abide by medical prescriptions do not trigger legal consequences specific to loss of chance.

According to art. 1385 par (2) NCC, „had the illicit action also determined loss of chance to gain an advantage or to avoid a damage, the recovery will be proportional to the probability of having gained the advantage or, if required, of having avoided the damage, taking account of circumstances and actual situation of the victim".

The courts' focus on damages suffered as a consequence of losing a chance became more visible in France, as early as the 19th century. The doctrine records a lawsuit settled on July 17 1889 by which damages were granted for having lost the chance of winning a litigation which never followed its course due to the fault of a ministerial clerk[40]. Another example which became at least as classical as the first,

[38] M. Eliescu, *op. cit.,* p. 101

[39] C. Bîrsan, *Drept civil. Teoria generală a obligațiilor*, Ediția a IX-a revizuită și adăugită, Ed. Hamangiu, 2008, p. 147

[40] G. Viney, P. Jourdain, *Traité de droit civil. Les conditions de la responsabilité*, 2-e édition, Paris, LGDJ, 1998, nr. 280, p. 74

is the one regarding a horse's failure to participate to a competition due to delayed caused by the transporter who therefore deprived the owner of his or her chance to win a prize[41], or the case of a painter who could not exhibit his or her canvases on time and lost the chance of being a laureate[42].

The practice of compensating this type of damages is getting more and more affluent; the ones standing out are the cases in the judiciary area, where the question is about valuing the contribution played by the lawyer's guilty action or by action of another auxiliary working for the justice system to loss of litigation as well as the cases in the medical system where death, health getting worse or disabled birth are attributed to medical fault.

The French Court of Cassation has defined loss of chance as being „*an element of damages represented by loss of chance which may be direct and definite in itself (requirements related to compensation) every time disappearance is recorded as a consequence of the offense, of the probability linked to a favorable event, even though, by definition, the achievement of a chance is never certain"*[43]. More recently, the same court defines the loss of chance as *„current and definite disappearance of favorable likelihood"*[44].

In its turn, the doctrine considers that: „if the chance of winning something or avoiding a loss had been serious, the aspect of which the victim was deprived stands for recoverable damages to the extent to which it may be analyzed as definite disappearance of a favorable likelihood"[45]. In a more synthetic text, the authors of a dissertation on the right to liability and to contracts define the loss of chance as „disappearance of likelihood of a favorable event at the time when the chance seemed sufficiently serious"[46].

Despite the fact that the doctrine unanimously addresses the „loss of chance", what is really interesting, in terms of civil law, is only the damage suffered as a result of such event. It is thus called so as to avoid mistaking it for the final damages, represented by the advantage of which the victim was deprived or the loss which may have been avoided providing that the favorable event had been occurred.

Viewed from the perspective of the certainty of the damage suffered by a victim, the theory on chance loss represents the co-existence of two contradictory components: a probability of occurrence of favorable event without guilty action of the author, which implies consideration of a random element and a certainty, i.e. without this action the favorable event may have occurred. This is related to the causality relation[47].

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[41] Ph. Tourneau, L. Cadiet, *Droit de responsabilité et des contrats*, Paris, Dalloz Action, 2000, p. 320
[42] Ibidem
[43] Crim. 18 mars. 1975, Bull. Crim. 1975, no. 79, p. 223
[44] Cass. 1re civ., 21 nov. 2006 apud Ph. Malinvaud, *Droit des obligations*, 10 e édition, Litec, 2007, p. 403
[45] J. Flour, J.L.Aubert, E. Savaux, *Les obligations*, vol. 2 Le fait juridique, Dalloz, 2009, nr. 137
[46] Ph. Tourneau, L. Cadiet, *op. cit*. nr.1418
[47] Jacques Boré " *L'indemnisation pour les chances perdues : une forme d'appréciation quantitative de la causalité d'un fait dommageable* ", JCP 1974, I, 2620

The structure of the concept of loss of chance takes account of preoccupation to harmonize the two contradictory components of the certainty, without exaggerating in one way or another. The conclusion one comes to is that damages may be called on every time there was a chance to avoid and such chance was lost.

Semantically speaking, the phrase „loss of chance", even though famous in jurisprudence and doctrine, is ambiguous, as long as, the law does not focus on all losses of chance but only on those which may be imputable to a person, on „the loss of chance owed to somebody else's fault".

From this point of view, we believe that it would be more appropriate to speak of „missing the chance", collocation which we find preferable since it suggests more of the reality we aim. If „loss" of a chance may have multiple reasons, many of which objective – the civil law is not really concerned with it - , „missing" a chance is a better expression for interruption of a favorable evolution due to a faulty action. On the other hand, neither the advanced definition of loss of chance as „disappearance of a favorable likelihood" is sufficient to place ourselves in a hypothesis of delictual liability. Moreover, many of the damages caused by loss of chance, such as the ones in the medical sector, the ones concerning the chance to cure a disorder or the chance to survive, prove to be mainly moral prejudices, fact which will have to result from the definition of loss of chance. There are also damages due to lack of information or counseling, such is the case of the surgeon who fails to warn the patient on the potential implications related to post-surgery time[48]. This is why we feel free to advance another definition of damages suffered because of chance loss i.e. *prejudicial consequences from an economic and moral standpoint, caused by the action of the person who prevents occurrence of a favorable event of which probability to have occurred was sufficiently well outlined.*

[48] P. Jourdain, *Les principes de la responsabilité civile*, Dalloz, 2003, p. 128

PARTIAL CRITICAL REMARKS ON SETTLEMENT OF HIGHER EDUCATION BY NATIONAL EDUCATION LAW NO.1/2011

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Abstract: *The law of national education no.1/2011* wants to be the central pillar of the Romanian education reform. These important changes were made in all components of education, have adopted solutions that have changed the fundamental institutions. Entry into force of law of national education, in the absence of the given acts for its implementation, has led to congestion and to the impossiblility, for those affected by the fulfillment of obligations imposed by this law, to carry out the terms established by the same law. In addition, *in* various materials inconsistencies or gaps can be identified that cause problems on application and interpretation.

Keywords: *National Education Law no.1/2011, study contract, student, evaluation, teaching norm*

1. Introduction

The national education law no.1/2011[1] (hereinafter referred to law –our note) is the legislative basis for training material.

An analysis of the Law no. 76/2002 regarding the unemployment insurance system and stimulation of imploiment[2] with the Government Ordinance no.129/2000 on the training of adults[3], with art. 192-210 of the Labor Code (relating to vocational training) and with the standards in law no.1/2011, follows two major training systems that are interrelated and are aimed at primarily employment:

- training through the national education system, while in school[4];
- training outside the national education system during the professional activity[5].

Organization and functioning of national education under administrative law[6]. Thus, point 31 from the annex of Law no.1/2011 states that education is a public

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[1] Published in the Official Gazette of Romania, Part I, no.18 from 10 January 2011.

[2] Published in the Official Gazette of Romania,, Part I, no.103 from 6 February 2002, subsequently amended and supplemented.

[3] Republished in the Official Gazette of Romania, Part I, no.711 from 30 September 2002, subsequently amended and supplemented.

[4] Initial training takes place in higher education through: higher education, postgraduate education.

[5] Ion Traian Ştefănescu, *Theoretically and practically labor law treated,* Universul Juridic Publishing House, Bucharest, 2010,page 198.

[6] Ibidem.

service held under circumstances of public legal education and training for the young generation. Regarding point 44 from the annex of Law no.1/2011, the national education system is consisted of all the establishments and educational institutions of state, private, religious accreditated, of various types, levels and forms of organizing education and training activities.

Accredited higher education institutions form, according to art.116 paragraph 1 thesis I from the law, *the national higher education system.* In the higher education institutions authorized to operate the provisional current legal proceedings, they become part of national system of higher education only after accreditation.

2. Contracts of studies in higher education

University programs give access to occupations and functions specific to each completed university course and are grouped by area of studies and study organized in three cycles: Bachelor, Master, PhD.

Filling in the study contract is mandatory. The higher education institution signs with each student / PhD student / student / postdoctoral researcher enrolled in a program of university studies, a contract in accordance with the rules of organization and development of curricula and in compliance with legislation. Learning Agreements do not change during the academic year (art.141).

We notice from the very begining the error from the text of law: „…student / PhD student / student / postdoctoral researcher... uiversitary study contract" and therefore we propose to amend article 141 in the sense „The higher education institution concludes with each student / PhD student/ postdoctoral researcher enrolled in a program of university studies a contract, a post universitary one..".

By signing the contract which arises a legal relationship, in our opinion has a very complex legal subject of both private law and public law. This is a mutually binding (because it gives rise to mutual obligations and mutual interdependent task), for consideration (usually, there are benefits in counter-party), commutative (parties even know the existence and extent of the obligations of the contract), consensual (because if the law uses the term „sign" is not null and void and forms provided no such declaration is implicit), and with successive execution and adhesion [7].

This contract must be signed respecting the general conditions of validation entered into art.1179 Civil Code: capacity to contract, consent, object and the cause [8].

[7] For clasification of the contracts see Liviu Pop, Civil Law Treaty. Obligations. *Volume II. The Contract*, Universul Juridic Publishing House, Bucharest, 2009, page 92-135.

[8] For a more detailed analise see Gheorghe Beleiu, Romanian civil law. Introduction to civil law. Rights issues, *Edition* XI revised and added to Marian Nicolae and Petrică Truşcă, Universul Juridic Publishing House, Bucharest, 2007, page 142-172; Liviu Pop, *in the work cited*, page 139-153 and 305-387.

Related to art.37 Civil Code, „the exercise capacity is the ability of a person to sing alone civil legal acts „„ and according to article 43, paragraph 1 Civil Code, are uncapable to contract: the minor below the age of 14 years and the prohibited court.

In the conditions in which the national education law allows two years of study in one school year (art. 21 paragraph 4) it is possible that a minor under 18 years to be enrolled in an undergraduate program. For the minor who has full legal capacity acquired by marriage under the provisions of art. 39 Civil Code, or the person acquiring the early exercise under art. 40 Civil Code, The study contract is not problematic. But related to the minors with restricted legal capacity, it is questioned the need for prior declaration of legal protector or double declaration. We believe that he may conclude the study contract:

a) without prior consent, if it is older than 16 years, it would be unnatural to recognition, from that age full capacity to enter into an employment contract (art.13 paragraph 1 Civil Code), of professional qualification (art.202 paragraph 2 Civil Code) or apprenticeship (art.5 paragraph 1 from Law no.279/2005 related to apprenticeship at the work place[9]);

b) with prior approval of legal protector, if he is14 to 16 years.

To avoid different interpretations, we believe that it is necessary a specific regulation in this respect even more the applicable rules are not uniform. Thus:

- art.42 paragraph 1 Civil Code: „The minor may enter into legal acts on work, sports or artistic pursuits on his profession, with the consent of the parents or the guardian and to the provisions of the special law, if applicable";
- art.47 paragraph 2 from Law no. 272/2004 regarding the protection and the promovation of the minor's rights[10]: „The child's parents have priority in choosing the type of education that shall be given to their children and are required to enroll their child in school and to ensure regular attendance of school courses by him;"
- art.47 paragraph 3 from Law no. 272/2004: „Child reaches the age of 14 years may require court approval to change the way of teaching and training".

Rules on contract changes are generally applicable to contract law, indicating that it may not occur during the academic year. Even if it is a standard contract, the variation can not work except by agreement of the parties.

3. Quality of student or PhD student

The person admitted to an undergraduate degree program, master or doctoral student has the quality of a student or doctoral student, for the duration of its presence

[9] Republished in Official Gazette of Romania, Part I, no.522 from 2 September 2011.

[10] Published in Official Gazette of Romania, Part I, no.557 from 23 June 2004, subsequently amended and supplemented.

in the program, from the registration and before the graduation exam or expulsion, less during the periods of interruption of studies (art.142 paragraph 7 from Law).

Related to art.142 paragraph 7 with art.168 paragraph 5-8 from law it is resulted that in studies of:

a) license, the quality of a student lasts from the exam registration to license or diploma exam / expulsion;

b) master, the quality of student registration lasts from the examination of the dissertation / expulsion;

c) PhD - doctoral student quality lasts from the registration to the public support the thesis / expulsion. But it is possible a second support (art.168 paragraph 6) followed by submission to CNATDCU or expulsion, but also by CNATDCU invalidate and resend to this, followed by validation or expulsion (art.168 paragraph 8), we ask whether the public support of the thesis and to the validation or expulsion concerned he has the quality of doctoral student, and thus the rights and obligations of this quality. It could be argued that with the first support this quality stops and the expulsion would not be possible. We believe that the accuracy of the text of law, that paragraph 7 of article 142 should be amended so that for the doctoral student the termination of this quality to be specified explicitly depending on possible steps described above.

In respect of those on post-doctoral research programs or graduate programs and professional development training, they have not student status because they do not attend university programs.

A person may receive funding from the budget for one undergraduate program to a single master's degree and one doctoral program (art.142 alin.6 from Law).This right can be exercised only if enrollment in a program of study places financed from the state budget. As the law stands not believe that for expulsion, the person concerned can not benefit from it when re-study program in question. If enrollment in many programs of study, students will choose the institution that wishes to benefit from this right.

4. Assessments during university programs

During a program of studies exam type assessments and summative and continuous assessments are realized. Learning outcomes are assessed in exams:

a) full grades from 10-1, minimum grade 5 certifying skills related to a discipline and passing the examination;

b) with qualifications, as appropriate.

According to art. 144 paragraph 4 of Law, the results of an examination or assessment may be canceled by the dean of the University Charter under the provisions when it turns out that they were obtained fraudulently or in breaking of the Code of Ethics and academic ethics. The Dean may have re examination. First Code of University Ethics must include, in our opinion, and references on possible

fraud. Thus, ethics is all the rules of proper moral conduct and ethics is the doctrine concerning the rules of conduct and ethical obligations of a profession [11]. In addition, art. 124 paragraph 1 letter c contains the following forms „equity and academic ethics policies contained in the Code of University Ethics".

Regarding the reorganization of the exam, one might ask whether this concerns only those who have obtained results contrary to the Code of Universitary Ethics or examination as a whole. We believe that the rule in question do not meet the principle of fairness established by article 118 paragraph 1 letter e of the law whatever the solution adopted: replay the entire examination or only examination of the target. We believe that the cancellation of results should I target only those who have obtained in violation of code of ethics and professional conduct examination is not possible reorganization or wholly or in part, in additional to punish those involved under art. 319 of law.

Therefore we propose to amend paragraph 4 of art. 144 of the law for the purposes „....and notifies the University Ethical Committee thereof".

As related to art. 145, analysis of complaints filed by candidates for admission, the students examined, the graduates during the graduation exam is exclusively for the higher education institutions under its institutional regulations and the Charter University. How, according to paragraph 1 of article 144 of the law, assessments are summative examination and continuous type, we ask whether the phrase „appeals filed ... by the examined students" addresses both forms of assessment. Even though „to examine" means „to subject a student, a candidate for a job, etc.., in a test and evaluation of knowledge", and ongoing assessment activities involves repeated examination, we believe that are considered summative assessments of examination type, due to practical inability to solve such objection on continuous assessment.

We propose to amend article 145 of the law by replacing the phrase „examinated students" with „examinated students in the summative assessments of the examination type".

Graduation exams in higher education are:

a) license exam for academic studies degree or diploma exam for education in engineering sciences;
b) dissertation examination for master academic studies;
c) public exam for the doctoral thesis;
d) certification exam for graduate programs by specialization type;
e) examination of selection preceding the graduation exam, for students / graduates who come from higher education institutions and / or study programs which went into liquidation.

[11]Explanatory Dictionary of Romanian language, 1998.

5. Problems indicated by the activities which overcome a teaching norm[12]

The minimum weekly teaching norm for teaching, seminar, practical and laboratory projects year guidance, guidance development work license, the Masters dissertation, doctoral theses and other educational activities, practice and research included in plans education is, according to the art.287 paragraph 10:

a) for professor: 7 conventional hours, at least 4 conventional hours of teaching activities;
b) for associate professor: 8 conventional hours, at least 4 conventional hours of teaching activities;
c) for lecturer: 10 conventional hours, at least 2 conventional hours of teaching activities;
d) for assistent: 11 conventional hours, seminar activities, practice works and laboratory, year project guidance, guidance for licensing work and „other teaching, practice and research activities included in the curricula". Thus, the assistent can not have activities such as teaching, guidance for developing Masters dissertation or thesis, legally.

Depelopment of activities overcoming a teaching norm. Going beyond teaching a teaching norm under art.287 are paid under the payment by the hour (art.288 paragraph 1 thesis I). For staff, holding the maximum number of hours paid under payment by the hour, regardless of the institution they are being made, shall not exceed minimum teaching norm (art.288 paragraph 1 thesis II).

But art.287 uses the notion of minimum standard twice, once in paragraph 10 in determining the minimum weekly teaching norm and the second time in paragraph13 thesis II,where it states that „the University Senate, based on university autonomy, may increase, by regulation, minimum weekly teaching norm, with quality assurance standards, without exceeding the maximum limit „of 16 hours. It is possible that the minimum weekly teaching norm is actually the maximum teaching assignments.

It raises the first question: what is the minimum norm talking about in art.288 of Law? If you opt for the set of art.287 paragraph 10 of the Law we are in the realm of the absurd odds with the hierarchy of educational titles, allowing a title below to make more hours outside the basic norm than a higher title.

If you opt for the set by paragraph13 of art.287 of law it raises a new question: whether the Senate of an institution of higher education maintains the minimum standard and the Senate of another institution increases it to a maximum of 16 hours, tenured staff in relation to one of the two institutions and, naturally, associated to the

[12] To view the unconstitutionality art.288 paragraph 1 from Law no. 1/2011, as for other observations related to this, see Mara Ioan, „Brief consideration of the academic standard of the special provisions art.288 paragraph(1) from the Law of national education no.1/2011", in *Law* no.4/2012, page 109-120.

second, how many teaching hours can take place over time as an associate? In these circumstances we consider it necessary to amend art.288 paragraph1 of the Law for expressly specify the minimum standards that should be considered.

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HUMAN RIGHTS BETWEEN TRADITION AND MODERNITY IN ROMANIAN LEGISLATION

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Abstract: *The Constitution/Establishment is the first act of modern political thought and practice, it had an enlightened character, designed to help the political authority in his attempt to reshape the Romanian society. The areas affected by these reforms were: the public administration, which has been centralized, the legal system, the fiscal one, the army and the church.*

The conclusion emphasizes the fact that the enlightened reforms of Constantine Mavrocordat contributed to the modernization of the two Danubian Principalities, Wallachia and Moldavia, creating the premises of the great events of the 19th century Romanian history.

Keywords: *Romanian legislation, Constitution, Establishment, Human Right.*

1. Introduction

Throughout the late 17th and early 18th century, Europe passed through an extremely complex situation, as a consequence of a „general crisis", the last phase of the general transition from feudal to a capitalist economy. From the early 18th century, „bourgeois" society advanced, fueled by the progressive aspirations of the social forces to achieve an ideal system of governance, and hence for the development of a social and moral human being, aware of its natural rights. These aspirations stimulated the taste for revolutions.[1] Crucial events have taken place with major repercussions for the future of the continent. At the military and foreign policy level, a broad anti-Ottoman coalition has been forged, which included Austria, Polish, Russia, and later Venice. The coalition triggered a broad European counteroffensive lasting 16 years; during the 1683 second siege of Vienna it rejected the last outside attempt of the Turks to kneel Europe. The main results were the defeated of the Ottomans and the signing of the 1699 Karlowitz peace (Sremski Karlovici). Inside, politically, Europe will evolve towards a monarchical absolutism. Economically, progresses in this period are numerous, especially due to the converging action of factors, some of the most relevant being the Western bourgeoisie and the affirmation of the

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[1] E.J. Hobsbawm, „The general Crisis of the European Economy in the 17th Century", *Past and Present* 5 (1), Oxford University Press, 1954, p. 33.

capitalist relations. The bourgeoisie was a very rich and dynamic social class, interested in participating in government, and thus taking advantage of a new position in the state, which may correspond to its economic power. The bourgeoisie realized that these changes are only possible if she succeeds to impose new and revolutionary values and principles, as a part of a general, revolutionary worldview, which soon spread throughout the continent. It is one of the reasons why Michel Vovelle characterized the 18th century revolutions as the ones of the „regeneration" of human being[2], while for Lucia Popa the same century is „...a century of cosmopolitism, trade, and intense movement of people and ideas."[3]

2. Enlightenment and enlightened absolutism (despotism).

Those who will develop and disseminate the new Enlightenment view of the world and society – placing at its center the enlightened person seeking knowledge and, most important, self-knowledge, will not be theologists, as was the case with the Reformation, but the 18th century philosophers, French mostly, but also English. The *philosophes* were preachers not just of reason but reasonableness. They preached the gospel of humanity and secularism. Critical reason was their surgeon's scalpel. The religious overtones are deliberate -- reason was the new faith of men dissatisfied with the prophets of old. The *philosophes* were indeed cosmopolitan. Voltaire (1694-1778), Denis Diderot (1713-1784) and the Marquis de Condorcet (1743-1794) were great French *philosophes*. From Great Britain came Adam Smith (1723-1790), David Hume (1711-1776) and Edward Gibbon (1737-1794). Germany contributed Gotthold Ephraim Lessing (1729-1781) and Kant (1724-1804) and from Italy came Giambattista Vico (1688-1744) and Cesare Beccaria (c.1735-1794). And the Americans contributed the genius of Benjamin Franklin (1706-1790), Thomas Jefferson (1743-1826) and James Madison (1751-1836). All these men were inundated with Enlightenment ideas -- all of them were *philosophes*. Taken as a whole, the *philosophes* set no national boundaries to Reason -- they believed themselves to be part of a vast international movement. They were an international family. As Peter Gay has aptly remarked, considered collectively, the *philosophes* composed the „party of humanity."[4] As Tame said referring to Maslow's viewpoint on the New Enlightment, their „new world view" implicitly contained „a new image of society and of all its institutions".[5] Now not

[2] Michel Vovelle, (coordinator), *Omul luminilor*, Iaşi, Ed. Polirom, 2000, p. 5.
[3] Lucia Popa, „Franc-masoneria, lumina invizibilă a secolului luminilor", *Istorie şi ideologie*, Bucureşti, Editura Universităţii Bucuresti, 2002, p. 142.
[4] Steven Kreis 2000, http://www.historyguide.org/intellect/lecture9a.html
[5] Chris R. Tame, „The New Enlightenment: The Revival of Libertarian Ideas", *Philosophical Notes* No. 48, Libertarian Alliance, 1998, pp. 1-8 (first published in Arthur Seldon, ed., *The 'New Right' Enlightenment*, Economic and Literary Books, Sevenoaks, Kent, 1985), 1998, p. 2.

only the nature of Reason was examined, but man's world also, the society in all its components. Moreover, the man endowed with reason was and should be able to receive the light of knowledge and culture, that is to be enlightened and freed from prejudices, accept social changes made in his favor.

The new world view has strongly influenced all strata of society, from top to bottom. Especially from the second half of the 18th century the Central and Eastern European monarchies were marked by a new flow of specific political ideas and practices entitled enlightened absolutism or despotism. The new government view combined the feudal forms of government with the new ideas of Enlightenment philosophy. This symbiosis has resulted into a series of reforms intended to improve - and in some cases it succeeded - the situation of the peoples of Central and Eastern Europe.

The Enlightened despots reformist policy is characterized by a series of measures taken by the monarchy, concentrated in the areas of administration, justice and finance, to strengthen the feudal rule by incorporating elements of capitalism. In the new perspective on governence, the monarch's status is changed. Monarch's power no longer has a divine nature, but it appears rather as a delegation of the power of the people; the sovereign no longer appears as an emissary of God, but as a father of his people. Despite the diversity of expressions, the new perspective of governance has some common features: a centralized absolutism, a hierarchy of officials, a government rage (translated by the state intervention in economy, education, religion), a unitary perspective on government. The economic thinking of the enlightened monarchs was the mercantilism. Their aim was to obtain an active trade balance, the monarchy supporting manufacturing and commercial activities Socially, the state intervenes, on fiscal and humanitarian considerations, in the relations between peasants and nobles, with the intent to make each person a useful contributor. A central administrative apparatus appears, headed by the sovereign, who becomes the owner of all levers of state power. Due to the nationalist character of state activity, education becomes a major issue for the enlightened absolutism/despotism. As for religion, the importance of the Church is maintained, but significantly, it is subject to state power which seeks to regulate its activity. Among the most famous enlightened asbolutist monarchs were Maria Theresa and Joseph II (Habsburg Empire), Frederick II (Prussia), Catherine II (Russia) and Constantine Mavrocordat (the Danubian Principalities).

3. Enlightenment and Freemasonry

In the Age of Enlightenment it is important to mention in this context, a phenomenon that evolves simultaneously with the Enlightenment, a crucial phenomenon by its implications not only on European society and civilization, but also on the Romanian ones: *freemasonry*. Freemasonry appears as a spectacular phenomenon by being, permanence, development and amplitude. Reflecting the spirit of Enlightenment, and advocating for a new social and moral behavior, freemasonry

has become an integral part of the new Enlightenment culture.[6] Great personalities of the century, from thinkers such as Diderot, J.-J. Rousseau, Voltaire, to the Europe's enlightened despots, have embraced this new philosophical, social, political and cultural trend assuming its revolutionary ideas on human emancipation by means of reason, of the light of knowledge, of education, for the benefit of development and progress of the whole society on the principles of liberty, equality and human rights. What both Enlightenment philosophy and freemasonry offered, unlike other philosophies, was mostly the emphasis on freedom and human natural rights, the combination of philosophical exploration with a technical knowledge to find a balance way of living in society, on the basis of natural and social law and equity, *i.e.,* a reflection of the harmony of the universal laws on human society. In this context it must be admitted that the great revolutions of the Age of Enlightenment (and their appropriate declarations), *i.e,* The American Revolution / American War of Independence (1775-1783) and the U.S. Declaration of Independence (July 4, 1776); The French Revolution (1789) and The Declaration of the Rights of Man and of the Citizen *(*26 August 1789), to give the most notable examples, were therefore the brilliant work of illustrious Freemasons, based on the principles of the Enlightenment and Freemasonry, mainly on the recognition and enforcement of human rights. Also, the constitutions which are being developed in that period arise from the revolutionary enlightened thinking of the 18th century freemasons.

The Danubian Principalities have been connected too to the innovative ideas of European Enlightenment and their princes were mostly scholars, scientists, freemasons, interested in imposing and consolidating their countries in the European assembly. There have been some Romanian princes that applied the ideas and principles of the Enlightenment that Freemasonry has spread into Romanian practice. For instance, in Moldavia and the Wallachia, since the previous century Alexandru Lăpuşneanu and Radu Serban were founded royal schools „to teach people", in Cotnari (1561) and Targoviste (1603). Serban Cantacuzino has built the famous royal Academy in Bucharest (1688), while Antiochus Cantemir has built one in Iasi (1707). But most important Constantin Brancoveanu, Dimitrie Cantemir and his son, Antiochus have implemented fiscal and legal reforms, opened schools and hospitals, and popularized the idea of "common good".

The connection of the Romanian society to the great European flows of ideas have begun from the top, elite level, having socio-political implications and repercussions at all levels of the Romanian society. In the 18th century the legal custom or habit becomes too narrow for the new political realities and can no longer solve problems of state organization and management, generated on the one hand, by the relations of the Romanian Principalities with the Ottoman Empire in declined and, on the other hand, by their relations with other states. The liberal ideas of necessary changes in economic and social structures, in the administrative, fiscal, and legal system, begin to take shape in the Romanian Countries too.

[6] Lucia Popa, *op. cit.,* p.52 şi urm.

4. The Phanariot Rule

In the Romanian Principalities the Age of Enlightenment corresponds mainly to the Phanariot Rule. This is a controversial period in Romanian history, considered in many respects a step backwards in the evolution of the Romanian society, given the increased subordination of Wallachia and Moldavia to the Ottoman Empire, accompanied by severe damaging of the autonomy they had enjoyed so far. On closer look, however, in the range of princes imposed by the Ottoman Empire there can be distinguished outstanding figures who, beyond self-interest, have tried to determine a trend in legal-fiscal-social-cultural aspects of the society, in agreement with the Enlightenment perspective.

The Phanariot Rule was a social, political, and cultural structure that could integrate all those willing to accept and respect a particular system of values, based on conservative orthodoxy, anti-Western traditionalism, and respect for the bond and oath of allegiance to the Ottoman Empire. Since, however, the Romanian Principalities have been integrated into the European reformism, in accordance with their specific the Phanariot regime shows the enlightened absolutism effects which has generated a process of renovation and rationalization of the state institutions. Therefore the Phanariot century (1711-1821) can be called the „century of reforms", insofar as over a hundred years all sectors of social life - taxes, agrarian relations, administration, justice and law, church and culture - have been subject to extensive restructuring, aimed, ultimately, the establishment of order and the modernization of state and society relations. The reforms aimed to fulfill the obligations to the Ottoman Porte, strengthening the Phanariot control over the Romanian principalities, the limitation of the power of the Romanian nobles (boyars), and the modernization of social, political and administrative structures to adapt them to a more efficient exploitation for the benefit of Ottoman Empire. Deliberately or not, the Phanariote princes have shaped their actions in accordance with local conditions. Though they acted as representatives of the Ottoman Porte, their policy reforms adapted to the Romanian realities.

The age of maximum intensity of the reforms have taken place during the reign of Constantine Mavrocordat. Benefiting from the Sublime Porte agreement, the Phanariote prince began the implementation of the reorganization programme of fiscal, administrative, and judicial institutions, for rationalizing the state.

5. The reformist prince Constantine Mavrocordat and its 7 February 1741 Establishment/Constitution

Constantine Mavrocordat was Prince of Wallachia and Moldavia in several stages since 1730. According to the Enlightment trend, he was a famous freemason too and also a renowned reformist. His reformist work must be understood in the

light of Freemasonry principles which he embraced. The greatest influence on him have had the Voltaire's philosophical ideas. As a „Enlightenment", he, therefore, realized that the feudal institutions must be reformed. The principles of „Enlightenment" which he applied into practice as prince of Moldavia and Wallachia, in accordance with his enlightened aristocratic culture were: the freedom of expression and the equality before the laws regardless the social status, the recognition of the human rights to all people. Finally, it should be noted that the lights of the first Romanian Freemasonic lodge were turned on in Iasi, Moldavia (1733-1734). Moreover, the one who founded the Romanian freemasnory was the Italian Anton Maria Del Chiaro, the former secretary (1709-1714) of Romanian Prince Constantin Brancoveanu (1688-1714), in his second coming in the Romanian Principalities, this time in 1733, as the secretary of Prince Constantine Mavrocordat.

Etymologically, the word *constitution* comes from the Latin noun *constitutio*, which means „settle on basis" or „state of a thing". In all constitutional systems, the constitution was imposed as fundamental law. It is at the basis of the the state organization and functioning. As such, its adoption is a very important event because it exceeds the legal, as a political and state reality, because in the constitution are regulated and established the fundamental principles of all social and state life. Therefore, according to Professor's Ion Deleanu's definition and consistent with the term used by Constantine Mavrocordat Constitution is „the fundamental political and legal establishment, which, reflecting people's achievements and projecting future directions of the society's development, perpetuates the conquest of state power, the new social structures - economic and political ones, and the fundamental rights and duties of citizens."[7] It is by no accident, therefore, that in the 18th century the word *constitution* would have been first used by J.-J. Rousseau in *The Social Contract*, to describe the fundamental law. Certainly, the Phanariote Prince Constantine Mavrocordat, as an enlightened despot, and aware of the European political transformations of his time, was familiar with the philosophical and political ideas of Rousseau. And as a freemason, he certainly knew of the fundamental law of Freemasonry, *The Masonic Constitutions*, synthesized by the Rev. James Anderson, whose first edition appeared in 1723.

It was naturally, then, that the word *constitution* in our country to be used for the forst time, by the author himself, for the French translation of the *Establishment* of Constantine Mavrocordat of 7 February 1741 (or *The Great Charter,* by its other name) . This document was composed as an enlightened document and contained advice for government, given by the Phanariote Prince to his son Nicolae Constantine Mavrocordat.

The Constitution/Establishment is the first act of modern political thought and practice, it had an enlightened character, designed to help the political authority in his attempt to reshape the Romanian society. The areas affected by these reforms were: *the public administration*, which has been centralized, *the legal system*, *the*

[7] Deleanu 1993, vol. I, p. 37.

fiscal one, the army and *the church*. A particular attention has been devoted by the Prince to the reformation of the *nobility status* and to find solution for the *servile peasantry's* situation to free this category from serfdom Constantine Mavrocordat's innovation is the replacement of *jus valachium* with the *Byzantine law* through written texts. His reforms are all applications of the „enlightened despotism", practiced also by Frederick II of Prussia and the Habsburg Emperor Joseph II. The document was firstly implemented in Wallachia and then in Moldavia during 1741–1743, when Constantine Mavrocordat ruled there. The procedure by which the reforms were made in the debate of the Assemblies of States of the two Romanian Principalities expressed its quasi-constitutional character. The *Establishment* was voted on 7 February 1741.

Seeking eagerly acknowledgement in the Enlightenment Europe and aware of the enlightened value of his reforms, Constantine Mavrocordat has published the Establishment in French in the famous *Mercure de France* gazette and literary magazine of July 1742 under the title *Constitution*. But finally, as in the most cases of enlightened despots, his reforms will be short-lived, not good enough to withstand the assault of both Romanian nobility and Ottoman Porte financial pressures. Instead, the act of publication, is no coincidence, taking into account that in this famous French gazette had published their creations all the great Enlightenment personalities contemporary with the Romanian Prince. Last but not least, the Constitution's publication is important once more for both the Romanian Principalities and Europe, given that it was a precursor of the 18th revolutionary constitutions of Europe as the first set of fundamental reforms written and published in Europe and dealing with human rights. The first written fundamental law, called *constitution* of was the American one in 1787, and in Europe the one adopted in France in 1791.

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FEW PROPOSALS DE *LEGE FERENDA* REGARDING LEGAL INHERITANCE[1]

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Ion PARASCHIV[**]

Summary: *In our opinion, Law No. 287/2009 on the Civil Code*[2] *insures an adequate regulation form to the field of inheritance, which is mainly characterized by the justness of the solutions proposed, but also by the flexibility and coherence of the norms contained. Nonetheless, incomplete legal texts can be identified in some parts. At the same time, it can be equally acknowledged that some aspects which have been a lot underlined in time by specialized literature are not regulated. Under these circumstances, the present work aims to identify those texts of the Civil Code with incidence upon the field of legal inheritance which evince certain flaws, so as to propose to the lawmaker to go back on such texts and improve them. Moreover, the present work aims to identify those aspects quite frequently encountered in practice which do no benefit from legal regulations. We consider that this way will be able to bring our own contribution to increasing the quality of the provisions of the Civil Code, which have incidence upon legal inheritance and, implicitly, upon the act of justice.*

Keywords: *hereditary unworthiness, hereditary vocation, hereditary representation, vacant inheritance, inheritance rights of the surviving spouse.*

1. Introduction

In our opinion and in principle, the Civil Code in force regulates inheritance in a modern, flexible and coherent manner. Still, there can be identified some legal provisions evincing flaws, but also some aspects which, although are quite frequently encountered in practice, have not benefitted from legal regulations. Consequently, the present work aims to identify those provisions of the Civil Code with incidence upon legal inheritance[3] that can be subject to criticism, due to various aspects.

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[2] Republished in the Romanian Official Gazette No. 505 from July 15th 2011.

[3] Out of reasons of space, we shall restrict our analysis only to the field of legal inheritance, while on a next study we will also deal with the field of testamentary inheritance.

Thus, our proposals will concern the field of hereditary unworthiness, hereditary vocation, hereditary representation, inheritance rights enjoyed by the surviving spouse and vacant inheritance[4].

2. *De lege ferenda* proposals regarding hereditary unworthiness

a) According to the provisions of article 958 paragraph (2) of the Civil Code, which regulate legal unworthiness, „If the conviction for the deeds mentioned at article (1) is prevented from happening by the death of the author's deeds, by *amnesty* or by putting criminal liability under the statute of limitations, unworthiness operates if the deeds in question were acknowledged through a civil definitive sentence".

Thus, the legal text mentioned above refers to amnesty[5], but without mentioning which of its forms are concerned. Still, according to the Criminal Code in force[6] and even from the perspective of the new Criminal Code[7], it is made a distinction, in accordance to the phase of the lawsuit in which the crime subject to amnesty is found, between pre-conviction amnesty and post-conviction amnesty. We mention that only the first form of the amnesty is capable to prevent conviction and, implicitly, the record of hereditary unworthiness. What is of interest in what the record of inheritance unworthiness is concerned is the existence of a conviction decision (criminal or, if it is no longer possible, civil). Only like this it can be explained why the pre-conviction amnesty (which removes criminal liability and prevents the definitive conviction sentence to operate) removes unworthiness, whereas post-conviction amnesty (which

[4] In order to understand better all the issues regarding legal inheritance, in the light of Law No. 287/2009, see (in the order of their appearance): D.C. Florescu, *Dreptul succesoral,* Universul Juridic Publ. House, Bucharest, 2011, pp. 7-47 şi 158-163; I. Genoiu, *Dreptul la moştenire în Noul Cod civil,* C.H. Beck Publ. House, Bucharest, 2012, pp. 1-137; L. Stănciulescu, *Curs de drept civil. Succesiuni,* Hamangiu Publ. House, Bucharest, 2012, pp. 15-85; V. Stoica, L. Dragu, *Moştenirea legală,* Universul Juridic Publ. House, Bucharest, 2012; C. Macovei, M.C. Dobrilă, „Despre moştenire şi liberalităţi", pp. 1012-1032 and 1179-1183, in coordination. Vl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod civil. Comentariu pe articole,* C.H. Beck Publ. House, Bucharest, 2012.

[5] Amnesty is the clemency act made by the Parliament of Romania, through which, out of criminal policy reasons, is removed the criminal liability for the crime committed until the amnesty law appeares. See for that matter I. Oancea, *Drept penal. Partea generală,* Ed. Didactică şi Pedagogică Publ. House, Bucharest, 1971, p. 467; C. Mitrache, *Drept penal român. Partea generală,* „Şansa" Publishing and Press House SRL, Bucharest, 1994, p. 248; L. Vlădilă, O. Mastacan, *Drept penal. Partea generală,* II edition, revised, Universul Juridic Publ. House, Bucharest, 2012, p. 219.

[6] According to the provisions of article 119 of the Criminal Code, "Amnesty removes criminal liability for the committed deeds. If it intervenes after conviction, then it also removes the serving of the punishment given by the court, but also the other consequences of conviction..."

[7] We are referring to Law No. 286/2009 on the Criminal Code, published in Romanian Official Gazette from July 24th 2009, for which it has not been established yet the date when it will entry in force. The provisions of article 152 of the new Criminal Code take over exactly those of article 119 of the Criminal Code in force, mentioned above.

removes criminal liability and serving of punishment and, thus, not the existence of the conviction) maintains hereditary unworthiness.

In fact, there is no difference in terms of legal effects between the two forms of amnesty, since both remove criminal liability. Moreover, post-conviction amnesty also removes the serving of the sentence. Nonetheless, when it comes to hereditary unworthiness triggered by the existence of a conviction decision, amnesty evinces a difference in terms of legal effects, in accordance to the moment when it intervenes. If amnesty intervenes before the conviction, than it removes hereditary unworthiness, whereas if it intervenes after conviction, it does not remove hereditary unworthiness.

We consider our criticism to be justified, since the civil lawmaker himself refers to the second form of amnesty, at article 961 paragraph (2) of the Civil Code, stating that „The effects of unworthiness cannot be removed by rehabilitating an unworthy deed, *by amnesty happening after conviction*, by pardon or by ascribing criminal punishment to the statute of limitations".

In this context, we consider that the civil lawmaker should have referred to pre-conviction amnesty, at article 958 paragraph (2). If he had done this, the lawmaker would have insured two necessary correlations:

- on the one hand, civil provisions would have been correlated to criminal ones (both of the Criminal Code in force and the new Criminal Code);
- on the other hand, civil provisions themselves would have been correlated, namely those of article 958 paragraph (2) of the Civil Code to those of article 961 paragraph (2) of the Civil Code.

b) A similar course of action has been taken by the civil lawmaker also in regard to article 959 paragraph (4) 1st thesis, which is dedicated to legal unworthiness. Thus, according to the legal text mentioned above, „When the conviction for the deeds mentioned at article (1) letter a) is prevented by the death of the author's deeds, by *amnesty* or by ascribing criminal liability to statute of limitations, unworthiness can be proclaimed if the deeds in question were acknowledged by a civil definitive sentence".

In respect to the legal text quoted above, we would like to state the same criticism, by suggesting to the lawmaker to go back on those legal provisions and complete them accordingly.

c) Another text which could also be criticized is that contained by article 959 paragraph (1) point a), according to which can be declared unworthy to obtain an inheritance „a person who was criminally convicted for committing *with intent* serious deeds involving physical or moral violence against the person leaving the inheritance, or some deeds causing the victim's death". In regard to the legal text quoted above, we would like to mention that the deeds described in its second part (namely deeds causing the victim's death) can be suspected to have been

committed with oblique intent (praeterintent)[8], and not with intent. Thus, the guilty form typical to those deeds causing the victim's death is represented by oblique intent. To be more rigorous, the lawmaker should have made that distinction.

In consequence, we propose to the lawmaker to restate the legal text mentioned above accordingly. By doing so, the lawmaker would correlate the provisions of the Civil Code to those of article 16 paragraph (5) of the new Criminal Code, according to which „Oblique intent takes place when the deed consisting in an action or unintended action generates a more serious result, out of the author's guilt". It is true that the current Criminal Code (at article 19) and the Criminal Procedure Code in force [article 27 point 1 letter b)] only refer to intent and fault, as forms of guilt, but even so, oblique intent is acknowledged as a form of guilt. Even in these circumstances, the Civil Code in force must be also correlated to the provisions of the new Criminal Code, which is said to enter in force in the near future and which includes oblique intent among the forms of guilt.

3. *De lege ferenda* proposals in the field of hereditary vocation

Although we are stressing also on this occasion the merit of the current Civil Code, namely that of regulating hereditary vocation among the conditions of the right to inherit, we consider that the lawmaker has dedicated too little space to such vocation. The Civil Code in force practically dedicates only one legal text (article 962) to hereditary vocation, by limiting to distinguish only between the latter's two forms, namely legal hereditary vocation and testamentary hereditary vocation. According to the legal text invoked, „In order to obtain an inheritance, a person must have the quality required by law or must have been nominated by the deceased in his will".

Consequently, also in the light of the current Civil Code, the legal doctrine will be the one to configure the content of this condition for the right to inherit, having at the same time open way to innovation.

As to us, we consider that the lawmaker should have regulated in a more complete manner all the issues regarding this condition for the right to inherit.

4. *De lege ferenda* proposals regarding the field of hereditary representation

Similar to the 1864 Civil Code, the Civil Code in force makes no reference to the possibility for the persons who died at the same time to be represented. But since also under the incidence of the former Civil Code specialized literature stated that the solution according to which co-deceased should be represented is equitable, we can also state, *de lege lata*, with the same arguments, that the persons dying at the same

[8] For more details, see L. Vlădilă, O. Mastacan, *quoted works,* p. 71.

time[9] (equivalent of the co-deceased from the former regulation) can be represented. Consequently, we blame the current Civil Code for not have clearly regulated this situation, although specialized literature has pointed out this need.

5. *De lege ferenda* proposals regarding birth by a mother substitute

The Civil Code does not regulate birth by a mother substitute, although specialized literature has pointed out this need[10]. At Title III „Kinship", Chapter II „Filiation", articles 441-447, the Civil Code regulates only medically assisted human reproduction with a third party – the donor.

As to us, we consider that the regulation of this modern method of human reproduction is useful. Nonetheless, this legal institution generates effects also in the hereditary field, given that, according to the provisions of article 441 paragraph (1) of the Civil Code, the child resulted from this kind of reproduction has no kinship degree established with the third party – donor, being considered the child of the couple who resorted to this modern method of reproduction. It is true that, on the basis of the provisions of article 443 paragraph (2) of the Civil Code, the mother's husband can question the child's paternity, according to law, if he did not consent to the medically assisted reproduction performed with a third party – the donor. The deceased who was born in such way can be equally inherited by all his relatives.

Different from medically assisted human reproduction with a third party – the donor, birth by a mother substitute can also be encountered in practice. Consequently, a woman who cannot carry/give birth to a child can agree with another one to carry and give birth to a child for her. In most cases, the surrogate mother is inseminated with the genetic material of the man from the couple wanting that baby.

We mention that birth by a substitute mother is not forbidden by the Romanian law, but is not regulated either. Also, the Bill of the Civil Code[11] contained the clear interdiction of this circumstance. Still, in its form published in Romanian Official Gazette, the 2011 Civil Code no longer maintained this interdiction, but did not regulate this possibility either. Consequently, legal doctrine can continue to uphold the regulation of this possibility for a woman to carry a baby for another.

Regulating this method of reproduction is of interest also in the field of inheritance because, in accordance to the solution agreed by the lawmaker, it will be possible to assess if the persons resulting from this type of reproduction are

[9] According to the provisions of article 957 paragraph (2) of the Civil Code, "If more person die and it cannot be established who died before whom, then those persons have no capacity to inherit each other". It can be thus noticed that new civil regulations refer to the persons who died at the same time, including here both the co-deceased from the former regulations and those from the category created by legal doctrine, but not regulated before October 1st 2011.

[10] V. Dobozi, "Medically assisted reproduction in the light of the new Civil Code", în *Curierul judiciar,* no. 10/2011, pp. 535-541.

[11] Adopted in the meeting of the Government from March 11th 2009.

entitled to inherit the surrogate mother or, on the contrary, the couple for whom the surrogate mother carried the baby. Moreover, it will be possible to assess if the surrogate mother preserves her hereditary vocation in regard to the child she carried for another woman or for a couple.

As to us, we do not necessarily blame the Civil Code for not having allowed this possibility, but we blame it instead for remaining silent. The Romanian lawmaker should have adopted a certain attitude in relation to the proposal stated by legal doctrine on this matter, either allowing or forbidding it. By remaining silent, the practical situations of this type (encountered with a certain frequency) receive contradictory solutions.

6. *De lege ferenda* proposals regarding the field of hereditary rights enjoyed by the surviving spouse

a) According to the provisions of article 970 of the Civil Code, „The surviving spouse inherits the deceased one if, when the inheritance is opened, there is no definitive divorce sentence".

Therefore, when it comes to the moment up to which a person can preserve his or her quality of surviving spouse, the Civil Code only refers to the hypothesis of a divorce sentenced by court. Consequently, the Civil Code mentions that a person can preserve this quality of surviving spouse until the divorce sentence is definitive. Yet, *de lege lata*[12], the divorce can also be sentenced by the notary public or by the Register Office servant. But when the lawmaker regulated the issues regarding the surviving spouse's right to inheritance, he did not make the necessary correlation between legal provisions and only referred to the possibility for marriage to be annulled on a judicial way.

In respect to this actual state of affairs, we propose to lawmaker to complete the legal text under scrutiny and to mention that the quality of surviving spouse is equally maintained until the divorce certificate is released. Consequently, if the two spouses addressed the Register Office servant in order to have their divorce sentenced on an administrative way and, respectively, by notarial procedure, but without the divorce certificate being released, then they preserve their quality of spouses and, if one of them dies, the other can inherit him or her.

b) Speaking about the regulation of the same issue regarding the surviving spouse's inheritance rights, we rebuke the lawmaker for not having regulated a delicate problem, pointed out by specialized literature, namely that of the imputation of the surviving spouse's inheritance share in relation to the whole

[12] See the provisions of article 375 of the Civil Code, which regulate divorce by the agreement of the parties or by notarial procedure.

hereditary patrimony. The former legislation[13] did not made either any reference to this aspect, reason for which specialized practice and literature unanimously appreciated that the surviving spouse's inheritance share will be determined with priority, by imputing it in relation to the whole inheritance patrimony. Consequently, when competing with any of the heirs classes, the surviving spouse will have his or her inheritance share established with priority, so that only what will remain after such determination will be divided between the deceased's relatives, on the basis of the principles of legal bequeath of inheritance.

Since the Civil Code in force does not contain either any reference to the matter presented above, although lawmaker cannot take defense by invoking he did not know about the controversial character of this issue, we can continue to argue that the share of the surviving spouse who competes for inheritance with the other relatives of the deceased will continue to be established with priority. A fact which entitles us to uphold this opinion is that, *de lege lata*, the surviving spouse's inheritance rights are the first to be regulated, before those enjoyed by the deceased's relatives.

Yet, the fact that the issue in question is not regulated generates much greater effects. A truly controversial issue is that regarding the imputation of the surviving spouse's inheritance share in relation to the whole inheritance patrimony, by reducing the inheritance shares of the other legal forced heirs. In the short time that has passed from the entry in force of the Civil Code, there have emerged two orientations. According to one of them, which seems to have more upholders[14] (including the Romanian Union of Notaries Public[15]) the surviving spouse's inheritance share is imputed in relation to the whole inheritance patrimony, thus reducing the shares of other forced heirs, equally disinherited by the deceased.

Moreover, there has also been expressed a contrary opinion[16], according to which all the shares of forced heirs disinherited by the deceased are imputed altogether. It is true that, from a mathematical point of view, this thing is possible, under the circumstances in which the current Civil Code establishes for forced heirs smaller shares than the former Civil Code. *De lege lata*, the disinherited forced heir receives only half of the share to which he would have been entitled if he had not been disinherited, therefore less than the share provided for by the former Civil Code. The new Civil Code preserves forced share only in what the surviving spouse is concerned. If we were to embrace the latter point of view, in order to maintain the coherence of thought, we should also express the same opinion also in the circumstance in which the surviving spouse is not disinherited

[13] We are referring to Law No. 319/1944 on the surviving spouse's inheritance rights, currently abrogated.

[14] See for that matter: I. Genoiu, *quoted works,* p. 271 and the following; L. Stănciulescu, *quoted works,* p. 158; V. Stoica, L. Dragu, *quoted works,* p. 134 and the following.

[15] See *Codul civil al României. Îndreptar notarial*, volume I, Monitorul Oficial Publ. House, Bucharest, 2011, p. 404.

[16] For the contrary opinion, see I. Popa, „Rezerva succesorală şi moştenitorii rezervatari în reglementarea Noului cod civil", published in *Law Magazine,* No. 6/2011, page 39 and the following; D.C. Florescu, *quoted works,* p. 124; C. Macovei, M.C. Dobrilă, *quoted works,* p. 1118.

and comes to inheritance by competing with the other 4 class heirs. Thus, in this case too would be necessary to state that the inheritance shares of the surviving spouse and deceased's relatives with whom he or she competes must be all established at the same time.

In regard to the aspects mentioned above, we blame the lawmaker for not having regulated the issue concerning the share (including forced share) enjoyed by the surviving spouse, who competes for inheritance with the other 4 class heirs – relatives of the deceased.

c) *De lege lata,* the situation of the bigamous spouse is not regulated in what concerns his or her special right upon furniture and household objects.

According to the provisions of article 974 of the Civil Code, when not competing with the deceased's descendants, *the surviving spouse* inherits, apart from the share established according to article 972 (the share to which he is entitled when competing with any of the heir classes), the furniture and household objects, which were dedicated to common use by the spouses.

Consequently, the lawmaker did not take into account the hypothesis in which the deceased spouse was bigamous, case in which to his inheritance are entitled two (or more) spouses, namely the spouse from the valid marriage and the good faith spouse/spouses from the putative marriage.

Since the former hereditary legislation said nothing on the matter, specialized literature and judicial practice unanimously appreciated that the good faith spouse from the putative marriage must benefit as well from the special right upon furniture and household objects. This opinion must be even more upheld under the influence of the Civil Code in force which, in relation to the inheritance share to which the surviving spouse in entitled when competing with any of the class of heirs, regulated at article 972 paragraph (3) the hypothesis in which for inheritance compete the spouse from the valid marriage and good faith spouse from the putative marriage. Thus, according to the legal provisions of the Civil Code in force, „If after the putative marriage two or more persons have the quality of surviving spouse, then the share established according to articles (1) and (2) is equally divided between them".

We therefore blame the Civil Code that, when regulating the special right of the surviving spouse upon furniture and household objects, did not do the same as in the case of article 972 paragraph (3).

7. *De lege ferenda* proposals regarding the field of vacant inheritance

According to the provisions of article 1135 paragraph (2) of the Civil Code, „If by legacy was assigned only a part of inheritance and there are no legal heirs or their vocation has been restricted as an effect of the will left by the deceased, that part from the inheritance which remains non distributed is vacant".

In our opinion, the legal text mentioned above does not cover all the hypotheses in which partial hereditary vacancy can be encountered, being omitted

the situation in which the testator instituted no legatees, while he limited nonetheless hereditary vocation to forced heirs, by will. In this case, the testator no longer disposes of his assets by means of legacies, but he only restricts, by will, the hereditary vocation of his forced legal heirs, whom he disinherits. These disinherited heirs will receive only the forced heirship to which they are entitled, while within the limits of the available quota from inheritance operates hereditary vacancy. We consider that this is the hypothesis which the lawmaker did not cover when elaborating the text of article 1135 and which constitutes without any doubt a case of partial hereditary vacancy.

On the contrary, if the legal heirs of the deceased, disinherited by will, are not forced heirs, and the testator does not institute legatees either, we can speak of total hereditary vacancy.

Therefore, the cases in which partial hereditary vacancy can be encountered are the following:

- There are no legal heirs and the testator instituted legatees, by universal or particular title, only for a part of his inheritance, while for the rest of hereditary assets intervenes hereditary vacancy.
- The testator institutes legatees only in respect to a part of his hereditary patrimony, while he limits hereditary vocation to the existing legal heirs, by will.
- The testator does not institute legatees, but he limits hereditary vocation to the existing forced heirs by will.

Therefore, we blame the lawmaker for the fact that, at article 1135 paragraph (2) of the Civil Code, only made an incomplete list of the hypotheses of partial hereditary vacancy, under the circumstances in which, from the formulation contained by the legal text invoked, it apparently results that it presents an exhaustive list of them.

Yet, we also point out on this occasion the merit of the current Civil Code, that of referring to both forms of hereditary vacation, namely total and partial hereditary vacation.

Conclusions

The present work has debated the legal texts which have incidence upon the field of legal inheritance and which, in our opinion, should be completed (just like those regarding hereditary unworthiness or those establishing the moment up to which is present the surviving spouse quality or those identifying the situations of partial hereditary vacancy). It would be like this insured a necessary correlation, on the one hand between the provisions of the Civil Code belonging to different books, while on the other hand between the provisions of the Civil Code and those of criminal legislation.

At the same time, if the lawmaker regulated the aspects we have underlined (offering for instance more complete regulations for hereditary vocation, for the possibility of the persons who died at the same time to be represented or for the way in which is determined the share/forced share of the surviving spouse who competes for inheritance with the deceased's relatives), then legal inheritance would be completely regulated, therefore being substantially reduced the creating legal intervention of judicial practice. But since the aspects in question are currently not regulated, this will undoubtedly generate a judicial practice which is not unitary, but also contradictory opinions within specialized literature.

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INCIDENTS REGARDING THE COMPETENCE OF FISCAL AUTHORITIES IN FISCAL PROCEDURE

Nadia Cerasela ANIȚEI *

Abstract: *Fiscal authorities competence has been analyzed in the research literature in terms of certain expressions common in practice, namely that of financial apparatus or fiscal apparatus. The third title of the Fiscal Procedure Code entitled „General Procedural Provisions" devotes Chapter I to rules of competence of fiscal authorities. The Fiscal Procedure Code defines in art. 37 paragraph 1 both the negative and positive conflict of competence as those situations where two or more fiscal bodies are considered competent or incompetent at the same time. In this case, the fiscal body which was first invested or which was the last declared incompetent shall continue the ongoing procedure and shall require the common superior body to decide upon the conflic. The conflict of interest is a case by which the official is unable to perform their duties. According to art.39 of the Fiscal Procedure Code, the official from the fiscal body involved in a management procedure is in conflict of interest if:*

a) within the procedure he/she is a taxpayer, he/she is husband / wife of / the taxpayer, he/she is relative to the 3rd degree including of the taxpayer, he/she is a representative or agent of the taxpayer;

b) within the respective procedure can gain an advantage or suffer a direct disadvantage;

c) there is a conflict between him, the husband / wife, his/her relatives up to 3rd degree including one party or the husband / wife, the family of the party to the 3rd degree inclusively;

d) in other cases provided by law.

According to art.40 paragraph 1 of the Fiscal Procedure Code the official who knows he/she is in one of the situations referred to in art. 39 shall notify the head of the fiscal body and refrain from performing the procedure.

Keywords: *Fiscal authorities competence; rules of competence of fiscal authorities; conflict of interest; abstention and recusation.*

1. THE CONCEPT OF COMPETENCE OF FISCAL AUTHORITIES

Fiscal authorities competence has been analyzed in the research literature in terms of certain expressions common in practice, namely that of *financial apparatus*[1] or *fiscal apparatus*[2].

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[1] D., Drosu, Şaguna, *Drept financiar şi fiscal (Financial and Fiscal Law)*, All Beck Publishing House, Bucharest, 2003, p. 89-90.

[2] Ioan, Condor. *Drept financiar (Financial Law)*, R.A. Official Gazette, Bucharest, 1994, p. 432-436.

The third title of the Fiscal Procedure Code entitled „General Procedural Provisions" devotes Chapter I to rules of competence of fiscal authorities.

Further, since the provisions of the Fiscal Procedure Code do not define the notion of competence we will show, what is meant by competence in civil procedural law and then try to define the notion of ***competence of the fiscal authorities***.

The term competence can be found in different fields and is not specific only to law.

Legally, the issue of competence has been studied by all branches of law, on its value depending the knowledge of the authorities called to address the problem regarding the observance of rights and of the interests of natural persons and legal persons.

The notion of competence even in law has different meanings.[3] In the civil procedural law competence is defined as the ability recognized by law of a court (of another jurisdiction authority or with jurisdiction activity) to judge a dispute.

Please note that the concept of competence envisaged by the Fiscal Procedure Code has a narrower scope, referring only to the management of taxes, contributions and other amounts owed to the general budget as defined by Article 1 of the Fiscal Procedure Code.[4].

Since the notion of ***competence of fiscal authorities*** is not defined in the Fiscal Procedure Code we will try to define this concept. Thus, ***the competence of fiscal authorities*** is the ability of a fiscal authority, acknowledged by law to administer taxes, fees, contributions and other amounts owed to the general budget, to assist and guide taxpayers in the consistent application of the provisions of fiscal law, to exercise tax control and to issue rules implementing the law on tax matters.[5]

The Fiscal Procedure Code contains no provisions regarding the penalties for rules on competence non-compliance. To this end, the general rules contained in the Code of Civil Procedure, adapted to the specific non-judicial activities of fiscal authorities shall be applied. Thus, we believe that the violation of the competence rules, when issuing a fiscal administrative document, determines the absolute nullity of the fiscal administrative document issued in these circumstances[6].

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[3] V., M., Ciobanu, *Tratat teoretic şi practic de procedură civilă. Teoria generală, (Theoretical and Practical Treaty of Civil Procedure. General Theory)* vol. I, Național Publishing House, Bucharest, 1996, p. 371.

[4] For details Daniel, Dascălu. Cătălin, Alexandru. *Explicațiile teoretice şi practice ale codului de procedură fiscală (Theoretical and Practical Explanations of the Fiscal Procedure Code),* Rosetti Publishing House, Bucharest 2005, p. 99.

[5] Nadia Cerasela Dariescu, Cosmin Dariescu. *Discuții şi propuneri de lege ferenda cu privire la competența organelor fiscale (Discussions and proposals of lex ferenda on the competence of tax authorities).* in TRANSYLVANIAN REVIEW OF ADMINISTRATIVE SCIENCES (ISSN: 1454-1378), No.1 (23) on July 2009, Cluj, pp. 52-67 (available at: http://www.rtsa.ro/497,discu-354;ii-350;i-propuneri-de-lege-ferenda-cu-privire-la-competen-354;a-organelor-fiscale.html) .

[6] For details Daniel, Dascălu. Cătălin, Alexandru. *Explicațiile teoretice şi practice ale codului de procedură fiscală (Theoretical and Practical Explanations of the Fiscal Procedure Code) ,* Rosetti Publishing House, Bucharest 2005, p. 115.

General and material jurisdiction of courts is always absolute. Territorial jurisdiction is in principle relative, only the exclusive territorial jurisdiction is absolute.

Material competence is regulated by mandatory rules and, so, the parties cannot agree, even with the consent of the court, to deviate from these rules.

Territorial jurisdiction is governed by rules and, so, the parties may derogate from them. In exceptional cases mandatory rules are brought under regulation.

2. THE CONFLICT OF COMPETENCE

According to the civil procedural law, *the conflict of competence* is defined as the situation where the court that received the case by decision of competence declining finds that it is incompetent and considers that the competence belongs to the court that sent the case, declining its competence in favor of this court. Such a conflict may occur if two courts, in case of the alternative competence rules, are both declared competent to deal with the same case.

So we see that we are dealing with two types of conflict of competence, namely: negative conflict of competence in the first case and positive conflict of competence in the second case.

The Fiscal Procedure Code defines in art. 37 paragraph 1 both the negative and positive conflict of competence as those situations where two or more fiscal bodies are considered competent or incompetent at the same time. In this case, the fiscal body which was first invested or which was the last declared incompetent shall continue the ongoing procedure and shall require the common superior body to decide upon the conflict.[7]

The conflict arising between two administrations of public finances in the same county jurisdiction shall be settled by the General Directorate of Public Finance to which they are subordinated.

The conflict arising between two administrations of public finances in different counties or between an administration of public finances and the General Directorate of Public Finance or two General Directorates of Public Finance are resolved by the National Agency for Fiscal Administration.

If the fiscal authorities between which the conflict of competence arises are not subordinated to a common body, the conflict of competence occurred shall be settled by the Central Fiscal Commission of the Ministry of Public Finance.

The conflict arising between two customs bodies is solved by National Customs Authority.

[7] For more details see Horaţiu, Sasu. Lucian, Ţâţu. Dragoş Pătroi. *Codul de procedură fiscală. Comentarii şi explicaţii(Fiscal Procedure Code. Comments and Explanations),* C. H. Beck Publishing House, Bucharest, 2008, pp. 124-126.

In case of local budgets, to solve the conflict of competence the Central Fiscal Committee is replenished with a representative of: the Association of Communes of Romania, the Association of Towns in Romania, the Association of Municipalities of Romania, the National Union of County Councils of Romania and the Ministry of Administrative Reform and Interior.

The body competent to resolve the conflict of competence shall decide on the conflict and shall communicate the decision to the fiscal authorities in conflict.

According to art.2 of Order no. 877/2005 the Central Fiscal Commission issues **decisions** for:

- fiscal problems by corroborating legislation in the field with related legislation, as appropriate, requiring a unified solution to eliminate different interpretations of the legislation;
- issues on conflicts of competence arising between the fiscal authorities which are not subordinated to a common hierarchical body.

3. CONFLICT OF INTEREST

The conflict of interest is a case by which the official is unable to perform their duties.

According to art.39 of the Fiscal Procedure Code, the official from the fiscal body involved in a management procedure is in conflict of interest if:

a) within the procedure he/she is a taxpayer, he/she is husband / wife of / the taxpayer, he/she is relative to the 3rd degree including of the taxpayer, he/she is a representative or agent of the taxpayer;
b) within the respective procedure can gain an advantage or suffer a direct disadvantage;
c) there is a conflict between him, the husband / wife, his/her relatives up to 3rd degree including one party or the husband / wife, the family of the party to the 3rd degree inclusively;
d) in other cases provided by law.

Of the provisions of art.39 letter a. we conclude that there is a conflict of interest for the official within the fiscal authority involved in a proceeding of the administration of taxes, fees, contributions and other amounts owed to the general budget in situations where that official is: taxpayer in this proceeding; husband / wife of / the taxpayer or authorized representative of the taxpayer.

Of the provisions of art.39 letter b. we see that there is a conflict of interest for the official from the tax authority involved in a proceeding of administration of taxes, fees, contributions and other amounts owed to the general budget in situations where the official concerned may gain an advantage or suffer a direct disadvantage.

Of the provisions of art.39 letter c we note that there is conflict of interest for the official from the tax authority involved in a proceeding of administration of taxes, fees, contributions and other amounts owed to the general budget in

situations where a conflict of any kind exists between him, the husband / wife, relatives up to the third degree inclusively and the taxpayer subject to fiscal control or the husband / wife, relatives of the taxpayer subject to fiscal control by the third degree inclusively.

In case of conflict of interest the solution is abstention or recusation.

4. ABSTENTION AND RECUSATION

In civil procedural law, abstention and recusation are two procedural institutions that are in indissoluble connection. Abstention is nothing but a judge's self-accusation. Recusation is the power conferred by law to the parties to apply in cases expressly determined by law, the removal of one or more judges from the settlement of civil cases.

According to art.40 paragraph 1 of the Fiscal Procedure Code the official who knows he/she is in one of the situations referred to in art. 39 shall notify the head of the fiscal body and **refrain** from performing the procedure.

Paragraph 3 of the same article states that the abstention is proposed by the civil servant and decided immediately by the tax authority head or by the superior authority.

We note that paragraphs 1 and 3 of art. 40 of the Fiscal Procedure Code refer to the abstention of the official from carrying out the procedure of management of taxes, contributions and other amounts due to general budget.

Paragraph 2 of the same article provides that if the conflict of interest refers to the head of the fiscal body, they are obliged to notify the superior body.

Regarding paragraph 2 of art.40 of the Fiscal Procedure Code we mention that it relates to recusation. Thus, the head of the fiscal body who finds himself/herself in one of the situations referred to in art. 39 of the Tax Procedure Code is required to notify the superior body.

The recusation of the civil servant in conflict of interest may be required by the taxpayer involved in the administrative proceedings.

The recusation of the official shall be decided immediately by the head of the fiscal body or by the superior authority. The decision rejecting the request for recusation may be appealed to the competent court. The recusation request shall not suspend the administrative procedure in progress.

We agree to the opinion[8] that the decision to refuse the recusation, not the admission, may be appealed to the administrative courts and tax administrative tribunal, in terms provided by Law no. 554/2004 on administrative contentious with subsequent amendments and additions without the need for prior procedure.

The request for recusation shall not suspend the administrative procedure in progress, the situation remaining the same during the period of time when the request is in the Administrative Court.

[8] Mircea, Ştefan, Minea. Cosmin, Flavius, Costaş. *Dreptul finanţelor publice. Drept fiscal (Public Finance Law. Fiscal Law),* vol. II, Wolters Kiuwer Publishing House, Bucharest, 2008, p. 413 .

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BRIEF CONSIDERATIONS REGARDING THE INFLUENCE TRAFFIC OFFENSE

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Abstract: *In essence, corruption is an abuse of power in order to obtain material benefits or other benefits (honours, titles, advertising, disclaimer etc.). Most of the times, it is only an ordinary contract work from Roman law principle do ut des (I give you to give me) that are negotiated and carried out clandestinely and under confidential conditions.*

The offence of traffic influence is part of the service or related to the service (under the current Criminal Code) and to the offences of corruption (according to the New Criminal Code).

Keywords: *crime, corruption, public servant*

Introduction

Corruption exists from Antiquity, as one of the worst behaviour and, at the same time, as one of the most spread among civil servants. Of course, over centuries, traditions and historical and geographical conditions have changed considerably public sensitivity regarding the perception and the evaluation of these behaviours, and also how they are treated by legal regulations.

In certain historical periods, giving and receiving benefits by the officials were even accepted as being something natural, meaning a particular courtesy. On our territory, for example, the tip was not impugned, only deplored, possibly by the rules of morality.

Corruption can be seen as a social phenomenon, an expression of a manifestation of moral decay, of spiritual degradation or as a legal phenomenon, which is the most serious form of the corruption[1].

In our legislation, unlike that of other countries (USA, France, Italy etc.), there is no text that punish a crime called „corruption", but the legal literature includes in that term, with a large meaning, many violations of the criminal law concerning the scope of employment relationships.

The influence traffic is part of the work crimes category or in connection with the work.

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[1] *V. Dobrinoiu*, *Corupţia în dreptul penal român*, Atlas Lex Publishing House, Bucharest, 1995, p. 8.

The legal content

According to the article 257 from the Penal Code, „demanding or receiving money or other benefits or accepting the promises of gifts, directly or indirectly, for himself or for another person, committed by a person who has influence or allows it to believe that he/she has influence on an official, in order to determine him/her to do or not do an act that falls within his duties, shall be punished with imprisonment from 2 to 10 years".

Special legal object is represented by the social relations regarding the smooth running of public or private establishments and that exclude any attempt to create suspicion about the correctness of the civil servant or of the official.

Material object. Influence traffic offence has no material object, money or pretended gains or the ones received by the active subject representing the given things for the offence enactment.

Active subject of this crime can be any individual who meets the legal requirements for criminal responsibility.

In terms of criminal participation, it is possible in all forms prescribed by law: co-author, incitement, complicity.

Passive main subject is the unit where the public official or the official activates for which influence the offender receives or claims gifts or benefits.

Secondary passive subject is the public officer or the official who can be under the suspicion of incorrectness.

The material element of the objective side is represented, in the influence trafficking case, in the trafficking of influence action that relies on the offender. This can be achieved by requiring a fee or other benefit, receipt of money or other favours, promises acceptance or acceptance of offered gifts, all these so that the author intervenes with a public official or officer of which has or allows to believe that he/she has influence.

"Receiving" means the offender acceptance of a sum of money or of some assets, directly or through another person.

"Demanding" means a request from the active subject of receiving a sum of money or assets. The request may be express or implied.

"Promises or gifts acceptance" means the manifestation of agreement regarding the promises made by the influence buyer.

To complete the objective side, the following conditions must be met:

- the offender must have influence or let to believe he has the power to influence a public official or an officer.

To have „influence" means in a close enough friendship relation, to actually enjoy the confidence of the public servant or that of the official.

"To let oneself to believe he/she has influence" means to create to the influence buyer the false impression that he/she enjoy official favour in front of the civil servant or of the officer;

– the offender must promise his/her intervention along civil servant or an officer;

– receiving, demanding money or other benefits or accepting promises or gifts have to take place before the official with whom one has promised to intervene already fulfilled the act the influence buyer is interested in or, at least, to be fulfilled while it is carried out. Otherwise, the provisions of the article 215 from the Penal Code will be applied (fraud), if the offender knew that the officer had already complied that act when he/she made use of influence.

– *The immediate result* is to create a state of danger for the effective exercise of an authority, of a public institution or of other legal entity in which the public officer or the official works.

The causal link between the material element and the immediate result (the socially dangerous outcome). Being a crime of danger, it is not necessary to prove the existence of the causal link, the socially dangerous result inevitably occurring as a consequence of committing the action which constitutes the material element of the objective side - *ex re*.

Regarding the form of guilt with which it can be committed, the traffic influence offence is committed only with direct intention qualified through purpose.

Forms. The preparatory acts and the attempted, although possible, are not punishable by law. They are similar to the consumed fact. Influence traffic offence is consumed at the moment of the claim, when the promises are made or when gifts are accepted, when money or other benefits are received.

Crime unit will not be affected, even if one or all the alternative ways of the crime shall be realised.

Ways. Influence traffic offence can be committed in three alternative ways:

– receiving payments or other benefits;

– demanding money or favours;

– accepting promises of gifts.

Penalties. Influence traffic offence is punished with imprisonment for 2 to 10 years.

The money, values any other received assets shall be confiscated and if they are not found, the convict is obliged to pay them with money.

In the new Penal Code, the traffic influence offence is regulated within the Corruption *Offences* chapter, in Title V, entitled *Work and Corruption Crimes*.

Therefore, according to the article 291 paragraph (1), *claiming, receiving or accepting promises of money or other benefits, directly or indirectly, for himself/herself or for another, committed by a person who has influence or allows it to believe that he/she has influence on a public servant and who promises that will determine the public servant to fulfil, not to perform, to expedite or delay the performance of an act that falls within his duties or to fulfil a service or act contrary to his/hers duties, shall be punished with imprisonment from 2 to 7 years.*

As noted, the crime of influence trafficking undergoes a change of content. Thus, it is not enough for the active subject to have influence or to let it to believe

that he has influence on a civil servant (as in the current regulation), but he/she also must *promise* that he/she will determine the respective officer to perform, not to perform, to speed or to delay entering the performing of a service within his/hers duties or to perform an act contrary to these duties. Therefore, to achieve the objective side, an additional condition was specified.

In terms of enforcement, the new Penal Code is a more lenient law, if we consider the special maximum of the sentence.

In the new Criminal Code, in article 292, is also incriminated the influence buying offence[2]*:The promise, offering or giving money or other benefits, directly or indirectly to a person who has influence or allows it to be believed that he/she has influence on a civil servant, in order to determine him/her to meet, not to meet, to expedite or to delay the performance of an act that falls within his duties to fulfil a service or to fulfil an act contrary to these duties, shall be punished with imprisonment for 2 to 7 years and with the prohibition of some rights exercising.*

According to the paragraph 2, the perpetrator is not punishable if the offence is denounced by him/her before the prosecution has been notified about it.

This offence is taken, as contained, from Law no. 78/2000 regarding the prevention, the discovery and sanction of the corruption acts, modified and completed by Law no. 161/2003.

It can be seen that the methods of committing the material element of the objective side are identical with those specific to the bribery offence[3].

What differentiates the two crimes is the quality of the person receiving money or other undue benefits. In the influence buying offence, this can be any person who has influence or allows it to be believed that he/she has influence against a civil servant, whereas in the case of bribery offence, money or other undue benefits are directly offered to the civil servant who has the competence to perform the requested bribery act.

Conclusions

Corruption is clearly a deviation from morality, from fairness, from debt, but what interests us above all is that it represents a violation of the law. Corruption presents criminal aspects - such as accepting and soliciting bribes, influence trafficking, receiving undue benefits - but not always has such incidences. Corruption facts typically require the obtaining of patrimonial benefits

[2] The offense of buying the influence is criminalized by the article 6^1 of Law no. 78/2000 on preventing, discovering and sanctioning corruption actions

[3] According to the article 255 paragraph (1) from the Criminal Code, it represents a bribery crime is „the promise, the offering or giving money or other benefits, in the ways and purposes stated in article 254", meaning for an official to meet, not to meet, to delay the performance of an act concerning the duties of his/hers employment or to act contrary to these duties.

by the person who allowed himself to be corrupted, but also by the one who corrupts or even by someone else, a third person.

Patrimonial benefits, quantifiable or immediately measurable are not always the main concern as other kind of benefits may be the point of interest: political, administrative, power etc., that are sometimes more important than the patrimonial ones[4].

Therefore, there is corruption also when the fact is committed for the benefit of another person, not only just in author's interest, or when, for example, promotions are not based on professional criteria, but on those belonging or not to a certain party or when people are not promoted or they are removed from office on grounds of party membership.

There is also corruption when rights are granted based on other criteria than the legal ones or when there are protected relatives, friends, party colleagues, when they seek to extend the authority in an unduly area or otherwise than according to the law, when the corrupted persons are not removed from the positions they occupy or when corruption facts are hidden.

Corruption, in its active or passive manifestations has often a criminal element, has almost always one of illegality and always an immorality one. Corruption undoubtedly expresses the failure or the inability of the state authorities, of the society, as a whole[5].

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[4] *V. Dobrinoiu*, op. cit., p. 42

[5] *Idem*, p. 43.

HISTORICAL LANDMARKS REGARDING THE SURVIVING SPOUSE'S INHERITANCE RIGHTS

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Abstract: *Historical data in the ancient era reveal that the development of the call for inheritance of the surviving spouse have displayed over time an endless struggle between the principle of the preservation of the estate in the family and the justified inheritance claims of the surviving spouse. Getting to know the evolution of the surviving spouse's inheritance rights should not make us think of proceeding to a legal archaeology, but should make us aware of the character of the science we are researching and permanently keep in mind the evidence that law represents a science of life.*

For a more complex knowledge of this institution, we believe it is necessary to make a presentation of the surviving spouse's legal situation from the ancient period up to now.

The inheritance right originates in the primitive time, when the rudimentary character of the tools constrained people to collaborate in order to face the forces of nature and the wild beasts, so that they could obtain the necessary goods for their survival.

Keywords: *historical, evolution, the surviving spouse's inheritance*

In the primitive society[1], people mutually respected their rights and cooperated for their common safety and for providing the material conditions of life, their tight cooperation being a vital condition, an indispensable means for survival[2].

In the period of formation and consolidation of the *Roman* society, the surviving spouse's rights were characterized by the fact that a person's patrimony disappeared once he was dead, on the basis of the principle according to which

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[1] See M.O. Kosven, *Introducere în istoria culturii primitive*, Edit. Ştiinţifică, Bucureşti, 1957, p. 99 and the following; I. Ceterchi, I. Demeter, Vl. Hanga, Gh. Boboş, M. Luburici, D. Mazilu, C. Zotta, *Teoria generală a statului şi dreptului*, Edit. Didactică şi Pedagogică, Bucureşti, 1967, p. 29 and the following< E. Safta-Romano, *Dreptul la moştenire. Doctrina şi jurisprudenţa*, vol. I, Edit. Graphix, Iaşi, 1995, p. 23-24; for the opposite regard, see I. Albu, *Observaţii privind terminologia proiectului Codului civil în materie succesorală*, in R.R.D. no. 8/1973, p. 60; A. Rădulescu, Dreptul de moştenire al soţului supravieţuitor, Bucureşti, 1925, p. 9-22; Gr.C. Conduratu, Compararea drepturilor succesorale ale soţului supravieţuitor în dreptul roman, Codicele Calimach şi Caragea, Codul Napoleon şi Codul Alexandru Ioan I, Bucureşti, 1898, p. 99; V. Arangio-Ruiz, Istituzioni di diritto romano, 1934, p. 522. Tr. Ionaşcu, Egalitatea sexelor în R.P.R. sub diversele aspecte ale vieţii sociale, in Studii Juridice, Edit. Academiei, Bucureşti, 1960, pp. 117-145. I. Genoiu, Drepturile succesorale ale soţului supravieţuitor în reglementarea noului Cod civil, în Dreptul nr. 1/2011, p. 76. V. Stoica, Impactul unor acte normative adoptate după anul 1990 asupra dreptului de moştenire al soţului supravieţuitor, în Dreptul nr. 6/1999, p. 29-35.

[2] See V. Luncan, V. Duculescu, *Drepturile omului*, Edit. Lumina Lex, Bucureşti, 1993, p. 20.

there was no patrimony without a holder[3]. Consequently, getting the patrimony assets by the heir from the deceased was not seen as a succession transmission, as the deceased's right ended with his/her being, and it was considered that the successors obtained a new right – the right of property-power[4].

Later, the idea of inheritance began to develop truly with the emergence of the monogamous family. Thus, in the *Roman* society, the woman married to a *manus* was regarded as a *loco filiae* to man, having the right to the succession[5].

In the Roman time, the inheritance law comprised the totality of the legal norms that regulated the transmission of a patrimony from *de cuius* - the abbreviation of the formulation in the Roman law *is de cuius successione agitur* - by the heirs. Moreover, none of the heirs could have more rights than *de cuius* used to have, as according to the old Roman principle „*nemo plus iuris ad alium transferre potest, quam ipse habet*.

It is known that in the Roman time succession did not involve the principle of the continuity of the deceased's person, being considered that the inheritance right on certain goods ends with the death of the holder of that right. It is also stated expressly that the heir obtained a new right – the right of property-power, and in this regard we can invoke the etymology of the word „*heres*" coming from „*herus*", which meant master, inheritor. The terms of „*succesion*"[6] and „*successor*"[7] appeared much later, only after the Romans admitted the principle of the continuity of the deceased person.

In the Roman law, succession was opened through death, but the moment of death did not represent also the moment of succession, but only its offer to *hereditas defertur*. In order to obtain it, the heirs had to manifest their will in this regard, only in this case taking place *aquisitio hereditatis.* Meanwhile, the succession did not have an actual holder, being a *hereditas iacens* and as *res nullius* it could be occupied by anyone, and this situation was not considered a theft. Due to this complicated process, the effect of the succession transmission imposed with difficulty in the Roman law. Initially, starting from the fact that patrimony was tightly connected to the holder, the Romans considered that his death meant the disappearance of his patrimony. The heirs obtained a new property right, founded on the idea of power[8].

Only later, in the first part of the application of the Roman law, the surviving spouse, as per *bonorum possessio unde vir et uxor*[9], obtained the inheritance of the

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[3] See A.G. Alexianu, *Cetatea antică*, Edit. Librăriei Socec, Bucureşti, 1929, p. 76.

[4] See Gh. Bică, D.L. Bică, *Aspecte privind evoluţia dreptului la moştenire al soţului supravieţuitor*, in *In honorem* Prof. univ. dr. Nicolae Popa, Culegere de studii juridice, Edit. Sitech, Craiova, 2010, p. 83.

[5] See E. Laboulaye, *Recherches sur la condition civile et politique des femmes depuis les Romains jusqu'à nos jours*, Paris, 1943, p. 11; V. Stoica, *op. cit*., p. 17.

[6] Fr. Deak, *Tratat de drept succesoral*, Edit. Actami, Bucureşti, 1999; M. Eliescu, *Transmisiunea motenirii* p. 120 and the following; V. Ursa, *Dicţionar de drept civil*, Edit. Ştiinţifică şi Enciclopedică, Bucureşti, 1980, p. 334.

[7] A se vedea L. Stănciulescu, *Curs de drept civil,* 1996, p. 6.

[8] See E. Molcuţ, *Drept privat roman*, vol. II, T.U.B., 1980, p. 3-4 and 26.

[9] The term comes from the Roman expression „*bonorum possesio unde vir et uxer*", translated as „the possession of the goods is both of the husband and of the wife".

deceased spouse, only after the relatives that were called to the inheritance up to the sixth degree of kinship[10].

The regulation of the surviving spouse's inheritance right, according to the *Law of the Twelve Tables*[11], did not correspond anymore to the new trends in the field of family organization, so that the praetor[12] acted to protect the kinsmen and consolidate the relations between spouses in the marriage without *manus*[13]. This new regulation was known as *bonorum possessio*[14] (possession of goods)[15].

In the empire time, the law-maker was not concerned anymore with providing an inheritance right to the surviving spouse, a situation that is explainable through the fact that in that age marriage did not represent a durable institution, did not form anymore the foundation of the society, as the celibacy and the temporary union had become more and more spread, the divorce becoming in time the common way to unbind the marriage, so that all the efforts made by the public authorities to prevent the alert rhythm of the divorces were in vain[16].

In the Romanian consuetudinal law[17], the surviving husband and the surviving wife inherited each other, each getting a certain part of the other's estate, and if the deceased had neither children, nor parents, the surviving spouse inherited from the deceased's estate a part for each child, and if there were parents alive, the surviving spouse inherited from the deceased's succession a more substantial part[18]. It was not paid attention to the fact that, according to the documents, the most frequent cases of inheritance between husband and wife were those appeared as a consequence either of a will, of a settlement, or of an agreement between spouse, this fact making us wonder if, without these means – will, settlement, agreement –, the norms of the succession transmission *ab intestat* in the Romanian laws of the land would have taken precise enough forms.

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[10] See Vl. Hanga, *Drept privat roman*, Edit. Didactică şi Pedagogică, Bucureşti, 1977, p. 333-338.

[11] Accordeing to the Law of the Twelve Tables, the property does not belong to *gens*, but to the individual. In compliance with this law, there were the following categories of heirs: *suis heredes*, *agnatus proximus* and *gentiles*. See I.M. Anghel, *Drept privat roman*, vol. I, Edit. Hyperion, Bucureşti, 1991, p. 165; T. Sâmbrian, *Drept roman*, Edit. Helios, Craiova, 2001, p. 195; Vl. Hanga, *Drept privat roman*, Edit. Didactică şi Pedagogică, Bucureşti, 1978, p. 315; R. Nițoiu, *Scurte considerații cu privire la raportul diacronic în materia proprietății şi dreptului de proprietate*, in S.D.R. no. 3-4/2007, p. 328.

[12] There is no information concerning the name of the praetor who established this formula.

[13] See E. Molcuț, D. Oancea, *op. cit.*, p. 136.

[14] At the beginning, *bonorum possessio*, as a means of Praetorian law, had only Praetorian effects, thus it did not come into conflict with civil law, *i.e* it did not produce effects unless a claim from the civil. In that period of time, the praetor could grant a *bonorum possessio*, and in the case of the act done according to the civil law with a *mancipatio*, a *iuris civilis adiuvandi gratia* was done, supporting thus the civil law.

[15] See I. Dogaru (coord.), *op. cit.*, p. 298-301; I.C. Cătuneanu, *op. cit.*, p. 527.

[16] See M. Decugis, *Les étapes du droit des origines à nos jours*, vol. I, Paris, 1942, p. 65; C. Accarias, *Précis de droit romain*, vol. I, 4^{e} éd., Paris, 1886, p. 241.

[17] *Idem*, p. 16.

[18] See G. Fotino, *Pagini din istoria dreptului românesc*, Edit. Academiei, Bucureşti, 1972, p. 96.

Another observation revealed by the study of the documents concerning the inheritances between husband/wife is that of the differentiation made between the non-marital property (owned before the marriage) and the goods gathered during the cohabitation, the widow or the widower having advantage on the other relatives, especially as concerns the inheritance of the marital property[19].

The documents reveal that the surviving spouse's call for inheritance was somehow limited - that is why spouses frequently used the will, settlement, or agreement in order to provide each other with the inheritance right[20]. Through the use of these means of expressing the call for inheritance between husband/wife, the mutual inheritance right of the spouses was configured and later established through the written laws.

As concerns the historical aspect, it has been concretely shown that in all ancient codes of laws – The Code of Hammurabi[21], the king of Babilon (2250 BC.), and The Code of the Chinese emperor Scium, at about the same epoch[22] – the surviving spouse's rights were stipulated explicitly. Art. 176 in the Code of Hammurabi stipulated that the surviving wife should obtain the property of half of the estate belonging to the community. The surviving wife was acknowledged an inheritance right to the estate of her deceased husband, varying as the children resulted from their marriage were or not minors at the date of the succession opening[23].

The Code of Manu[24] or *Manava-Dharma-Sastra*[25] stipulated the surviving spouse's inheritance right (man or woman), as the surviving spouse was a man or a woman, the widow being granted however certain privileges. Thus, is the surviving spouse was the man, he had the right to his deceased wife's succession only if there were no descendents[26].

A change in the inheritance law is noticed at the end of the XVIIIth century, when more important laws appear, representing the written law in the old Romanian regulation.

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[19] *Idem*, p. 125.

[20] For detail, see I.D. Condurachi, *Expunerea rezumativă a teoriei moştenitorilor în vechiul drept romînesc*, Bucureşti, 1919, p. 45.

[21] See I. Tanoviceanu, *Codicele lui Hammurabi, regele Babiloniei*, in C.J. 1904, p. 129; in some literature Hammurapi is mentioned instead of Hammurabi – see I. Dragomirescu, N. Laşcu, *Istoria antică, manual pentru clasa a IX-a*, Edit. Didactică şi Pedagogică, Bucureşti, 1996, p. 40.

[22] See V. Dongoroz, *Curs de drept penal şi de procedură penală*, Bucureşti, Edit. Curierul Judiciar, 1930, p. 8; *idem*, *Drept penal*, Bucureşti, 1939, p. 268-269; V. Dongoroz, *Drept penal* (1939 republished edition), Bucureşti, 2000, p. 218.

[23] See V. Stoica, *op. cit.*, p. 12.

[24] See M.G. Boissonade, *Histoire des droits de l'époux survivant*, Paris, 1874, p. 25.

[25] *Sastra* means *book* and *science*, *Dharma* means *law* and *Manava (Manu*) is *the author's name.* See I. Mihălcescu, *Legea lui Manu sau Instituţiunile civile şi religioase ale Indiei*, Edit. Tipografia N. Stroilă, 1920, p. 3.

[26] See A.G. Alexianu, *op. cit.*, p. 79.

Vasile Lupu' Code of Laws in 1646 did not stipulate explicitly the situation of the surviving spouse, as most of the provisions comprised in this document had penal character [27].

Matei Basarab's „*Cartea românească de învățătură*" [28](1646) and „*Îndreptarea legii*" (1652) contained provisions regarding the surviving spouse's rights. These represented the first Romanian codes of laws that contained provisions in this regard. According to these laws, the surviving spouse's right could vary in its amount, depending on the degree of kinship of the heirs he/she competed with and in its nature, as the surviving spouse was the man or the woman and complied or not with the interdiction to get married the second time under certain circumstances.

Alexandru Ipsilanti's Code of Laws (*Pravilniceasca Condică*) (1780) stipulated the situation of the surviving spouse from the succession point of view in the chapter „*For Trimirie*"[29]. According to the provisions included, the surviving spouse was acknowledged the inheritance right, whose nature and amount varied according to the relatives in competition and to the existence or inexistence of children, sometimes with differences depending also on their age[30].

Starting from the Calimach Code[31], the situation of the surviving spouse is much better regulated, a classification of the heirs being made depending on the degrees of kinship, being known the principles of call to inheritance according to the order of the kinship classes, to the kinship proximity between the heirs of the same class and to the succession equality between the relatives of the same class and degree of kinship[32]. Though, the Calimach Code imperatively stipulated that, if there were no descendant, ascendant relatives or other *de cuius* relatives, the inheritance was left to the surviving spouse[33].

As regards the surviving spouse, The Code of Caragea (Caragea's Code of Laws from Wallachia, 1818[34]) gave him/her an inheritance right which did not depend on the material conditions at the time when the spouse died, or on the existent relatives, their age or the marriage duration with *de cuius*. Thus, when she was called to inheritance, the surviving wife inherited, competing with the children,

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[27] See E. Cernea, E. Molcuț, *Istoria statului şi a dreptului românesc*, Edit. Şansa, Bucureşti, 1992, p. 131.

[28] See L. Marcu, *Obiceiul în vechiul drept românesc*, in S.C.J. no. 1/1985, p. 76; I.M. Bujoreanu, *Colecțiune de legiuirile României vechi şi cele noi*, vol. III, Bucureşti, 1885, p. 300.

[29] See D. Condurachi, *op. cit.*, p. 45.

[30] See A. Rădulescu, *Studii…*, p. 253-254; D. Mototolescu, *op. cit.*, p. 20; *Pravilniceasca condică,* 1780, critical edition, Edit. Academiei, Bucureşti, 1957, p. 102.

[31] The Code of Calimach (after its author's name - Scarlat Calimach) appeared at Iaşi, between 1816-1817, in Neo-Greek. It was called *Codul civil al Principatului Moldovei*. See *Codul Calimach*, critical edition, Edit. Academiei, Bucureşti, 1958, edition made for the old Romanian law by the Acad. Andrei Rădulescu, p. 62, pp. 99-101; Vl. Hanga, *Codul civil austriac şi Codul civil Calimach*, in S.D.R. no. 1-2/1998, p. 181-183.

[32] See Gh. Bică, D.L. Bică, *op. cit.*, p. 90.

[33] *Idem*, p. 103.

[34] See L. Marcu, *op. cit.*, în S.D.R. nr. 1/1985, p. 79.

the usufruct of a *pars virilis*[35], and competing with other relatives she used to inherit 1/6 of the inheritance, but only when the marriage lasted for at least 10 years. If the deceased husband did not have any relatives, the whole estate was obtained by the wife[36].

The Code of Caragea became the „Law of the Land" (*Pravila Pământului*) and remained in force until 1865[37]. It stipulated an inheritance right for the surviving spouse without any conditions as poverty state or the obligation not to remarry[38]. The nature and the amount of the inheritance right were different depending on the other entitled relatives, on children's age, in case of their death, also on the marriage duration[39]. The Code of Caragea, in art. 18, letter c, stipulated also that if there were children and all were deceased, the inheritance would be shared in three, a part for the surviving spouse, another one for the relatives and the third one was meant for burial expenses[40].

The Code of Andronache Donici gave to the portionless and poor widow ¼ of the inheritance in full property, when there existed less than four children, and on the contrary, a part for each child[41]. The Code stipulated that the surviving spouse calling for the inheritance should not remarry. This stipulation came into force only if the surviving spouse competed with the children of the dead spouse[42].

In the initial regulation of the Civil Code, the surviving spouse's inheritance right of included two categories of provisions: some having a general character, referring to the situation when the surviving spouse came to the succession of the deceased spouse, and others having a special character admitting that the poor widow had a succession right, but only when certain conditions, explicitly stipulated in the law, were met[43]. Therefore, art. 679 of the Civil Code stipulated that in order to come

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[35] Art. 17 in the Code of Caragea stipulated: „Când mortului îi trăieşte muierea şi copiii cu dânsa, sau moartei îi trăieşte bărbatul şi are copii cu dânsul, atunci copiii, sufletul mortului sau al moartei, şi soţia cea vie moştenesc deopotrivă averea astfel: copiii îşi iau părţile lor pe care sunt stăpâni desăvârşiţi, luând asupra lor şi partea sufletului pentru cheltuielile îngropării şi a pomenirilor mortului sau moartei, iar soţia cea vie are numai hrisis, adică folosul părţii sale". (When the deceased has a wife and children, they inherit the estate as follows: children take their parts they own entirely and the part for the burial expenses and funeral feasts and rituals and the wife has only *hrisis*, i.e. the use of her part.) See *Legiuirea Caragea*, critical edition, Edit. Academiei, Bucureşti, 1955.

[36] See M. Eliescu, *Curs de succesiuni*, p. 99.

[37] For details see *Legiuirea Caragea*, p. 116.

[38] See D. Alexandresco, *op. cit.*, p. 199, M. Eliescu, *op. cit.*, p. 128.

[39] See A. Rădulescu, *op. cit.*, p. 19; D. Alexandresco, *op. cit.*, p. 199; M. Eliescu, *op. cit.*, p. 128.

[40] Art. 23 in the Code of Caragea stipulated: „Când bărbatul cel moştenit n-are rude, nici de sus, nici de jos, nici de alăturea, îl moşteneşte fără diată soţia sa; şi pe soţie, de nu va avea rude de sus, de jos şi de alăturea, o moşteneşte fără diată soţul ei". (When the man to be inherited had no relatives, neither ascendant or descendant or collateral, his wife got the inheritance without a will; and the wife is to be inherited, if there are no ascendant or descendant relatives by her husband, without a will.)

[41] See D. Alexandresco, *op. cit.*, p. 200; M. Eliescu, *Curs de succesiuni*, p. 98.

[42] See V. Stoica, *op. cit.*, p. 28.

[43] See C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *op. cit.*, vol. III, p. 249.

to the succession of the preceded spouse, the surviving spouse should meet, along with the general conditions requested to every heir, other specific conditions[44].

Latter, the ancient dispositions of the Civil Code were modified by the Law on the progressive tax on successions from 28 of July 1921 (known also as „Titulescu Law"), which limited the call for inheritance of the relatives of the deceased who came to inheritance before the surviving spouse, up to the fourth degree of kinship, inclusively[45].

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Codul civil din 1864 (publicat în M. Of. nr. 271 din 4 decembrie 1864, nr. 7 din 12 ianuarie 1865, nr. 8 din 13 ianuarie 1865, nr. 8 din 14 ianuarie 1865, nr. 11 din 16 ianuarie 1865, nr. 13 din 19 ianuarie 1865 şi pus în aplicare de la 1 decembrie 1865);

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[44] See Gh. Petrescu, *Succesiunile*, vol. I, Bucureşti, 1895, p. 274.

[45] See Fl. Ciutacu, *op. cit.*, p. 345.

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LOAN FOR CONSUMPTION ACCORDING TO THE CIVIL CODE LEGAL REGIME

Rada POSTOLACHE*

Abstract: *The legal ground of loan for consumption is represented by the provisions of the Civil Code, articles 2158-2170. We are talking about a presumably free contract, the borrower having the duty to give back after a certain period of time the same amount of money or a quantity of assets of the same type and quality. The legal regime of the contract in question constitutes the object of our analysis in the present work, which will establish at the same time the elements taken over from the former regulations, but also the novelty ones brought by the new normative act.*

Keywords: *loan for consumption, loan with interest, same kind assets, interest.*

1. Legal regulation

Loan for consumption is regulated by the Civil Code[1] at title X „Various special contracts", Chapter XIII „Loan contract", after „loan for use", Section 3, benefiting nonetheless from a distinct reduced space, namely articles 2158-2170, enough to be somehow particularized.

In case of loan with interest, there also applicable the provisions of the Government Ordinance No. 13/2011 on legal remunerative interest and penalty interest for financial obligations[2], and are also applicable the legal bank provisions, if the loan is practiced by professionals, credit institutions or non-bank institutions, as the case may be.

2. Notion

Notion. According to article 2158 of the Civil Code, loan for consumption is the contract by means of which the lender gives to borrower an amount of money

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[1] Law No. 287/2009 on the Civil Code, republished, Romanian Official Gazette, part I, No. 505 from July 15th 2011, which is subsequently called the Civil Code, the new law or the law in force, in order to distinguish it from the abrogated Civil Code, called in the present work the former regulations, the former Civil Code or the 1864 Civil Code.

[2] Romanian Official Gazette, part I, No. 607 from August 29th 2011, called in the present work G.O. No. 13/2011.

or other similar fungible and consumable assets, while the borrower commits himself to give back the same amount of money or a quantity of assets of the same type and quality, after a certain period of time.

The definition presented above points out the essence of loan for consumption, by stressing at the same time the diversity of material assets that it can involve (money or other assets of the same kind).

According to article 2159 ("Nature of loan"), (1), „In the absence of a contrary stipulation, the loan is presumed to be by free title. (2)"Until contrary evidence, the loan having an amount of money as object is presumed to be onerous." Consequently, in relation to these legal provisions, we can distinguish: free loan for consumption or actual loan; onerous loan for consumption or loan with interest, pointed out by the provisions of the Civil Code as a distinct species (of loan for consumption).

3. Legal characters

In principal, loan for consumption is characterized by the following legal characters: unilateral contract; real contract; transfer of property contract[3]; free or onerous contract, as the case may be.

a) Unilateral contract. Loan for consumption, just like the bailment agreement, represents a unilateral contract[4], instituting duties only for the borrower – mainly the duty to give back the borrowed assets and, when it comes to the onerous contract, to pay the stipulated interest, in any of its forms. The onerous character, when it exists, does not transform the unilateral contract in a contract with mutual rights and duties, being absent mutuality and interdependence of duties. Moreover, handing back the asset does not constitute a distinct obligation of the borrower, this act being integrated here in the conclusion of the contract.

b) Real contract. Loan for consumption, in any of its various forms, is real[5], being concluded only when the assets are given to the borrower[6], just as it happens with loan for use; until this moment, we can be at most in the presence of just a simple promise to enter a contract.

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[3] For a more complete approach, see M.A. Stoian, în D.M. Gavriş ş.a. (collective), *Noul cod civil. Comentarii, doctrină, jurisprudenţă*, volume III, Hamangiu Publ. House, Bucharest, 2012, pp. 538-539; D. Ungureanu, *Împrumutul de consumaţie*, in Fl. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordination), *Noul Cod civil. Comentariu pe articole*, C.H. Beck Publ. House, Bucharest, 2012, pp. 2133-2135.

[4] See for that matter Fr. Deak, St. Cărpenaru, *Contracte civile şi comerciale*, Lumina Lex Publ. House, Bucharest, 1993, p. 171.

[5] G. Decocq, Y. Gérard, J. Morel-Maroger, *Droit bancaire*, RB Edition, Paris, 2010, p. 126.

[6] According to article 1174 paragraph (4) of the Civil Code, „the contract is real when its validity requires handing in a debtor's asset".

On the reason mentioned above, the contract analyzed by us is different from credit facility – a consensual contract[7], concluded when the will agreement is expressed, even if the amounts of money have not been yet rendered available to the customer filing the application[8].

c) Transfer of property contract. The transfer character is provided for by law. According to article 2160 of the Civil Code, „when the contract is validly concluded, the borrower becomes the owner of the borrowed asset and bears the risk of its disappearance", although the borrowed asset is of the same kind one and its category is not determined by its specific nature. The transfer of the property right happens when the asset in question is individualized and given, that is, hypothetically, *when the contract is concluded*. The provisions of article 2160 are in agreement with those of article 919 paragraph (3) of the Civil Code, instituting the property presumption on favor of the owner, „until contrary evidence", but also with the provisions of article 937 paragraph (1), protecting the good faith owner, in this case the borrower.

d) In principle, by free title. According to article 2159 paragraph (1) of the Civil Code, „if there is no contrary provision, the loan is presumed to be by free title", a disinterested act. Yet, „until contrary evidence, the loan which has an amount of money as object is presumed to be onerous" [paragraph (2)], but the parties can also stipulate the contrary.

4. Conclusion of the contract. Essential conditions

The contract is subject to the conditions which are essential for its validity, regulated by article 1179 of the Civil Code – capacity to enter a contract; valid consent of the parties; a determined, possible and licit object; a valid cause for duties. Nonetheless, it experiences certain particular features.

Consent. The consent must be doubled by the act of giving the asset for loan, which we consider the moment when the contract is concluded.

Capacity. Since the loan contract institutes a transfer of property, the parties must have the capacity to make provision acts, bearing including the risk for fortuitous loss.

Moreover, the borrower must also be the owner of the borrowed assets. In the contrary case, the borrower can defend himself by invoking the provisions of article 919 paragraph (3) of the Civil Code – „until contrary evidence, the possessor is considered owner, excepting the cases involving buildings inscribed in the Real estate register" (hypothesis excluded here).

Object. The object is particularized when it comes to the onerous loan for consumption (loan with interest), having a double component: borrowed asset; interest.

[7] See for that matter R. Postolache, *Credit facility according to the new civil code*, in Agora international Journal of Juridical Sciences, No. 2/2011.

[8] For that matter, see Ph. Neau-Leduc, *Droit bancaire*, 4e édition, Dalloz, Paris, 2010, p. 227.

Generically speaking, the borrowed asset is a same kind asset, consumable in its nature; when it comes to loan with interest, the special provisions which are assigned to it use, at articles 2168-2169 of the Civil Code, the generic name of „capital" or „borrowed amount of money".

Interest. The Civil Code, at article 2168, institutes „the forms of *interest*", by stating: „interest can be established in money or other performances, under any title or denomination, to which the borrower commits himself, as an equivalent for using the capital" or, more synthetically speaking, „interest can be established in amounts of money, but also in other assets of the same kind" (article 2167).

According to the Government Ordinance No. 13/2011, article 1 paragraph (5), interest signifies „not only the amounts calculated in money with such title, but also *other performances*, under any title or denomination, to which the debtor commits himself, as an equivalent for using the capital".

According to specialized literature, interest represents an „ordinary performance, on the exchange of transferring the borrowed asset"[9] or „the price that the borrower commits himself to pay, as an equivalent for using the capital"[10].

Cause. It is considered null that contract which is based on an immoral cause or even on a crime committed.

5. Loan evidence

As the loan contract is a unilateral one, there is no request for multiple copies of it to exist; it is enough even *one* copy, of the borrower, in quality of the creditor of the duty to give back the borrowed amount of money and to pay the interest agreed – in case of an onerous contract.

The transmission of the amount of money, seen as a material fact, can be nonetheless proved with any evidence means.

6. Effects of loan for consumption

It is considered that loan for consumption has a double effect[11]: transmission of the property right; creation of duties for the parties. Being unilateral, this contract generates obligations only for one of the parties – the borrower. The main obligation consists in giving back the borrowed asset. When the contract is onerous, than the borrower has also the duty to pay the stipulated interest.

[9] Fr. Deak, St. Cărpenaru, *quoted works,* p. 179.

[10] G. Boroi, L. Stănciulescu, *Instituţii de drept civil în reglementarea noului Cod civil,* Hamangiu Publ. House, Bucharest, 2011, p. 509, footnote no. 3, making reference to: Supreme Court of Justice, Commercial department, December No. 21/1994, in B.J., 1994, p. 230; Supreme Court of Justice, Civil department, December, No. 904/1992, in Law magazine No. 11/1992, p. 82.

[11] M.A. Stoian, in D.M. Gavriş ş.a. (colectiv), *quoted works*, p. 541.

6.1. Borrower's duties

a) Duty to give back the borrowed asset

Assets subject to restitution. According to article 2160 of the Civil Code, when the loan contract is validly concluded, the borrower becomes the owner of the asset and bears the risk of its disappearance (according to *res perit domino*).

According to article 2164, (1) „In the absence of any contrary provision, the borrower must give back the same quantity and quality of the assets that he received, irrespective of any growth or diminishment in their price. If the borrower gives back assets of another type, than we can talk about an exchange[12] and not about loan for consumption.

(2) „If the loan involves an amount of money, than the borrower is bound to give back only the nominal amount of money that he received[13], irrespective of any variation in its value, if the parties did not agree otherwise".

The restitution duty exists even if it was not provided for by the document acknowledging the contract, as it is implicitly understood as a natural consequence, from the moment is proven that the handing in was done with loan title[14]. Practically, the amount of money due is provided by its initial value – the nominal amount of money received.

Being a personal action regarding movable assets, the legal action demanding restitution can also be oriented against borrower's successors[15].

Deadline of the restitution duty. According to legal doctrine, „when it comes to loan, the lender cannot demand its immediate restitution, since this contradicts the scope of the contract and the reason for which the lawmaker legitimates such legal relations"[16].

According to Civil Code, the restitution is made „after a certain period of time". What is for sure, this legal text perceives the time factor as a basic reference point also for quantifying duties. Still, from a general perspective, this legal text concerns finally the term agreed by the parties or, if there is not one, the term established by the judicial court.

First of all, restitution is done on the due date or according to the terms established by the parties. The lender cannot demand an anticipated restitution, without taking into account the cessation or denunciation of the contract. Not even the borrower has the possibility of an anticipated restitution, given that, by being

[12] D. Florescu, *Contractele civile în noul cod civil*, II edition revised and completed, Universul Juridic Publ. House, 2012, p. 271.

[13] Article 2164 of the new Civil Code consecrates monetary nominal character, principle which was previously instituted by article 1578 of the former Civil Code. The new regulations leave nonetheless to parties the possibility to decide otherwise too.

[14] Fr. Deak, St. Cărpenaru, *quoted works,* p. 174-175.

[15] M.A. Stoian, în D.M. Gavriş ş.a. (collective), *quoted works*, p. 544.

[16] For that matter, see Fr. Deak, St. Cărpenaru, *quoted works*, p. 177.

involved an onerous contract, the terms are stipulated on favor of both parties (article 2161 of the Civil Code). Yet, no one can prevent the parties from agreeing together an anticipated restitution.

Restitution at the term established by the court. If there is no restitution term, the court will be the one to decide one, law establishing two hypotheses for this decision[17]:

The hypothesis in which no restitution term was agreed [article 2162 paragraph (1)]. In this case, the creditor benefits from a three year term to file his application to court, in order to establish the term for the restitution of lent assets; this is a statute of limitations term, starting to elapse from the conclusion[18] of the contract [19].

The action for establishing the restitution term involves the use of a debt title right, which can be ascribed to statute of limitations, according to law, and which is at the same time in accordance with the provisions of article 2524 of the Civil Code, regulating „the right to the action for demanding the compliance to the duties to give or to do".

The establishment of the restitution term rests nonetheless with the assessment of the court, which will decide, in accordance to the „relevance" of the circumstances, law[20] underlining the following: scope of the loan, nature of the duty and the borrowed assets, situation of the parties.

The application for the establishment of the restitution term is subject to the legal regime of the Presidency ordinance, questioned in fact by the representatives of legal doctrine, on the reason that it affects the content of the cause filed to the court[21].

Although is distinctively regulated, the application for establishing the restitution term is in practice integrated to the application for the compliance with the restitution duty, constituting only a request of the latter, also because the court must acknowledge, first of all, the existence of the restitution duty and, implicitly, the right to obtain it.

After the statute of limitations term is no longer valid, the material right to restitution continues to exist in its specific nature, being nonetheless deprived of legal protection, so that the restitution duty becomes natural or imperfect.

The hypothesis in which was stipulated that the borrower will pay only when he or she has the necessary resources.

The new law has instituted a simplified statement for that: „*the borrower will pay only when he or she has the necessary resources"*[22]*,* giving up to the

[17] Application of the provisions of article 1495 paragraph (2) of the Civil Code, according to which: „The court can establish a restitution term when the nature of the performance or the place where the payment is due to be made imposes it".

[18] For the arguments concerning the possibility to ascribe or not the legal action for the establishment of the restitution term to statute of limitations, according to the case, see Fr. Deak, St. Cărpenaru, *quoted works,* p. 177.

[19] In accordance with the provisions of article 1415 paragraph (3) of the Civil Code.

[20] The circumstances of the assessment were before included in the expression "according to circumstances", contained by article 1582 of the former regulations.

[21] See for that matter M.A. Stoian, în D.M. Gavriş ş.a. (collective), *quoted works*, p. 543.

[22] Qualified by legal doctrine as "a suspensive uncertain term, transformed by the court, on creditor's demand, in a certain term".

expression „*he or she will pay when he or she can"*[23], which in fact we consider mere potestative and which has also been rejected by law.

Nonetheless, even the actual statement is quite general, according to judicial authorities. It would be preferably for loan contracts to also specify the potential resources for complying with the restitution duty.

The court will establish a payment term, which cannot be more than 3 months, if it acknowledges that the debtor owns or will be able to possess the necessary resources in the meanwhile. This time, since law says nothing on that matter, the right to demand the restitution of the lent amounts of money shall be ascribed to a statute of limitations term of 3 years, which will start nonetheless to elapse from the moment the restitution term established by the court is reached. In theory, the recovery can be delayed, due to the uncertainty of the statement „he or she will pay only when he or she has the necessary resources".

The payment shall be done by any regular means, on the place where it is supposed to take place [article 1488 paragraph (2) of the Civil Code].

Restitution by equivalent. In principle, *genera non pereunt.* Yet, according to article 2165, „if it is not possible to give back assets of the same type, quality and quantity, the borrower must pay the value of such assets, on the date and place[24] where the restitution is supposed to take place", so that the lender has the possibility to purchase other things, which are similar from a quantitative and qualitative point of view to the lent ones.

It is considered that, „if the lender has the possibility, he will be able to purchase assets on the account of the borrower „[25].

The Civil Code no longer preserves the provision of the former regulation which stated that „if there is no mention to the time and place of the payment of the loan, the payment will be done by the borrower in accordance to the current value of it at the moment and on the place it was agreed"; if no restitution term has been established, this will be established by the court (article 2162 of the Civil Code).

Restitution by delay. In the absence of some provisions regarding the compliance with delay of the restitution duty, the borrower's legal liability will be subject to the common provisions regarding contractual legal liability and will take the form of damages. If we are talking about a loan by onerous title consisting in amounts of money, the borrower may be bound to pay a penalty interest, according to G.O. No. 13/2011.

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[23] In the former law, article 1583

[24] In the absence of some special provisions, become incident the general provisions of article 1494 paragraph (1) letter a), c) of the Civil Code: „In the absence of a contrary stipulation or if the place of the payment cannot be established in accordance to the nature of the performance or on the grounds of the contract, of the practices established by parties or habits: a) the financial duties must be fulfilled on domicile or, as the case may be, at the creditor's headquarters existing on the payment date; b) the other duties are fulfilled on domicile or, as the case may be at the debtor's headquarters existing on the date the contract was concluded. For more details, see D. Florescu, *quoted works,* p. 272.

[25] *Ibidem*.

The quality of enforceable tile of the contract. Civil Code refers to the provisions of article 2157 of the Civil Code, according to which, „when speaking about the restitution duty, the bailment agreement concluded in authentic form or by a document under private signature with a certain date constitutes an enforceable title, in the conditions of law, if the person entering the bailment agreement dies or when the due date is reached".

b) The duty to pay the interest

The interest is due only for the onerous loan contract. Unlike the former regulations, the Civil Code, at article 2168, institutes the „ways to pay the interest", stating that: „the interest can be established in money or other performances, under any title or denomination, to which the borrower commits himself as an equivalent for using the capital" or, more synthetically speaking, „interest can be established in amounts of money, but also in other assets of the same kind" (article 2167).

According to specialized literature, interest represents „an ordinary performance delivered in the exchange of using the borrowed asset"[26] , „the price which the borrower commits himself to pay as an equivalent for using the capital"[27] or remunerative interest.

In case of the loan consisting in amounts of money, interest has a special regime, subject on the one hand to provisions of articles 2167-2170 of the Civil Code, while on the other hand to those of G.O. No. 13/2011, quoted above.

c) Other duties

By acquiring property over the assets and since these assets are fungible and consumable, the borrower could have at most the duty to maintain them.

6.2. Lender's duties

a) Liability for vices

Since the loan contract is a unilateral one, the borrower has no contractual no duties in principle.

In regard to this aspect, the Civil Code institutes a legal obligation, at article 2166, namely „liability for vices".

Just as it happens with the person entering a bailment agreement, the lender must make amends for the prejudice caused by the vices of the borrowed asset.

A novelty element brought here is lender's liability, in case of loan by onerous title, for the prejudice suffered by the borrower as a result of the vices of borrowed assets, being applied accordingly the rules regarding the warranty released by the

[26] Fr. Deak, St. Cărpenaru, *quoted works,* p. 179.

[27] G. Boroi, L. Stănciulescu, *quoted works,* p. 509, footnote No. 3, referring to: Supreme Court of Justice, Coomercial Department, December, No. 21/1994, în B.J., 1994, p. 230; Supreme Court of Justice, Civil Department, December, No. 904/1992, in *Law Magazine*, No. 11/1992, p. 82.

seller (art. 2166). This request is justified by the effect of property transfer generated by the contract, as it happens to a sale contract. But since they are of the same kind, fungible and consumable, the borrowed assets can only exceptionally cause prejudices to the borrower, so that, on this ground, the provisions of article 2166 of the Civil Code lack practical relevance. When such liability can exist, it will be established in the sphere of criminal liability and not contractual one.

7. Termination of the contract

The natural way to terminate the contract is represented by payment on due terms. The anticipated fulfillment of duties – the restitution of the capital and of the interest corresponding to the period the loan was used, another than that mentioned at article 2170 of the Civil Code – is possible only with the agreement of both parties and, given the onerous character of the contract, with fulfillment terms presumed on favor of both parties, law not containing other provisions.

A loan can be extinguished also in the other ways in which a duty can be fulfilled, that is common ones (which also apply in other field).

8. Conclusions

The Civil Code in force offers a better systematization of the field regarding loan *lato sensu*. Thus, it accurately determines the main forms of loan, ascribing them to a unitary regulation: loan for use or bailment agreement; loan for consumption – which is in its turn divided between actual loan or loan by free title and onerous loan.

Moreover, the Civil Code emphasizes the typical element of loan by onerous title – interest, eliminating any confusion about it [interest can take the form of amounts of money or same kind assets (art. 2167 of the Civil Code)].

The same legal text institutes the lender's liability for the vices of the lent asset, according to the liability of the person offering a bailment agreement or of the seller and in relation to the quality of loan – free or onerous, as the case may be.

Moreover, the Civil Code manages to improve legal terminology, in relation to the existing reality.

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COMPARATIVE LAW AND GLOBALIZATION OF LAW

Emilian CIONGARU*

Abstract: *It is more clear that the law had become sufficiently of movable and tends to become a matter of exchange in the sense that exceeds the borders of the state too an exportable product. The call to another system of law, other than national law made for the purpose reforming a specific national legislation accompanied and encouraged, Inevitable, the analysis of legal comparing of the systems in question. So systems of law can have mutations the effect of a possible tendency of globalization of law. Unification of legislation inside the some states of law, as a result of globalization of law creates essentials problems to normal course of the economic relations and, generally, of social relations in those countries, the unification legislation between independent states may wish to discuss the idea of respect for national sovereignty, fact which represents one of the most complex and delicate problems of comparative law. When the case of elaboration of national system of law, the legislators have used frequently in most domains and in most countries on the materials developed by attorneys and lawyers who use the methods of comparative law.*

Keywords: *system of law, comparative law, globalization of law, state of law*

The objectives of this paper are, to identify a part of the effects of globalization in terms of realization of law as well as the juridical mechanisms to do as this *global law* to be efficient, effective and valid for all its subjects. In this sense the paper treats of the conceptual point of view *the comparative law*, *the globalization* as well as the relation or reciprocal influence of these two concepts, that could lead to the creation of law institutions in the world level that can give due meaning and direction of juridical norms as well as necessities of a social life in a organized global society the necessities of realization of *the general good* as a result *the individual good*.

In this sense the human society, from beginning third millennium, is in a strong interdependence and interconditioning and lives the era of globalization with all effects, good and less good, wich resulting from this. This society, as a whole, is confronted with a lot of phenomenas and essential transformations in all areas: juridical, economic, political, social, spiritual.

The juridical component of this social reality have, in this context, a special importance as meaning that, every state must find solutions to new problems wich manifest themselves in society through organizing the lives of people and of

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society, in general, on all the coordinates of life: juridical, political, economic, social, cultural, spiritual. The whole activity of a society must be introduced in the form of juridical norms, so that the global society to function in real and concrete connection of all its components. This The regulatory function is for the law as meaning that the law studies the reality for investigate its regularities, its genesis and its ways in which the human behavior must responds to the rigors of society.

Law, as a science, is called to study and to investigate this juridical rules of existence and of evolution of the state and the law, the appearance, the evolution and activity of political and juridical institutions as well as the concrete forms in which these institutions influence the society in its globality and supports its their turn the effects of this influence.

Everywhere in the world, in every society, law, science, today is confronted with a diversified problem and,the area of research and of analysis which are offers science of law is in permanently evolution.

In terms of normative the law is presented as an attempt of order, of disciplinary, of coordination and of articulation of all social relations, and this fact it gives the possibility of promoting and regulating in properly mode the most important values of society: the life of person, freedom individual property, family, education, legal security, public order etc.. In order to establish the common points of the existing law systems in the world, the comparative law, as an ensemble of processes according to which comparison shall be made norms of different juridical systems, aims the purpose to find global solutions to the individual problems .

Through the its specific subject, science of law acquires at present, a very special importance which is determined by the need for research of law and of state in a perspective of globalization. It is ever more clear that the state and the law shall no longer presents under the same value as ten or twenty years ago. The regional organizing is considered as the intermediate step that leads to globalization and is based on the transfer, deliberately and voluntarily, of sovereignty towards the supranational institutions. In this sense there is in the world today tens of regional member associations, associations that differ from each other by intensity of cooperation or level of institutionalized.

In this sense, the comparative law can be described as the process through which its put face to face different legal systems, considering as this process can be extended so to the spirit and style of the whole juridical system - macrocomparison as well as to the solutions of individual problems which as they exist in different legal systems which are concerned - microcomparisons.

So, by the methods of comparative law, both on the microcomparation way as well as on the macrocomparation, patrimonies of juridical sciences of the branch is rich and acquires new dimensions, down to the point that, through a true metamorphosis, changes its appearance. The roman civil law is different, for example, only the civil law compared, even though it starts from the roman law.

But these compared disciplines of the branch[1] are not identical, even partially, sectorial, with comparative law they collecting the results which has won of juridical sciences of branch, as a result of carrying comparison.

The comparative law has the following features:

- It is a method of acquire the knowledge, being capable to enrich and to extend the variety of solutions being capable to offer person who uses critically this possibility to find better solutions to clear and concrete problems[2], than those offered by juridical science of national law system in discussion.
- Facilitates both the creation of a system of law which is relatively new, but also supranational unification of rights.
- As it results from definition the comparative law is not a set of rules, is not a branch of law.
- The comparative law may represent a ideal solution for the courts, in the interpretation of juridical norms as well as in the its role of the creators of their[3].

The study of large systems of law existent in the world, by the methods of comparative law, assumes an analysis of applicable legislation in the various states. Codes, laws, decrees, decisions of governments, orders of ministers, other the juridical regulations, but also way in which is applied in practice, the principles that governing them, forming the national juridical system. The national juridical systems are grouped into categories as defined in the report to a particular community of principles which constitute, but also by phenomenas of reception of the law of country by other countries.

A great system of law represents assembly of some the national juridical systems in the report of some common features of their. To distinct two great systems, traditionals and religious. Characteristic of traditional systems is their personal status, their norms is not apply to all persons resident in a specific state or territory, but also to all which, having a particular religion, whether State in which would permanent residence, are subject to a personal status which finds its basis in the precepts of that religion. An example is Islamic law, which in an inseparable unit of the norms, with the Mohammedan religion and morality, are addressed to all adherents of Islam, wherever its could find in the world. Muslim jurists also mentioned at present that before the war, European limit of a juridical system represented Dobrogea, where local Turkic population using Romanian language practice Islamic law, the jurisprudence journals of the time even published decisions of the Muslim judges.

The comparative law groups the national juridical systems in large family of law which takes a different look, separate for each of branches of law, depending

[1] Passicos J., *Canonical law and comparative law today.* Renewing a problematic*,* in International Journal of Comparative Law, nr. 1/1981, pp. 17 and next.

[2] Allard J., Garapon A., *Judges and globalization. New revolution in law,* neat edition of Mona-Maria Pivniceru, Ed Rosetti education, Bucharest, 2010, p.55.

[3] Slaughrer A.M., *A New World order*, Princeton, Princeton University Press, USA, 2004, p.57.

on the content branch of law, criteria for sharing in the large families differ so that the picture which is available is totally different. It is admitted in general that a great system of law or a large family of law, represents assembly of some the national juridical systems in relation with certain common features of these.[4]

The exception to this idea which must be made is related to so-called *religious and traditional systems*. Certainly in terms of history, they systems represent anachronisms, relics of other eras but is not less true that, so anachronistic as these juridical systems which fall within with difficulty in all classifications tested until now, still governs hundreds of million people, so that they can not be ignored, removing them, as did some researchers, from the juridical map of the world. Characteristic of these traditional systems is fact that they are attached to personal status, that is, their norms is not applicable to all persons residing in a specific state or territory, but also all who, having a particular religion, whether State in which the would reside, are subject to personal status which find the basis in the precepts of that religion.

The national juridical sciences called in the plastic mode in the doctrine the national getouri[5], have made it difficult the development of comparative law and in fact, the positive law, law as it is at present or it was in the past not as it should or would like to be[6], it is everywhere a national law, and the juridical science has become the national science, leading is paradoxically mode to the nationalization of private international law. The majority jurists, before the nineteenth century, are were limited to knowledge of national law, sometimes only of the part of it, without being interested in what happens in the law of other states. Poor trials of application of the comparative method have resulted in a multitude of fragmented studies, without any establishment, which have had later corroborated to obtain a unified vision.

Is observed so that the report is reversed, the comparative law, even less developed initially was the one that has contributed to expanding the horizon of the national juridical sciences, and, later, they have fed the development of comparative law in a cycle that repeats today.

In course of history, juridical science has had and the reverse evolution than that of the world, from the universal juridical science, it has become the national science, from general science at the particular science[7]. The main reason is that law is divided between two contradictory trends, namely: the globalization, the integration of planetary more and more pronounced, sovereign state and its autonomy, which circumscribing the life of peoples and the third trend is that the law represents formula type of the world organization.

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[4] Filipescu I., Jacotă M., *Private International Law*, Didactic and Pedagogic Publishing House, Bucharest, 1968, pp.78-79.

[5] Constantinesco L.J., *Treaty of Comparative Law,* vol I. *Introduction in the comparative law.* Bucharest: C. H. Beck, 1997, p.17.

[6] Losano Mario G., *Major legal systems. Introduction and extra-European law.* IIA Ed Beck, Bucharest, 2005, pp.19.

[7] Constantinesco L.J., *Op.cit.*, p.18.

However, the law orders will never be able exist outside of the world where we live. Situation in which a law order is completely separate from the other is illusory, no matter how big it the political barriers, social or military, there will always be minimum interference between different law orders.

At present it can not make management of a company in an autonomous manner, separate from other states and nations. Almost any a phenomenon of any nature can not be completely isolated and controlled strictly in accordance with the national limit. International cooperation, intergovernmental or supranational organizations, the multiculturalism and multilingualism have become definitions of the contemporary political life.

Now exists the supranational entities ever stronger, which become autonomous from the states which them finances or have obtained along the time the supranational character. These entities without a flag, for example International Monetary Fund World Bank, have exercised an important influence in the formation of the national rights, especially in post communist states[8]. In the specialized literature[9] to even said that the political organization of international society, international implementation the practice of organization of states as federations and even prefiguration of a state or one world government are at the base of the appearance and development of international organizations.

Among all disciplines the law is the most affected by this movement of continuous unification of the world because the law to be continuous updated so as to cover all new aspects of contemporary social life because they appear permanently new stretches and new areas of law new plans for the application or modalities of regulatory so that can be reached so that can be reached in a situation where which in the past was a fiction at present can become a acquis.

At global level existence of some concerns about the independence of the judiciary and the status of those abilities to realize the law, has at least two significant explanations.

In the first place is about the phenomenon of globalization that determines amongst others and convergence of the juridical systems creation some spaces and common legal instruments to continental and regional level enhance institutions cooperation which necessarily involves a specific approximation of the concepts on the judicial independence immovability of judges and their role in a democracy state.

In the second place it may be established that in the all state exists the tendency of the political factor and in main of the executive organizations to try in various ways, directly or less directly to influence the judiciary power, especially through the mechanisms of nomination and promoting of magistrates thus influencing the in a negative way the general principles of law and, moreover, prejudicing the state of law.

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[8] Losano Mario G., *Op.cit.,* p. 72.

[9] Besteliu Raluca Miga, *International organizations.* All Beck Publishing House, Bucharest, 2000, pp.1-5.

Globalization of judicial function to can be grouped into two features of activities of magistrates: the first would be their position to the political power and a second would be constraints imposed by activity of judgment[10].

The concept of globalization must not only know and known but rather understand as be a very used term which can be attributed many meanings. Through this term can understand the development of global financial markets, increased of transnational corporations and their growing dominance of national economies. Most problems that people associated with globalization, including the penetration market of values in those areas where they are not belong traditionally, can be attributed to these phenomenas. You might also talk about the globalization of information and of culture, about the spread of television, of the Internet and other forms of communication and about the increased mobility of marketing ideas.[11]

The globalization can also be defined as a set of structures and economic, social, technological, political and cultural processes which arising from the changing nature of production, consumption and commerce of the goods. There have been many changes in the global economy, globalization in fact can be considered as being a result of the creation of the world market but can not be synonymous with internationalism and with transnationalism because the two processes have their roots in mercantilist mode to direct commerce in especially after the First World War, in a multinational model of development.

It exists four main characteristics that may explain the origins of globalization as follows: integration of in the world markets of national economies, the transition from the, *high volume* economy to the *high value* economy which results from the better knowledge of products and services used in the market, the end of bipolarity between capitalism and socialism in the cost of production, and, last but not least configuration of the new economic blocs.

The globalization is to be desired from many points of view. The private enterprise is capable to produce richness than the State. Moreover, states have the tendency to abuse of their power. The globalization offers a level of individual freedom which the no state can not provide it. Free competition at a global scale has issued entrepreneurial and creative talents and has accelerated the technological innovations.

But the globalization has end its negative aspect. In the least developed countries, many peoples have suffered because of globalization without receiving a support in terms regards the social security system. Globalization has produced a bad allocation of resources between private and public goods. The markets are capable to respond and other social necessities. The global financial markets may arise crises. Is possible that residents of developed countries are not fully conscious of the devastating consequences of financial crises because they have a tendency to strike more severely in developing countries. The globalization can be a threat to cultural and ethnic identity of states which by the economic integration become

[10] Allard J., Garapon A., *Op.cit.*, pp. 113.
[11] Soros George, *About globalization.* Ed. Polirom, Iasi, 2002, p.23.

anonymous or even to terminate. The globalization can be associated rather more than with danger than the safety and social security, and in these conditions the states that have been built sometime to defend its citizens of the external dangers, of the barbarians, of the robbers, of the predators can become the veritable social jungle in which the borders have not any value in the avalanche of iniquity, of cibernetic profit, of pornography fashion, of organized crime, of hidden slavery under the umbrella of democracy.

The global financial markets impose their laws and precepts of the world. States do not have sufficient resources or freedom of movement to put into service the own mechanism of functioning[12]. Practically the state no longer controls the economy and the finances, these two important components are removed from area the political, of the fundamental decision area of, the nation-state characteristic of. The only thing which it can also do national state this obsolete, thing which in fact is permitted or, rather, imposed, is to provide a so-called balanced budget, fact which is realized practically by controlling the to local pressure, of protest addressed to state authorities of important segments of civil society.

In such a mainframe is clear that the nation state can not ensure the coherence of society and discipline of individuals behaviors which composing it. People are losing trust in the political system and in the false structure of management of society.

The question may be born who will be the result of globalization and if possible that in the future world to become a unique political system, led by a world government? The globalization is one of the most important social changes with to facing the world today. Many of the present fundamental issues, such as the organic problems or prevent a military confrontation on a global scale are, for the purpose, of global importance.

The state, the creator of law, is less sovereign when the international law order prevails to that national order of law. The concept of sovereignty is today attacked, contested and eroded. The impact of globalization leads to significant decrease of the role of national states.

Thus in spite of the sharp rise of economical and cultural interdependence, the global system is characterized through inequality and divided into a group of states, whose concerns may be common but also divergent. There is no clear evidence of a political consensus in the near future, which will overcome conflicting interests of states. A global government may appear finally but it will be the result of a long enough process. In many senses the world becomes more united, and some sources of conflict between nations tend to disappear.

However, the major differences between highly developed societies and poor societies can be with ease in the sources of the international conflict. Thus, there is no another *world agency* that can to effectively control these tensions or to realize a redistribution of prosperity and of peace to the world.

[12] Bauman Zygmunt, *Globalization and its social effects*, Ed Antet, Bucharest, 1999, pp.79.

In the era of globalization, the dialogue of civil society with the public power exceed the national governments, mainly due to the prevalence of international law and of global juridical order against national systems of law through the practice monistic. At the same time is more evident the internationalization tendency of nongovernmental organizations and of institutionalization their on a global scale, with the declared intention to take under observation and under pressure both their own national governments as well as supranational institutions and organizations international to prevent or to stop excessive, abuse and discrimination measures of every kind.

In conclusion, the notion of *juridical culture of globalized comparative law* has developed in terms of both general but also particularly aspect, as a conceptual tool for understanding of international juridical norms and as a social phenomenon which at present functions as a specific system within the global society. The juridical culture represents a provocation launched by a reality in the continuous change in a world that rapidly changing. Globalization has a great important impact on the classic juridical tradition, by removing the legal and cultural old borders, bringing new influences in different sectors of the juridical system. This phenomenon is included and comparative law through the evolution of international law of foreign investments, the evolution which brings in the discussion specific elements of juridical culture of comparative law.

The modern state as the main exponent and defender of national interests has created the according institutions in order to achieve the objectives which to set in the early modern era. State of law together with the juridical system have guaranteed and ensured the fundamental human rights and the freedoms.

The most important problem that arises in the world today is that this type of modern state is outdated and is no longer considered as being the main actor of globalization. Eclipsing and weakening of state authority, even disappearance of the state was subject thoroughly discussed by lawyers, sociologists, political scientists, etc.

It admits, almost totally, that eclipsing and weakening of state authority, its even disappearance but also the fact that nation-state is transformed and changes its responsibilities have had a series of effects such as, for the European Union: the transfer of a part of sovereignty in the European integration process, the increasing decentralization and transfer of powers to local authorities, loss of control of national states on the global economy; acceptance harmonization of legislation with that of other states, dependence on decisions or recommendations of major financial and banks organisms, regional or international organisms (International Monetary Fund World Bank). Completely this globalization process aimed at the state and law.

The most difficult domains in which states are required to resolve them now in the era of globalization are those aimed at justice and equity. Such states are called to ensure in their competence territory everything relating to social rights, health, education accessible for all, equitable distribution of wealth, the harmonization of interests of groups and of communities that form the society, etc..

According to Mircea Malita: „The globality does not ensure the internal order and the application of justice. States are called to resolve the new challenges: arms trafficking, money laundering, corruption, terrorism, drugs"[13].

For these reasons, and Romania is at present in a state of transition and adaptation its own the legislative system and jurisdictional system to law system of the European Union, imported and transplanted as part of the globalized law system, which tends more and more to the unification and uniformity of the law system of member countries.

The methods of comparative law demonstrates that the globalization of does not appear to law toward a world juridical order, owing to the many conflicts and struggles for influence, in this case, the globalization is far from being the peaceful and consensual process. The comparative law has the mission to find ways and optimal solutions to resolve much of these conflicts, which will bring peace for the global social life.

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ROMANIAN YOUTH PARTICIPATION IN LOCAL GOVERNMENT. CASE STUDY – DAMBOVITA COUNTY[1]

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Abstract: *The article is the second part of a more complex study that a team from the University of Valahia from Târgovişte, compose by professors and students, have done recently. It treats about the implication of the youth in the public administration, in local government. In this second part of the article, will treat the case of the youth participation in local government in Dâmbovița County.*

Keywords: *local government, youth participation, administrative structure, youth in action.*

I. Involvement of Youth in the Decision-making Process. Case Study – Dambovita County

1. Background.

In Dâmbovița County, the initiative and youth involvement in the decision-making process was noted as insufficient. Local public authorities are not among those who thought as mandatory the provision of the law for establishing a Youth Council. Consequently, such a body is not included in the package of concerns of the local administration.

In Dâmbovița County, things do not seem to have improved in recent years. We still stand among those counties where young people activity and their involvement in local public life is extremely low. Although it exists and is affiliated to Romania Youth Council, the *Dâmbovița Youth Foundation* is limiting its scope of action to the cultural field.

In this respect, one can easily observe that the presence of Dambovita youth was felt predominantly in the civil society. There are a few forms of youth association the action of which can be observed.

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[1] The study was presented in the project *Youth in action*. *The case of Peloponnese Region in Greece and the case of Dambovita County in Romania* – in the contract nr. GR – 13-34-2010-R5.

Of these, the following can be enumerated:

• The *Student League*, involved in supporting the rights of students, answering their problems, programs, social activities (student nights, camps, freshmen ball, film week), Unifest week (to encourage the cultural and artistic student branch – free entry to the theater, movie theater, philharmonic; it organizes seminars, sporting events etc).

• The *Floare de Colt Ecological Association*, NGO with the purpose of attracting young people to practice ecological activities, eco-tourism and specialized tourism in complete safety and by respecting and protecting the environment.

• The „*Youth for Youth" Foundation* – Dâmbovița Branch

• The „*Targoviste to Europe"* Association

• The „*Romanian Association for Education and Development" (ARED)*

• The „*Youth that Give a Chance"* Association

• The „*Valah"* Sports Association

• The „*Open Minds"* Association for Children and Youth

• The „*Green Tourism"* Ecological Association

• The „*Chindia"* Tourism Association

• The „*Ambassadors of Friendship"* Cultural-Educational Association

• The „*Astronomical Society of Meteors (MRSA)*

• The *Dâmbovița Youth Foundation*

There are some frequent current forms of manifestation:

- *Social activities, networking* with people from other parts of the country: camps, exchanges, inter-county mobility programs, scientific and sports competitions

- *Business activities*: training, entrepreneurship programs with business plan competition, business exercise.

2. Knowledge and Assessment of Local Public Administration Authorities on Issues Concerning Youth. Investigation by Using the Questionnaire

For knowing the situation concerning Dambovita youth involvement in decision-making, a study was conducted with a *questionnaire* as means of investigation that includes both quantitative and qualitative measures, structured as follows:

I. Information on participants (which includes identification data of the respondent, elements of personal and professional status, gender and age category).

II. Information on the degree of knowledge concerning local government institutions and their functions.

III. Information on the assessment of institutions identified as belonging to local government.

IV. Information on issues identified at county level, and the associated advantages.

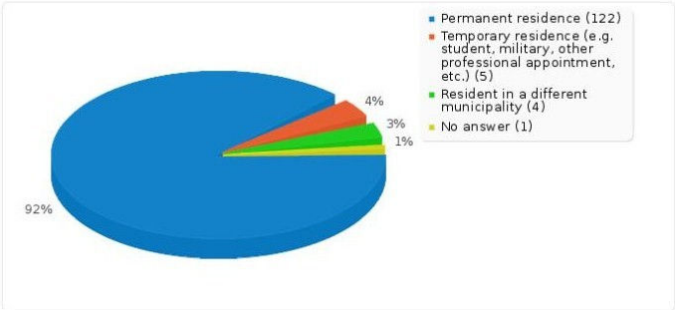
V. Information on actions with the involvement and for the benefit of youth, with the formulation of suggestions and innovative ideas.

The target sample consisted of 132 respondents, people from various social environments, of different ages, the majority residing in Dambovita County and some from the outside.

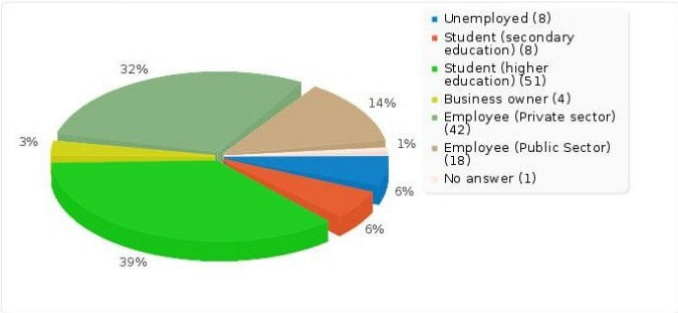
3. Data Interpretation. Identified Issues.
§ Primary Statistical Data/Information on Participants

In terms of membership in the local community, the questionnaire is addressed to a relevant segment.

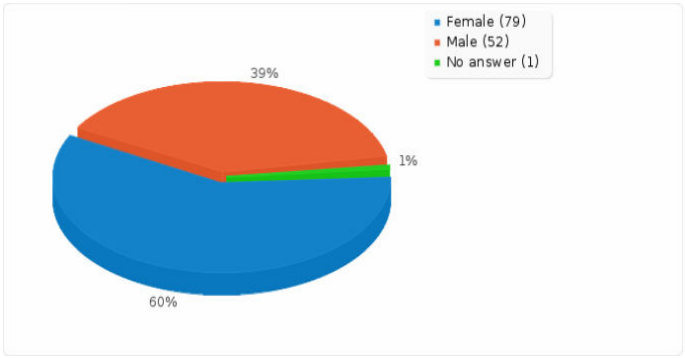
Thus, from the 132 people surveyed, 122 stay in Dâmbovița, while other four are from other counties and other 5 have the residence in Dâmbovița.



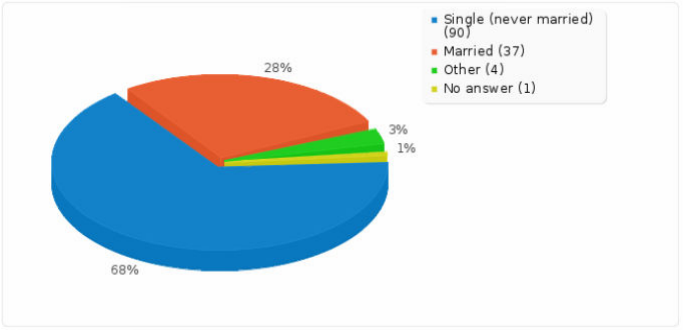
In terms of socio-professional statute, the higher percentage has people with the quality of student (at a rate of 39%), then people who are working in the private sector (32%), while much more less are working in public sector or at the local authority (only 14%).

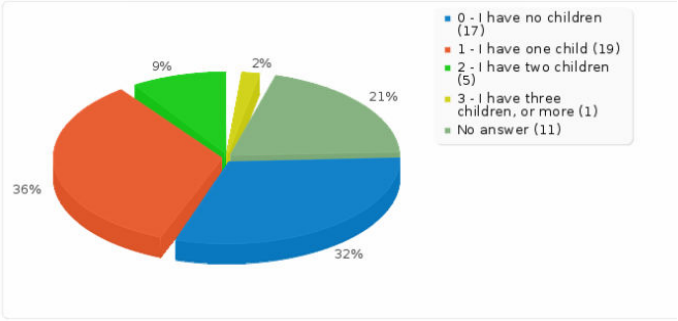


Reported to the gender, 60% of the respondends are women and the rest men.

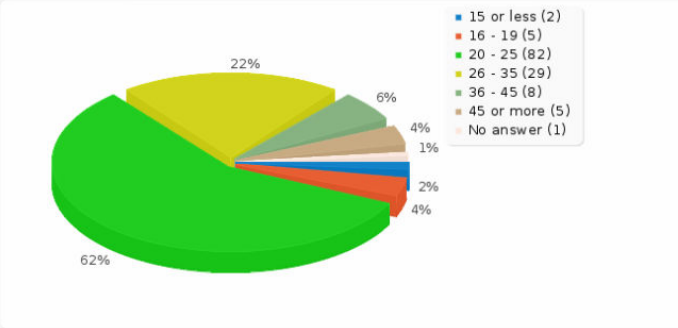


Taking into accont their family situation, it was found that 68% from the respondends are in the category of unmarried and from the married ones just 14,4 % have children.





In terms of age respondends, the mostly segment is given by people located in the age group of 20-25 years, because most of them were students, relevant reason for the survey.



§ From the perspective of the *Degree of Knowledge of Local Public Administration,* the survey that we made allowed the knowledge that the range of local governments and non-governmental organisations that young people from the countie know is extremly low or identifications is ambigous.

Thus, answering the question „What public local auhority know", all the respondends reffered to the Cityhall, then in different percentages, to the Local Council or Municipality Council.

Few respondends identified an organism or more to support young people, and, less of them are include among active participants in decisions on young people.

Here is the situation in figures:

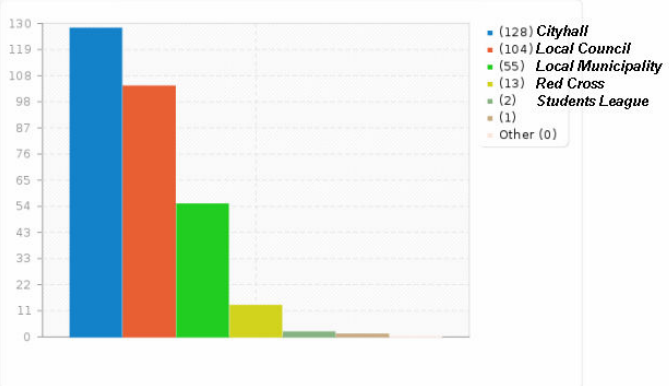
- 132 persons (100%) know as public authority the City hall;
- 106 persons (80.3%) know as public authority the Local Council;
- 69 persons (52.57%) know as public authority the Municipality Council.

By way of entities with non-governmental character, most of respondents spotted in this category:

- 42 persons (32.8%) Red Cross;
- 34 persons (25.7%) Students League.

Were identified by confusion, as non-governmental organisms two governmental authorities in youth field:

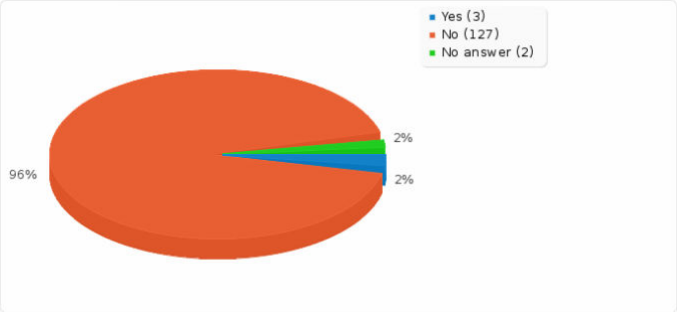
- 6 persons (4.45%) identified National Authority for Youth;
- 3 persons (2.27%) identified National Authority for Supporting Youth Initiatives.



Concerning the ***Degree of Participation in Decision-making Process at Public Administration Level***, *from the study resulted an insignificant percent regarding the youth people.*

The situation is the following:

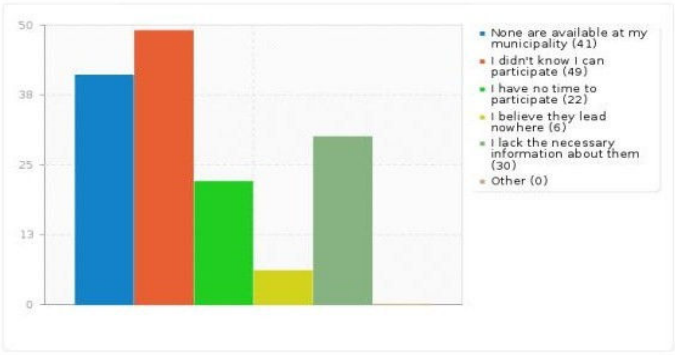
- only 3 people (2,27%) participated at public administration consultations ;
- 127 people didn't participate;
- 2 people didn't answered.
-



It's easy to establish that the main cause for non-participating is ignoring or not knowing the legally stated right, doubled by the lack of credibility for such action. Also we could add the absence of public practices at local or municipality level .

Concerning the reasons of non-participation , from the study results that :

- 49 people (37,12%) think that they can not participate;
- 41 people (31,06%) said that „none are available in my municipality;
- 30 people (22,73%) said „I lack the necessary information about them" ;
- 22 people (16,67%) have no time to participate ;
- 6 people (4,55%) think that the consultations lead nowhere.

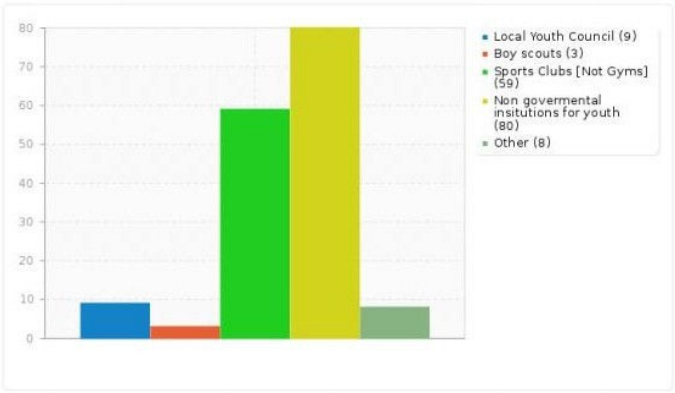


§ About the existence of a Local Youth Council

The study shows that in the perception of the public the Youth Council doesn't exist. Instead, the public identified other institutions as active.

This is the situation :

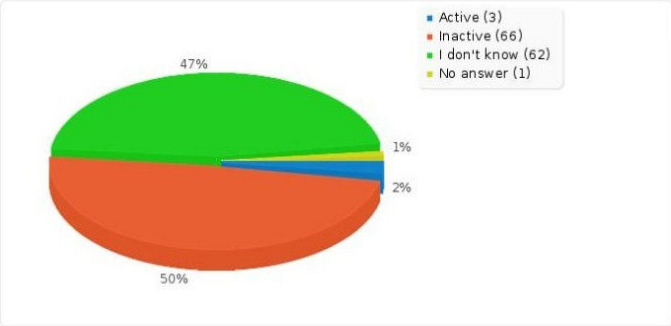
- 80 people (60,61%) think that the non govermental institutions for youth are active;
- 59 people (44,70%) think that the sports clubs are active;
- 9 people (6,82%) think that the Local Youth Council is active;
- 3 people (2,27%) think that the boy scouts is active.



Concerning the existence of a Local Youth Council - LYC), a considerable percent didn't identify it among the youth institutions and that's why the public didn't feel the need of an LYC or to recall it.

The figures are :

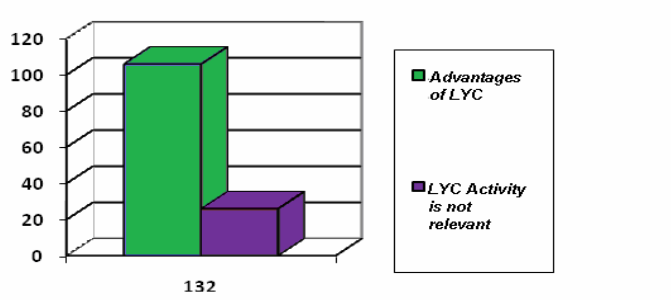
- 66 people (50%) think that the LYC is inactive;
- 62 people (47,7%) don't know if it's active or inactive;
- only 3 people (2,3%) think that LYC is active;
- 1 person didn't answer.



From this perspective, the survey has considered and also may be considered a step towards informing the respondents about the presence of such an entity potentiality.

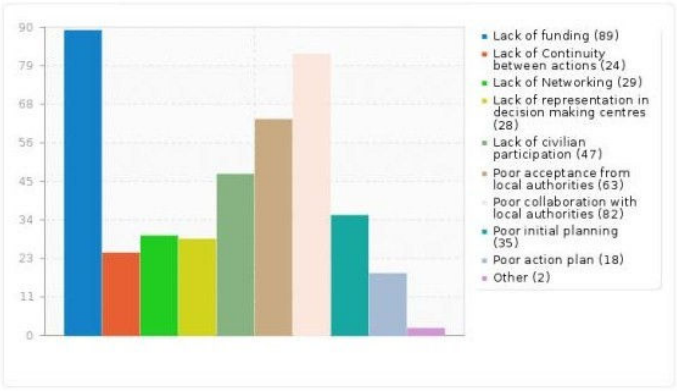
Asked about the potential effectiveness of such an organism, since it would operate under the law, most young people were optimistic.

Over 80% of respondents said that LYC could support young ideas and make them to be heard in the decision-maker level. According to the statistic obtained, this has been highlighted as:

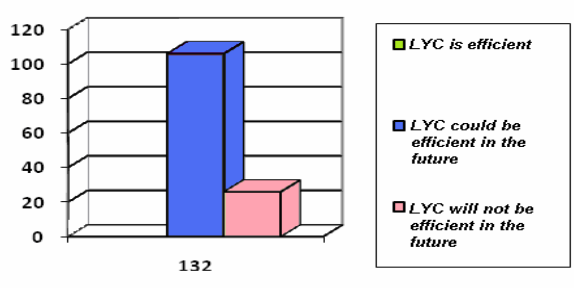


As a potential shortfall, the major opinion set in front of ranking the lack of funds. Thus, 67.42 of respondents identified it as a possible problem and added to it poor cooperation with local authorities (62.12%), low acceptance of LYC from local authorities (42.73%) or lack of participation of civil society (35.61%). To those we added more like:

- 35 people (26.52%) considered poor planning a problem;
- 29 people (21.79%) considered lack of communication networks a problem;
- 28 people(21.21%) considered the lack of regional decision-maker centers a problem;
- 24 people (18.18%) considered lack of continuity of operations a problem;
- 18 people (13.64%) consider the weak action plan a problem.



Organism efficiency: over 80% consider that a LYC can be effective.



§ Life Conditions in Dambovita County. Difficulties and Advantages

In terms relative to the concerns of young people living in Dâmbovița, are set out in formal and informal, shortcomings or dissatisfaction manifested, often accompanied by improvement measures that they propose.

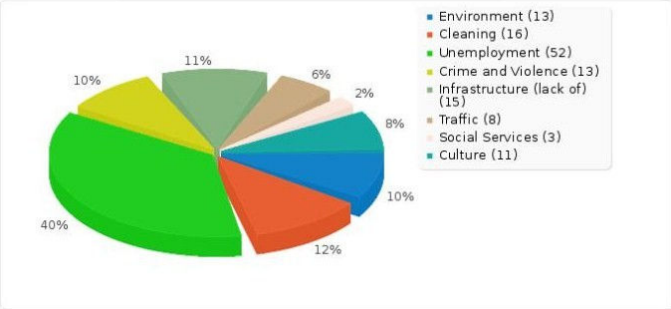
By example, are identified as common needs, problems or issues of the county: the environment, cleaning, unemployment, violence, lack of infrastructure, roads, social services, culture.

A prioritization of areas would identify as occupying the first three positions as follows:

- *unemployment* – 52 persons (39.69%);
- *cleaning* – 16 people (12,21%);
- *the lack of infrastructure* - 15 people (11,45%).

Also the following responses were given :

- 13 people (9,92%) ranked first the environment;
- 13 people (9,92%) ranked first the violence;
- 11 people (8,4%) ranked first the culture;
- 8 people (6,11%) ranked first the roads;
- 3 people (2,29%) ranked first the social services;

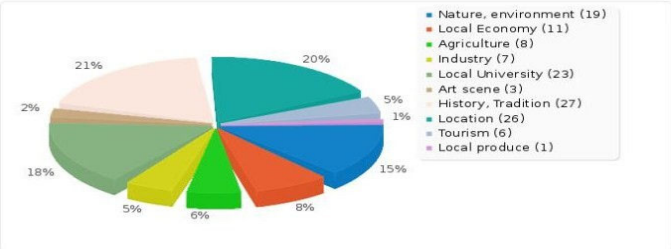


On the other hand, when the public had to identify the advantages of our county, the answers showed on the first place :

- *history and tradition* - 27 people (20,61%);
- *the location* - 26 people (19,85%);
- *the local University* - 23 people (17,56%).

The list of advantages continued with the following :

- 19 people (14,50%) ranked first the nature;
- 11 people (8,4%) ranked first the local economy;
- 8 people (6,11%) ranked first the agriculture;
- 7 people (5,34%) ranked first the industry;
- 3 people (2,29%) ranked first the art scene;
- 6 people (4,58%) ranked first the tourism;
- 1 people (0,76%) ranked first the local produce.



4. Corrective Action Proposals

Given these findings, approaches should be carried out toward public authorities to take action in the direction of reconsidering the legal provisions in the subject matter, particularly those resulting from the enforcement of the Youth Law and Volunteering Law.

Thus, we support the need to formulate at least a few corrective action proposals:

1) For increased awareness of the need for the active presence of a Youth Council or other appropriate body, several informative sessions should be initiated and implemented, concerning youth and the local public authorities representatives alike.

2) From the funds for youth activities, certain amounts should be allocated to foster a youth initiated project competition that will be scored by methods of implementation, modality of use, originality and seriousness of the project.

3) It is recommended to consult action models developed and implemented in other counties and to adopt and adapt them to local needs.

4) Establish a partnership with schools and universities, to create a system to promote policies inspired by their training needs and life choices.

5) Adoption of a realistic system of representation in the new youth body.

6) Promote discussion and debate sessions on a formula to establish a youth organization at the County Council level that should be non-political, permanent, sustainable from public funds, with well defined action area and well determined purpose and objectives.

7) Make a connection between RYC and the Dambovita County Council.

8) Amend the current law in the subject matter for making mandatory the establishment of a Youth County Council (YCC) in every Romanian county, with the possibility of forming local branches in various cities, in order to ensure a real youth representativeness. The role of this body should be consultative only, but there should be an obligation for the County Council and/or City Council to consult with the YCC in all matters pertaining to youth.

5. Notes and Conclusions

Young people active at local, regional, national and European levels can and should play an important role in stimulating debate on issues that concern the community.

Many of them do so through non-governmental youth organizations, managing to represent even the most marginalized or excluded groups. However, although youth represent a significant share of the voting (national and European) population, paradoxically, they are not properly represented in the decision-making body.

Their absence from public decision-making mechanisms is a shortcoming not attributable exclusively to them. On the contrary, their need for involvement, convincingly shown in the civil society, should be followed by a much stronger response, with effective means of achieving, by the authorities.

The presence of a legal framework is not enough, it even risks to remain only a label, since the texts are not immediately relevant in practice, fact which is desirable for any legislative initiative.

Asked, the young people always have opinions, always have expectations, always have the willingness to identify, bluntly, the shortcomings. Crucially, they often have solutions.

Finally, we are convinced that young people ***should first be questioned*** and ***then taken into account***. Only thus will they have the courage to shape and express opinions, to believe in them and, more importantly, to assume them as responsibilities.

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REGULAR PROPERTY – THE WAY OF PRIVATE PROPERTY RIGHTS IN CIVIL LAW REGULATION

Nicolae GRĂDINARU[*]

Abstract: *Joint property is, every time, pursuant to a legal document or to another mode of acquisition provided by law, the right to private property has two or more holders.*

If the asset is possessed in common, co-ownership is presumed until proven otherwise.

Each co-owner is the exclusive holder of a share of the ownership right and can freely dispose of it in the absence of contrary stipulation.

Regular property is a mode of the ownership right within which each holder exercises on his/her behalf and in personal interest the powers of his/her right on fixed periods, which successively and perpetually repeat, at regular intervals, assuming at least two holders, natural or legal persons.

Within regular property each holder exercises his/her single ownership right, there being several owners of the same asset and not many co-owners of the same asset.

Keywords: *regular property, joint property, absolute, exclusive, perpetual, co-owner, presumption, exclusion.*

1. Introduction

The private ownership right is defined in article 555 of the Civil Code as the holder's right to possess, use and dispose of an asset exclusively, absolutely and perpetually, within the limits set by law.

Unlike other holders of certain subjective rights upon the same asset, the owner, that is to say the holder of the ownership right, performs the legal attributes of this right (*jus possidendi* possession, *jus utendi and jus fruiendi* use and *jus abudendi or abusus* disposal) on the asset through his/her own power and for his/her own interest. The other holders of the certain subjective rights upon the same asset exercise only some attributes (ownership and use) by dint of the owner's power of transmission, owner who materializes them and set the limits for exercising them.

Regular property is a new institution regulated by article 687 - 692 of the Civil Code; it should not be mistaken for the joint property itself.

Joint property is, every time, pursuant to a legal document or to another mode of acquisition provided by law, the right to private property has two or more holders.

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If the asset is possessed in common, co-ownership is presumed until proven otherwise.

Each co-owner is the exclusive holder of a share of the ownership right and can freely dispose of it in the absence of contrary stipulation.

The shares are assumed to be equal until proven otherwise. If the asset has been acquired by a legal act, it cannot be proven otherwise except through documents.

The co-owners will share the benefits and will bear the burdens of the co-ownership, proportionally to their share of the asset.

Regular property should not be mistaken for the quota property; it is a distinctive form of the forced joint property.

Within regular property each holder alone exercises his/her ownership right, there being several owners of the same asset and not more co-owners of the same asset.

The difference between regular property and quota property is just the divided character of the right, expressed by time intervals.

Regular property is a mode of the ownership right within which each holder exercises on his/her behalf and in personal interest the powers of his/her right on fixed periods, which successively and perpetually repeat, at regular intervals, assuming at least two holders, natural or legal persons.

Within regular property each holder exercises his/her single ownership right, there being several owners of the same asset and not many co-owners of the same asset.

According to the stipulations of article 646 of the Civil Code, the assets subject to regular property are also in forced joint property. The co-ownership regime is governed by rules derogating from the general scheme of co-ownership.

According to the stipulations of article 687 of the Civil Code, in the absence of special regulations, whenever more people exercise successively and repetitively the attribute of the use specific to the ownership right over a movable or immovable asset, in fixed periods of time, equal or unequal, represents regular property. Thus, two or more people may be holders of regular property over an asset if they have a fixed share or quota of the ownership right over the asset, similar to the quota co-ownership, but the use attribute is not exercised simultaneously, but successively and by each owner, on certain periods of time, determined, equal or unequal.

The legal character of the regular property right is the same with the one of the ownership right, being an absolute, exclusive and perpetual right.

2. Characteristics of regular property

- the object of the regular property right remains unfractionated in its materiality, it is not divided in shares, but in portions of time in which each holder exercises the powers of his/her right;

- concerning the time interval allotted, each co-owner may sign, under the law, legal acts such as rental, sale, mortgage, and the like (article 689 paragraph1);

- the management or disposal regulations concerning the quota of the ownership right corresponding to another time interval are unopposable to the respective quota holder (article 689 paragraph 2);

- in the relations with the good faith third co-contractor parties, the specified management or disposal regulations are struck by relative invalidity (article 689 paragraph 3);

- each co-owner has the obligation to make conservation acts, so as not to hinder or impede the exercise of the other co-owners' rights (article 690 paragraph1);

- depending on the repairs made, each co-owner is obligated to contribute to the costs in relation to the quota owned. For the major repairs, the co-owner who advances the necessary expenses is entitled to damages in relation to the value of the other co-owners' rights;

- concerning the acts through which the asset substance is consumed in whole or in part, all co-owners must agree (article 690 paragraph 2);

- co-owners may enter into a management contract. In case any of the co-owners denounce the management contract, it shall cease to exist (article 690 paragraph 4 and article 644 paragraph 2 of the Civil Code).

3.Grounds for regular property

Regular property arises on the grounds of a law such as a contract or testament; the requirements concerning the rent-roll apply properly if the asset which is the object of the regular property is a real estate.

The object of regular property can be formed both from real estate and movables. An example of regular property is time-sharing[1] contract, property of a vacation house.[2]

[1] Directive no.2008/122/CE of the European Parliament and of the Council of 14 January 2009 on consumer protection related to certain aspects of the contracts concerning the right to use assets on a limited period of time, the contracts on products for holiday with long term use, as well as the resale and exchange contracts, published in the Official Journal of the European Union, series L, no. 33 of February 3, 2009.
The Directive was transposed into the Romanian legislation by Ordinance no.14/2011 for consumer protection upon signing and executing contracts for acquiring the right to use, on a limited period of time, one or more accommodations, of the long-term contracts for the acquisition of certain benefits for holiday products, of the resale contracts, as well as the exchange contracts, published in the Official Gazette no.134/22.02.2011.

[2] The Romanian Lottery sold between 1995 and 2004 lottery tickets (The gold jackpot) which offered as prize the right for life to spend one week in a villa centre in Poiana Braşov.
The ownership right over this period can be passed on. This way, most of the poor winners have sold their winning jackpot or their right of use.

The assets subject to regular property are tangible and inconsomptible because each co-owner has the obligation to provide them at the end of each period to the other co-owner holder of the regular property right.

4.Validity of documents signed by the co-owner

Concerning the time interval for each co-owner, any co-owner may sign, under the law, documents such as the rental, sale, mortgage, and the like.

The administrative or disposal documents concerning the quota of the ownership right corresponding to another time interval are unopposable to the holder of the quota concerned.

In the relations with the good faith third co-contractor parties, the administrative or disposal regulations mentioned are voidable.

The injured co-owner's right is recognized in order to, before partition, perform the actions against the third party who would have acquired the joint asset after completion of the document. In such cases the refund of the asset possession will be done for the benefit of all co-owners, with damages, if appropriate, for those who have participated in signing the document.

Each co-owner can stand alone in court, regardless of standing, in any lawsuit relating to co-ownership, including the action for recovery of property.

The decisions of the court of law given on behalf of the co-ownership are in the advantage of all co-owners. The judicial decisions hostile to a co-owner are not opposable to the other co-owners.

When the legal action is not brought by all co-owners, the defendant may ask the court the introduction of other co-owners as plaintiffs, within the terms and conditions set out in Code of Civil Procedure for the proceedings of others[3]

[3] Article 57-59 of the Code of Civil Procedure
Either party may summon any person who could claim the same rights as the plaintiff.
The request made by the defendant shall be submitted together with the legal contest. When the legal contest is not mandatory, the application shall be filed not later than the first day of the appearance before the court.
The request by the applicant shall be filed not later than the close of the debates before the first instance.
The request shall be justified and shall be communicated both to the summoned party and to the adverse party. Summon request, legal contest and file writings copies shall be attached to the summoned party' request.
Article 58
The summoned party acquires the quality of intervening in his/her own interest, and the court decision shall be opposable.
Article 59.
In the case stipulated by article 58, when the defendant sued for a money debt admits the debt and declares that he desires to pay for it to the person who shall legally set this right, shall be removed from the trial if he/she deposits the amount due.
In this case, the trial shall continue only between the plaintiff and the sued.

5.Rights and obligations of co-owners

According to article 690 of the Civil Code, every co-owner is obliged to make all the conservation acts, so as not to impede or hinder the exercise of the other co-owners' rights.

For the major repairs, the co-owner advancing the necessary expenses shall be entitled to compensation in relation to the value of the other owners' rights.

The documents that consume in whole or in part the substance of the asset can be made only with the other co-owners' agreement.

At the end of the time interval, the co-owner is obliged to deliver the asset to the co-owner entitled to use it in the next interval.

The co-owners may enter into a management contract. In case any of the co-owners denounces the management contract, it shall cease to exist.

Article 67-70 of the new Code of Civil Procedure, Law no.134/2010 published in the Official Gazette no.485/15.07.2010.

Either party may summon any person who could claim, by means of a separate application, the same rights as the plaintiff.

The request made by the plaintiff or by the main intervener shall be filed at the latest by the end of the trial investigation before the first instance.

The request made by the defendant shall be filed within the prescribed period for filing the legal contest before the first court, and if the legal contest is not mandatory, no later than the first hearing.

Article 68 Communication of the request

The request shall be justified and, together with accompanying documents, shall be communicated both the sued party and to the adverse party.

Copies of the proceedings, legal contest and file writings shall be attached to third party's request copy.

Article 69 The position of the third party in the trial

The sued party acquires the standing position of plaintiff and the decision takes effect to his/her regard.

Article 70 Removal of the defendant from the trial

In the case stipulated in article 69, when the defendant, sued for a money debt, admits the debt and declares that he desires to pay for it to the person who shall legally set this right, shall be removed from the trial if he/she deposits the amount due at the disposal of the court.

Likewise, the defendant, sued for assigning an asset or its use, shall be removed from the trail if he/she declares that he/she shall grant the asset to the person whose right shall be determined by court decision. The asset in question will be seized by the court vested with judicial proceedings, the provisions of article 959 and the following being applicable.

In these cases, the trial will continue only between the plaintiff and the third party sued. The decision shall be communicated to the defendant as well, to whom it is opposable.

6.Obligation for compensation and exclusion

Failure to comply with the co-owners' obligations draws the payment of compensation. If one of the co-owners seriously disturbs the exercise of the regular property, he/she can be excluded, by court order, at the request of the injured co-owner.

The exclusion can only be ordered if one of the other co-owners or a third party buys the share of the excluded one.

To this end, a closing of admission in principle of the exclusion demand will first be decided, which establishes if the exclusion conditions are met, a closure that may be appealed separately.

After the final conclusion of the admission closing in principle, in the absence of the parties' agreement, the price of the forced sale will be determined based on expertise. After recording the price at the bank set by the court, the ruling which shall substitute the sales contract will be delivered.

After this decision becomes final, the acquirer will be able to sign his/her right in the rent-roll, and the transmitter will be able to cash the amount recorded at the bank established by the court.

7.Cessation of regular property

According to article 692 of the Civil Code, regular property ceases through cancellation out of the rent-roll under the acquisition by one person of all the shares of the regular property right, as well as in other cases provided by law.

In the case of regular property and in the other cases of forced co-ownership, the partition is possible only by agreement.

In conclusion, regular property is a mode of the ownership right, in addition to the revocable property and the joint property. Regular property can be described as the legal situation in which more people exercise successively and repetitively the attribute of the use over a movable or immovable asset in equal or unequal time intervals, but fixed. The asset that is the subject of regular property may be sold, rented, or may constitute a warranty.

The provisions of article 687-692 do not affect the provisions contained in the GEO no. 14/2011 on consumer protection when signing and executing contracts for acquiring the right to use, on a predetermined period of time, one or more accommodations, long-term contracts for the acquisition of benefits for holiday products, resale contracts, as well as exchange contracts.[4]

[4] GEO no.14/2011 on consumer protection upon signing and executing contracts for acquiring the right to use, on a limited period of time, one or more accommodations, of the long-term contracts for the acquisition of certain benefits for holiday products, of the resale contracts, as well as the exchange contracts, published in the Official Gazette no.134/22.02.2011.

PAYMENT FOR DAMAGE CAUSED TO THE EMPLOYER BY EMPLOYEE

Lavinia SAVU*

Abstract: *By Law. 40/2011 amending and supplementing the Labour Code, an additional possibility for recovery of damages, finding a note and damage assessment, which involves the recovery of its consideration by agreement. The legislature has established a restriction agreement between the parties, unless the damage is less than 5 minimum salaries, if the injury would be greater than this limit, the court exclusive jurisdiction.*

Keyword: *Recovery of damages, the parties' agreement, the value of damage*

The main ways of determining and collecting product injury employer, both the liability and the property of restitution are parties made an agreement and an action[1].

To the mandatory provisions of the Labour Code would mean that the only way to recover the damage caused to the employer by the employee out of the bargain the parties would be only by the court, by admitting (in whole or in part) the application of summons judgment made by the employer to the competent court to settle the conflict of rights[2].

Not excluded the possibility to recover damages by agreement of the employee[3], payment commitment, even if it was implicitly repealed the legal texts governing the institution of property liability coverage is a possible way of damages, but must be accepted by default, without any expression of consent, the the employer.

Moreover, they said that[4] „the existence of art. 169 par. 2 of the Labor Code does not hinder the employee's right to consent voluntarily to recover damages caused by him, without waiting for a judgment of court „.

Commitment is possible, since that is not forbidden, and fully effective against the employee and employer benefit after taking / release or a later date agreed by the employer by the mere fact of neacționării employee in court until the first payment .

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[1] Alex. Ticlea, *The treaty of labour law*, Law Publishing House, Bucharest, 2007p. 829

[2] I.T. Stefanescu, *Treaty theoretical and practical labour law*, Law Publishing House, Bucharest, 2011, P 725.

[3] *Solutions and proposals concerning the interpretation and application of provisions of the Labour Code*, the Romanian Journal of Labour Law, nr. 2/2003, p 15, I.T. Stefanescu, op cit., P 726

[4] M.M. Moceanu, *New labour code. Liability, the work*, nr. 4/2003, p 40.

But is it a self-declaration or by law, in the current Labour Code Enforcement.

In all cases, payment commitment produces a charged employee, that limitation interrupted at the time when a new prescription is counted, and so with each new payment / installment. There is also the effect start obligation to pay compensation.

The employer can block employee intention to commit, if not agree with this instrument, by sue him (or even as a way of actually failing to register as an act received payment commitment).

Therefore it is argued that desirable - to the extent that there will by - alternative payment agreement, the employer can give and negotiation of terms for the recovery of damages.

By Law. 40/2011 adds another possibility to recover damages, Art. Paragraph 254. 3 showing that „if the employer establishes that its employee caused a fault and damage in connection with his work, the employee may request, through a note of finding and assessing damage, recovery of the value thereof, by agreement, a term which shall not be less than 30 days from the date „.

Initiative amicable note presenting findings and assessment of damage to the employee, as if payment commitment, it is also the employer. possibility of achieving agreement between employer and employee on the amount of damages and the payment thereof.

It recognizes[5] recocery damages by agreement, by mutual agreement, contract, arguing that commitment is even paying the unilateral act is not an alternative.

In the absence of an agreement but, as far opened only way the employer has no legal proceedings for recovery through salary deductions for employee injury.

Refusal would not entail consequences employee disciplinary or stability of the employment plan[6].

This recognizes the possibility of recovery of viable payment[7].

Use note finding, is a faculty[8] that can be regulated by law commonly used by the employer.

Specification of Art. Paragraph 254. 4 that the value of damages recovered by agreement can not be greater than the equivalent of five minimum salaries in the economy, which basically caps the amount of damage that can be recovered by agreement merely payment commitment țărmurească possibility that not may extend beyond this amount[9].

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[5] S. Beligrădeanu, *Theoretical and practical roots* in key aspects from within Law nr. 40/2011 amending and supplementing the Labour Code (II), the Romanian Journal of right labour nr.3/2011, p 37-44.

[6] Răzvan Gabriel Cristecu, Cristina Cristescu, *op.cit.*, p. 366

[7] Răzvan Gabriel Cristecu, Cristina Cristescu, *op.cit.*, p. 366

[8] Monica George, *News pecuniary liability of employees* "in the Romanian Magazine labour law no. 5/2011

[9] Dan Top, Labour Code amended through Law no. 40/2011., Publisher Bibliotheca, Targoviste 2011 p. 153.

The legislature has established a restriction agreement between the parties, unless the damage is less than 5 minimum salaries, if the injury would be greater than this limit, the court exclusive jurisdiction, although the doctrine is accepted porsibilitatea the damages, regardless of cuantun by agreement[10].

Was considered[11] and that such limitation is justified, as the parties would be able recover damages by their agreement, regardless of its value, but emphasized that a working party report could amicably agree that damages exceed the threshold legal maximum, such an agreement is void for violating the provisions of art. 38 of the Labour Code.

We appreciate that finding the note transmitting employee found guilty by the employer has the effect of giving notice thereof, as when submitting an application for the proceedings, but it is a mandatory procedure prior notification to the court.

Under State law requires that any enforcement is to be based on a valid enforceable and pecuniary liability for damages to be determined by the courts, which, according to art. 124 par. 1 of the Constitution, republished, administer justice on behalf of law.

So, even if the injury is the result of several employees illegal act, separate and together they agree to cover damage by agreement with the employer, the provisions of art. 254[12], in derogation from art. 169 par. 2 of the Labor Code that the, 'Deductions in respect of damage caused to the employer can not be made unless the employee is due debt, cash and due and was established as such by final and irrevocable judgment. „

It was also noted that legal provision criticized is part of employee protection measures in its relations with the employer, which can not mean discrimination, the two parties being in different situations justify different legal treatment.

The note itself is not enforceable character, or the parties' agreement is not enforceable within the meaning of the Code of Civil Procedure.

Amount established for claims shall be forfeited, according to art. Paragraph 257. 1 of the Labour Code, in monthly installments from the salaries that are due the person from the employer that is employed.

Unlike the common law debtors, staff responsible for heritage under the Labor Code, benefit from protective measures[13].

Rates may not be (Art. 257 para 2) more than one third of net monthly salary, not to exceed with the other deductions that you would pay half of the concerned person.

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[10] I.T. Stefanescu, *Concrete highlights of recent results and modify the Labour Code*, Romanian Journal of Cases, nr.2/2011, p 25

[11] Alexander Ticlea, *Commented Labour Code*, Second Edition, published by Legal Universe, Bucharest, 2011, p 280.

[12] Alexander Ticlea, *Commented Labour Code*, Second Edition, published by Legal Universe, Bucharest, 2011, p 280.

[13] Razvan Gabriel Cristecu, Cristina Cristescu, *Labour Code as amended and republished in 2011*, publishing Hamangiu, Bucharest, 2011, p 364

These provisions constitute special rules of procedure execution, follow the path precludes enforcement and other items of property belonging to the debtor employee for three years.

If the individual is terminated before the employee to be compensated by the employer and shall be covered by another employer or becomes public servant salary deductions are made, according to art. 258 paragraph 1 by the new employer or new institution or public authority, as appropriate, based on enforcement communicated for this purpose by the employer injured.

RESTING TIME IN WORKING RELATIONSHIPS

Laura GEORGESCU[*]

Abstract: *Rest time of employees is a right recognized by Article. 24 of the Universal Declaration of Human Rights, governing reasonable limitation of working hours and periodic holidays with pay grant.*

The same rights are recognized by the International Covenant on Economic, Social and Cultural referring to rest, leisure, reasonable limitation of working hours, paid holidays, remuneration for public holidays where they work.

So while the rest is a right granted to employees for recreation, to increase efficient regeneration efficiency at work.

Keywords: *working time, employees, the resting leave, lunch break*

1. General notions concerning the working and resting time

The working time is the duration set, out of a day or a week, when performing labour within the individual work contract is compulsory or, in other words, „any period when the employees perform their work, are at the employer's disposal and fulfil their tasks and assignments, according to the provisions of the individual work contract, collective work contract enforceable and/or the legislation in force" (Romanian Labour Code, art. 111).

The Directive 2003/88/CEE in art. 2 point 1 defines *the working time* as „the time when the workers are at their job place, at the employer's disposal and perform their activity or functions, according to the national legislation and practices".

The working time should not be mistaken with the working schedule. The working time means the number of hours per day or week when performing the paid activity is compulsory, while the working schedule means the hours within which the work is performed on a daily basis, namely between the moment when the activity starts and the moment when it ends.[1]

The Labour Code, art.112 par.1, regulates a normal duration of the working time, usually 8 hours a day and 40 hours a week.

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[1] Alexandru Țiclea, *Labour Law Treaty*, Universul Juridic Publishing House, Bucharest, 2012, p. 540.

According to the art. 133 in the Labour Code, „the resting period is any time that is not working time"[2]. The resting time is defined as „the time necessary for recovering the physical and intellectual energy in the working process and for satisfying the social and cultural-educational needs, while the employees do not perform the work they are obliged to, according to the individual work contract."[3]

2. The Lunch Break

The Labour Code, art. 134, stipulates that whether the daily working time exceeds 6 hours the employees have the right to take lunch break and other breaks.

The duration of the break and the times when they are given are set through internal regulations or the collective working contract enforceable. They are not included in the daily duration of the working time, unless it is negotiated otherwise through the collective working contract in force.

Therefore, during these periods the work ceases and resumes after the lunch break.

The youngsters aged 15-18 benefit from a meal break of at least 30 minutes, if the daily working time exceeds 4.5 hours.

3. Breastfeeding breaks

The breastfeeding breaks are regulated through the Government Emergency Ordinance no. 96/2003 concerning the protection of maternity at the job place.[4]

According to art. 17 in this normative act, the employers have the obligation to give two breast feeding breaks (one hour each, until the child is one year old) to the employed women who breast feed and did not take the child care leave up to 1 or 2 years. The necessary time for going both ways to the place where the child is, is also included in these breaks. [par. (1)].

Per mother's request, the breastfeeding breaks will be replaced by reducing the normal working duration with two hours daily [par. (2)].

They are included in the working time, do not decrease the salary and are paid totally from the employer's salaries funds. [par. (3)].

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[2] In the same respect there is art. 1 point 2, Directive 2003/88/CEE.

[3] Ion Traian Ştefănescu, *Theoretical and Practical Treaty of Labour Law*, Universul Juridic Publishing House, Bucharest, 2012, p. 550.

[4] Published in Romania's Official Monitor, Part I, no. 750, October 27, 2003, approved with changes by the Law no. 25/2004 (published in Romania's Official Monitor, Part I, no. 214, March 11, 2004), changed subsequently.

4. Daily Resting Time

The difference between the 24 hours and the 8 working hours, namely 16 hours daily, is rest time or repose time. According to Labour Code, art. 135, the employees are entitled to at least 12 consecutive repose hours between two working days.

The Directive 2003/88/CEE concerning certain aspects the working time management sets that any worker must benefit from „11 repose hours daily" (art. 5).

However, there are exceptions – if the people work in shifts[5] the repose time is shorter, at least 8 hours (Labour Code, art. 135 par. 2).

The youngsters aged 15-18 benefit from a minimum repose time (12-14 consecutive hours) between two working days. The youngsters who attend compulsory full time education benefit from 14 hours of rest time.[6]

5. Weekly Repose

The Labour Code, art. 137 sets two consecutive repose days per week – usually, on Saturday and Sunday.

The working week is 5 working days long, as the art. 113, par. 1 in the Labour Code stipulates. The working days are usually from Monday to Friday. Saturday and Sunday are the 2 weekly consecutive repose days.

But it is possible that the employer organize the schedule in shifts or *turnus* etc. and the people must work on Saturday and Sunday, while the two consecutive repose days are granted, for example, on Monday and Tuesday or Wednesday and Thursday; the employer is obliged to grant this weekly repose after 5 working days. The Labour Code stipulates „usually on Saturday and Sunday", but this is not compulsory.

There may be exceptions when the employer considers necessary. The employer's right to set the organization and functioning of the unit is guaranteed by art. 40, par. 1, let. 1 in Labour Code.

In the same respect, the art. 137, par. 2, Labour Code stipulates that in case the public interest or normally carrying put the activity are prejudiced, the weekly repose, namely the two consecutive free days can be granted in other days, set through the collective working contract enforceable or through internal regulations.

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[5] The Labour Code in art. 136 par. 1 defines *the work in shifts* as „any way of organising the working schedule, according to which the employees follow each other on the same working position, according to a schedule, including rotating schedule, that can be continuous or discontinuous, implying that the employee is required to perform an activity in various time intervals in relation to a daily or weekly period, set through the individual work contract." *Employee working in shifts* means „any employee whose working schedule occurs within the work schedule in shifts" (art. 136 par. 2).

[6] Art. 14 in the Government Decision no. 600/2007 concerning the protection of youth at work (published in Romania's Official Monitor, Part I, no. 473, July 13, 2007).

Art. 137, par. 3 sets the *employer's obligation* to negotiate a salary increment in case the weekly repose is not granted on Saturday and Sunday.

In exception situations, the weekly repose days are granted cumulated, after a continuous activity time that cannot exceed 14 calendar days, with the authorisation of the territorial labour inspectorate and with the approval of syndicates or employees' representatives, as the case may be.

Therefore, if the people work from 6 to 14 days unceasingly, the authorisation from the territorial labour inspectorate is required, as well as the approval of the syndicate or of the employees' representatives. It's natural to be that way, so that the employees could benefit from the protection they are entitled to.

Granting the weekly repose days *consecutively* is compulsory, as results from the legal text.

Convention of the International Labour Organization no. 14, in 1921 stipulates the same, setting the employees' right to at least 24 consecutive hours repose within a 7 days period.

The Directive 2003/88/CE concerning particular aspects of time organisation sets the obligation for the member States to take measures so that each worker would have the right - for each 7 working days period – to a minimum repose of 24 *consecutive* hours (mainly on Sunday), *plus the 11 compulsory daily rest hours*.

The Labour Code also regulates this period of compulsory daily repose, as mentioned above. Therefore, after corroborating the texts, one can see that the employer is obliged to comply with the rule of the two resting days after the 5 days of work weekly; only in exceptional cases the employer can ask for labour inspectorate's authorization and approval from syndicate or employees' representatives.

The employees whose weekly repose is granted under the conditions showed above, namely more than 5 days, have the right to receive the double amount of the compensations they are entitled to, according to art. 123, par. 2 in Labour Code, namely 15% of the basic salary.

This type of repose can be suspended in case of some urgent works, which require to be immediately performed in order to organise measures for saving persons or the employer's goods, in order to avoid imminent accidents or for removing the effects these accidents had on materials, equipment or buildings of the unit, but only for the staff required to perform these works (art. 138, Labour Code).

6. Legal Celebrations

The right to legal celebrations for an employee is acknowledged in all the EU States. According to the Labour Code art. 38, the employees cannot give up to the

rights set by law; therefore, any transaction that aims to giving up the rights acknowledged by law or limiting these rights is void.[7]

The Labour Code, art. 139 par. 1 sets the Legal Celebrations days when the people should not work, as follows:

– January 1 and 2;
– First and second days of Easter;
– May 1;
– First and second Pentecost day;
– The Assumption Day;
– December 1;
– First and second day of Christmas;
– Two days for each of the two annual religious celebrations, declared as such by the legal religious cults, others than the Christian ones, for the persons belonging to them.

The Labour Code stipulates in art. 143 that other free days can also be set through the collective working contracts.

These norms do not apply in the jobs where the activity cannot be interrupted due to the character of the production process or specific of the activity (Labour Code, art. 141).

By „the character of the production process" one must consider the units of working places known under the generic name „with a running fire", for example, those where electric or thermal power is produced (thermo centrals, hydro centrals etc.) or the activity cannot be interrupted (blast furnace, foundry) etc.[8]

The phrase „specific of the activity" concerns a wide range of units and work places, namely those from transportation field (airlift, shipment, terrestrial transport), telecommunications, sanitary and social work field, providing the population with gas, electricity, water, heat, food, retail trade and supplies for population (stores, „malls", restaurants) etc.[9]

Compensation with corresponding time in the following 30 days is granted to the people who work during the legal celebrations. If not possible, they benefit from a salary increment that cannot be less than 100% of the basic salary. (art. 142).

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[7] Radu Răzvan Popescu, *Provisions concerning the legal celebrations*, in „Romanian Labour Law Magazine", no. 8/2011, p. 184.
[8] Alexandru Țiclea, *Labour Law Treaty*, Universul Juridic Publishing House, Bucharest, 2012, p. 556.
[9] *Ibidem.*

7. The resting leave

This is provisioned by art. 39 par. 1 let. c in Labour Code. Its minimum duration is 20 working days (art. 145 par. 1, Labour Code).

Art. 7 in Directive 2003/88 sets 4 weeks as the minimum duration of the paid annual leave.

The actual duration is set through the individual work contract, in compliance with the law and the collective work contract in force and is granted in direct proportion with the activity performed in a calendar year (art. 145 par. 2).

The legal celebrations when the people do not work, as well as the free days paid through the collective work contract are not included in the duration of the annual paid leave (art. 145 par. 3).

The resting leave must be scheduled under the conditions of the art. 148 in Labour Code, so that the people benefit from it.

The employer programs the holiday, by consulting the syndicate or, as the case may be, the employees' representatives, for the collective programing, or by consulting the employee, for the individual programing. The holiday time can be set until the end of the calendar year for the next year.

For the resting leave period, the employee benefits from a holiday allowance that cannot be less than the basic salary, indemnities and permanent increments they are entitled to for the respective period, provisioned in the individual work contract (par. 1).[10]

The allowance represents the daily average of the mentioned salary rights in the last 3 months prior to the one when the holiday is taken, multiplied by the number of the leave days (par. 2).

The employer pays the leave indemnity at least 5 working days before the employee goes in holiday.

The employees relocated in another place who are granted the leave *during the time or their relocation*, have the right to be reimbursed with the transportation expenses (round trip), from the locality where they have been relocated to the locality where their common job place is, according to the contract. Of course, these expenses are paid by the unit which benefits from relocation. In the lack of mentions concerning the payment of the expenses, the general norms concerning the delegation or relocation outside of the job place locality must be applied.[11]

If certain situations occur while the employees are in resting leave (temporary work incapacity; the employees are summoned to fulfil public duties or military obligations; they attend or are about to attend a qualification, re-qualification, specialization or professional development course; the woman employee enters the maternity leave; the employees are summoned at the job place), the leave is suspended.

[10] Art. 150, Labour Code.

[11] Alexandru Țiclea, *Labour Law Treaty*, Universul Juridic Publishing House, București, 2012, p. 565.

The remaining leave days will be used after the respective situations cease or at the date set by a new programming within the same calendar year. If one of the cases of leave suspension occurs, the indemnity is not to be given back.

Art. 149 in Labour Code stipulates that the employee is obliged to perform the leave when it was scheduled, except the exceptional situations provisioned by law when, for objective reasons, the leave cannot be taken.

The compensation in money for the not used leave is allowed only in case the work contract ceases (art. 146 par. 4).

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RESTRICTION OF SOME COMPETENCES OF PUBLIC LOCAL AUTHORITIES REGARDING THE ADMINISTRATION OF PUBLIC DOMAIN, BY SOME ARTICLES OF THE NEW CIVIL CODE

Ivan Vasile IVANOFF[*]

Abstract: *This study analyzes the new regulations that the Civil Code introduces with respect to granting to public institutions the right of free use by public authorities of some assets belonging to public domain, and the restriction, in our view, of this right against the wider regulations offered by Law no. 215/2001 in this field.*

Keywords: *public utility institutions, free right of use, public property*

From the analysis of Title IV „Public property", but particularly of Section 4 „Right of use by free title" contained by Chapter 2 „Real rights corresponding to public property", it results, in our opinion, that there is a restriction of some competences attributed to public authorities by both the Constitution and the Organic law No. 215/2001.

Thus, article 889 of the current Civil Code contains the following phrase:

"The right to use the assets which belong to public property is granted, by free title and on limited term, to public utility institutions".

In comparison with this text, article 124 of Law No. 215/2001 consecrates this way such competence:

"Local councils and county councils can give to free use and on limited term movable and immovable assets belonging to public or private, local or county property, as the case may be, to non-profit legal persons that carry out charity or public utility activities, but also to public services."

Before going into the analysis of the two texts mentioned above and seeing which are the fundamental differences between them, we consider that it must be first of all answered the question whether article 889 of the Civil Code is a text which abrogates implicitly article 124 of Law No. 215/2001. Specialized doctrine speaks of implicit or tacit abrogation when a normative act or new normative acts do not clearly abrogate the former ones, but deviate instead from the former regulations by means of the rules which they contain.

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According to article 15(2) of the Constitution, the new regulations shall be applied in future, no sooner they are adopted, to all the circumstances which emerge after they come into force, therefore being excluded the application of former law.

In our opinion, since we are talking about the same punctual competences regarding public domain, more exactly about giving to free use some assets belonging to public domain, the regulations contained by article 889 of the Civil Code refer practically to the same punctual competence as article 124 of Law No. 215/2001, so that the new text has, right from the moment of its entry in force, incidence upon the free granting which can be performed by local public and county authorities of some assets belonging to public domain.

After assessing these aspects which precede our analysis, there shall be carried out a comparison between the new text, introduced by article 889 of the Civil Code and the former text contained by article 124 of Law No. 215/2001, tacitly abrogated, and it will therefore become clear why the text contained by the title of the present study is relevant when it comes to restricting the domain of action held by local and county authorities.

Thus, the new text clearly refers only to „public utility institutions" which can benefit from some potential bailment agreements approved by the local and county public authorities with decision power, when it comes to granting the free right of use upon some assets belonging to public property of the territorial-administrative units in question.

Yet, the expression „public utility institution" or „public interest institution" does not coincide either with the „public institution" notion or with the „public authority" one. The expression in question refers to those private structures (private law legal persons) that are authorized by a public authority provide a public service, being under the supervision and control of a public authority (for instance, a private university).

Public utility institutions are similar to public institutions in what concerns the type of the activity that they perform, both categories of structures having a public service mission.

In our opinion, the fundamental distinction between the two resides in the fact that, while public institutions are state structures or, as the case may be, belong to administrative-territorial units, public utility institutions are represented, from the perspective of their legal nature, by private law legal persons.

Another mention should be made here: the correspondent of „public institution" notion contained by the inter-war doctrine and legislation was the „public establishment" one, whereas instead of the „public interest institution" expression was used the „public utility establishment" one.

In general, public interest refers to material and spiritual needs of citizens, acknowledged at a certain point as general social values; in other words, we are talking about a complex of social objective needs, indispensable to society.

Nonetheless, public interest is an abstract notion with a relatively determined character, having a concrete content which depends mainly on the purposes and

options of the governing political power. For that matter, the concrete content of such notion can be modified in time as a result of the changes of the vision held by political power, of political interchanges and so on.

According to article 38 of the Government Ordinance No. 26 from January 30th 2000, an association or foundation can be **acknowledged** by the Government of Romania as a **public utility** one, if the following conditions are met altogether:

a) its activity is performed on behalf of general interest or of some collectivities, as the case may be;

b) has been functioning for at least 3 years;

c) presents a report of activity from which it results that it has also performed a significant activity before, by implementing projects or programs specific to its purpose, attaching to it the annual financial statements and the income and expenditure budgets for the last 3 years preceding the moment when the application for the acknowledgement of its public utility statute is filed;

d) the value of its patrimonial assets for each of the 3 previous years must be at least equal to the initial patrimony;

At the proposal of the competent administrative authority, the Government of Romania, through its specialized body, can grant an exemption from the compliance of the conditions previously mentioned at letters a) and b), if:

a) the association or foundation filing the application resulted from the merger of two or more preexistent associations or foundations; and

b) each of the preexistent association or foundation would have complied with the two conditions in question, if they had filed the application independently.

According to article 381 of the **GEO No. 26/2000**, **public utility** is understood as **any activity** which is performed within domains of general public interest or on behalf of the general public interest of some collectivities.

The acknowledgement of public utility statute provides the following rights and duties to the association or foundation in question:

a) the right to use freely public property assets (letter b) abrogated);

c) the right to mention in all the documents it drafts the fact that the association or foundation is acknowledged as a public utility one;

d) the duty to maintain, at least in what its activity is concerned, also the performance which determined its acknowledgement;

e) the duty to communicate to the competent administrative authority any change in its articles of incorporation and statute, but also the reports of activity and annual financial statements; the administrative authority has the duty to make sure that the documents mentioned above can be accessed by any interested person;

f) the duty to publish, within 3 months from the end of the civil year, an excerpt from its reports of activity and annual financial statements, in Romanian Official Gazette, Part IV, but also in the National records of non-profit legal persons. The model for the excerpt of financial statements is approved by the order of the Minister of Public Finances.

Trying to synthesize the content of the definitions and interpretations above, we can say that article 889 of the Civil Code refers to public utility institutions which can benefit from such rights, whereas these legal persons are, on the one hand, those that emerged either on the basis of GEO No. 26/2000 or on the basis of some special normative acts [see Law No. 139/1995 on the Red Cross or Law No. 69/2000 on sports associations and so on], while on the other hand those which received the „public utility" qualification, according to GEO No. 26/2000 or according to the special regulations establishing their set up. Consequently, all these entities are on the one hand private law entities, while on the other hand they must benefit from the „public utility" qualification, received either by means of their statute of incorporations or acquired afterwards according to the GEO No. 26/2000.

The expression contained by article 124 of Law No. 215/2001 refers to legal non-profit persons that carry out charity or public utility activities, or to public services.

The category of legal non-profit persons includes associations, foundations or other similar organizations, political parties, Employer's associations, labour unions, religious cults, other legal persons set up on the basis of some special laws, so as to perform non-profit activities. It can be noticed right from the beginning that the notion stipulated by article 124 of Law No. 215/2001 includes the hypothesis provided for by article 889 of the Civil Code, which has nonetheless a broader scope, as it also refers to other private law subjects. Thus, by including for instance political parties in the general domain of legal non-profit persons, Law No. 14/2003 considers them, at article 1, public law legal persons. [Political parties are associations with political character of Romanian citizens with right to vote, who freely take part in the constitution and exertion of their political will, thus complying with their public mission granted by the Constitution. Political parties are public law legal persons]. If we were to analyze political parties from the perspective of article 889 of the Civil Code, they are not public utility institutions [as private law legal persons], since they do not belong the one hand to private law, while on the other they do not have the public utility quality.

According to Law No. 489/2006 on religious cults, the latter represent, according to article 8), public utility legal persons that enter under the incidence of article 889 of the Civil Code; religious associations or religious groups could never enter under the incidence of article 889 of the Civil Code, as a result of the fact that, according to article 6, „the religious group constitutes an association form with no legal personality of some physical persons that, without any previous procedure and in a free manner, adopt, share and practice a religious faith", whereas „the religious association is the private law legal person, constituted in the conditions of the current law and composed of physical persons that adopt, share and practice the same religious faith". But they are not of public utility and, therefore, they do not enter under the incidence of article 889 of the Civil Code.

Following the logics of article 889 of the Civil Code, the Red Cross would have never benefitted from the right to use some assets belonging to public domain, as it is not a public utility institution, but is instead a public law legal person, and not

of private law. Here is how article 1 of Law No. 139/1995 qualified this entity: „the National Society *Red Cross Romania* is a pubic law legal person with an autonomous, non-government, apolitical and non-profit character. It carries out its humanitarian activity as a voluntary aid organization, auxiliary to public authorities". Consequently, according to article 889 of the Civil Code, this organization can no longer benefit from the advantage of using freely some assets belonging to public domain, whereas according to the former abrogated text could enter under the incidence of article 124 of Law No. 215/2001, being the most emblematic organization which carries out charity activities, from Romania and the world.

Consequently, the restrictive text of article 889 of the Civil Code, which currently has incidence upon freely granting the assets belonging to public domain, is much more restrictive than the former legal text stipulated by article 124 of Law No. 215/2001, tacitly abrogated by the text mentioned above.

On the other hand, the former text provided for by article 124 of Law No. 215/2001 offered to public authorities the possibility to give to free use assets belonging to public domain or public services. By comparison, the new text stipulated by article 889 of the Civil Code excludes such possibility.

Specialized doctrine considers that public services constitute a body created by a state, county or locality, with determined powers and competences, using the financial means obtained from the general patrimony of the administration creating that service, rendered available to the public so as to satisfy in a regular and continuous way a general need, which otherwise would have been only incompletely and undeterminably provided by private initiative.

A public service is an administrative instrument by means of which services of general interest are provided to citizens, within a political power system. The set-up of public services constitutes the exclusive attribute of authorities with decision power, but also of local councils, whereas the organization and functioning of such services constitute the attribute of executive authorities, namely of „prefects and mayors". The category of public services includes:

- Public services with state character;
- Community services (created at a local and county level);
- Public services of property management;

Other local public services:

- Public commercial services;
- Public services for cultural activities;

In accordance to their nature, there are:

- Public administrative services;
- Industrial and public commercial services.

In accordance to the way general interest is met, there are:

- Public services aiming to meet directly and individually the needs of citizens;
- Public services offering advantages to private entities indirectly;
- Public services destined to collectivity on the whole.

From the perspective of their social importance, there are:

- Vital public services (water supply, sewage);
- Optional public services (parks and amusement places fit-ups, information centers and so on).

Specialized literature has defined public service from several points of view.

One category of the given definitions stresses the fact that a public service is first of all an activity: „activities performed by public authorities in order to meet a general interest", „any activity created for satisfying some collective interests, which is accomplished according to the special procedure of public law and, when necessary, with the aid of public force"[1].

Another category of the given definitions stresses the formal character of the public service. Thus, professor Paul Negulescu regards the public service as an „administrative body, created by a state, county or locality, with determined competences and powers, with financial means obtained from the general patrimony of the public administration which created it, rendered available to the public in order to satisfy in a regular and continuous way a need with general character, which otherwise would have been only incompletely and intermittently satisfied by a private initiative"[2].

In the current circumstances, public services – in the way they are described – can no longer benefit from the bailment agreements granted by public local and county authorities, due to the drastic restriction of their competences operated by article 889 of the Civil Code.

In our opinion, the immediate consequences of this restriction make so that the principle of local autonomy, clearly provided for by article 3 of Law No. 215/2001 and article 119 of the Constitution, is affected.

Here is the definition given to local autonomy by the lawmaker:

„Local autonomy is the effective right and capacity of the authorities of local public administration to settle and manage, on behalf and in the interest of local collectivities which they represent, public affairs, in accordance to legal provisions".

In this context, we consider that article 889 of the Civil Code obviously contradicts article 119 of the Romanian Constitution and that it should be declared non constitutional by the Constitutional Court. There is still no precedent for that matter, but if an eventual decision taken by a local or county council, to offer a free granting to a legal subject provided for by the former regulations contained by article 124 of Law No. 215/2001 and not by article 889 of the Civil Code, would be questioned by the prefect at the Administrative court, on the reason that the incident article involved is article 889 of the Civil Code and by no means article 124 of Law No. 215/2001, it could successfully be invoked in front of the Administrative court the exception of illegality, whereas the Constitutional Court

[1] Maurice Haurion, Tratat de drept adminstrativ, 1892

[2] Paul Negulescu, Tratat de drept administrativ,volume I, general notions, Bucharest,1934,page123.

would have enough arguments to acknowledge the lack of constitutionality of article 889 of the Civil Code, on the basis of the reasons mentioned above.

We consider that this issue could be correctly settled and that it would have practical beneficial effects, either as a result of rendering available a single register of public utility institutions to public authorities, or by providing a regulation by *lege lata* of the legal definition of public utility institutions, which specifies without any reason of doubt the field of the potential beneficiaries.

THE ADMINISTRATIVE CODE - THE PROSPECT OF A UNIFORM REGULATION OF THE PUBLIC ADMINISTRATION IN ROMANIA

Benonica VASILESCU[*]

Abstract: *Since the codification of the legislation from the public administration field was included as a priority in the Government Program 2009-2012, the Project „A more coherent legislative framework for a more effective public administration", SMIS Code 2989 ran within the Operational Program, Development of the Administrative Capacity. This project was funded by European Social Fund and its implementation lasted 28 months, having a total eligible value of 3,497,534 lei.*

With the purpose of running the project, by Order no.84/March 31, 2010 of the Minister of Administration and Interior, a Working Group was established, having deliberative role in determining the codifying version, identifying areas subject to codification and marking guidelines in the development process of the Administrative Code draft. The five areas subject to the codification of law are: the central government, the local government, the government's staff, the public and private property of state and administrative-territorial units, the public services.

Based on the identification of shortcomings generated by the legal rules in force from the public administration field, some legislative solutions have been proposed, aiming at achieving a unified and coherent legislative framework, which would provide the predictability, but also the stability of legal provisions, the citizen's accessibility and confidence in an effective and bureaucracy-free public administration.

We hope that the Administrative Code will open the prospect of a clear, concise and complete regulation of the numerous and diverse issues that the public administration in Romania are facing with, and that this legislative approach will be included among the priority concerns of the current government policy.

Keywords: *public administration, central government, local government, administrative code, a dignitary, public official, public property, public services, public interest.*

The need for codifying the public administration legislation, both in terms of substantive law and procedural law, has represented a constant concern of legal doctrine and practice, being resumed also by the Governments that have been invested since 2000 until now.

Developing an administrative Code that would unify and systematize the legal provisions applicable to public administration has proven to be necessary and effective, giving the fact that there is an impressive number of laws on the matter.

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Moreover, the non correlation of various legal provisions, backed by the numerous and frequent legislative interventions in the legal framework, in this area has generated regulatory ambiguities and contradictions. In those situations, the only solution was the interpretation in time and space of legal regulations, interpretation that has often proved to be wrong in relation to the legislator's intention.

The administrative doctrine and practice have found that the major problems of public administration can result in: *the lack of legislative coherence*, caused by the multitude of existing legal regulations, *the lack of clarity of rules* and *accessibility limitation*, caused by successive amendments to the specific legislation, *the lack of systematic rules* to govern the public administration activities, *the lack of uniform terminology*[1].

A unification and correlation of the vast legislation regulating the public administration can not be fully realized, but in some fields, it is possible and even necessary, because, in addition to systematic regulations, the use of a uniform terminology for the same concepts and legal realities, institutions or principles shall be provided. Moreover, such unification would have to eliminate the regulatory duplication, inconsistencies and inaccuracies in the content of rules, but also to cover the lack of legal texts that would have had to solve the practical problems existing in the administrative practice that is so diversified.

Professor Ioan Alexandru considers *codification* as a real remedy for *reforming and modernizing the administration*, arguing that *both theorists and practitioners of public administration approve the codification, hoping for a clean-up of legislation in various areas and for obtaining a legal hygiene, that would afterwards generate a reduction of the field of interpretations, and consequently of an abusive appropriation of certain legal rules*[2].

Given the variety and complexity of actions specific to public administration and the dynamics and mobility of public law regulations, the development of an administrative code, even reduced to some areas, represents a legislative approach of undeniable difficulty[3]. It involves consistent thinking, precise knowledge of legal provisions and failures between them, the joining of factors responsible in the development, adoption and implementation of legal provisions, as well as a comprehensive documentation of codification patterns that some EU Member States have resorted to.

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[1] Study on the shortcomings generated by the legislation in force of the Romanian public administration, developed in the project „A more coherent legal framework for a more efficient public administration", p.7.

[2] Ioan Alexandru, Interdisciplinarity. The new paradigm in public administration research and reform, Romanian Academy Publishing House, Bucharest, 2010, p.131.

[3] In the interwar period, Professor Anibal Teodorescu argued the objective impossibility of codification of administrative law, considering that an administrative code would never be aware of the legislation in force *because of changes or renewals that happen too often and too fast of laws and that make it up* - A. Teodorescu quoted by Dana Apostol Tofan in Administrative Law, Vol.I, 2nd Edition, C.H. Beck Publishing House, Bucharest, 2008, p. 71.

Since through Government Program 2009-2012, the priority of codifying the legislation in the public administration field was resumed to Chapter XIX entitled „Public administration reform", the Project „A more coherent legislative framework for a more effective public administration", SMIS Code 2989 ran within the Operational Program, Development of the Administrative Capacity. This project was funded by European Social Fund and its implementation lasted 28 months and took place between July 2009 - November 2011, having a total eligible value of 3,497,534 lei, of which 2,972,903.9 lei (85%) grant and 524,630.1 lei (15%) national contribution.

The main beneficiary of the project is the Ministry of Administration and Interior, through the Central Unit for Public Administration Reform.

In order to establish a common approach and to find legislative solutions to be used in developing the Administrative Code, a *Working Group* was established, through Order no.84/31.03.2010 of the Minister of Administration and Interior. That Working Group was made up of representatives of Committees on Public Administration of the Chamber of Deputies and Senate, Legislative Council, General Secretariat of Government, Ministry of Justice, Ministry of Administration and Interior, National Agency of Civil Servants, Bucharest Prefect Institution, Association of Villages of Romania (AVR), Association of Towns of Romania (ATR), Association of Municipalities of Romania (AMR), National Union of County Councils of Romania (NUCCR), Transparency Romania, Academic Society of Romania, the Association for Implementing Democracy, the University of Bucharest, the Academy of Economic Studies from Bucharest.

The Working Group was tasked with ensuring a solid grounding for solutions promoted, based on the analysis of all the documents elaborated, formulating points of view, opinions and comments. Simultaneously, the *Working Group* had deliberative role in determining the codification variant, identifying areas subject to codification and marking guidelines in the development of the Administrative Code draft.

A technical support team also operated within the project, serving to provide technical and documentary support for the functionality with maximum efficiency, of the Working group.

Since the project aimed not only at systematizing and unifying the legislation and identifying faults and their corresponding legislative solutions, but also at creating the necessary conditions for implementation of new regulations, a *Target group* composed of 118 pilot institutions was established, including public authorities from central and local level, NGOs, institutions of superior education in the field.

Analyzing the alternatives for approaching the codification process proposed by the Central Unit for Public Administration Reform, in the Ministry of Administration and Interior and emphasizing that the development of the Administrative Code did not confine to a single Codex, the Working Group decided to launch a single bill, with the repealing of relevant regulations subject to codification, the updating and redrafting of rules, but also with the introduction of

new legislative solutions to cover the existing gap in the current regulation.

Five fields to be codified in the legislation were established during the Working Group meetings, namely:

• the central government
• the local government
• the government's staff
• the public and private property of the state and administrative-territorial units
• the public services.

In order to encode the regulations related to the five areas of activity, 306 laws have been analyzed; the conclusions were to propose the total or partial codification of 154 regulations. Those were deducted into areas subject to codification, being developed subsequently an extensive process to identify contradictions, duplications and inconsistencies between the regulations containing them, aspects that generated failures in the public administration practice.

The beginning of the project started for the codification of the public administration legislation covered three aspects[4]:

1. The study of malfunctions caused by regulations in force in the public administration field

2. The conclusions drawn from the interpretation of questionnaires on identifying disruptions in the public administration legal framework, contained in the Research Report

3. The comparative analysis of the public administration legal framework, at the level of EU Member States, with emphasis on the codification.

1. In the first stage, to have a clear image of the impact of the practical application of existing legislation on public administration, 22 meetings with representatives of authorities and institutions of central and local government belonging to the target group were organized.

At the same time, for an analysis of dysfunctionalities of the current legal framework incident to the public administration in Romania, an extensive consultation process with public authorities, academic environment and civil society, through a questionnaire was developed.

Thus, to identify problems faced by institutions and public authorities arising from the legal system and to acknowledge how they perceive the manner in which regulations are developed, during December 2010 - January 2011, the Central Unit for Public Administration Reform conducted a sociological research in the pilot institutions within the target Group.

[4] Summary - comprehensive document of results from the analysis phase of the legal framework of public administration developed in the project „A more coherent legal framework for a more effective public administration", p.5.

The study objectives aimed at:

- Knowing the points of view about the five fields of the public administration subject to the codification process
- Identifying the types of malfunctions of the legislation in these fields
- Determining the main causes of occurrence of these malfunctions
- Establishing key regulatory solutions to these problems, from the perspective of the surveyed institutions.

2. Following the gathering and interpretation of data obtained through the work instrument, a Research Report was issued; the report centralized the options expressed, and concluded the deficient aspects of the public administration practice.

As shown in this Report[5], *the data collection was heavily influenced by the degree of openness of the selected authorities / institutions before the approach initiated. The lack of collaboration between them and the non compliance with the time period required for data collection led to the gathering of a smaller number of questionnaires (48 institutions responded to the invitation).*

From the point of view of perception of regulations and their effects, most institutions expressed the opinion that the regulations from the public administration field adopted in the last four years have been poorly designed (64.60%), the five areas being characterized by a fragmentation of regulations and therefore, the effects could not be assessed as being largely positive.

The main malfunctions of the legislation in these areas are caused by the lack of consistency and clarity, the existing mismatches between the legal regulations, legislative instability, excessive bureaucracy and formalism, incomplete or deficient technical grounding, poor training of the staff from the public administration.

Regarding the comprehensive nature of legislation, the general trend expressed was negative, most affected being the fields of the staff from public administration and public and private property of the state and administrative-territorial units, while the local government legislation was considered to be the most comprehensive (39,60%).

In terms of how the law, subsumed under the five areas, can be applied, the responses obtained were not at all favorable, the legislation being considered cumbersome, with uncertainties, especially that relating to local government (77.10%), the majority of deficiencies being found at this level (87.50%), but also at central government level (70,70%). The absence of public policy, the adoption of regulations that could be brought to court, delays in drafting or ignoring quality management standards were also noted.

[5] Research Report - Analysis of malfunctions of the legal framework within the field of public administration developed by the Central Unit for Public Administration Reform in the Ministry of Administration and Interior, funded under Priority Axis 1, the major area of intervention 1.1. „Improving the decision-making process at political-administrative level" of the Operational Program Development of the Administrative Capacity, p.2.

For example, regarding regulations in local government, the study revealed mismatches between:

- Law no.215/2001[6] and Law no.393/2004[7], respectively Law no.161/2003[8] regarding the mandate termination, incompatibility cases and conflicts of interests in relation to provisions of Law no.144/2007[9] and Law no.176/2010[10]

- Law no.215/2001, Law no.393/2004 and Government Ordinance no.35/2002[11] on the functioning of local government's authorities

- Law no.215/2001 and Law nr.393/2004 on the County Council president and the deputy dismissal

- Law no.215/2001, Law no.351/2001[12] and Government Ordinance no.53/2002[13] on metropolitan areas

The Report noted, as possible measures to remedy malfunctions reported by questionnaire respondents, the correlation of regulations, completing the current legal framework, the unitary regulation, through consistent and complete rules to avoid the subjective interpretation and the need for codification of laws from the five areas of public administration.

To these were added: the need for correspondence between laws and social reality, the improving of the procedure for drafting regulations, the permanence of public consultations, ensuring transparency in the decision-making process, as well as the specialization of the staff from the public administration.

3. As for the comparative analysis of legal framework on public administration at the level of EU Member States, seven countries were selected: France, United Kingdom, Portugal, Netherlands, Germany, Poland and the Czech Republic. The

[6] Local Public Administration Law no.215/2001, republished in the Romanian Official Gazette, Part I, no. 123 of February 20, 2007, as amended and supplemented.

[7] Law no.393/2004 on the status of local officials elected, published in the Romanian Official Gazette, Part I, no.912 of October 7, 2004, as amended and supplemented.

[8] Law no.161/2003 on measures to ensure transparency in the exercise of public dignities, public functions and business environment, preventing and sanctioning corruption, published in the Romanian Official Gazette, Part I, nr.279 of April 21, 2003, with subsequent amendments.

[9] Law no.144/2007 on the establishment, organization and functioning of the National Integrity Agency, republished in the Romanian Official Gazette, Part I, nr.535 of August 3, 2009, as subsequently amended and supplemented.

[10] Law nr.176/2010 on integrity in exercising public functions and dignities, for amending and supplementing Law no.144/2007 on the establishment, organization and functioning of the National Integrity Agency and for amending and supplementing other regulations, published in the Romanian Official Gazette, Part I, no.621 of September 2, 2010.

[11] Government Ordinance no.35/2002 for the approval of the framework Regulation of the organization and functioning of local councils, published in the Official Gazette, Part I, No. 90 of February 2, 2002, approved by Law no.673/2002.

[12] Law no.351/2001 concerning the approval of National planning - Section IV Network of localities, published in the Official Gazette of Romania, Part I, no.408 of July, 24 2001, as subsequently amended and supplemented.

[13] Government Ordinance no.53/2002 on the Framework status of the administrative-territorial units, published in the Official Gazette of Romania, Part I, no.633 of August 27, 2002, approved by Law no.96/2003, as subsequently amended and supplemented.

study had the purpose to acknowledge the organization and functioning of public administration and their related legislation in those countries, and also the preoccupations about the initiative of encoding the legislation in the field of public administration. In general, the governments' concerns in legislative matters focused on reducing and simplifying the legislation, by creating a unified framework, easy access of citizens to laws and improvement of laws enforcement.

The analysis took also into consideration the findings, information and documentation gathered after two study visits to France and Portugal, which allowed the deepening of the phenomenon of reformation and codification of government's legislation in both states.

As shown in the study, concerning the codification initiatives at the level of some EU countries, *the options considered range from the development of unique laws in the field (Portugal), to collections of laws on fields (codices - France) and to the sector codification (France, Germany), but none of these states has a single Administrative Code to embrace in a consistent and systematic manner, the legislation from more areas of public administration*[14].

The justification would be the administrative phenomenon mobility that would lead to permanent legislative interventions, which, at some point, would hold back the knowledge and application of the rule in force, if the regulation were made through a single piece of regulation, encompassing several areas of activity.

However, we believe that a review and systematization of legislation, by creating a uniform legal framework, ensuring a unitary terminology and consistency in regulating, could determine a legislative stability, the strengthening of responsibility of those called to enforce the law and better accessibility and understanding of legal provisions.

In this respect, Professor Ioan Alexandru also argues *that a uniform legal terminology should be used, first in the code and then resumed also in special laws that will have to be harmonized with principle provisions of the Administrative Code*[15].

Since the sociological analysis identified a significant number of shortcomings in form and substance at the level of law applicable to the five areas subject to codification, benefiting from the information obtained in the analysis phase of the legislative framework, an *Opportunity Study* was developed, and three solution alternatives were proposed. The document was based on proposals made by experts and on the points of view expressed in workshops and roundtables by members of the Working Group and by representatives of the pilot institutions from the target Group.

If regarding the unification of legislation, the codification requires a limited effort, the same can not be said about the substance interventions on the

[14] Summary - comprehensive document of results from the analysis phase of the legal framework of public administration developed in the project „A more coherent legal framework for a more effective public administration", p.9.

[15] Mihaela Cărăușan in Coordinator Ioan Alexandru, Administrative Law, Third Edition, revised and enlarged, Bucharest, 2009, p.104.

legislation in force, involving fundamental decisions of public policy. From this point of view, the solutions proposed took into consideration the impact on the overall regulatory system, as well as on the institutional system.

The opportunity study was analyzed with the Working Group members and representatives of the Target Group in a *Forum to discuss* results of the grounding stage of the Romania's Administrative Code draft. During those discussions, in most cases, the alternative recommended by the opportunity Study was confirmed, but there were also situations in which the Forum recommended a different version, justifying with convincing arguments, the legislative solution proposed.

Based on the alternatives and structure of the Administrative Code accepted and endorsed by members of the Working Group, the technical support team went to drafting the Administrative Code. It is composed of six parts, beginning with specifying the object of regulation and the definition of terms and principles with which it operates. The meaning of certain terms and phrases is taken either from regulations related to the encoded areas or is the result of doctrinal development in the last two decades. There are defined the: *public administration, administrative act, public administration authority, public property, public domain, civil service, dignitary, public servant, public interest, public institution, public service*, etc.

The following five parts are reserved for each of the areas subject to codification. Thus, *the central government* is regulated in Part II. In the contents of some distinct chapters, rules on the Romanian President, Government, ministries, autonomous administrative authorities, the prefect and decentralized public services were found.

Among the issues that needed to be specifically clarified, are included those relating to the legal regime of acts issued by the Romanian President, incompatibilities and conflicts of interest concerning officials, to establishing functions and common tasks for ministries, creating a legal framework for the establishment of autonomous administrative authorities or for the decentralized public services.

Moreover, it was wanted to clarify the legal status of functions of the general secretary and general deputy secretary of the Government, starting from the role of the General Secretariat of the Government of institution responsible for ensuring the continuity of the carrying out of technical operations related to government acts, being the connecting and stability element of the government. Such problem had to be resolved, because Law no.90/2001[16] placed the two functions in the scope of political functions, while Law no.188/1999 on the Status of civil servants[17] placed them in the scope of public functions, placing them in the category of senior public officials.

[16] Law no.90/2001 on the organization and functioning of the Romanian Government and ministries, published in the Official Gazette of Romania, Part I, no.164 of April 2, 2001, as subsequently amended and supplemented.

[17] Law no.188/1999 on the Status of civil servants, published in the Official Gazette of Romania, Part I, no.365 of May 29, 2007, as subsequently amended and supplemented.

At the same time, through the Administrative Code are regulated: the ministerial responsibility issues, the categories of administrative acts issued by ministers and their applicable legal regime, as well as aspects concerning the prefect, as representative of the Government in the territory and the decentralized public services, as extensions of specialized central government at local level, responsible for the achievement of policies and government sector strategies.

Specifically, among regulations entirely codified, we remember provisions of Law no. 47/1994[18], of Law no. 90/2001 and of Law no.115/1999[19] and partly the provisions of Law no. 161/2001.

On the prefecture, Law no.340/2004[20] was also entirely codified, indicating that the only substantive change was aiming at reintroducing the compulsory preliminary procedure in the prefect's task before referral to the administrative court, measure that must, however be accompanied by a legislative intervention in this regard, on the Administrative Law no. 554/2004.

The third part of the Administrative Code draft is dedicated to *local government*. In this matter, the legal substance is rich in regulations, some of them even resulting in regulatory duplication, so the codification process is designed to achieve a legislative sanitation and a conjunction of regulations resumed.

The solutions proposed aimed at a number of issues concerning the functioning of deliberative authorities, clarifying the legal liability of local authorities in the development process and adoption/issuance of administrative acts, regulating a similar legal regime applicable to the mayor and to the county council president, and also at expressly establishing the legal regime of associations of intercommunity development and of metropolitan areas.

The following laws were entirely resumed for codification purposes: Law no.215/2001 on local government, Framework Law no.195/2006[21] on decentralization, Law no. 393/2004 on the status of local officials elected, Government Ordinance no. 53 / 2002 on the framework Status of administrative-territorial units.

The administrative-territorial division of the country was also wanted, through the Administrative Code draft, by repealing Law no.2/1968[22], adopted by the old regime, which exists for over 40 years.

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[18] Law no. 47/1994 on the organization and functioning of the Romanian Presidency, republished in the Official Gazette of Romania, Part I, no.210 of April 25, 2001, as subsequently amended and supplemented.

[19] Law no.115/1999 on ministerial responsibility, published in the Official Gazette of Romania, Part I, no.200 of March 23, 2007, as subsequently amended.

[20] Law no.340/2004 on the prefect and prefect institution republished in the Official Gazette of Romania, Part I, no. 225 of March 24, 2008, as subsequently amended and supplemented.

[21] Framework law no.195/2006 on decentralization, published in the Official Gazette of Romania, Part I, no.453 of May 25, 2006.

[22] Law no.2/1968 on the administrative organization of the territory of Romania, republished in the Official Gazette of Romania, no.55 of July 27, 1981, as subsequently amended and supplemented.

General issues relating to *public administration staff* can be found in Part IV of the Administrative Code draft. Since the legal provisions on functions of public dignity and of elected officials have been integrated in the parts reserved to central government, respectively to local government, here are found codified only those provisions defining the general criteria for establishing a legal regime for each function belonging to the categories of public administration staff.

The clarification of those issues was considered necessary, given that the legal regime applicable to different functions is extremely diverse, with fragmentations, even within existing staff categories of the government (public officials, civil servants and contractual staff).

Thus, these functions are occupied either after an electoral process or by appointment, while, depending on the particularity of public office holders' duties, general public functions and specific public functions are identified. In relation to the level of necessary studies, there are functions requiring higher education and functions requiring secondary education, and depending on powers conferred, there are public functions of management and public functions of execution.

In terms of regulation of the public function, we distinguish Law no.188/1999 on the Status of civil servants – as general law, and the special statutes, including derogations which are additional or complementary to regulations established by general law, in areas specifically and exhaustively provided by it.

Regarding the persons employed with individual employment contract, the core material is represented by Law no.53/2003- Labor Code[23], stating that this regulation makes no distinction between public sector and private sector employees.

The public and private property of the state and administrative-territorial units is contained in Part V of the Administrative Code draft.

The problems that were intended to be solved by developing the Administrative Code were:

- clear definitions for concepts such *general interest* or *public interest*
- clarification of the definition of *public utility*, by reference to the terms of *public use* and *interest* and that of *cause of public utility*
- unitary regulation of the legal regime of vacant heritage and of abandoned assets
- establishing the legal obligation for all managers of public assets, to write them down in the land Register
- the regulation of common criteria that are meant to ensure accurate records of the property belonging to the public and private domain of the State and administrative-territorial units.

Some proposals were correlated with changes brought to the new Civil Code, but others have covered even the need for legislative intervention in the text of this code, estimating that the provisions on public property of the state and

[23] Law no.53/2003 - Labor Code, published in the Official Gazette of Romania, Part I, no.345 of May 18, 2011.

administrative-territorial units should be included in the Administrative Code, and not in the Civil Code.

The Administrative Code draft contains, at the end, the framework regulation of *public services*. The last part of the Code has pursued, primarily to clarify the concept and the legal regime applicable to public services because, currently, there is no uniform definition of this concept[24]. The diversity and complexity of the public services categories require establishing a uniform method for defining the public service in relation to its general characteristics, following at sectoral level, that the legal status of each of them to be treated separately.

A uniform regulation of the principles underlying the organization and functioning of public services, as well as of the competence of local and central government authorities on the establishment and termination of public services in a functional meaning were also wanted. From the latter point of view, the powers granted can be: regulatory, monitoring and of control, of providing direct service.

There were also discussed funding issues in conjunction with EU regulations and the jurisprudence of the European Court of Justice concerning the rules on state aid, public procurement and internal market.

In developing the Administrative Code, it was envisaged that the proposed legislative solutions had to take into account the specific Romanian administrative system, the public administration authorities and the relationship between these, enshrined at constitutional level. There were also evaluated the effects that would occur by adopting the Administrative Code, conceived as a unified and coherent regulation meant to ensure predictability, but also stability of regulations, the citizen's accessibility and trust in an efficient and bureaucracy-free public administration.

The Administrative Code draft developed through the project „A more coherent legal framework for a more effective public administration" is a working version that can be improved and updated with the new changes occurred in the legislation, after its achievement. It can be adapted also for administrative-territorial reorganization, since the rules are systematized on subjects, allowing an easy intervention on the current legal codified texts.

We hope that the Administrative Code will open the prospect of a clear, concise and complete regulation of the numerous and diverse issues that the public administration in Romania are facing with, and that this legislative approach will be included among the priority concerns of the current government policy.

[24] Under article 2 paragraph (1) letter k) of the Administrative Litigation Act no.554/2004, with subsequent amendments, the *public service* is defined as *the activity organized or, where appropriate, certified by a public authority to meet a legitimate public interest*, while article 4 letter c) of the Law on public-private partnership no.178/2010 defines it *as all the actions and activities that ensure the needs of utility or of general public or local interest of communities*.

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Summary - comprehensive document of results from the analysis phase of the legal framework of public administration, developed in the project „A more coherent legal framework for a more effective public administration"

Legislation

EUROPEAN UNION INITIATIVES IN THE FIELD OF ELECTRONIC GOVERNANCE, VECTOR FOR THE MODERNIZATION OF NATIONAL PUBLIC ADMINISTRATION[1]

Constanța MĂTUŞESCU*

Abstract: *Electronic governance (e-government) is increasingly becoming a fundamental tool for enhancing public administration. Governments and public bodies have been fostering the development of e-Government services during the last decade, promoting more and better administrative services through digital channels. E-government is not only a tool or platform that enhances delivery of public services but also has the potential to reform the way policies are formulated and implemented in terms of efficiency, accountability, transparency, and citizens' participation.*

In Europe, e-government is considered to be one of the main goals for the future. The European Union put e-government on its agenda aiming to improve access to the public information and services, increase transparency of public administration, exploit effectively the information technology within public administration, and establishing e-procurement.

During the latest years, each EU Member State has taken significant steps toward the directions posed by the European Union. The development of the e-government services in the Member States, as it is expressed by the data regarding the supply and demand side, has been conducted in a more or less different manner that led, at the Union's level, to a relatively high availability but a rather low usage of the specific services.

There are numerous potential benefits of eGovernment, including greater efficiency, improved public services and enhanced engagement with citizens.

Keywords: *electronic government, European strategy of e-government, public administration*

1. Electronic government and public administration

The recent dynamic development of new information and communication technologies have changed significantly the everyday life of all the members of the society and offered the government new possibilities for providing citizens and businesses with better, more efficient services[2].

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[1] This work was supported by CNCS-UEFISCDI, project number PN II-RU, code 129, contract 28/2010.

[2] Verdegem, P., Verleye, G., *User-Centered E-Government in practice: A comprehensive model for easuring user satisfaction,* Government Information Quarterly, Vol.26, No.3, 2009, p. 487.

Representing in the general sense, „*the use of Information and Communication Technologies (ICTs) in public administrations combined with organisational change and new skills in order to improve public services and democratic processes and strengthen support to public policies*, e-Government has become a common element of government programs to modernize the administration[3] and a real challenge for democratic societies[4].

According to the United Nations, e-Government represents the capacity and willingness of the public sector to develop the use of information and communications technologies to improve service delivery to citizens, while the World Bank definition emphasizes that e-Government aims to provide an easier, cheaper and more transparent interaction between Government and citizens (G2C), government and companies (G2B) and government organizations themselves (G2G)[5].

One of the most complete definitions of the phenomenon of e-government in literature is given by Grant and Chau[6], according to which this is „A broad-based transformation initiative, enabled by leveraging the capabilities of information and communication technology; (1) to develop and deliver high quality, seamless, and integrated public services, (2) to enable effective constituent relationship management, and (3) to support the economic and social development goals of citizens, businesses, and civil society at the local, state, national, and international levels."

The implementation and deployment of information technology means first of all that we change the operational structure of the public administration[7] and its connection to the expectations of society, being less dependent on the technical means available.

The key concept of e-government is to improve the relationship and the streamline of the exchange of information between public sector - on the one hand and citizens and businesses, on the other. Electronic government means providing public services electronically to citizens and businesses, a more efficient and cheaper alternative that would allow the government to be closer to citizens and to adapt their services as required.

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[3] Eifert, M., Püschel, J. O, *National Electronic Government*, London: Routledge, 2004; Henman, P., *Governing electronically: e-government and the reconfiguration of public administration, policy and power,* Basingstoke: Palgrave Macmillan, 2010.

[4] For a detailed analysis of the concept of electronic government in Europe, see Paul G. Nixon, Vassiliki N. Koutrakou, Rajash Rawal, *Understanding E-Government in Europe: Issues and Challenges,* Routledge, London, 2010.

[5] Gottschalk P., *E-business strategy, sourcing, and governance*, Elsevier, 2006; The Working Group on E-Government in the Developing World: *Roadmap for E-Government in the Developing World*, Pacific Council on International Policy, 2002.

[6] Grant, G., Chau, D., *Developing a generic framework for e-Government*. Chapter 4 in G. Hunter and Tan F (eds) *Advanced Topics in Global Information Management*, Volume 5, 72-101. Idea Group: London, 2006.

[7] European Commission, ICT for Government and Public Services. Information Society, June 27, 2011, from http://ec.europa.eu/information_society/activities/egovernment/index_en.htm.

E-Government is a complex evolutionary process that covers all levels of government. Various maturity models are proposed and used for assessing the state of e-Government. Models describe a set of progressive phases through which the evolution may occur.

In general, it is estimated that there are five stages in the development of electronic governance, stages reflecting the degree of technical knowledge ability and the extent of interaction with the users: information dissemination (one-way communication), two-way communication, financial services and economic transactions, integration (horizontal and vertical) and political participation[8] .

In accordance with the model developed by the United Nations in the well-known e-Government assessments[9]: *the emerging stage* involves a simple online presence of the institution, *the improved stage* brings a number of additional information - documents, laws, reports that are archived and publicly available; *the interactive stage* marks the beginning of a portal, of a site not only of presentation and information but a useful site, with downloadable forms; *the transactional phase* shows the transformation of the way how institutions and citizens interact through online services including payment of fees, application for identity card, for birth certificates, renewal of licenses; and *the connected stage* is the most advanced form of electronic government, being individualized by making connections between local and central agencies, between institutions and citizens, between stockholders by addressing infrastructure compatibility issues.

A complete electronic government solution would meet the requirements such as: a single point of contact for electronic service delivery 24 hours a day, seven days a week; a bridge towards the digital society; the rebuilding of citizen's trust in the government; a faster economic growth; setting government policies and regulations; creating a more participatory form of governance, promoting distance learning solutions.

Being aware of the stakes of the information society in recent years, most governments have implemented action plans for e-government development, the objective consists in creating a better quality of administration at the same time based on information technology (IT).

For a successful implementation of electronic government it is necessary to define a coherent architecture of applications and a predefined set of generic services and tools for development, implementation and subsequent management applications. This architecture must be updated to ensure correspondence with user

[8] Moon, M. J., *The Evolution of E-Government among Municipalities: Rhetoric or Reality?,* Public Administration Review, 62(4), 2002, pp. 424-433; Stoica, V*, Ilaş, A., Romanian Urban e-Government. Digital Services and Digital Democracy in 165 Cities*, Electronic Journal of e-Government Volume 7 Issue 2 2009, pp. 171 - 182, available online at www.ejeg.com

[9] United Nations Department of Economic and Social Affairs, *UN E-Government Survey 2008 - From E-Government to Connected Governance*. United Nations, New York, 2008, p 16.

requirements and new technologies emerging, the innovation being essential for e-government progress[10].

For the local public administration, especially the one that operates on the principle of decentralization (local autonomy), the implementation of electronic government solutions (which should allow more effective interaction between officials and local politicians and citizens and a better consideration of their needs and concerns) is also an important issue given that the local decisions directly affect the daily lives of citizens in the most diverse areas.

Following a natural logic, e-governance should be built gradually, by accumulating a set of services based on public standards and protocols, often based on local experiences. In fact, in many cases, as is the case of Romania, the central character of the government still makes the adoption and implementation of electronic government solutions to be achieved through the central government and the measures to modernize local government by using ICT to be isolated and different, often based on autonomous activity in relation to financial capacity, human and technical resources that local authorities have. Most often the local self-governments log behind the central government in the application of e-government devices.

In addition, in Romania (as in most other new Member States), e-government is a relatively recent phenomenon. The practice and development of strategies and programs for e-government was determined in the first instance by the need to align with EU requirements in the field rather than specific needs identified in Romanian society.

2. European Union initiatives in the field of electronic governance

From the end of the nineties to the present, several strategic documents concerning the development of information society, e-Government issues and delivering online public services were adopted within the European Union. All these documents point to the fact that the European development strategy of information society and e-governance have evolved along with the Union, which has growth from the Economic Community into an entity very similar to the individual states which compose it.

The European Commission is actively supporting eGovernment both at the national level and at its own supranational level. The Vice-President for Administrative Affairs is responsible for the advancement of eGovernment at the Commission level through large-scale activities that implement the e-Commission strategy. The Information Society and Media Directorate-General and the Directorate-General for Informatics implement this strategy, through several programmes and related activities. In 2005, the Commission adopted a strategic framework, „e-Commission 2006-2010", aimed at becoming a first class e-

[10] United Nations, *UN E-Government Survey 2008...,* p. 69.

administration in order to improve its efficiency and transparency through the best use of Information and Communication Technologies (ICT).

The EU e-government strategy document adopted in April 2006 and titled „i2010 e-Government Action Plan: Accelerating e-Government in Europe for the Benefit of All"[11], committed all EU Member States to „inclusive e-Government objectives to ensure that by 2010 all citizens, including socially disadvantaged groups, become major beneficiaries of e-Government, and European public administrations deliver public information and services that are more easily accessible and increasingly trusted by the public, through innovative use of ICT, increasing awareness of the benefits of e-Government and improved skills and support for all users."

The Declaration concluded on 18 November 2009 at the Fifth Ministerial Conference

on e-Government held in Sweden in Malmo[12], defined the following priorities for Europe which Member States should jointly be striving for:

- Citizens and businesses are empowered by e-government services designed around users' needs and developed in collaboration with third parties, as well as by increased access to public information, strengthened transparency and effective means for involvement of stakeholders in the policy process.

- Mobility in the Single Market is reinforced by seamless e-government services for the setting up and running of a business and for studying, working, residing and retiring anywhere in the European Union.

- Efficiency and effectiveness are enabled by a constant effort to use e-government to reduce the administrative burden, improve organizational processes and promote a sustainable low- carbon economy.

- The implementation of the policy priorities is made possible by appropriate key enablers and legal and technical preconditions.

Ten years ago the different symposium of experts brought ideas of common electronic databases, implementation of Internet in the functioning of public administration[13], while also the common strategy and plans at the level of the European Union were adopted, as well as agreements on mutual cooperation on e-Government.

In March 2010, the European Commission launched the Europe 2020 Strategy[14] in view to exit the crisis and prepare the EU economy for the challenges of the next decade. Europe 2020 Strategy establishes a vision in order to achieve high levels of employment, a low carbon economy, productivity and social cohesion, to be implemented through concrete actions both at the EU and national levels. It requires ownership at top political level and mobilisation of all actors in Europe

[11] European Commission, Information Society , *"i2010 – A European Information Society for growth and employment",* (COM(2006)0173).

[12] Ministerial Declaration on eGovernment, Malmo, Sweden, (18 November 2009)

[13] See, *Visions and priorities for eGovernment in Europe: Orientations for a post 2010 eGovernment Action Plan*, European Commission eGovernment Sub-group, Working Paper (20 March 2009)

[14] Commission's Communication "*EUROPE 2020 – A strategy for smart, sustainable and inclusive growth*", (COM(2010)2020)

The Digital Agenda for Europe represents one of the seven flagship initiatives of the Europe 2020 Strategy, in view to define the key role of the use of Information and Communication Technologies (ICT). The Digital Agenda focuses on those aspects of Europe's competitiveness which involve digital economy. It outlines a set of policies and actions in order to"maximise the benefit of the Digital Revolution for all".

The European Commission aims to provide a new generation of services administration for e-businesses and citizens through its *E-Government Action Plan for the period 2011-2015*[15], based on the Malmö Declaration. The action plan identifies four policy priorities:

- improving relationships between citizens and the business sector;
- strengthening of the single market mobility;
- facilitate efficiency and effectiveness;
- creation of the key required for setting preconditions so that things happened.

The above-mentioned action plan contributes to a knowledge based, sustainable and inclusive economy for the European Union, as set forth in the Europe 2020 Strategy. It supports and complements the Digital agenda for Europe.

The Action Plan aims to maximize the complementarity of national and European policy that supports e-Government transition to a new generation of open, flexible, and in every field ready for the cooperation of e-Government at local, regional, national and European level, which will greatly improve the relationship that exists between citizens and the business sector.

According to the Committee of the Regions[16], the European eGovernment Action Plan can significantly help bridge the digital divide and achieve the objectives of the Europe 2020 strategy, while at the same time helping to fulfil a number of the key social, cultural and economic needs of the European public.

In accordance with the E-Government Action Plan for the period 2011-2015, it is therefore necessary for the Commission to set up a group of experts composed of the competent Member States' authorities, which are responsible for the eGovernment area, and to define its tasks and its structure. The 'eGovernment Group' shall be composed of the competent Member States' authorities. Each Member State authority shall nominate one high level representative. Then representatives shall be responsible for the national eGovernment strategies, able to ensure appropriate coordination between the national public authorities involved in the various areas covered by the eGovernment Action Plan.

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[15] European Commission: „The European E-Government Action Plan 2011-2015, Harnessing ICT to promote smart, sustainable & innovative Government", Brussels, 15 December 2010, COM (2010) 743.

[16] Opinion of the Committee of the Regions - The European Egovernment Action Plan 2011-2015, CdR 65/2011 fin

Established in early 2012[17], the Group's tasks shall be:

— to advise the Commission on strategic eGovernment issues in the context of the eGovernment Action Plan, and give input and suggest necessary adjustments to priorities, objectives and actions on the basis of the mid-term evaluation of the eGovernment Action Plan implementation,
— to assist the Commission in defining common targets for Member States for relevant actions of the Action Plan,
— to offer a forum for strategic discussions and for the exchange of experiences, with all Commission services involved,
— to exchange views on issues arising from the national eGovernment strategies, in the areas covered by the eGovernment Action Plan, in relation to achieving its objectives,
— to provide a forum through which Member States inform the Commission on Action Plan implementation progress in their country

The 'eGovernment Group' will liaise via the Commission with the 'High Level Group for the Digital Agenda' with the view of ensuring optimal implementation of the eGovernment actions.

The Commission may consult the 'eGovernment Group' on any matter relating to the implementation of the eGovernment Action Plan. The 'eGovernment Group' is chaired by a representative of the Commission.

3. Prospects for a „digital Europe"

The European Union initiatives in the field of electronic governance can significantly help bridge the digital divide, achieve the objectives of the Europe 2020 strategy and the modernization of national public administration.

The information society (IS) has been a tremendous accelerator of economic and social progress. Recognising this, all countries and regions worldwide include the enhancement of the IS in their development plans and, through public intervention, try to speed up the establishment of Information and Communication Technologies (ICT) infrastructure, support the creation of content, accelerate the services offered and support citizens in increasing their degree of utilisation. Europe is among the global pioneers in this respect and its agenda should be reinforced by the participation of local and regional authorities (LRAs)[18]. The Committee of the Regions notes that „the social partners, LRAs and governments need to work together to ensure that a virtuous circle of human resource upgrading, organisational change, ICT and productivity is set in motion and that ICTs are developed and used

[17] Commission Decision of 26 January 2012 on setting up the eGovernment Expert Group (2012/C 22/04), Official Journal of the European Union C 22/7, 27.1.2012.
[18] Opinion of the Committee of the Regions - The European Egovernment Action Plan 2011-2015, CdR 65/2011 fin

effectively. Policies aimed at enhancing basic literacy in ICT, building high-level ICT skills, fostering lifelong learning in ICT, and enhancing the managerial and networking skills needed for the effective use of ICT are particularly relevant and are among the core competencies of local and regional authorities"[19].

According to the ninth compared analysis Report concerning the e-government[20], released by the European Commission in February 2011, at the level of the 27 member states of the European Union the basic public services available online have grown from 69% in 2009, to 82% in 2010. The report indicates that the national public administrations are on the right track, but there still are numerous differences between the member states.

The barriers to eGovernment adoption are not necessarily only technological, but also organisational, political, legal and cultural, and that successful solutions and practices are usually highly dependent on local conditions

In an analysis of success factors of e-government in developing countries[21], have identified 6 success factors: changes in work process, technical/human resources, organizational culture/values, vision/strategy/internal leadership, external/financial support, and laws/regulations/policies.

Particularly two systemic barriers may occur in the way of effective implementation of e-government: the lack of coordination at european, national and local levels and the lack of systems interoperability.

One of the most important issues in e-governance is *the interoperability*. One of the major factors contributing to the success of e-governance is understood as interoperability of the systems understood as their ability to communicate with each other, both locally and internationally. Interoperability, within the context of European public service delivery, is the ability of disparate and diverse organisations to interact towards mutually beneficial and agreed common goals, involving the sharing of information and knowledge between the organisations, through the business processes they support, by means of the exchange of data between their respective ICT systems[22].

In line with *the European e-government action plan 2011-2015*, until 2013, the member states must align their national interoperability frameworks to the European level. All e-government solutions implemented must be embedded in a

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[19] Ibidem, point 33.

[20] Colclough, G., Tinholt, D. and Lörincz B., "*Digitizing Public Services in Europe: Putting ambition into action, 9th Benchmark Measurement"*, [*online*], Capgemini worldwide, 2010, http://www.capgemini.com/insights-and-resources/by-publication/2010-egovernment-benchmark/,

[21] Shin, S. , Song, H. and Kang, M., *"Implementing E-Government in Developing Countries: Its Unique and Common Success Factors",* Paper presented at the annual meeting of the APSA 2008 Annual Meeting, Hynes Convention Center, Boston, Massachusetts, *[online]*, http://www.allacademic.com/meta/p280176_index.html,

[22] Commission communication entitled 'Towards interoperability for European public services – European Interoperability Strategy (EIS) for European public services (Annex 1) and European Interoperability Framework (EIF) for European public services (Annex 2)' (COM(2010)0744), http://ec.europa.eu/isa/documents/isa_iop_communication_en.pdf

unit system with the appropriate links and connections to achieve compatibility of collaboration and information processing, according to their transfer both within the same institution, between central and local authority and at local level between local municipalities and other public institutions, between area institutions and the similar ones from other areas.

4. Conclusions

Modernization of administration presents a key element for ensuring efficiency, effectiveness and accountability of public administration in providing public services to the society and a critical part of state-building process due to the need for social development, economic[23].

E-Government has become an explicit component of public sector reform, as an instrument to increase efficiency, strengthen competitiveness and enhance modernization. In this context, the present paradigm on the use of IST in e-Government focuses on greater quality and efficiency in public services, mainly by delivering existing services through cheaper ICT-based channels of distribution or by complementing existing services.

In Europe, e-government is considered to be one of the main goals for the future. The European Union put e-government on its agenda aiming to improve access to the public information and services, increase transparency of public administration, exploit effectively the information technology within public administration, and establishing e-procurement.

During the latest years, each EU Member State has taken significant steps toward the directions posed by the European Union**.**

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PARENTAL LEAVE AND CHILD ALLOWANCE

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Nadia MASTACAN [**]

Abstract: *The legal work is a continuous character against successive execution. Romanian legislator has identified cases in which this work is suspended due to circumstances that do not allow the employee to carry on business lucrative. One such case is given a baby in the family and child needs to be cared for on a certain period of time.*
Keywords: *Leave, compensation, child, parents, social protection.*

I. The nature of legal

In order to improve program allowance for child[1] or, where appropriate, the monthly incentive insertion, it was reviewed taking into account the duration of the principles of finance and other European Union member states[2] have similar benefits[3] .

Because of difficulties to support social protection measures paid from the state budget in 2010, by Law no. 118/2010 on measures necessary to restore budgetary balance, as amended and supplemented, however, to maintain the grant of rights, to reduce the amount of regulated child allowance by 15%.

Given the target group covered by the provisions of this legislation, the minimum period necessary administratively to implement the proposed measures and the need to improve socio-economic balance of the family, through its support to increase child birth to stimulate growth and reduce child abandonment[4], parental leave is regulated by emergency Government Ordinance no. 148/2005 on family support sees bad child raising[5], published in Official Gazette no. 1008 of November 14, 2005 and Government Emergency Ordinance no. 111/2010 on parental leave and childcare allowance monthly, published in Official Gazette no. 830 of 10 December 2010.

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II. Conditions for gives:

Rules provide that the rights granted under the Emergency Ordinance no. 111/2010 on parental leave and childcare monthly allowance, the following person[6]s:

- any of the child's natural parents;
- Either spouse entrusted child for adoption or adopted child;
- the person who has the child in foster placement or emergency;
- professional foster its only natural or adopted children;
- the person who was appointed guardian.

Persons entitled shall be given rights under the emergency ordinance if they meet the following conditions[7]:

- are Romanian citizens or, as appropriate, foreign or stateless;
- permanent or temporary residence in Romania, according to law;
- live in Romania together with the child / children for seeking rights and dealing with growth and care of his / their.

Any of the categories mentioned above must be made for 12 months last year before her birth, income from wages, self-employment[8] income from agricultural income tax according to Law no. 571/2003 on Fiscal Code. The 12 months may consist entirely of periods in which people found themselves in one or more of the following situations[9]:

- received unemployment benefits, or have completed periods of contribution period in the public pension system;
- records were found in county agencies for employment, the Bucharest, to grant unemployment benefits;
- have received leave and health insurance benefits under the Emergency Ordinance no. 158/2005;
- have received sick leave and compensation for illness prevention and rehabilitation of work capacity, only for situations arising as a result of accidents or illnesses, according to Law no. 346/2002;
- have received a disability pension under the law;
- the interruption is temporary activity of the employer, without termination of employment, for economic, technological, structural or similar law;
- received the monthly allowance leave and parental leave[10];
- leave and received monthly allowance for disabled child[11];

[6]art. 1 alin. (1) lit. a) - e) din Normele metodologice de aplicare a O.U.G. nr. 111/2010.

[7] art. 1 alin. (2) lit. b) - d) din Normele metodologice de aplicare a O.U.G. nr. 111/2010.

[8] Cosmin Cernat*, Dreptul muncii,curs universitar, ediția a III a*, Editura Universul Juridic, Bucureşti, 2011, p. 353.

[9] art. 2 alin. (5) lit. a) - v) din O.U.G. nr. 111/2010.

[10] Alexandru Țiclea, *op.cit.*, p. 661

[11] Ion Traian Ştefănescu, *op.cit.*, p.370.

- have received unpaid parental leave12;
- is 3 months from the termination of a fixed-term employment and start another fixed-term employment contract;
- accompanied the husband / wife sent / sent on permanent missions abroad;
- have performed military service or voluntary, were concentrated, mobilized or prisoner;
- attend, without interruption, day courses of secondary education or, as appropriate, undergraduate studies at undergraduate or master, as well as postgraduate education at Masters, organized by law in the country or abroad, in an area recognized by the Ministry of Education, Youth and Sports, unless termination rates for medical reasons;
- the capacity of PhD, as provided by art. 20 and 21 of Government Decision no. 567/2005;
- is the period between the completion of a form of school education and start in the same calendar year, other forms of university education, on campus, organized by law, attended without interruption;
- is the period between graduation day of school education, organized under the law, and starting university, on campus, in the same calendar year;
- is the period between the completion of a form of higher education, full time, with or without a degree or diploma exam, and start the same calendar year, another form of higher education, full time, frequently without break;
- is the period between the completion of a form of tertiary education at undergraduate or master, as well as postgraduate education at Masters, on campus, and starting in the same calendar year, other form higher education studies at undergraduate or master, on campus, organized by law, attended without interruption;
- is the period between the completion of a form of postgraduate education, intramural, and start the same calendar year, other form of postgraduate education, training day, organized by law, attended without interruption;
- period is 60 days after completion of compulsory education courses or, where appropriate, the graduation day of high school and university studies at undergraduate or postgraduate Masters and Masters level, organized under the law with or without a graduation exam, for employment or, if necessary, shift in unemployment, calculated from the 1st of the month following completion of studies;
- have received paid leave to attend professional training courses by the employer or to which it has agreed, organized under the law;
- is the period between graduation day of medical education, organized under the law, license exam held its first session, and beginning of the first residency after graduation.

[12]Cosmin Cernat*, op.cit.,* p. 355.

III. Content of the regulated O.U.G. no. 111/201

The provisions of Emergency Ordinance no. 111/2010, individuals who are eligible can benefit from the following:

A. Parental leave under the age of one year and a monthly allowance amounting to 75% of the net income realized in the previous 12 months, which can not be less than 600 lei and no more than 3400 lei . After the child reaches the age of one year, those who opted for granting these measures are entitled to unpaid leave for child care until the age of 2 years[13].

B. Parental leave in the age of 2 years and a monthly allowance amounting to 75% of the net income realized in the previous 12 months, which can not be less than 600 lei and no more than 1 200 lei .

C. In the case of disabled children, leave parents who meet the eligibility criteria provided by law shall be granted for a period of three years, and the related allowance amounting to 75% of the net income realized in the previous 12 months, will be between 600 lei and 3,400 lei. However, the premium to return to work is ever done until the child reaches the age of 3 years.

Incentive insertion

People in the period they are entitled to receive parental leave under the age of one year and the related allowance, receive income subject to income tax[14], before the child reaches the age of one year, are entitled to a insertion incentive amount of 500 lei per month for the period remaining until the child reaches the age of 2 years. The relationship between the two rights (child allowance and incentive) is mutual exclusion. Thus, payment of compensation shall be suspended from the date of completion of work-related income taxable under the Tax Code, born of a vocation to the stimulus.

If the second option is chosen, for two years, the incentive will not be granted if the parents return to work sooner.

IV. Practical way of exercising the right covered by GEO no. 111/2010

A. Necessary documents for child-raising allowance

- application form;
- identity document (BI / CI / CIP parents, marriage certificate, birth certificates of all children) - original and copy;
- statement.

[13] Alexandru Țiclea, *op.cit.*, p. 661;
[14] Cosmin Cernat*, op.cit.,* p. 355.

For employees:
- type certificate issued by the employer, and upon fulfillment of legal conditions for the contribution period and achieved net income (12 months last year before childbirth);
- copy of the application submitted by the employer to grant parental leave to two (or up

to three years for disabled children);
- addendum and / or decision to suspend the employment contract, starting at the earliest, the 43rd day of life or after maternity leave, the original or certified copy.

For people who received income from independent activities:
- decisions of income tax and certificates issued by tax authorities for the last 12 months before childbirth;
- certificate of tax;
- documentary proof to suspend work during parental leave;
- For lawyers, the demand on: statements 200 and 220 and certificate issued by the Bar.

2. Realization of income while

Can apply for child allowance income persons who had business income tax for a period of 12 months in the year prior to childbirth, such as developed in section granting conditions.

To the extent that the monthly leave and parental leave is requested during the month, when calculating the 12 months to include fractions of a month that have made professional incomes subject to income tax, which is considered month. In situations where birth occurs prematurely, the stage needed to open the right is reduced to the period from the date of birth of the child and the presumed date of birth, certified health care provider.

3. Number of births

Leave, and the monthly incentive is given for each insertion[15] of the first three births or, where appropriate, for the first 3 cases of adoption. The duration of leave is four months and granted full once each child's natural parents[16] or, where applicable, guardians or persons who receive children for adoption or placement in the period until the child reaches the age of 2 years and 3 years of age, if a disabled child.

Stillborn child or situation where he dies in the corresponding period maternity leave is not taken into account in establishing the first three births for which it is granted.

[15] Cosmin Cernat*, op.cit.,* p. 355;
[16] Ion Traian Ştefănescu, *op.cit.*, p.370

Births is calculated as of 01.01.2006. In other words, a person who has received the monthly leave and parental leave 3 children before 01.01.2006 will be able to apply this law for another three children, if the conditions required by law.

4. Payment

The monthly allowance for child support and incentive from the state budget is being paid by county social services agencies.

Payment[17] is made following a decision by the Executive Director of county agencies for social benefits in the month following application approval.

Payment is made monthly by bank transfer, postal order or personal account of the beneficiary.

To the extent that payment is not made directly to the holder of his home, it will be done to address the legal representative or agent.

In this respect, since claiming that is personal or legal representative, that the trustee will file contains documents showing their quality.

4. A. Moment of which is paid monthly child allowance:

a) The termination date of granting leave and maternity allowance. Payment term is subject to submitting your application right up to within 60 working days.

b) The child's birth date, if the conditions for granting maternity leave. In this case the right is granted from the date of birth of the child, as the application is submitted within 60 days from now. It assimilates the birth child: date of adoption, date of establishment of guardianship, placement date, time custody.

c) The filing date, if not met deadlines for 60 days.

4. B. Conditions which affect the granting of rights

a) Events whose production ceases after the monthly child allowance:
- age of 2 years and 3 years for children with disabilities;
- death of child.

b) suspend payment of Events:
- the beneficiary is deprived of parental rights[18];
- the beneficiary is removed by law from exercising guardianship;
- the beneficiary no longer meets the conditions prescribed by law for custody of the child for adoption[19];
- the beneficiary no longer meets the conditions prescribed by law to maintain the easure of placement;
- beneficiary serving a sentence of imprisonment or detention in custody for more than 30 days;

[17] art. 9 alin. (3) din O.U.G. nr. 111/2010.
[18] art. 11 lit. a) - b) din O.U.G. nr. 148/2005.
[19] art. 12 alin. (1), lit. a) - g) din O.U.G. nr. 148/2005.

- the child is abandoned or is hospitalized in a public or private care institution;
- the beneficiary died. To the extent that the occurrence of such suspension or termination to generate payment rights under the ordinance, the beneficiary shall notify in writing the mayor change occurred. Communication requirement must be fulfilled within 15 working days after the occurrence to be notified.

Shall be sent by the municipality social services agency within 5 working days of registration. To the extent there is a state of suspension of rights related to child aged up to 2/3 years the same rights can be requested by a person entitled, eg the other parent. In this case, the applicant must meet the requirements of the Ordinance itself no. 148/2005, citing a personal right. Now that would entitle the applicant is given the new suspension.

If death occurs concrete parent who qualify for the leave and receive the allowance, that the incentive of insertion, and the other parent does not comply with the law, the surviving parent is entitled, upon request of parent rights died[20]. Resumption of payment of such duties is on request. The application shall be submitted within 60 working days from the date of suspension of payment. In case of exceeding this time, the granting of rights is the filing date.

V. Special situations related to the right covered by GEO no. 111/2010

A. Existence of several children born in the same task

Monthly allowance provided by law shall be increased by 600 lei for each child born of a twin pregnancy of triplets or multiplets, since the second child coming from such a birth[21].

Birth of a new child during parental leave. A new element is the provision of an additional amount of 600 lei monthly parent is the child care leave in accordance with EO no. 111/2010, and where a second child is born during the holidays. For example, if the second child was born two months before completing their first child care leave (leave any option chosen by parents), the parent will receive the allowance for these two months of growth associated with the first child and additional amount of 600 RON per month for the second copies[22]. In this situation, once the period of leave granted for the first child, parent leave is granted and the allowance for the second child, depending on the option you choose (1 year leave, leave allowance between 600-3400 USD or 2 years , allowance between 600-1200 USD).

[20] art. 12 alin. (5) si (6) din O.U.G. nr. 148/2005.
[21] Legea nr. 239/2009, publicata in Monitorul Oficial nr. 403 din 15 iunie 2009.
[22] Cosmin Cernat, *Armonizarea dreptului intern cu dreptul comunitar al muncii,* Editura Cermaprint, Bucureşti, 2007, p.276;

VI. As compared

The European Union, the period during which parental leave varies, being at least 3-6 months (Belgium). Some states grant such leave until the child reaches the age of 4 years (Czech Republic). Most states have established this form of protection granted leave until the child reaches the age of 2 years (Austria, France, Norway and Hungary - some practice various conditions).

The amount of compensation varies depending on the child's age, birth rank, the income of parents and even the type of employment contract had a parent or complete or partial interruption of professional activity (Belgium, France), the level of budget deficits, etc.

In Austria is given whether or not self-employed, a daily rate of 14.53 euros to 30 months old child. If twins are granted an additional 50% of value.

In Belgium, leave and child allowance is granted from the asiguratoriu, only those employed in public or private interrupt their work to take care of children:

- 3 months of leave to interrupt a full-time, before reaching the age of 6 years children;
- 6 months of leave to interrupt a part-time work before reaching the age of 6 years children;

The amounts are differentiated by complete or partial interruption of professional activity:

- Break total: 684.94 euros;
- partial interruption: between 342.46 (for persons under the age of 50 years) and 580.90 euros (for people older than 50 years).

The Czech parental allowance is paid from taxes through a contributory system and is provided to persons dealing with child care. Work allowed the parent to receive this allowance, if child care is provided by another adult. Is given in three installments, which are set in fixed monthly amounts depending on the duration:

- Provide parental allowance fast - immediately after the payment of maternity benefits or equivalent benefits, provided the father, to a high (11.400 CZK) (approx. 425 euros) to the child reaching the age of 2 years;
- Provide parental allowance standard - immediately after the payment of maternity benefits or equivalent benefits, provided the father, at a rate of 7.600 CZK (approx. 283 euros) to the child reaching the age of 3 years;
- Provide parental allowance aa stages - immediately after the payment of maternity benefit or equivalent benefit, granted the father's or child's birth date if there is no entitlement to maternity allowance at a rate of 7.600 CZK (approx. 283 euro) child until he reaches the age of 21 months or at a reduced rate of 3,800 CZK (approx. 142 euros) to the child reaching the age of 4 years.

In France, the compensation is conditioned by previous work childbirth. The total amount of allowance is EUR 530.72. The amount is part of 403.56 euros for a half-time activities. Be given a supplement amounting to 758.95 euros for complete suspension of business. The amount paid to a person who takes care of a child

under age 3, varies according to income family. Daily allowance for the presence of parents is given for 310 days and can be paid over 3 years depending on the needs of the child. The amount rises to 39.58 euros / day and increased to 47.02 euros an amount is given for raising a child alone.

In Norway, the allowance is granted for the care children aged 1-3 years. The amounts are differentiated by the number of hours / week spent in a nursing home: up (0:00) 3303 NOK (€ 402) - minimum (25-32 hours) NOK 661 (€ 81).

The Hungarian state child allowance is provided to persons with at least 180 days of insurance during the last two years before childbirth. The child must live with family and a parent must stay home with the child. The benefit is given to the child reaching the age of 2 years and 70% of the average daily gross income of the previous year, up 70% of the minimum wage of HUF 91,700 double (€ 365).

Conclusion

As mentioned at the beginning of work, improving program Allowance for childcare or where appropriate, adopting incentive and implementation of Government Emergency Ordinance no. 148/2005 and Government Emergency Ordinance no. 111/2010, the Romanian legislation has made uniformity compared to other European countries and their systems.

It should be noted that one of the main reasons is to alter the growth of birth, as polls show that the increase of mortality is about 2% higher than birth.

Also extremely important for employee receiving monthly leave and parental allowance is that the duration of leave and for 6 months after return to work, it can not be fired, this measure protection are included as Government Emergency Ordinance no. 111/2010 and the Labour Code and Law no. 188/1999.

Being under the rule we apply two legal acts regulating the same subject, that the Government Emergency Ordinance no. 111/2010 and Government Emergency Ordinance no. 148/2005, is generated not only double regulation and ambibuități, breaking the framework legislation on rules of legislative technique.

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THE UNDERTAKING IN THE CONCEPTION OF THE NEW CIVIL CODE AND OF THE SPECIAL COMMERCIAL LAWS

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Abstract: *The New Romanian Civil Code was based on the monist conception of an unitary regulation of the relationships of private law. The undertaking is a concept newly launched by the New Romanian Civil Code, as a legal organization form of the civil or commercial activity. It is juridically determined by explaining what the meaning of the „exploitation of an undertaking" is and by several rules derogatory from the common law on the „presumption of solidarity", the „quality of representative", the „placement in default by right", when these are related to the exercise of the activity of the undertaking. The elements making up the concept of undertaking in the vision of the New Romanian Civil Code are as follows: it is a systematic activity organized and carried out by the professional, natural or legal entity, on his/her own risk; the object of the undertaking consists in the production, administration or alienation of goods or in the performance of services; the purpose of the undertaking may be profitable or non profitable. The undertaking may be of several types, according to the criterion by which the determination is made. According to the purpose, the undertaking may be profitable (commercial) or non profitable (civil). According to the object, the undertaking may produce goods; exchange and circulate goods; perform services. According to the number of persons organizing the undertaking, there may be an individual undertaking or a collective undertaking. The commercial undertaking is a specific category of undertaking regulated both by the norms of the New Romanian Civil Code, and by the norms imposed in the special commercial laws. It has as its purpose getting profits, and its holder is a professional - trader. In the special commercial laws, the undertaking is also qualified as a subject of law and has also other terminological hues (e.g.: undertaking in difficulty; insolvent undertaking).*

Keywords: *undertaking; professional; commercial undertaking; undertaking in difficulty.*

I. The notion of undertaking

1. Preliminary elements.

Trying to unify the rules of the private law, the Romanian New Civil Code[1] launched many new concepts, among which also those of „undertaking", „professional", „entrepreneur", „economic operator".

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[1] The New Civil Code was adopted by the Law no. 287/2009 on the Civil Code and was put in application by the Law no. 71/2011 for putting in application of the Law no. 287/2009 on the Civil Code.

The article 2 of the New Romanian Civil Code specifies that it is made up of a number of rules representing the common law for all the fields to which the letter or the spirit of its provisions refer and that, by these rules, the patrimonial and non-patrimonial relationships among persons as subjects of civil law are regulated.

Having at its basis the monist conception of lawmaker of the relationships of private law, the New Romanian Civil Code meant to incorporate in a single code the regulations concerning persons, family relationships and commercial relationships. The success of such a step is partial at first sight, as many regulations in commercial matter remained outside the New Romanian Civil Code, i.e.: regulations on traders (trade companies; cooperative companies; autonomous agencies; national companies and enterprises; groups of economic interest); the traders' professional obligations (the obligation of registration and advertising by the trade register; the obligation to organize and keep the records; the obligation to exercise the trade within the limits of the loyal competition; the obligation to exercise the trade complying with the consumers' rights); the traders' insolvency; the credit instruments; the capital market; certain commercial agreements (leasing; franchise; factoring).

It is not less true that the regulations of labor law which also belong to the private law were not included at all in the New Romanian Civil Code.

Concerning these omissions, there are already opinions expressed in the juridical literature, in the sense that we are in the presence of a failure[2] of the monist theory in the unitary regulation of the private law.

The undertaking as a new legal institution, launched by the New Romanian Civil Code, represents the legal organization form of the civil or commercial activity.

2. Legal determination and definition of the undertaking in the New Romanian Civil Code.

The legal determination of the undertaking is made both by the provisions of the New Romanian Civil Code, and by those of other special normative acts.

The article 3 (3) of the New Romanian Civil Code defines the operation of an undertaking as follows: „The operation of an undertaking is the systematic performance by one or more persons of an organized activity consisting in the production, administration or alienation of goods or in the performance of services no matter if it has or not a profitable purpose".

The article 1297 (2) of the New Romanian Civil Code, on not showing the quality of representative, stipulates that „if the representative pretends to be the holder of the undertaking when he/she contracts with the third party within the limit of the granted powers, on behalf of the undertaking, the third party who

[2] Buta, Gh., *Noul cod civil şi unitatea dreptului privat, în Noul Cod civil. Comentarii*, Ed. Universul Juridic, Bucharest, 2011, p.62; Piperea, Gh., *Drept comercial. Întreprinderea în reglementarea Noului Cod civil*, Ed. C. H. Beck, Bucharest, 2012, p. 5.

discovers afterwards the identity of the real holder may also exercise against the latter the rights he/she has against the representative".

Concerning the delay by right in the execution of the obligation, the article 1523 (2), letter d stipulates that the debtor is in delay by right when „the obligation to pay an amount of money, assumed in the exercise of the activity of an undertaking, has not been executed".

Concerning the presumption of solidarity, the article 1446 of the New Romanian Civil Code stipulates that „the solidarity is presumed among the debtors of an obligation contracted in the exercise of the activity of an undertaking unless otherwise stipulated by the law".

Concerning the terminological hues of that the New Romanian Civil Code assigns to the notion of undertaking, the following problems[3] come out: if the undertaking is an activity or a subject of law; if the operation of the undertaking is made only by the holder or by other persons, too; if other persons than the holder also get the status of professional as effect of the operation of the undertaking.

For the first problem, we consider that the undertaking is an activity, a form of organization of an activity with a profitable or non profitable purpose, made by the professional, natural or legal entity.

The expression „operation of an undertaking" refers to the organization and development of an activity by the professional, natural or legal entity, and to the benefit of its results.

This concept was taken over from the Romanian Commercial Code, abrogated at the moment, and promoted by the article 3 in which the following were considered as acts of trade: the undertaking of supplies (point 5); the undertaking of public shows (point 6); the undertaking of commissions (point 7); the undertaking of buildings (point 8); the undertaking of factory, manufacturing and printing house (point 9); the undertaking of publishing house, book shop and art objects, when another person than the author or the artist sells (point 10); the undertaking of transport of persons or things on water or on land (point 13).

In the assessment of the concept of undertaking, as regulated in the commercial code, it was appreciated in the juridical literature[4] in matter that the undertaking is an organized activity, whose purpose is the production of goods, the execution of works and the performance of services.

So, the undertaking, in the conception of the New Romanian Civil Code, is an organization form of an activity and not a subject of law.

For the second problem, we consider that the valorization, the operation of the undertaking is made only by its holder, as he/she is the one who assumed the risk of its organization and is the one who benefits from its results.

[3] Buta, Gh., *cited works,* 2011, p. 58.

[4] Cărpenaru, S. D., *Drept comercial român*, Ed. Universul Juridic, Bucharest, 2007, p. 42; Cărpenaru, V., *Drept comercial român*, Ed. Universitaria, Craiova, 2003, p. 90; Schiau, I., *Drept comercial*, Ed. Hamangiu, Bucharest, 2009, p. 68; Jorje, M., *Droit des affaires*, Armand Colin, Paris, 2001, p.153.

The other persons, i.e. the employees, the professional's representatives are auxiliary to him/her and only contribute to the accomplishment of the object of the undertaking, which is a component of its operation.

We consider that the term „operation" has the meaning of carrying out the activity in all its extension, from organization to the harvest of the results, and not only of a segment of the object of the undertaking.

Concerning the third problem, we appreciate that other persons than the holder of the undertaking who contribute to the accomplishment of its object may not acquire the quality of professional, as these have an auxiliary status, and their activity is not carried out on their own behalves, but on behalf of the professional.

They cannot be assimilated to persons who operate the undertaking, as this quality belongs only to the holders who organize the undertaking, who valorize the capital, goods and who pursue a profitable or non profitable purpose.

The following elements must be taken into account to determine the concept of undertaking related to the terminological hues assigned by the provisions of the New Romanian Civil Code.

First of all, the undertaking is an activity systematically organized and carried out by the professional, natural or legal entity, on his/her own risk.

Second, the object of the activity organized consists in the production, administration or alienation of goods or in the performance of services.

Third, the organized activity may have or not a profitable purpose.

So, the undertaking is a legal form of systematic organization of an activity by the professional, natural or legal entity, or by an entity with no legal personality, having as object the production, administration or alienation of goods or the performance of services with a profitable or non profitable purpose[5].

II. Categories of undertakings according to the New Romanian Civil Code.

1. Identification of the undertakings.

The New Romanian Civil Code does not specify which the categories of undertakings are.

Still, there is a determination of them according to purpose of the undertaking, its object and the number of persons organizing[6] it.

2. Classification of the undertakings.

According to the regulations of the New Romanian Civil Code and according to certain criteria, the undertakings may be classified in several categories.

[5] See also Cărpenaru, S. D., *cited wor*ks, 2007, p. 42; Găină, V.S., *cited works*, 2003, p.90; Schiau, I., *cited works*, 2009, p.68; Piperea, Gh., *cited works,* 2012, p. 36; Nemeş, V., *Drept comercial*, Ed. Hamangiu, Bucharest, 2012, p. 18.

[6] Art. 3 of the New Romanian Civil Code.

According to the purpose of the undertaking, these may be undertakings with a profitable (commercial) purpose, which pursue to get a profit, and undertakings with a non profitable (civil) purpose, which are non-profit.

According to the object of the undertaking, there may be undertakings for producing goods, undertakings for trading goods and undertakings for performing services.

According to the number of persons organizing the undertaking, this may be an undertaking organized by a single person or an undertaking organized by several persons.

III. Commercial undertaking - specific category of undertaking

1. Regulation of the commercial undertaking by special laws.

In the special commercial laws, the undertaking is regulated and established both as activity, and as subject of law.

According to the article 2, letter f of the Emergency Governmental Ordinance no. 44/2008 on carrying out economic activities by the authorized natural entities/ free lancers, the individual undertakings and the family undertakings, the economic undertaking is the economic activity carried out in an organized way, permanently and systematically, combining financial resources, attracted workforce, raw materials, logistical means and information, on the entrepreneur's risk, in the cases and under the terms provided for by the law.

In the conception of the Emergency Governmental Ordinance no. 44/2008, the economic undertaking may be individual or family and has no legal personality. It may have as its holder an entrepreneur natural entity or the latter together with his family. For participating to the legal relationships, the individual or family undertaking uses the legal personality of its holder.

In another conception, i.e. that of the article 2 of the Law no. 346/2004 on the stimulation of the incorporation and development of the small and middle undertakings, the undertaking is any organization form of an economic activity and authorized, according to the laws in force, to do acts and deeds of trade[7], in order to get a profit, in conditions of competition, respectively: trade companies; cooperative companies; natural entities independently carrying out economic activities and family associations authorized according to the legal provisions in force.

In this vision, the undertaking is considered a subject of law, an entity with legal personality. An extra proof that this is the interest of the undertaking, i.e. of subject of law, is represented by the following provisions of the Law no. 346/2004.

The article 4 of the Law no. 346/2004 establishes that, according to the yearly medium number of employees and the net yearly turnover or the total assets held

[7] According to art. 8 (2) of the Law no. 71/2011, the expressions of trade acts, were replaced with the expressions production activities, trade and services provision.

by them, the undertakings are classified in: micro-undertakings, having more than 9 employees and making a net yearly turnover or holding a total number of assets up to 2 millions EURO, equivalent in ROL; small undertakings, having between 10 and 49 employees and making a net yearly turnover or holding a total number of assets up to 10 millions EURO, equivalent in ROL; middle undertakings, having between 50 and 249 employees and making a net yearly turnover up to 50 millions EURO, equivalent in ROL, or holding a total number of assets not exceeding the equivalent in ROL of 43 millions EURO; great undertakings which are over the above-mentioned criteria.

According to their relationship with other undertakings, concerning the capital or the rights to vote held or the right to exercise an influence, there may be 3 types of undertakings[8]: connected undertakings, having domination relationships among them, in which one holds the majority of the rights to vote in the other one; partner undertakings, which are not connected, but among which there are coordination or subordination relationships, in which one holds individually or in common with others at least 25% of the registered capital or of the rights to vote; autonomous or independent undertaking, which is neither connected, nor partner, in the sense that no undertaking holds more than 25% of the registered capital or of the rights to vote of the undertaking in case.

2. Elements of the commercial undertaking.

The commercial undertaking, as legal organization form of an economic activity has the following elements: the autonomous organization with the help of the production factors (capital; workforce; natural means) and the coordination on the risk and the responsibility of the professional trader, natural o legal entity, having the quality of trader, of certain economic activity; the object of the activity consisting in the production, administration and circulation of the goods; the execution of the works or performance of services; the purpose of carrying out the economic activity is to get a profit.

a. Systematic organization.

The commercial undertaking is an economic structure, a business[9] systematically organized by the professional trader, on its own risk and responsibility. He/she employs various factors in the organization and operation of the undertaking.

The human factors[10] employed in the organization and operations of the undertaking are the professional, the staff of the undertaking, the business partners and the customers who ask for the services of the undertaking.

The professional trader, natural or legal entity, is the one who takes the initiative to organize the undertaking and who assumes the risk of the patrimonial

[8] See art. 4 of the Law no. 346/2004.
[9] Piperea, Gh., *cited works*, 2012, p.37.
[10] Schiau, I., *cited works,* 2009, p.72.

or social consequences implied by the organization and operation of the undertaking.

The staff of the undertaking is made up of those who are employees, administrators or representatives of the professional-trader, who are involved, according to their position, in the organization and operation of the commercial undertaking.

The trade partners are those who enter in specific relationships with the undertaking, i.e. of sale-purchase; intermediation; crediting, and so on.

The customers of the undertaking are made up of the persons who ask for the products and services supplied by the undertaking.

The material factors of the undertaking consist in the movables and immovables that the professional trader employs for the organization and operation of the undertaking. The capital or financial funds represent, along with the material factors, the patrimonial support of the undertaking, without which the undertaking could not achieve the object and its purpose.

b. Object of the commercial undertaking.

The object of the commercial undertaking consists in the conclusion of certain juridical deeds and the performance of certain juridical and commercial deeds, which, generically, may be called commercial juridical deeds.

The expressions „acts of trade" and „deeds of trade" were replaced in all the normative acts in force with the expression „activities of production, trade or performances of services"[11].

As the New Romanian Civil Code established the regulation unit of the juridical patrimonial and non-patrimonial relationships[12], when determining the object of the commercial undertaking, we must take into account both the object of the undertaking, as regulated in this normative act[13], and the special Regulations in commercial matter[14].

Whereas, the commercial undertaking has as its object the following: production of goods; administration of goods; alienation of goods; performance of services; execution of works; exchange and circulation of goods.

The production of goods may have various forms, as the creation of goods in a manufacturing or factory system; constructing buildings.

The administration of goods may have the form of the activity of renting, concession, lease of goods, leasing, and franchise.

The alienation of goods may have the form of sale-purchase, assignment, exchange of goods.

The performance of services may be made under the form of transport, supply of utilities, organization of shows, conclusion of insurances, depositing of goods.

[11] See art. 8 (2) of the Law no. 71/2011.
[12] See art. 2 of the New Romanian Civil Code.
[13] See art. 3 (3) of the New Romanian Civil Code.
[14] See art. 2, letter a of the Emergency Governmental Ordinance no. 44/2008.

The execution of works may be materialized in the contract agreement, the subcontract agreement.

c. Purpose of the commercial undertaking.

The purpose of the commercial undertaking is to get a profit. The commercial undertaking differs from the civil undertaking by its purpose.

3. Definition of the commercial undertaking.

The commercial undertaking is the juridical form[15] of systematic organization or exercise by the professional - trader, natural or legal entity, with the help of the production factors, on his/her own risk and responsibility, of an activity of production, administration or circulation of goods, execution of works, performance of services with the purpose to get a profit.

IV. Specific valences of the concept of undertaking

1. Preliminary elements.

The concept of undertaking is identified in the special situations in which the undertaking may enter by specific valences.

There are special regulations qualifying the undertaking according to the specific situation in which it is.

Such qualifications are as follows: undertaking in difficulty[16]; insolvent undertaking[17].

2. Undertaking in the difficulty.

The art. 3, letter b, of the Law no. 381/2009 on the introduction of the arrangement and of the ad-hoc mandate establishes that „the undertaking in difficulty is the undertaking whose potential of managerial and economic viability is in an increasing dynamics, but whose holder performs or is able to perform due obligations".

The undertaking in difficulty is considered[18] a business provoking losses and which may lead to bankruptcy.

The undertaking in difficulty is characterized by: decreasing dynamics of its economic potential; deficient managerial potential; existence of a recovery premise and of the execution of the due obligations by inner measures or by external support.

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[15] See also: Cărpenaru, S.D., *Drept comercial român*, Ed. Universul Juridic, Bucharest, 2007; Piperea, Gh., *cited works*, 2012, p.36; Schiau, I., *cited works*, 2009, p. 70; Nemeş, V., *cited works*, 2012, p. 18.

[16] See art. 3 of the Law no. 381/2009 on the introduction of the arrangement and the ad-hoc mandate.

[17] See art. 3, point 1 of the Insolvency Law no. 85/2006.

[18] Piperea, Gh., *cited works*, 2012, p.38.

The safeguarding of the undertaking in difficulty has as its purpose the continuation of its activity, the maintenance of the jobs and the coverage of the receivables on its holder by amicable procedures of negotiation of the receivables and of their terms.

3. Insolvent undertaking.

The insolvent undertaking is the one in which the state of the debtor's patrimony is characterized by the insufficiency of the funds for the payment of the due debts. The situation of the undertaking is so serious, that it must be put under the protection of the Court and under the creditor's control.

The insolvent undertaking may enter reorganization based on a plan elaborated and approved to this end or bankruptcy, i.e. winding-up by the Court.

It receives a special juridical treatment, regulated by the Insolvency Law no. 85/2006.

If the undertaking gets to insolvency due to the juridical deeds fraudulently concluded by the members of the managing[19] or surveying board and by any other persons, these may be liable for part of the debtor's liabilities which remained uncovered of the capitalization of its goods.

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*** Emergency Governmental Ordinance no. 44/2008;
*** Law no. 71/2011 for putting in application of the Law no. 287/2009 on the Civil Code;
*** Law no. 381/2009 on the introduction of the arrangement and the ad-hoc mandate;
*** Law no. 85/2006 concerning the insolvency.

[19] See art. 138 of the Insolvency Law no. 85/2006.

ENCODING THE RIGHT TO THE TRIAL OF THE CIVIL CASE WITHIN AN OPTIMUM AND FORESEEABLE TIMEFRAME

Maria FODOR[*]

Abstract: *The trial of the civil case within an optimum and foreseeable timeframe represents a new objective for the judicial systems, appreciated by the European Commission for the Efficiency of Justice (C.E.P.E.J) as being necessary to eliminate the endemic evil, consisting of the excessive length of the justice procedures and recommended for the jurisprudence of the European Court of the Human Rights (C.E.D.O).*

Keywords: *term, reasonable; optimum; foreseeable*

1. Preliminary

The slowness with which the civil cases are being judged is a deficiency of the justice everywhere, punished in many times by the European Court of Human Rights[1] because, regardless how fair a decision may be, its preventive-educative effect can be accomplished only to the extent in which holding liable for and determination of the rights or legitimate interests takes place at a date closest to the moment in which the law has been infringed.[2]

It has been considered that the delays in the administration and distribution of justice represent a denial of the justice, fact often expressed by the saying „Justice delayed is justice denied".[3] This is also the reason for which the Committee of Ministers of the European Council has decided in 1997 that the excessive slowness in solving the cases is a danger, especially for the rule of law.

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[1] For which we shall herein used the abbreviation „C.E.D.O".

[2] See: M. Fodor, C.F. Popescu, „Contestatia privind tergiversarea procesului civil" communication done within the scientific session „Noile coduri in evolutia dreptului romanesc" and published in the volume with the same title, Publishing House „Universul Juridic", Bucharest 2011, page 120 and following.

[3] In the same context, it is also used the French dictum with similar content „Justice retive, justice fautive" (A slow justice, a wrong justice) See R. Chirita, „Dreptul la un proces echitabil", Publishing House „Universul Juridic" Bucharest, 2008, page 178; I. Deleanu „Drepturile fundamentale ale partilor in procesul civil, norme nationale, norme conventionale si norme comunitare" Publishing house „Universul Juridic" Bucharest, 2008, page 275.

Therefore, the judge has to be equally preoccupied by the legality, solidity and promptness of the judicial decisions, all three attributes representing inseparable sides of the quality of justice act.[4] This way, in a study: „Justice may be sacred in the collective mentality only if it rules rightful solutions, namely legal and solid, within the shortest possible term, which, than can be also executed with rapidity, as the social conflict extinguish not only during a trial, but even in the conscience of its protagonists".[5] Therefore the right to the case trial within a reasonable time is in foreground of the preoccupations for the efficiency and credibilisation of justice,[6] being one of the essential components of the right to a fair trial,[7] expressly consecrated at the art. 6 paragraph 1 of the Convention[8] and developed by C.E.D.O. jurisprudence.

Usually, by its decisions, C.E.D.O. makes reference to the „reasonable time" by the syntagm „celerity"[9] which from the judicial point of view means solving the case with promptness, emergency, within a term closest to the date of the court of law notification.

In the Romanian law, the celerity of the justice act has a constitutional dimension, being consecrated at the art.21 paragraph (3) of the Constitution, which established that the „Parties have the right to a fair trial and to the solution of the cases within a reasonable time",[10] solution taken also in the art.10 of the Law no.304/2004 regarding the judicial organisation.

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[4] In such context: M. Fodor, C.F. Popescu, quoted opera, page 120.

[5] V. M. Ciobanu, F.A. Baias, „Cercetarea procesului in cazul administrarii probelor de catre avocati-institutie noua in procedura civila romana" in „:R.D.C" nr. 3/2001, page 1.

[6] C.E.D.O. The decision of October 23, 1990 in the case Moreira de Azevedo against Portugal, paragraph 74

[7] For developments, please see D. Cholet „La celerite de la procedure en droit processuel" L.G.D.J, 2006 nr. 288 and following and nr. 377 and following .

[8] It is about the European Convention of the human rights to which we shall make reference by the term „Convention" for the easiness of expression.

[9] The term or the syntagm „celerity" comes from the French word „celerite", the Latin word „celeritas- atis" and means quickness, rapidity ("Dictionarul explicativ al limbii romane, Publishing House „Univers Enciclopedic" Bucharest, 1998, page 160).

[10] But, the exigencies of the art. 6 paragraph 1 of the Convention on the celerity are quite applicable in the Romanian law since June 20, 994 (pursuant to the art, 20 of the Constitution), date when the Convention became effective for Romania and when the possibility of bringing forward an individual request has been admitted. But, please see CEDO, the decision of July 10, 2001, ruled in the case APCA and LPCA against Romania, summarised and commented by C. Birsan in „P.R" nr. 4/2001 page 192-205.

The notion of „reasonable time" is not defined by Convention and to the domestic legislator and to the courts of law of the states signing the Convention was impossible to determine reasonable times „of a general and undeniable manner"[11] as long as the reasonability of the duration of a procedure is most often a de facto matter, related to each case[12]. The verification of the reasonability of the time has in view the procedure in its whole, the evaluation of all the elements of each practical case.

In these conditions, the development of the concept of reasonable time and the conditions in which this right is guaranteed represents mostly the C.E.D.O opera. We do not have to ignore the role of the doctrine in the development of the concept of reasonable time, during the years, the evolution of the judicial literature related to this aspect is significant.

But, to the solution of the case within a reasonable time, the parties, the lawyers, the experts and also other participants in the civil trial have also to contribute because by their conduct they can influence the trial in the meaning of the acceleration or on the contrary in the meaning of its tergiversation.[13]

Besides the collaboration in the purpose of the increase of quality and efficiency of the act of justice, of ensuring an equilibrium between quality and celerity is also a preoccupation of the European Commission for Efficiency of Justice, which in the Framework Program of June 11, 2004, after the analyse of the causes of delay of trial, indicates based on the C.E.D.O. jurisprudence and on the conclusions of the Council of Europe that it has to be found an equilibrium between the expedient justice that leads to precipitation and the ruling of decision that sometimes are inequitable and the justice too slow, which rhythm leads to the denial of the justice.[14]

2. Encoding the Right to the Trial of the Civil Case within an Optimum and Foreseeable Timeframe

Pursuant to the Framework Program of the European Commission for the Efficiency of Justice (C.E.P.E.J) presented at Strasbourg on June 11, 2004 „the slowness of justice is the nr.1 problem" of the European judicial systems, „the reasonable timeframe" that is set at the art.6 paragraph (1) of the Convention is a „minimum limit" which separates the complying with from the non complying with the convention, and it can no longer be considered as a sufficient result, if it is achieved. Therefore for the elimination of the endemic evil, consisting of the

[11] In such context, R. Chiarita, quoted opera, page 181.
[12] CEDO Decision of July 13, 198 paragraph 24 in the case Zimmerman and other against Switzerland.
[13] See V.M. Ciobanu, „Cateva reflectii cu privare la reforma justitiei civile in Romania", in „Dreptul" nr. 2, 2006, page 37.
[14] See E. Oprina, „Judecatorul in procesul civil intre rol activ si arbitrar", vol I Publishing House „C.H. Beck" Bucharest, 2008, page 463-464.

excessive length of the justice procedures, C.E.P.E.J. has considered that „it is necessary to introduce a new objective for the judicial systems: the processing of each case within an optimum and foreseeable timeframe"[15]. Besides, also the Court has recommended in its jurisprudence that, throughout national mechanisms to prevent the excessive trial timeframes.[16]

More, C.E.P.E.J. has elaborated a document, called „Compendium"[17], conceived as a practical tool for policy makers and judicial practitioners so as to introduce new normative frameworks or judicial or administrative practices for improving time management of judicial proceedings[18], under the compliance with the essential principles of the Framework program[19], document by which there have been recommended length- framework of judicial proceedings, the processing of each case within an optimum and foreseeable timeframe.

[15] The Framework Program provides, among others: „A proceeding Proceedings must not be too long in order to guarantee legal certainty for citizens and the State. Never-ending disputes would jeopardise social continuity. Nor must proceedings be excessively shortened, since parties must, for example, have sufficient time to prepare their cases. Therefore the timeframe in which cases processed must avoid both an expeditious justice, as precipitation leads to decisions which are often unfair and always wrongly understood, and justice which is too slow, as slowness leads to a denial of justice (point 14) One of the most awkward problems for court users is that they are unable to predict when proceedings will end. Bringing an action often means embarking on a process that is expected to be long but whose exact length is impossible to predict. Accordingly, users tend to consider that the impression of a never-ending process applies to all cases. Users need foreseeable proceedings (from the outset) as much as an optimum time. However it must be noted that a foreseeable time-limit is not as such an acceptable time-limit. Acting towards a better foreseeability of timeframes is therefore additional to the action taken to reduce timeframes. Transparency should be provided through the publication of data related to the length of proceedings for each type of cases, both at national level and at the court level) (point 50) (…) Courts should as well make it sure that there is only a limited time between the moment when the decision is given orally and the day the decision is submitted by written to the parties (point 57) (…)The idea of the mandatory provision of information to individuals on the foreseeable timeframe of the case in which they are parties could be introduced(point 67) (…) The introduction or development, within programs of initial and continuous professional preparation of judges, public prosecutors and other relevant professional categories, of a special module which treat the issue of the length of the judicial proceedings. (point 92).

[16] CEDO, The Decision of October 26, 2000 in the case Kudla against Poland. See also the Recommendation R (2004) 6 of the Council of Ministers for the member states regarding the improvement of the domestic remedies, adopted on May 12, 2004.

[17] European Commission for the Efficiency of Justice (CEPEJ) „Compendium of best practices" on time management of judicial proceedings, Strasbourg, December 8, 2000, CEPEJ (2006) Page 1-2.

[18] The practices and policies are grouped and described in the Compendium as being concentrated on five groups. See page 3-21 of the Compendium; C.E. Alexe quoted opera, page 466-467.

[19] These principles are: the principle of balance and overall quality of the judicial system; the need of having efficient measuring and analysis tools defined by the stakeholders through consensus; the need to reconcile all the requirements contributing to a fair trial, careful balance should be struck between procedural safeguards, which necessarily entail the existence of lengths that cannot be reduced, and a concern for prompt justice (European Commission for the Efficiency of Justice (CEPEJ) quoted opera, page 7-9).

Therefore the „optimum and foreseeable" timeframe represents a more exigent and more efficient standard of the right to a fair trial or, as we have already said, the „optimum and foreseeable timeframe" does not suppress the substance of the „reasonable timeframe" but it only emphasizes the exigencies, the significances and especially the implications.[20] So, the syntagm „optimum and foreseeable timeframe" is in compliance with the provisions of the art. 6, paragraph 1 of the Convention and of the art.21 paragraph (3) of the Constitution.[21]

An immediate reaction to the European requests on the reduction of the excessive lengths is noticed on the level of the Romanian doctrine, where it has been specified that many of the measures suggested by C.E.P.E.J. have been already covered by our regulations on civil matter and, as integration, a series of practical measures have been suggested, among which the emphasizing of the active role of the court of law in the organisation and development of the trial, illustrating that waiting for the legislative modifications to reform the Romanian civil procedure, the judges can intervene in many situations and to ensure all the guarantees of a fair trial, using the enforcement of the general principles of the law and trial.[22]

The preoccupation for the processing with celerity and for the introduction of the above mentioned objective is reflected also on the level of the Romanian judicial system. This way, probably following the recommendation of the Framework program of C.E.P.E.J., the legislator dedicates as a fundamental principle of the civil trial „the right to a fair trial, within an optimum and foreseeable timeframe", in the art.6 of the Code of Civil procedure.

According to the text, any individual has the right to the trial of his/her case in a fair manner, within an optimum and foreseeable timeframe by an independent, impartial panel established by the law (paragraph 1 thesis I).

In order to ensure the efficiency of such rights, the legislator establishes in the second thesis of the 1st paragraph of the art.6 the new Code of Civil Procedure that the panel has to ensure the celerity trial performance."

Actually, as it is provided in the „Preliminary thesis of the project of the Code of Civil Procedure"[23], in the spotlight of the legislator was the preoccupation for the recognition and clarification within an optimum and foreseeable timeframe of the legitimate rights and interests brought to the trial, in the same time with the

[20] I. Deleanu, „Tratat de procedura civila", vol. I, Walters Kluwer Publishing House, 2010, p. 140.

[21] I. Deleanu, „Tratat", quoted opera, page 140, I. Les „Noul cod de procedura civila", Publishing House C.H. Beck, Bucharest 2011, page 12, M. Tabarca, „Principiul dreptului la un proces echitabil, in termen optim si previzibil, in lumina noului Cod de procedura civila" in „Dreptul" nr. 12/2010, page 45-46.

[22] I. Deleanu, Gh. Buta, „Procedura somatiei de plata. Doctrina si jurisprudenta" C.H. Beck Publishing House, Bucharest 2006, page 13-16.

[23] The preliminary thesis of the project of the Code of Civil Procedure have been approved by the Government Decision nr. 1527/2007 published in the Official Gazette of Romania, 1st Part nr. 889 of December 27, 2007.

improvement of the quality of act of justice. Therefore, the Romanian legislator passes from a „reasonable timeframe" to an „optimum and foreseeable timeframe".

But what is understood by „optimum and foreseeable timeframe"?

Pursuant to the Explanatory Dictionary of the Romanian Language, „optimum" means „proper, suitable, indicated, which provides the best efficiency" and „foreseeable" means „which can be foreseen"

In the doctrine, it has been appreciated that, in the absence of a connotation specific to the syntagm „optimum and foreseeable" we can not guess more than the request of solving the case within an „useful timeframe" to pass from „theoretical and illusory rights" to „effective and practical rights"[23], the expression „in useful timeframe" meaning „on time, just on the right moment" namely, according to the situation, circumstances something that is being done on the right moment.

Having in view the meanings of the above mentioned syntagms, we consider that solving the case within an „optimum and foreseeable timeframe" means more than proceeding with celerity, that the measures for a better predictability of the length of the procedures, as C.E.P.E.J. has considered, complementary to the measures for the reduction of the length of case solution, that within the legislative measures a proper equilibrium should be found between the initiative of the parties and the active role of the judge in order to avoid delays. This way, meanwhile the parties should be responsible mainly for their success or failure during the trial; the judge has to have the sufficient authority to develop the procedure in a pro-active manner to avoid the processual right abuses and the unjustified delays within the procedure.[24]

Therefore, the processing of each case within an optimum and foreseeable timeframe supposes among others:

- determination of a length – framework for the case processing, taking into consideration the case circumstances, the practical solution (therefore, it shall be considered that also in the case of the conjuncture and random „reasonable timeframe") as the litigants had a predictability of the proceedings;
- the length provided this way to be proper to the case, to provide the biggest efficiency;
- the monitoring of the case progress by the court of law;
- definition of standards and objectives for the time utilisation;
- determination of priorities in the cases processing;
- organisation of trial sessions as to reduce the uncertainty regarding the hour when the persons have been summoned shall be effectively called before the panel;
- monitoring the cases throughout information systems;

[23] I.Deleanu, „Consideratii generale si unele observatii cu privire la proiectul Codului de procedura civila," in R.R.D:P. nr. 2/2009 page 30, note 7.

[24] CEPEJ, Practical ways of combating delays in the justice system, excessive workloads of judges and case backlogs, Strasbourg, April 8, 2004, CEPEJ (2004) (5) (D1) page 32.

- punishing the ones exercising the processual rights in an „abusive manifest" manner;
- in case of delays it has to efficiently and promptly intervene throughout proper measures;
- granting priority attention to the quality of decisions from the courts of law.

C.E.P.E.J. was considering that two of the most significant elements by which the quick solution and the cases calendar are the case management and the procedural rules, expressly indicating the need of the increase of the active role of the judge, because in the Court jurisprudence it has been ascertained that the „inactivity of the court of law" and the „judicial inertia in the management of rules of evidences" were causes of the failure to comply with the request of reasonable timeframe.[25]

In order to achieve such objectives, the legislator provides that the court is obliged to rule all the measures allowed by the law and to provide the case processing with celerity (art.6 paragraph (1) 2nd thesis of the New Code of Civil Procedure) provisions which apply in a proper manner also in the phase of forced execution.

This way, for the first time for our judicial system, the new Code of Civil Procedure establishes at the art.233, marginally called „Estimation of the processing length" that on the first term on which the parties are being legally summoned, the judge, after hearing the parties, shall estimate the necessary length for the processing, considering the case circumstances, as the trial is being solved within an optimum and foreseeable term. The length estimated in such manner shall be mentioned in the conclusion.

Although the judge shall determine the processing length, stage on which procedural acts are being accomplished, upon the parties request or ex officio, for the preparation of the debate on the matter and based on which it shall be determined if the whole trial before the lower court is processed within an optimum and foreseeable time frame. The estimation of the processing length is done after the parties hearing, taking into consideration the case circumstances and especially the nature and object of the case.[26]

Because the legislator makes no distinction, means that the obligation of the estimation of the processing devolves upon the judge in any case brought to justice, but especially in the ones in which the emergency trial is being determined.[27]

For certain special proceedings, the law establishes a term of completion of processing. For example, the length of the procedure of issuing the payment order

[25] European Commission for the Efficiency of Justice (CEPEJ) quoted opera, page 13.
[26] I. Les „Codul…., quoted opera, page 374.
[27] For example, in the procedure of the presidential ordinance (art. 984, paragraph (3) the new code of civil procedure, in the possessory requests (art. 989 paragraph (1) of the new code of civil procedure, in the request of eviction from the properties used or occupied without right (art. 1027 paragraph (2) the new code of civil procedure.

is maximum 90 days from the date when the creditor's request has been brought forward, so, if this term passed, without pronouncing the payment order, the court shall rule, even ex officio, the closure of the file by final conclusion, the creditor having the possibility to submit a request to the court according to the common law (art. 1008 the new code of civil procedure).[28]

The length of the judicial proceedings estimated under the above mentioned conditions can be reconsidered by the judge, with grounded reasons, with the parties hearing (art.233, paragraph (2) the new code of civil procedure). Therefore, the conclusion in which the processing estimated length has preparatory character and not interlocutory, as long as the judge can return on the measure disposed by such conclusion.[29]

But the obligation of the judge to ensure the processing within an optimum and foreseeable timeframe does not exclude its obligation to rule the measures necessary to process with celerity as otherwise, it results from the art.6 paragraph (1) 2nd thesis the new code of civil procedure, marginally called „Insurance of celerity". Pursuant to the paragraph 1 of the text, for the processing, the judge fixes short timeframes, even from one day to the other, the provisions of the art.224 the new code of civil procedure which establish a presumption of acknowledgment of the processing term in the cases provided by the law and the exceptions from such cases, are enforceable. If there are grounded reasons, the judge can grant even more longer timeframes than the ones provided at the art.1 of the text of the paragraph (2). The judge also can establish for the parties and also for the other participants to the trial, tasks with regard to producing evidences with documents, written relations, the written response to the interrogatory communicated pursuant to the art.349[30], the assistance and the participation in doing the expert's reports on time and any other procedures necessary to solve the case (paragraph 3).

When it is necessary in order to comply with the obligations provided by the paragraph (3), the parties, experts, translators, interpreters, witnesses and any other participants in the trial can be notified also by phone, telegraph, fax, electronic mail or

[28] With regard to the Emergency Ordinance of Government nr. 119/2007 regarding fighting against the delay of execution of the payment obligations resulted from commercial contracts, which provisions are being taken, with certain modifications, by the art. 999-1010 of the new code of civil procedure, please see: S. Popa, M. Fodor in „Dreptul" nr. 4/2008 page 9-29, M. Fodor, „Drept procesual civil. Procedura necontencioasa. Arbitrajul. Executarea silita. Procedurile speciale." „Universul Juridic" Publishing House, Bucharest, 2010, page 453-469.

[29] The failure of compliance with the obligation of the judge to estimate the processing length can be appreciated as a disciplinary infringement in the meaning of the art. 99 letter e) of the Law nr. 303/2004.

[30] Art. 349 the New Code of Civil Procedure regulates the „taking the interrogatory of legal persons" establishing that the state and the other legal persons of public right and also the legal persons of private right shall respond in written to the interrogatory that shall be subsequently communicated, under the conditions of the art. 189 letter e) of the New Code of Civil Procedure. Except for the companies of persons, which partners with representation right shall be personally summoned for interrogation.

any other communication mean ensuring the transmission of the text of the document that is being communicated or the notification for presentation on term and also the confirmation of their reception. In case of phone notification, the clerk shall elaborate a report in which shall illustrate how he/she made the notification (paragraph 4).

For the phase of forced execution, the art.618 paragraph (1) the new code of civil procedure determines that during the execution, the judicial executor should have an active role, insisting by all the means allowed by the law to perform completely and with celerity of the obligation provided in the enforcement title, under the compliance with the law provisions, with the party's right and with the right of other interested persons. This rule represents a legislative consecration of the constant C.E.D.O. jurisprudence[31], jurisprudence which has involved or accelerated in many states, among which there is also Romania, changes of legislative or jurisdictional kind, able to guarantee both the reduction of the judicial proceedings timeframes and also the reduction of the length of the enforcement of decisions.

Still in the purpose of the efficiency of the procedure and ensuring the celerity processing, the legislator of the new Code of Civil Procedure establishes also the following procedural rules and mechanisms, which prevent the attempts of tergiversation or delay[32] in taking decisions by the judge and therefore, to reduce the length of the judicial proceedings:

- the postponings that the court may give, both with the parties assent and for lack of defence, shall have an exceptional character, eliminating this way the possibility of the parties to request and obtain unjustified repeated postponings[33];
- the lack of competence of public order shall be invoked on the first term when the parties are legally summoned before the lower court, but not later than the end of the completion of the processing (art.126 paragraph (1) the new Code of Civil Procedure)
- the cases change of venue and challenge of judges, processual tools often used for the tergiversation of the case are regulated by strict norms.[34]
- determination of the first term after the defendant filed statement of defence, it has been communicated to the plaintiff and the plaintiff has responded to the statement of defence or after the end of validity of the terms provided at the art.196 the new Code of Civil Procedure;
- extension of the modalities of communication of the procedural documents, in the meaning that besides the classical communication means throughout procedural

[31] See CEDO, the Decision of June 17, 2003 in the case Rusanu against Romania, published in the Official Gazette of Romania nr. 1139 of December 2, 2004.

[32] The concept of „tergiversation" or „delay" comes from the verb „to delay" which pursuant to the Explanatory Dictionary DEX means to postpone the solution of a matter, taking a decision.

[33] The art.216 paragraph (1)provides that the case postponing in virtue of the parties assent can be allowed only once during the trial, and the postponing of the trial for lack of defence can be ruled, pursuant to the art.217 paragraph (1) upon the request of the interested party, only in exceptional case, for grounded reasons and which are not imputable to the party nor to its representative.

[34] See the art.135-142, art.43-53 of the new Code of Civil Procedure.

agents or other employees of the court of law or by post services, upon the request of the interested party and on its expenses, the communication shall be also possible by legal executors or by fast courier services; the communication of the subpoenas and other procedural documents shall be done by the court clerk's office also by telex, electronic mail or other means providing the transmission of the document text and the confirmation of its reception, if the party has indicated the proper data in such purpose (art.149 the new Code of Civil Procedure)[35]

- the obligation of the judge to guide the trial parties to use the procedure of mediation, as alternative method to solve the conflicts;
- re-systematisation of the stages of the civil trial of a manner able to lead to a judicial dialogue, the simplification of the procedural forms and the regulation of measures able to raise the awareness of the trial parties;
- the notion of „notice of trial date" has in view any hypothesis in which the party has received the subpoena and acknowledges the date, meaning that also results from the art.153 paragraph (1) of the current Code of Civil Procedure, in the form given to this text by the art.1 point 18 of the Law no.202/2010 with regard to the processing acceleration;
- the failure to comply with prior procedure shall be usually invoked only by the defendant by the statement of defence under penalty of preclusion (art.188 paragraph 2 the new Code of Civil Procedure);
- the procedure of submitting evidences by lawyers has been maintained (art.360 the new code of civil procedure)
- the subpoena and the other procedural documents shall be delivered, under penalty of nullity, with at least 5 days before the trial term and in urgent cases or when the law expressly provides, the judge may rule to shorten such term.

The legislator has also create a remedy against the excessive procedure length and namely the appeal against the tergiversation of the trial, independent special procedure, established by the art.515-519 the new Code of Civil Procedure. Pursuant to these law texts, any of the parties and the prosecutor who participates in the trial may appeal invoking the right to processing within an optimum and foreseeable timeframe, to request to be taken all the legal measures to eliminate this situation. More, in the situation in which the appeal or the petition has been done with mala fide (bad faith), namely in order to delay the trial and to tease the opposite party, its author may be obligated to pay a judicial fine from lei 500 up to lei 2000 and also, upon the request of the interested party to pay damages to repair the prejudice caused by bringing forward the appeal or the petition.

We hope that these normative measures shall be accompanied by practical measures that have in view the eradication of the causes leading to the excessive, unjustified prolongation of the procedures and to ensure the optimum processing and of course, the effective achievement of the disregarded, unobserved or violated rights.

[35] A similar provision can be found also at the art.132^1 paragraph (2) current code of civil procedure.

LIABILITY OF PROFESSIONALS PHISICAL PERSON FOR THE OBLIGATIONS UNDERTAKEN IN THEIR OCCUPATION UNDER THE NEW CIVIL CODE

Maria DUMITRU[*]

Abstract: *This study proposes to clarify if, in the present law frame, the obligations undertaken by a professional authorized as a physical person in their activity are guaranteed with the entire patrimony of that person or the fraction that is used in the profession.*

The question was raised by the apparent contradiction that seems to exist between the limits of liability for the professional as a physical person in the Emergency Ordnance of the Government no. 44/2008 regarding the economical activities of authorized physical persons, individual enterprises and family enterprises, on one side and the provisions of the new Civil Code, on the other side. Finally*, the impulse* to initiate our approach was the constant struggle waged by this category of professionals with the tax creditor in delimitating the line that establishes individual responsibility for liabilities arising from his business.

Keywords: *responsibility, authorized physical person, professional patrimony.*

I. Presentation of the problem

Economic activities by an individual are regulated primarily by Government Emergency Ordinance no. 44/2008 regarding the economic activities done by authorized physical persons, individual enterprises and family enterprises[1]. The odinance mentiones that an individual can carry out economic activities individually and independently, as sole authorized phisycal person (PFA)[2] or as entrepreneur in a individual enterprise or as a member of a family enterprise. In consequence, the facts sustained regarding the PFA will be available also for the owner of an individual enterprise or a family enterprise. O.U.G no. 44/2008 shall not apply to liberal professions and certain economic activities whose development is organized and regulated by special laws. However, we believe that the

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[1] Government Emergency Ordinance no. 44/2008 regarding the economic activities done by authorized physical persons, individual enterprises and family enterprises, published in Romania's Official Monitor no.328 from April 25th 2008, modified by Government Emergency Ordinance no. 38/2009, published in Romania's Official Monitor no. 269 from April 24th 2009, modified by Government Emergency Ordinance no. 46/2011 published in Romania's Official Monitor no. 350 from may 19th 2011, norm that the latter form will be kept in mind in this article as O.U.G. no. 44/2008.

[2] Authorized physical person (PFA) is the physical person authorized to conduct any form of economic activity permitted by law, using mainly his labor. Characteristic is that PFA mainly operates using its labor and professional skill.

fundamental solution that will result from our approach is also applicable to other professions when they are exercised in individual forms of organization, forms which give rise to separate legal entities, provided that the special laws governing the professions do not provide otherwise.

II. Liability of the professional physical person under O.U.G.no. 44/2008

For his business, the PFA can constitute a individual professional patrimony. Under art. 2 lit. j from O.U.G. no. 44/2008 the professional patrimony consists of all the goods, rights and obligations of the physical person that exerts an economical activity, constituted as a fraction of the patrimony of the authorized physical person, separated from pledges to its general personal creditors.

The individual professional patrimony is currently constituted under the civil code plus, where applicable, provisions of special laws. The mass of patrimony affected by exerting a profession individually is established by the owner, respecting the conditions of form and publicity stipulated in the law. The transfer of rights and obligations from a patrimonial mass to another in the same patrimony does not consist a sale. However, it is necessary that the transfer of patrimony does not harm the interests and rights of creditors into each patrimonial mass.

The constitution of patrimony is not mandatory for a PFA. With all this, affecting a proportion of the patrimony for the profession is a judicial technique in the interest of the PFA because it is a measure of protection regarding the limits of liability for the obligations assumed.

According to art. 20 alin.1 from O.U.G. no. 44/2008 PFA is liable for its „*obligations with its professional patrimony if this was constituted and, in completion, with its entire patrimony"*. From this text of law results without doubt that the liability of PFA for assumed obligations in the professional practice is not limited to the patrimony affected to the activity but also with the rest of the patrimony. In other words, PFA will be liable with its entire patrimony.

With all this, it seems that art. 2324 C.civ. alin. 4 C.civ., in opposition with the special law, limits the liability of PFA for obligations assumed in their profession. In this case, regarding the invoked text, „*the goods that make the object of a division of patrimony affected to the execution of a profession authorized by law can be pursued only by creditors linked with the respective profession. These creditors cannot pursue the other goods of the debtor"*.

III. The liability of the professional as a physical person under the Civil code.

Art. 2324 alin.1 C.civ. enshrines the principle that the one who is personally obliged is liable with all his movable and immovable patrimony, present and future. They serve as common guarantee to its creditors. In the situation in which in the patrimony of a person more patrimony masses exist, alin.2 from the same article separates the creditors and establishes a order of pursue for the goods in the patrimony of the person.

In a general manner the lawmaker enforces the creditors that have their liability established linked with one of the divisions of the person's patrimony, authorized by law, to pursue at first the goods that make the object of that

patrimonial mass. Only if these are not sufficient to cover the liability, the creditors can pursue other goods of the debtor. In this way, a separation of creditors is made, based on the patrimony mass linked with the liability: the mass of common goods, husbands goods respectively, the mass of goods used in the profession, the mass of goods given for administration to a 3rd party (fiduciary mass), etc. There is also an order of pursue for goods in the patrimony of a person. First, the creditor can pursue the goods that compose only the patrimonial mass linked and only of those are not sufficient to cover the liability, the creditor can go and pursue the other goods of the person. These goods can be found in other patrimonial masses included in the patrimony of the liable person, either free pf the rest of the patrimony, not included in any other division of patrimony authorized by the law.

For the situation in which the owner of the patrimony exercits a profession authorized by the law, by art. 2324 alin.4 C.civ., a special regime is instituted regarding the limits of liability of a professional for obligations assumed in his work and the order of pursue for his goods.

In the limits of liability, the text of the Civil Code clearly states that goods subject to division of patrimony affected by the exercise of a profession can be traced only by creditors whose claims have been born about the profession. Therefore any other creditor of the holder of property, other than the one that has claims related to work of the debtor, will not pursue the professional patrimony of the person. These goods are extracted outside the right to pursue of other creditors, being unable to be pursueed by personal creditors of the professional. They do not serve as a common guarantee to all the creditors of a person but only to the creditors that have claims related to the profession of the debtor. In this perspective, the patrimony of professional affection has a different status compared to the other patrimonial masses of a person that can be pursued by any creditor, unrelated to the origin of the liability. It is true that a good can be pursued outside the patrimonial mass in subsidiary if the creditor cannot realize its claim by selling the goods from the patrimonial mass by which they were born.

Instead, creditors' claims resulting from the owner of the work will not pursue other assets of the debtor if he cannot make claim of recovery assets and rights in the division affected the profession.

From the point of view of the debtor – PFA – the limit imposed to the right of pursuit of the creditor consists an advantage, a limit of its liability for obligations assumed in the course of exerting commerce only at a part of its patrimony. Although the professional individal patrimony is not a distinct patrimony from that of the „associate" in the case of a judicial person, in some cases there is a purpose: they both serve as guarantees for the execution of obligations by the professional and the limits of its liability for obligations assumed during the exertion of its profession.

In conclusion, according to the Civil code, the liability of a physical person for its professional obligations is in the limit of the person's individual professional patrimony. The creditors named in art. 2.324 alin. 4 C.civ. also include the state and

financial organisms. Because of the separation of patrimonies, personal creditors of the professional cannot claim goods from the professional individual patrimony.

In the variant that is in force right now since 1st of october 2011 art.151 of Law no. 71/2011 for the applying the Civil code states that the disposistions of art. 2.324 alin.4 C.civ. will be applied only in cases in which the professional operates its division of patrimony after the entry into force of the Civil code. As a follow up, if the patrimony of affectation is constituted before 1st of October 2011, no matter the date the liability was born or would have been realized the creditors could pursue all the goods in the patrimony of the physical person, with no regard on the masses they belong to..

By pct. 20 of Law no. 60/2012 regarding the approval of Government Emergency Ordinance no. 79/2011[3] the contents of art. 151 of Law no. 71/2011 was modified. In this moment, the incidence of dispositions from art. 2324 alin.4 C.civ in not reported at the date at which the division of patrimony was operated but, as it is normal, at the moment when the professional obligations were generated. As a follow up, the obligations of the professional as a physical person that were generated before the entry into force of the Civil code will be guaranteed only with the professional patrimony of affectation, without consideration of the moment of division. The liability of the professional as a physical person is limited only if the debt, liability, is after the 1st of october 2011. [4]

Conclusions

Considering the facts stated, it seems that art. 2324 C.civ. alin. 4 that limits the liability of PFA for obligations assumed in the exertion of its profession only to the professional patrimony of affectation is in opposition with the special law, precisely art. 20 alin.1 from O.U.G. no. 44/2008 that establishes that a physical person that performs a professional activity individually is responsible for the obligations derived from the activity, in the last place, with its entire patrimony.

With all these, by the dispositions of art. 230 lit. b of Law no. 71/2011 for applying it states that *„at the date of entry into force of the Civil code is abrogated: ... any other disposition contrary even if these are in special laws."* Leaving aside the technical and law considerations and limiting only at the interpretation of this statement we can appreciate that art. 20 alin.1 din O.U.G. nr. 44/2008 was repealed. As a follow up, the only norm that can be applied is in the Civil code.

[3] Law no. 60/2012, published in Romania's Official Monitor no. 255 from april 17 2012 regarding the approval of Government Emergency Ordinance no. 79/2011 for the regulation of entry into force of measures necessary in law no. 287/2009 regarding the Civil code published in Romania's Official Monitor no. 696 from September 30 2011.

[4] In the present form art 151 from Law no. 71/2011 has the pursueing content: „Dispositions of art. 2.324 alin. (4) from the Civil code apply in all cases in which the professional operates its division of patrimony but only regarding the rights and obligations born after the entry into force of the Civil code.

In consequence, at present time we appreciate that the obligations assumed by a PFA in the course of exerting its profession are guaranteed only with the patrimony affected to the exertion of profession if a patrimony of this kind is constituted; the patrimony of affection represents the limit of liability for the PFA for its professional obligations. In the case that the profession is not authorized by the law, the profession being exerted clandestinely, the professional will not be protected by this law that limits the liability only to its goods used for the profession.

The responsibility will be in the same limits no matter the legal frame in which a physical person exerts its professional activity as long as the profession doesn't take the frame of a judicial person that has a patrimony distinct to that of the physical persons constituting it. As a follow up, we will be subjected to this regime of civil professional responsibility for physical persons that perform individual economical activities, as authorized individual physical persons or as holders of an individual enterprise or in the frame of a family association and also the persons that exert liberal professions – lawyers, notaries, expert accountants, insolvency practitioners, architects, medics, fiscal consultants, etc. if they didn't organize in the form to exert their profession as judicial persons.

THE MANDATORY PARTICIPATION OF THE PROSECUTOR IN CIVIL TRIALS ACCORDING TO THE NEW CODE OF CIVIL PROCEDURE

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Abstract: *The new Code of Civil Procedure, adopted by the Law No 134 of 1 July 2010, published in the Official Gazette No 485 of 15 July 2010 shall enter into force, according to its law of application, on 1 September 2012.*

This important normative act creates the framework to value in justice the new regulations of civil law, thus establishing the necessary organs, forms and procedural means for its application.

At the same time, the new CCP states a series of provisions regarding the participation of the prosecutor in civil trials – provisions which, in the present paper, shall be analyzed, thus surprising the corollary of rights and obligations of the prosecutor in such cases.

Keywords: *civil trial, prosecutor, new Code of Civil Procedure.*

1. Means of participation of the prosecutor in civil trials

According to Art 63 of the Law No 304/2004 on the judicial organization[1], the attributions of the Public Ministry in the civil area are:

a) The exercise of civil action, in cases stated by the law;
b) The participation in civil trials, in cases stated by the law;
c) The exercise of the means of appeal against judicial decisions, in cases stated by the law;
d) The protection of rights and legitimate interests of minors, persons under interdiction, missing persons and other categories of persons, in the cases stated by the law.

Developing these forms of participation in civil trials of the Public Ministry, Art 90 of the new Code of Civil Procedure (CCP) states the following concrete possibilities:

- To initiate a legal action, when necessary for the protection of the rights and legitimate interests of minors, persons under interdiction and missing

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[1] Law No 304/2004 – initially published in the Official Gazette No 576/29 June 2004 – was republished in the Official Gazette No 653/22 July 2005. Since its republishing date, the text has suffered several modifications, the latter one being made by Law No 300/23 December 2011, published in the Official Gazette No 925/27 December 2011.

persons; one can notice that the prosecutor has the initiative to initiate any civil action (including personal actions, such as, for instance, divorce actions), only in the name of a limited category of persons. We are talking about minors, persons under interdiction and about missing persons.

- To conclude in any civil trial, regardless of its phase, if he considers it necessary for the protection of the state of law, of rights and interests of citizens. In this case, the prosecutor is no longer limited by the above mentioned categories of persons, but his attribution is justified by the necessity of protecting the state of law, the rights and interests of every citizen.
- In certain specified cases, the prosecutor has the obligation to attend and to conclude under the sanction of absolute nullity of the sentence. For instance, the participation of the prosecutor in trialling cases based on the Law No 221/2009 concerning politically motivated court sentences and their related administrative measures during the period 6 March 1945 – 22 December 1989[2].
- To use the means of appeal against sentences issued for the cases in which he has initiated the civil action for the protection of the rights and interests of minors, persons under interdiction and missing persons. It must be mentioned that the right to use the means of appeal of the prosecutor regards any civil trial in which he has participated, so not only the cases for which he initiated the civil action[3].
- To ask for the execution of all enforceable titles issued in the favour of minors, persons under interdiction or missing persons.

We must state that according to Art 91 of the new CCP, every time the prosecutor initiates a civil action in behalf of minors, persons under interdiction or missing persons, the owner of the right shall be a part in the trial. During trial, he will be able to do the following procedural actions of disposal:

- at any time, he will have the possibility to totally or partially end the trial
- at any time, he will be able to abjure his pretended right in front of the court, during ordinary or special means of appeal
- at any time, after consulting with the other parties of the trial, he will be able to ask to court to issue a sentence consenting their agreement

Regarding the above shown procedural actions of disposal, we consider that regarding persons without legal competence these can only be made by an authorized person by a special proxy or by their legal representatives, namely parents, guardian or curator.

The new CCP also states that in the case in which the prosecutor shall withdraw his action[4], the owner of the right shall be able to ask for the continuity of the trial or compulsory enforcement.

[2] Published in the Official Gazette No 396/11 June 2009.
[3] Art 90 Para 4 of the Law No 134/2010.
[4] Though the text does not mention, we consider that it refers to the application, the declaration of appeal and the request of enforcement.

We must note that the prosecutor's participation in a civil trial must be found both in the conclusion of the hearing, as well as in the sentences. Thus, Art 228 Para 1 Let b) of the new CCP states that for each court hearing is drafted a conclusion of the hearing, mentioning the full name of the prosecutor and in which prosecutor's office he works, if he was part of the hearing. Also, Let i) states that the conclusion of the hearing must mention all requests, declarations and a brief presentation of the pleadings, as well as the conclusions of the prosecutor, if he has participated in the meeting.

Regarding the content of the sentence, Art 419 Para 1 Let a) of the new CCP states that the sentence shall contain an introductory part mentioning the entries to be stated in the conclusion. When the debates were recorded in a conclusion of the hearing, the introductory part of the sentence shall mention only the name of the court, number of the file, current date, full name and quality of the members of the panel, full name of the clerk of court and full name of the prosecutor, if he attended the hearing, as well as the mention that other information are stated in the conclusion.

2. Means of exerting the proceedings by the prosecutor

The participation of the prosecutor in civil trials allows him to use all the rights stated in the new CCP.

Thus, the prosecutor can invoke the absolute nullity in any stage of the trial, if the law does not state otherwise[5].

Likewise, the prosecutor can invoke exceptions, namely procedural irregularities regarding the panel or the establishment of the panel, its competence or legal proceedings, or lacks regarding the right to action, aiming for declining the jurisdiction, the adjournment, the restoration or annulment of certain documents, rejection or obsolesce of the demand[6].

Also, the prosecutor may request the administration of any evidences. We must mention that the new CCP states, as novelty, the fact that in maximum 5 days from the admission of the evidences, the attorneys of the parties shall present to the court *the program of administration of those evidences* – program signed by the attorneys showing the place and date for the administration of each evidence. This program must be accepted by the court, in the advising chamber and becomes mandatory for the parties and their attorneys. When participates in a civil trial, without being mandatory, but only because he appreciates that it is necessary for the protection of the state of law, of the rights and interests of citizens, but also when under the sanction of the absolute nullity of the sentence, the participation of

[5] Art 173 of the Law No 134/2010.
[6] Art 239 of the Law No 134/2010.

the prosecutor is mandatory, the program of administration of evidences approved by the court shall be immediately communicated to him[7].

It must be mentioned that for the cases in which the evidence was administrated upon the request of the prosecutor in a trial initiated by him in the name of minors, persons under interdiction or missing persons, the court shall decide, by conclusion of the hearing, the expenses for the administration of that evidence and the party who must pay, being possible also to charge both parties with this cost[8].

In a civil trial, the prosecutor mandatory participates in the investigation on site if his participation in the trial is imposed by law[9].

As well, when the court agreed to, upon request or ex officio, the interrogation of any of the parties, regarding personal facts that may lead to the solution of the trial, with the approval of the president of the panel, the prosecutor, when participates in the trial, may directly ask questions to the interrogated person[10].

The new CCP specifically states regarding the participation of the prosecutor in the means of appeal of civil trials. Thus, regarding the term of appeal, it is shown that for the prosecutor, it starts from the moment of the issuance of the sentence, except the cases in which the prosecutor participated in the trial, when the term of appeal starts from the moment of the communication of the sentence[11]. Likewise, regarding the motivation of the appeal, for the cases in which the Public Ministry has participated in the trial, the recurrent shall submit a copy of the reasons of cassation for the prosecutor[12]. Regarding the order to speak in the hearing of appeal, the new CCP states that the prosecutor is the last to speak, except the cases when he is the recurrent, expressly stating the fact that if the prosecutor has initiated the civil action which is being attacked by appeal, he shall speak after the recurrent[13].

The new CCP inserts a new institution for our legislation. We are referring to the „*appeal for the delay of the trial*" – settled by Title IV of the Law No 134/2010 – appeal which can be made, among other things, if the court despised its obligation to solve a case in an optimum and predictable term by failing to take legal measures or by ex officio failure, when the law expressly states so, to carry out a procedure necessary for the solution of the case, though the term elapsed since its last act of procedure would have been enough for the measure or the performance of the procedure[14].

[7] Art 366 of the Law No 134/2010.
[8] Art 256 of the Law No 134/2010.
[9] Art 340 Para 1 of the Law No 134/2010.
[10] Art 346 Para 2 of the Law No 134/2010.
[11] Art 462 Para 4 of the Law No 134/2010.
[12] Art 481 Para 2 of the Law No 134/2010.
[13] Art 489 Para 2 of the Law No 134/2010.
[14] Art 515 Para 1 Point 4 of the Law No 134/2010.

We also mention that, regarding this situation, Art 515 of the new Code states the prosecutor among the subjects who may submit the appeal for the delay of the trial. Thus, when he participates in the trial, the prosecutor may submit an appeal, which by invoking the violation of the right to the resolution of the trial in an optimum and predictable term, to request legal measures for this situation to be removed.

Also, are stated in the stage of the compulsory enforcement of a sentence provisions regarding the prosecutor. Thus, the new Code states among the participants in the compulsory enforcement, together with the parties, guarantors as third-parties, creditors as interveners, the court of enforcement, the enforcer, public agents, witnesses, experts and interpreters and the Public Ministry.

Moreover, the enforcement formula applied on the writ of execution refers to the prosecutor: „We, the Romanian President, empower and order to the enforcers to enforce this present writ. We order to the public agents to support the prompt and effective performance of all compulsory enforcements, and the prosecutors to persevere in the performance of the writ of execution, as stated by the law...[15]".

Regarding his participation during the compulsory enforcement of a sentence, Art 648 states that the Public Ministry supports the enforcement of the decisions and of other writs of execution, and in certain cases, the Public Ministry shall request the enforcement of the sentences[16].

The participation of the Public Ministry is stated by the new Code also in the situation where the third parties, to whom are requested information by the enforcer, do not posses or refuse to offer the requested information. In this case, the Public Ministry shall lay all efforts, at the request of the enforcer, to find out the requested information, especially for the identification of public or private entities where the debtor has opened accounts or deposits, placements of securities, is a shareholder or associate, or owns bills, treasury bills or other enforceable securities[17].

3. Special proceedings in which is mandatory the participation of the prosecutor

The new CCP settles two special proceedings in which the participation of the prosecutor is mandatory: placement under interdiction and the judicial declaration of death.

[15] Art 631 of the Law No 134/2010.

[16] Such mandatory situations are the cases in which the sentences are issued in favor of minors, persons under interdiction and missing persons.

[17] Art 650 Para 3 of the Law No 134/2010.

3.1 Placement under interdiction[18]

The request for placing under interdiction of a person is solved by the competent court in whose jurisdiction the person resides. Such request shall mention, besides the common elements of a summon, the facts from which the mental alienation or debility results, as well as the evidences proposed for administration.

After receiving the request, the president of the court shall order the communication of the request to the person proposed for placement under interdiction, as well as of copies of the request and the attached documents. The same communication shall be sent to the prosecutor, when the request was not submitted by him. The prosecutor, directly or through the police, shall perform the necessary investigation, shall obtain an opinion from a commission of specialists, and if the person subjected to interdiction is found to be hospitalized in a medical unit, shall also be necessary the opinion of the unit. If, according to the opinion of the commission of specialists is necessary a longer observation of the mental condition and this cannot be performed in any other manner, the court, considering also the conclusions of the prosecutor, shall be able to order the temporary hospitalization, for maximum 6 weeks in a medical unit.

After receiving all documents, at the term of the hearing, with the citation of the parties, the participation of the prosecutor and after hearing the person subjected to interdiction, the court shall decide over his placement under interdiction.

3.2 *The judicial declaration of death*[19]

The judicial declaration of death of a person is requested to the competent court in whose jurisdiction that person has his last known residence.

After notifying the court, the president shall ask the mayor's office of the city, commune or division of Bucharest, as well as the police precinct in whose jurisdiction the person has his last known residence to collect information regarding the latter one. Also, the president shall order the publication at the last residence of the person, at the mayor's office of the city, commune or division of Bucharest and at the court's principal office, as well as the publication in a national newspaper announcing the initiation of the procedure to judicially declare the death of a person, inviting every person who possesses information on the missing person to reveal it.

The president shall notify the guardianship court from the last residence of the missing person to appoint a curator, in the conditions stated by the new Code.

After 2 months from the publication and after receiving the results of the investigations, a term for hearing shall be fixed. The missing person whose death is to be declared is cited at his last known residence, and the citation is published in a national newspaper. If the missing person had a representative, he will also be

[18] Art 924-930 of the Law No 134/2010.
[19] Art 931-938 of the Law No 134/2010.

cited, to offer information to the court. The request for judicial declaration of death shall be trialled with the participation of the prosecutor.

Also, the trial of the request for declaring the absolute nullity of the sentence declaring the judicial death if the person is alive, shall be made with the citation of the parties in the first trial and with the participation of the prosecutor.

4. The quality of the prosecutor in the civil trial and the interdictions to which he is subjected to

Art 40 of the new CCP states the cases of incompatibility of a judge. Thus, according to Para 2, the judge who was witness, expert, arbitrator, prosecutor, attorney, judicial assistant, assistant-magistrate or mediator in the same lawsuit cannot be part of the panel.

Likewise, among other cases of incompatibility stated by Art 41, the new CCP states that a judge is also incompatible to trial if, when he was appointed in the panel, his/her spouse or another relative up to the 4th degree of kinship has participated, as prosecutor, in the trial of the same litigation in front of other court[20].

It must be mentioned that the provisions of Chapter I titled „*The Judge. Incompatibilities*" of Title II of the new CCP also apply to prosecutors, as to assistant-magistrates, judicial assistants and registrars[21]. This means that all cases of incompatibility, the provisions on the restraint, on disclaim of competence and the procedure of deciding on the requests of restraint or disclaim of competence are also applied to prosecutors who participate in a civil trial.

Without being connected with the incompatibilities, Art 311 of the new Code must be mentioned in this context of interdictions imposed to the prosecutor in a civil trial. Thus, according to this article the prosecutors are exempted from being witnesses, even after their retirement, regarding secret circumstances that they knew as prosecutors[22].

Another new provision in our legislation is stated by Art 123 of the new CCP. The text refers to the optional competence of civil courts regarding summons against judges, prosecutors, judicial assistants and registrars who perform their activity in the competent court to trial the case, and also regarding the summons submitted by judges, prosecutors, judicial assistants and registrars who perform their activity in the court competent to trial the case.

Therefore, if the summon is submitted against a judge, prosecutor, judicial assistant or registrar who performs his activity in the court competent to solve the case, the claimant can notify one of the courts having the same level of competence

[20] Art 41 Para 1 Point 9 of the Law No 134/2010.
[21] According to Art 53 of the Law No 134/2010.
[22] Art 311 Para 2 Point 2 of the Law No 134/2010.

from the jurisdiction of a court of appeal neighboured with the court of appeal in whose jurisdiction is placed the initial competent court, as stated by the law.

Likewise, if a judge, prosecutor, judicial assistant or registrar who is claimant in a summon trialled by the court in which he performs his activity, the defendant may request, until the first term of hearing to which he was legally cited, the disclaim of competence, having the right to choose any other court of the same level of competence in the jurisdiction of any of the courts of appeal neighboured with the court of appeal in whose jurisdiction was the initial court competent to solve the litigation.

We appreciate that even if the text refers to the prosecutor performing his activity in a court, in a misinterpretation one could consider that Art 123 of the new Code is applicable only for the prosecutor who performs his activity in the „judicial" area of the prosecutor's office attached to the competent court to solve the litigation, and not for the prosecutor who performs his activity in the „penal action" area of that particular prosecutor's office. We could not agree such interpretation because not the area of activity of the prosecutor at a time is the criterion for the delimitation of the optional competence of the court competent to trial summons in which he would be claimant or defendant, but the very quality of being prosecutor the more so as the assignment of a prosecutor in an area or another of activity could be temporary and with the purpose to elude Art 123 of the new CCP.

This is why we consider that these provisions of the new CCP must be considered for all prosecutors and registrars performing their activity in the prosecutor's office attached to the competent court to trial the civil action in which they could be claimants or defendants.

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1. Law No 134 of 1 July 2010, published in the Official Gazette No 485 of 15 July 2010;
2. Law No 221/2009 concerning politically motivated court sentences and their related administrative measures during the period 6 March 1945 – 22 December 1989, published in the Official Gazette No 396 of 11 June 2009;
3. Law No 304/2004 on the judicial organization, published in the Official Gazette no 576 of 29 June 2004.

LEGAL CONCEPTS IN THE NEW ROMANIAN CIVIL CODE

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Bogdan PĂTRAŞCU[**]

Summary: *The authors address some legal concepts covered by the new Romanian Civil Code, concepts related to contracts and successions. The paper discusses, inter alia, the contract of agricultural tenancy, the contract for support until death, the will and the disinheritance. The main accents lay on the novelty elements in the recently adopted Civil Code, as well as on the respective legal terminology. The definitions, particularities and legal nature of the mentioned acts are also taken into account.*

Keywords: *agricultural tenancy contract, lease contract, contract for support until death, will, legacy.*

1. It is no doubt that the adoption of a new civil code is a large enterprise that requires a significant effort from many points of view. On the new Romanian Civil Code, this observation is the better founded if we consider that the enactment in question devote the monistic theory, which sharing aims to give private law a unique and unified regulation. About the extent to which was succeeded and about the consequences of the monistic theory on our system of law we expressed our views on other occasion.[1] We must emphasize again that we consider wrong the submission that we sometimes encountered, according to which the monistic view does not address the existence of branches of private law because the respective fields (family law, commercial law, etc.) remain relevant. It is, however, in this submission, certain confusion between the branch of law and the discipline, field of study. The two notions, in our opinion, should not be considered as equivalent. The branch of law is part of the legal system, an object that has its own specific regulations and methods. The changes in the system have important consequences in terms of configuration of branches of law, until calling into question their very survival. Instead, educational disciplines track and analyze the regulations of

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[1] A. Cojocaru, B. Pătraşscu, *New Civil Code between tradition and current reality*, communication at the Annual Session of the Legal Research Institute „Acad. Andrei Rădulescu" of the Romanian Academy, with the topic „Science and codification in Romania", Bucharest, 30 March 2012, under publication in the volume; Concerning the monistic theory shared by the Civil Code in force, see also Gh. Buta, *The new Civil Code and the private law unity*, in "New Civil Code. Comments", 3rd edition coordinator M. Uliescu, Universul Juridic Publishing House, Bucharest, 2011, pp.45-70.

branches of law, but have greater mobility and their severity is related to the needs of the educational process in facilitating knowledge of legal provisions. This is how there may be several educational disciplines addressing the regulations of one branch. For example, commercial and insolvency law or civil procedural law and foreclosure can be studied separately.

Therefore, the branch of law is totally different from the discipline teaching the same, and equivalence between the two would circumvent the current, real and significant problems that the unique and unified regulation of the private law puts forward as to the structure and even the existence of branches of law.

If such problems exist as regards the system as a whole, it is obvious that the new Civil Code makes important transformations of certain legal concepts in the structure of its matters.

What we have proposed here is to highlight just some of the novelty of certain legal concepts in matter of civil contract law and successions. We will, in this context also, refer to some problems of terminology, i.e. the names given in the new civil code to legal concepts, because from this perspective we can discuss concerns as to the justification for change of some names by others which, in some cases, seem less inspired, considering especially the effects they produce.

2. Among the normative acts repealed by the Law implementing the new Civil Code, there is also the Agricultural Tenancy Law no. 16 of 1994. The Civil Code in force devotes a separate section to the agricultural tenancy contract, called „Particular rules in the matter of agricultural tenancy" (Articles 1836-1850), and these special provisions are supplemented by the provisions of the Code relating to the lease contract (Article 1777-1823), as the agricultural tenancy, together with the lease are types of rental. No doubt that the latter point is correct. No less, it seems equally important and perhaps an enhanced interest to insist on specific differences between the agricultural tenancy and the lease. At least for the fact that these differences confer specific elements that characterize the legal nature of the agricultural tenancy contract. The more so as the agricultural tenancy has become, under the new Civil Code, a contract of interest, moreover, if not exclusively conceptual, with no practical, concrete existence, without being, in other words, an effective legal instrument met under this name, in the legal life. According to Article 1778 (1) Civil Code. „Rental of real estate and movable property is called lease and of agricultural property is called tenancy." Classification as movable and immovable property is a summa divisio, means that whatever the nature of the property would be, the contract will be for rent, except for agricultural goods, movable or immovable in which case we shall discuss about tenancy.

Therefore, even if the parties would name the document recording their consented agreement as lease contract, from clauses' analysis it should result whether the respective agreement is a lease or a tenancy.

Returning to the specific features of the tenancy contract, it is worth noting that such resulted more clearly from the special regulation given to this contract by Law no. 16 of 1994, now repealed. It can also be another argument that the monistic theory shared by the new Civil Code standardizes the legal status of concepts at the expense of their specific features. For example, it lacks in the Civil Code a definition of the tenancy, considering, mutatis mutandis, that it can be noted from this perspective, the definition of lease under Article 1777 Civil Code. But we wonder if tenancy's specificity did not require a definition mentioning, inter alia, the name of the parties to the contract, i.e. lessor and tenant, the specific nature of use exercised by the tenant, i.e. agricultural goods use, and also specific elements of the bilateral act in question: agricultural goods and rent.

A definition of tenancy should also mention legal characteristics of the contract, at least those that distinguish it from the lease contract. We refer to the solemn character[2] and the intuitu personae[3].

It is true that some of these elements result from different pieces of legislation enshrined in the Civil Code in terms of tenancy or even expressly mentioned, but we do find that such do not justify lack of a legal definition of the agricultural tenancy contract and that such were not likely to do the definition unnecessary. Instead, bringing together specific features of the respective contract, in such a definition, would have given the advantage of possibly more adequate systematization of the provisions of the Code containing one or more relevant elements. Even their possible and entitled denomination as *defining* elements, express, in our opinion, the need for definition.

The word „exploit", as particular type of use of agricultural property by the tenant is found, for example, in Article 1836b) Civil Code, which lists different categories of goods „for agricultural exploitation" and in Article 1846 Civil Code stating that „With the written consent of the lessor, the tenant may assign the tenancy to the spouse participating in the exploitation of the leased assets or to his descendants having attained legal age". The last quote highlights the fact that in the Code, the Contracting Parties bear, however, their specific and enshrined names as lessor and tenant.

Although sometimes in the doctrine[4] the concepts of use and exploitation are used in equivalence ratio, as synonyms, in our opinion there is a noticeable difference between them because the exploitation is an effective and lucrative use

[2] According to Article 1838(1) Civil Code "Agricultural tenancy contract must be concluded in written form, under the sanction of incurable nullity".

[3] As grounds for a contrary opinion, stating that agricultural tenancy is not of intuitu personae nature, it was pointed out that the requirements „of professional and moral nature in relation to persons who can act as tenants, are general requirements, and do not establish a certain, specific, actual person who has the capacity to act as part in a specific contract" (D.C. Florescu, *Civil Contracts*, Universul Juridic Publishing House, Bucharest , 2011, p.190).

[4] See, for example, Fl. Motiu, *Special contracts in the new Civil Code*, Universul Juridic Publishing House, Bucharest, 2011, p. 192.

that leads to obtaining agricultural income (of course without being affected the substantial qualities of agricultural goods). Therefore the tenant is required to have agricultural skill and specialized knowledge (specifically required by Law no. 16 of 1994, but no longer required by Civil Code). This does not mean that in choosing tenants, lessors do no longer consider their abilities, skills, but the lessor may not be as certain that they exist, certainly that, in some extent, was given by the legal requirements imposed to individual tenants, requirements that do no longer apply. As for the tenants, legal persons, Agricultural Tenancy Law no. 16 of 1994, contained the requirement that their business activity must be agricultural land exploitation. The Civil Code in force does not contain this requirement either. No such provision is found in the Code's section on private tenancy rules. Moreover, although in terms of legal persons, it is maintained the principle of specialty of their capacity of use, it is limited under Article 206 (2) Civil Code to legal persons without lucrative purpose, but the categories of collective subjects able to act as tenants do have such a purpose, so apparently they do not need to take only the duties and to exercise only the rights that would result from their company documents according to their own object of activity.

The fact that the tenant's skills in agricultural goods exploitation are necessary and certainly concern the lessor, is implicitly inferred because, under Article 1850 Civil Code „the tenancy contract is deemed terminated in case of death, incapacity or bankruptcy of the tenant." The tenancy contract is therefore an *intuitu personae* contract and only when the tenant is an individual but also when the tenant is a legal person.

Here are a few issues highlighting the differences between the current legal regime of tenancy, in relation to the old regulations of this contract.

3. The new Civil Code regulates, in a separate chapter, the contract for support until death. With a separate regulation, this contract, so far unnamed, becomes named. No doubt that the support contract will receive special attention in legal literature since it is now subject to separate regulation which must be thoroughly analyzed and the frequency of use in practice will request the courts to rule on various aspects of the legal nature of the support contract.

We make a few observations regarding the regulation of this contract.

The contract for support until death is a solemn agreement because, according to Article 2255 Civil Code, it must be signed, under penalty of incurable nullity, in authentic form.

A general observation resulting from the overall analysis of the relevant provisions is that we note grater closeness to the annuity contract. In fact, some of the provisions of the latter contract – as specifically stipulated in Article 2256(1) Civil Code - apply to the contract for support until death. Moreover, the title of Article 2261 Civil Code is „Substitution of support by rent". Pursuant to paragraph (1) of this legal text „If the provision or receipt in kind of support cannot continue

for objective reasons or if the debtor dies and the parties do not reach an agreement, the court may replace, at the request of either party, even temporarily, the support in kind with a proper amount of money".

Reduction of differences between annuity and support is observed – also given the relativisation of truth of the assertion that the main difference between support and annuity contracts, both random - is that while the support provider is held to the obligation to do (to provide support), the annuity debtor is required to give (to pay money on regular basis or, according to Article 2242 (1) Civil Code, other fungibles). But whenever the support provider procures on his expense support goods, it is not only obliged to do but to give. In this configuration of support obligation, more common practice in comparison with the hypothesis of benefits (food preparation, purchasing clothing, etc.) whose cost must be incurred by the supported person, is more appropriate the observation that while the annuity debtor is held exclusively by the obligation to give the provider has the obligation to do, sometimes accompanied by an obligation to give (ownership transfer).

We want to mention two more aspects on the regulation in the Civil Code in terms of contract for support until death.

The first is that Article 2257 Civil Code regulates the scope of the support obligation, including in terms of constituents, a listing on the main obligations undertaken by the support provider. It is a good thing, because there are clearer guidelines for assessing the extent to which the support obligation has been fulfilled, which can lead to a decrease in misunderstandings, and even of litigations concerning the actual support.

The second aspect consists in assessing whether the regulation on support contract allows it, in terms of the aim pursued, to be a consideration or free of charge, to provide support provision in favor of either Contracting Party or a third party, but in any these configurations it remains a called contract. We do say that, in practice, conclusion of contracts exceeding possible variety of support covered by the Civil Code itself may occur, but, following an overall assessment of their terms, however, they lead to the assessment that the object and purpose thereof, at least in part, is to ensure support of a person. They can also bear the name support contracts but they will not be called contracts.

4. Definition of the will in the Civil Code of 1864 was criticized mainly because it reduces the will to a legacy. Thus, Article 802 provides „the will is a revocable act whereby the testator decides what shall happen with all or part of his wealth after his death". In a literal interpretation it results that a mortis causa legal act which includes besides legacies also other manifestations of will is not a will; the stronger as this conclusion applies only if the mortis causa document contained other manifestations of will, for example recognition of a child, a disinheritance etc.

Legal literature and judicial practice have also interpreted extensively the provisions of Article 802 of the old Civil Code considering that all mortis cause

acts shall be considered will if they include other manifestations of will with or without legacies. Responsive to the orientation of the doctrine and practice, the new Civil Code in Article 1035 entitled „Content of the will" expressly provides that in addition to provisions relating to the estate or in their absence „the will may contain provisions concerning the division, revocation of previous will provisions, disinheritance, appointment of will executors, legatees and heirs and other provisions that take effect after death of testator".

The new Civil Code in Article 1034, defines the will as „personal and revocable unilateral act by which a person called testator, decides, in one of the forms required by law, for the time when he shall not be alive".

It seems that, taking into account the cited provision in Article 1035, which includes an enunciating list of legal documents that a will may include, the new Civil Code repaired the main deficiency of the definition in Article 802 of the old Civil Code, to reduce the will to legacy.

However, at a closer look it is noted a possible contradiction between the provisions of Articles 1034 and 1035 of the new Civil Code. If one only looks at the legal texts of the two codes, which define the will, he can reach the conclusion that there aren't significant differences as regards the issues discussed, the relationship between will and legacy. Moreover, one could say that Article 1034 of the new Civil Code operates with the same reduction of will to legacy, criticized constantly under the old code. This is because, just as Article 802 also Article 1034 states that in his will, the testator „decides ... for the time when he shall not be alive „. If the term „decides" means preparation of documents of will, such can only refer to legacies. Therefore, - and such interpretation of the legal text is possible, it has nothing forced - how can it be harmonized with the provision of Article 1035 of the Civil Code in force, which qualifies as will also the mortis causa act that contains manifestations of will other than those on the property of the testator? In our opinion, the only possible harmonization is to give the term „decide" in Article 1034 another meaning than that of act of will. We believe that a systemic interpretation of these laws, as concerns Article 1034 Civil Code, i.e. the testator *decides* for the time when he shall no longer be alive, is to be understood that the testator, by his act of last will, *provides, stipulates, registers provisions* that will take effect after his death. In such interpretation of the texts there will be no contradiction between the definition of the will and the content of this legal act.

5. Both the repealed Civil Code and the Civil Code in force prohibit the will by which two or more people would provide in the same act in favor of the other (another) or all together in favor of a third party. Such will, prohibited by law, legal

literature and practice has so far been devoted a name, that of connective or conjunct will[5].

But the new Civil Code calls it, in Article 1063, mutual will (this is the title of the mentioned article). The fact that the act we are talking about is absolutely null is explained at least in that it violates some legal characteristics of the will such as essentially personal legal act and fully revocable. There is therefore no reason to question the fairness of its prohibition. Our objection concerns terminology. There are two issues on which we have serious and, we believe, justified reservations. The first refers to the substation of an enshrined name, no matter which of its variants - connective or conjunct will – with one not known in law, of profane nature, a term already used in the doctrine[6] to describe the legal language sometimes used by the new Civil Code.

Then, the notion of mutual will is inappropriate in that it does not cover all circumstances that Article 1036 Civil Code itself has in view. If we describe as mutual the circumstance where two people decide on their will in respect to each other, the mutual nature is missing if two persons decide in favor of a third person. This objection of lack of coverage by name of all discussed variants of will does not subsist in case of the notion of conjunct or connective will. Conjunct is unified and connective is joining[7]. Indeed, the will in question is made together by two or more people, therefore unitarily and their act expresses their wills, while the legal operation is the factor that unites them.

6. The Civil Code in force governs, for the first time, systematically, disinheritance. It is a positive thing because in the past the configuration of exheredation was the doctrine's exclusive work who of course also received contributions of courts in the reasoning part of their decisions.

Our comment is summarized here only to Article 1074 Civil Code which defines and classifies disinheritance. The mentioned legal text reads as follows:

(1) „Disinheritance is the will disposition by which the testator removes from inheritance, in whole or in part, one or more of his legal heirs.

(2) Disinheritance is direct when the testator decides by will to remove from inheritance one or more legal heirs and indirect when the testator establishes one or more legatees."

Actual disinheritance is that mentioned in paragraph (1) of Article 1074 Civil Code, therefore a legal covenant contained in a will for a special purpose, namely to remove from inheritance one or more legal heirs. It is, therefore, the

[5] See, for example. V.Ursa in M. Costin, M. Muresan, V. Ursa, *Dictionary of civil law*, Scientific and Encyclopedic Publishing House, Bucharest, 1980, p.515.

[6] M. Uliescu, *Foreword*, in "The New Civil Code. Comments", 3rd edition, Universul Juridic Publishing House, Bucharest, 2011, p.11-12

[7] *Small academic dictionary*, vol. I, Univers Enciclopedic Gold Publishing House, Bucharest, 2010, p.487.

disinheritance called in paragraph (2) of Article 1074 Civil Code, direct disinheritance. The same paragraph talks about indirect disinheritance, done by establishing legatees which, as it can be inferred, leads to the legal heirs' removal from inheritance.

It is, in fact, the terms of one of the classifications of direct and indirect exheredation. What Civil Code called indirect disinheritance is not an act of exheredation because manifestation of will is done in order gratify persons other than legal heirs. Only as a consequence, the alienation mortis causa to others of part of the estate, legal successors are removed from the inheritance. Legal act or acts are in this situation, liberalities, legacies, and their purpose can only be intended to gratify, not to exheredate.

The actual, direct disinheritance, specific act for removal from inheritance, is a negative condition to inherit under the law. In other words, for access to inheritance, the legal heirs, except for the forced heirs[8], must not have been disinherited. The so-called indirect disinheritance cannot be considered a negative condition of legal inheritance. This is because - as we said – indirect disinheritance results from gratification by means of legacies included in the will, of other persons, following the removal of heirs. If indirect disinheritance would be considered a negative requirement to inherit under the law, would mean, paradoxically and unacceptably that testamentary legacy itself would be a negative condition of legal inheritance. Furthermore, a type of devolution, in our case the will, can be positive or negative demand for other types of devolution, namely for the legal one.

Here are some reflections on some of the new concepts established by the Romanian Civil Code. They raise only some issues and try to give some answers but undoubtedly the analysis of recently adopted concepts in the Civil Code will continue and the results will only be positive.

[8] In case of heirs who have a portion of estate reserved by law, even in case the exheredation act would address total removal of the heir in question, he would still be able to collect his reserved portion. Indeed, under Article 1086 Civil Code "Forced heirship is the portion of the inherited assets that forced heirs are entitled to by law, even against the will of the deceased manifested by gift or disinheritance.
A total exheredation, in case of forced heirs producing only partial effect, means that it can not be a negative condition to inherit under the law. For more information concerning the regulation on forced heirship in the new Civil Code, see, I. Genoiu, *The right to inheritance in the new Civil Code,* C.H. Beck Publishing House, Bucharest, 2012, p. 264 et seq.

THEORETICAL CONSIDERATIONS ON PHASE (STAGE) PRE-CONTRACTUAL COLLECTIVE BARGAINING

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Abstract: *Law No. 62/2011 provides that the employer or employer organization initiates zhe collective bargaining, making no distinction bet weend the two types of bargaining negotiations: mandatory (at the level of companies having more than 21 employees) and facultative (at the level of companies having less than 21 employees, of groups of companies, and of activity sectors).*

In any case, bargaining negotiations must take place within the framework of certain procedural terms and rules.

Keywords: *Law on social dialogue, negotiation of collective employment contracts, contravention, procedural rules.*

Article 128 paragraph (1) of the social dialogue law no. 62/2011 states that „collective agreements may be negotiated at units', units groups' and business sectors' level".

Although the wording „may be negotiated" expresses a possibility for the three levels of negotiation (on vertical), as stipulated by article 229 paragraph (2) of the Labour Code and article 129 paragaph (1) of law no. 62/2011, collective bargaining is mandatory at unit's level if such has more than 21 employees[1].

Non-observance of such obligation, binding upon the employer, is considered a minor offense, according to article 129 paragraph (2) of the Social dialogue law no. 62/2011 and is sanctioned by 217 paragraph (1) lett. b) of the same with a fine between 5,000 lei and 10,000 lei.

The doctrine, the case law and even the practice of social dialogue consider the obligation to negotiate a diligence obligation and not a result one. Moreover, according to the free will principle (article 1169 of the Civil Code – Law no. 287/2009) the parties may mutually agree to not conclude the collective bargaining agreement or even not to negotiate it[2].

On the other hand, there are some cases in which, because of the involved interests, the pre-contractual negotiation plays an important role. It is obvious that the more complex the object of the future contract is, the more intense the prior

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[1] Alexandru Țiclea, „Declanşarea negocierii colective", Revista română de dreptul muncii", nr.8/2011, p.44.

[2] *Idem*.

negotiations are[3]. This distinction is made by the law maker in article 1182 paragraph (1) of the Civil Code, stating that: „the agreement is concluded through negotiations between the parties or by acceptance withour any reserve of a contracting offer". The contract's dissociation phase is often a long one, involving various preliminary acts which anticipate the structure and contents of the future contract. Such phase could not be overlooked, therefore, the final version of the Civil Code[4] contains several articles in this respect.

In what the collective agreement is concerned, it should be underlined that collective agreements may be negotiated and concluded in units having less than 21 employees, provided that the parties reach such agreement.

In view of collective bargaining achievement, the law maker established certain terms and procedural rules equally applicable to negotiations at levels higher than the units' level: groups of units and business sectors.

The pre-contractual phase may entail a progression or a regression in terms of contractual agreement, this meaning that it may lead or not to the execution of a contract. Irrespective of the final solution of this phase, such is related to the freedom of negotiations, as stated by article 1183 paragraph (1) of the Civil Code, according to which: „the parties may freely initiate, undergo and break negotiations and may not be held liable for the failure thereof". The shape of contractual freedom is given by the parties right to chose the negotiations partners, to break the pre-contractual debates when considered appropriate, to reload negotiations or to refuse to

conclude the agreement upon finalization of the negotiations[5]. The limits of pre-contractual freedom are nevertheless given by the existence of certain legal or conventional, explicit or implicit obligations[6].

The labour law related regulations are more concrete and more detailed, thus, article 129 paragraph (3) of law no. 62/2011 states that the „employer or the investors organization initiate the collective bargaining with at least 45 calendar days before expiry of the collective labour agreements or of the applicability period of the clauses contained by the addenda to collective labour agreements".

It may be noted that this term is different than the one provided under paragraph (5) of article 129, according to which „the duration of collective bargaining may not exceed 60 calendar days unless the parties thus agree". This is the reason for which we consider natural that the 45 days term was in fact a 60 days terms, so that these are perfectly correlated: the new agreement enters into force upon expiry of the old one. It is of course possible that negotiations are finalized within a term shorter than 60 days, even within a 45 days or shorter term.

[3] L. Pop, „Tratat de drept civil, Obligațiile, vol II, Contractul", Ed. Universul Juridic, Bucureşti, 2009, p.203 and following..

[4] L. Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, „Tratat elementar de drept civil, Obligațiile", Ed. Universul Juridic, Bucureşti , 2012, p.91.

[5] Ph. Malaurie, L. Aynes, Ph. Stffel-Munck, qouted workes , p. 229 and following.

[6] L. Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, qouted workes p. 91.

But, in this manner, the new contract will be concluded (and registered etc.) before its entry into effect (date which coincides, as a rule, with the one of the lapse of the previous agreement)[7].

It may be noted that, while regulating the collective negotiation terms and procedure, the law maker does not make any distinction between mandatory and optional negotiation.

It is, indeed, further stated that, „in case the employer or the investors' organization does not initiate the negotiation, such will be initiated upon written request of the representative syndicate or of the employees representatives, within a maximum term of 10 days as of communication of the request" [article 129, paragraph (4) of law no. 62/2011].

Thus, in case there are less than 45 calendar days until lapse of the previous collective labour agreement and the employer or the investors organization have not initiated the negotiations, the representative syndicate or of the employees representatives will start negotiations through a written request addressed to the employer, but also to other parties entitled to participate therein (in case of negotiation at the level of units' groups and business sectors).

The employer [8] which has not initiated the negotiations, but was approached by the representative syndicate or by the employees representatives has to convene all parties in view of negotiations, within a 5 calendar days term as of the date of negotiations initiation under article 129 paragraph (4) [article 130 paragraph (1) of law no. 62/2011].

Accordingly, upon receiving the written request provided for by article 129 paragraph (4) the employer (the investors' organization) has to convene the parties within 5 calendar days so that negotiations are begun within a maximum 10 calendar days, as stated article 129 paragraph (4).

Notwithstanding this, such legal provisions are not correlated with those of article 140 paragraph (1) and (3) of the same enactment. According to such legal provisions, „in view of ensuring participation to negotiations of collective agreement at units, units' groups and business sector level, employers and investors organizations will provide all parties entitled to participate in the collective negotiations the announcement regarding the intention to begin collective negotiations, in case the employer or the investors' organization have not initiated the negotiation according to article 129 paragraph (3), the syndicate or the employees representatives, as the case may be, initiating the negotiations article 129 paragraph (5) shall provide to all parties entitled to participate in negotiations the announcement regarding the intention to begin collective negotiations."

[7] Alexandru Ţiclea, „ Declanşarea negocierii colective", Revista română de dreptul muncii", nr.8/2011, p. 45.

[8] For instance, it can be an employer`s organiyation dependencing on the level of negociation.

The mentioned announcement (irrespective who authored it) „will be transmitted in written form to all parties entitled to negotiate the collective labour agreement, with at least 15 days before the negotiations begin (paragpraph (3) thesis I)".

When analyzing the aforementioned legal provisions, the doctrine[9] acknowledged that such provisions are somehow contradictory, contain parallel terms and attributions, which may create confusions and, therefore, tried a logical interpretation thereof.

In case the employer or the investors' organization comply with article 129 paracgraph (2) and (3) and initiate negotiations, the conclusions are obvious: negotiations must be initiated with at least 45 calendar days before the expiry of the collective labour agreement, by means of the procedural act named „announcement regarding the intention to start collective negotiations" [article 140 paragraph (3) 2nd thesis], communicated to all parties entitled to negotiate the contract „with at least 15 days before the date when negotiations are begun" [article 140 paragraph (1) 2nd thesis]. Therefore, these „at least 15 days" are located within the „at least 45 days", more precisely at the beginning of such period.

In the opposite case where the employer or the investors' organization does not initiate negotiation, this will begin upon „express request of the representative syndicate or the employees' representatives". This means that, if the employer or the investors' organization remains passive and less than 45 days remained until lapse of the old contract, the „written request" will be submitted with such employer. After receiving the request, its recipient has 10 calendar days maximum [article 129 paragraph (4)] to covene the parties entitled to negotiations within 5 calendar days [article 130 paragraph (1)].

If negotiations are conducted at the unit's level, the employer will convene the representative syndicate or, as the case may be, the employees' representatives, from which it received the „written request".

However, in case negotiations are conducted at superior levels, convening the investors' organization overlaps with the announcement to be made by the syndicate or the employees' representatives, transmitted to all parties entitled to participate in the negotiations, according to article 140, paragraph (1), 2nd thesis of Law no. 62/2011.

Conclusively, if the employer or the investors' organization do not (separately) initiate the collective negotiation, the parties entitled to participate in such negotiation are convened by the group of employers (if negotiations are conducted at the units' group level) or by the investors' organizations (if negotiations refer to the business sector) and notified in writing by the syndicate or employees representatives [article 140 paragraph (1) 2nd thesis and paragraph (3) 1st thesis] whi initiated the procedure in discussion[10].

[9] Alexandru Țiclea, „ Declanşarea negocierii colective", Revista română de dreptul muncii", nr.8/2011, p. 45.
[10] Idem.

Consequently, employer's refusal to negotiate is contractually sanctioned only in case of units with at least 21 employees. In all other cases where negotiations may be carried out (superior levels – units' groups and business sectors) the mentioned refusal is not subject to legal sanctions. Notwithstanding this, syndicates or employees' representatives interested in negotiations, which undertook the necessary steps to start negotiations, may use the provisions of the Social dialogue law no. 62/2011 (article 156 and subsequent) and to initiate collective labour conflicts (including strikes).

Specific obligations of negotiation

The new provisions of the Civil Code establish certain express obligations of the parties involved in negotiations. Such are minimal obligations. Besides these, certain obligations may be also deducted and should be construed as implicit obligations. Finally, another category of obligations may be the result of preliminary conventions concluded by the parties during the negotiation phase. All these are the conclusion of a vast doctrine, but also of jurisprudence[11]. The doctrine identified several examples:

- The good-faith obligation is a legal obligation expressly provided by article 1183 paragraph (2) of the Civil Code, according to which „the party undegoring a negotiation is bound to observe the good-faith rules. The parties may not agree to limit or exclude such obligation". It is a mandatory obligation, which implies that parties may not limit or exclude it. It is difficult to determine the meaning of good-faith and, in other legal systems, the impossibility to provide a complete definition thereof appeared[12]. It would be simpler to determine the approaches contrary to to good-faith which have to be eliminated or restricted in the pre-contractual phase[13], such as: engaging in a pre-contractual negotiation without an actual intention to negotiate, unexpected break of negotiations etc. This was the same idea of the law maker itself, which stated, for example purposes, that initiating and undergoing negotiations without the intention to conlude the agreement is contrary to good-faith [article 1183 paragraph (3) of the Civil Code] and that „the party initiating, undergoing or breaking negotiations without good-faith shall be held liable for the prejudice caused to the other party" [article 1183 paragraph (4) 1st thesis of the Civil Code]. From the good-faith obligation other „implicit" obligations may be deducted amongst which the most significant would the pre-contractual obligation to inform[14];

[11] L. Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *qouted workes.* p.92.

[12] For more details see S. Whittaker, R. Zimmermann, „ Good faith in European contract law: surveyng the legal landscape" în „Good Faith in European Contract Law", The Common Core of European Contract Law, Cambridge University Press, 2000, p. 7 and following.

[13] R. Summers, „ The conceptualisation of good faith in American contract law: a general account", in *qouted workes*„Good Faith in European Contract Law", p.118.

[14] L. Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *qouted workes*. p.92.

- The confidentiality obligation is the second legal obligation to be considered during negotiations[5]. This is provided by article 1184 of the Civil Code, according to when a confidential information[6] is communicated by a party during negotiations, the other party is bound not to disclose it and not to use it for its own interest, irrespective whether the agreement is concluded or not. Failure to observe such obligation triggers the liability of the defaulting party". This obligation is not a mandatory one, but a dispositive one: the parties may derogate from the provisions of article 1184 of the Civil Code, allowing the use of the information obtained during negotiations within relationships with other persons, potentially in other negotiations. The meaning of such permission is equivalent to a requalification of exchanged information as not being confidential. The voluntary elimination of confidentiality is often replaced by other obligations (conventional ones, this time), such as the honesty obligation in what parallel negotiations are concerned[15], the persons involved in such negotiations, the result thereof etc;

The Social dialogue law provides that the first negotiation meeting establishes the public or confidential character of the information the employer will make available to the syndicates' delegates or to those of the employees representatives, according to the law, as well as the date until when such obligation is to be observed. On the other hand, the regime of confidential information disclosed by the employer is the one established by law no. 467/2006 regarding the employees' general information and consulting frame.

- The pre-contractual information obligation – despite the lack of express provisions in this respect, the general theory of hidden flaws contained by the Civil Code makes us acknowledging that such obligation, which we consider legal and implicit[16], resulting from the general good-faith obligation [17], is to be also considered in the pre-contractual phase. From the legal definion of intention as consent flaw contained by article 1214 of the Civil Code it results that there is a legal obligation to inform the other contracting party of „certain circumstances which should have been disclosed". The object of the information obligation is given by a sum of information relating to the future agreement which is deemed important for the execution thereof.

The information obligation is considered to be a result obligation, in the sense that the one upon which such is incumbent must ensure that information communication is achieved and, thus, the result of the obligation is achieved, while the receipent of the information understood the provided information. Complex distinctions are however related to the purpose of the provided information: information necessary to ensure a flawless, valid consent or information provided with the view of ensuring a complete and correct performance of the contract, wherefrom oftenly result different sanction for

[15] L. Pop, *qouted workes*, p 212.
[16] It would require a detail analysis of the Draft common France of Performance that regulates a various number of precontractual obligations., *qouted workes*, p. 93.
[17] Idem.

non-fulfillment of the obligation[18]. The pre-contractual or contractual character of the information obligation is often difficult to determine due to the progressive formation of the consent during the contracts negotiations[19]. In certain areas, the pre-contractual information obligation has a legal and express character[20]. We mainly refer to the informative formalism established by consumerism legislation[21], but not only to such[22]. The sanctions are in their turn different: there may be sanctions applicable to consent vices or even contractual sanctions[23];

The Social Dialogue law provides that within a 5 calendar days as of initiating the negotiations procedures set forth for the case where the employer or the investors' organization do not initiate the negotiations these will start upon the written request of the representative syndicate or of the employees representatives within maximum 10 calendar days as of request communication. The employer or the investors' organization has the obligation to convene all parties entitled to negotiaton of the collective labour agreement.

The information the employer or the investors' organization shall make available to the syndicates or employees' representatives delegates, as the case may be, shall contain at least data referring to the updated economical-financial status and the work force occupation status.

- There are also other contractual or pre-contractual obligations which may be considered. We envisage, for instance, the obligation to negotiate, to pursue with negotiations, the honesty obligation, the exclusivity obligation, the assistance obligation, the obligation to bear certain pre-contractual costs, etc.[24].

Pre-contractual agreements

It is possible for the pre-contractual phase to involve certain deeds to mark the negotiations performance, such as: parties agreements whereby the pre-contractual negotiations to be organized or the negotiations to a certain extent to be resumes, with extensive or limited effects. There is, hence, a variety of contracts preliminary to the final or envisaged contract:

[18] M. Fabre-Magnan, „ De L'obligation d'information dans les contracts, LGDJ, Paris, 1992, nr. 281, p. 234 and following.
[19] M. Fabre-Magnan, *qouted workes* , nr. 277 and following, p. 220 and following.
[20] J. Calais-Auloy, Fr. Steinmetz, „ Droit de la consummation", Dalloz, Paris, 2000, p. 49 *qouted workes*.; J. Goicovici, „Dreptul consumației", Ed. Sfera Juridică, Cluj-Napoca, 2006, p.32 and following
[21] L. Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, op.cit. p. 94; for more details see J. Goicovici, S. Golub, „ Formalismul informativ-privire specială asupra creditului pentru consum" în „ Consumerismul contractual. Repere pentru o teorie generală a contractelor de consum"(coord. Paul Vasilescu), Ed Sfera Juridică, Cluj-Napoca, 2006, p.84 and following.
[22] For example, in case of franchisse the legal obligation of informing the franchises., for more details see M. Mocanu, „ Contractul de franciză", Ed. C.H. Beck, București, 2008, p.53 and following.
[23] L. Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *qouted workes*, p. 94.
[24] L. Pop, *qouted workes*., p. 212 and following.

1. The preliminary contracts[25] are those contracts whereby the parties agree to negotiate in good faith the execution of a future contract and whereby the contractual negotiations between the parties are organized (a means obligation)[26];

2. The percentage or the partial agreement[27] is an agreement of the parties whereby these resume the negotiations carried out until a certain point and decide the establishement of common points which would not make the object of negotiations, being considered contractual elements already clarified[28]. The primary consequence of such agreement is the fact that neither party may unilaterally resume elements upon which a partial agreement was reached[29]. The labour law contains a similar provision which envisages the legal force of the applicable collective labour agreement. Thus, collective labour agreements may not contain clauses establishing right of an inferior level to that established under collective labour agreement concluded at a superior level, while individual labour agreements may not contain clauses establishing rights inferior to those established under the applicable collective labour agreements;

3. The preference pact – is in its turn a variety of preliminary contract whereby one party undertakes toward the other party to prefer the latter as contractual partner in identical contractual conditions[30]. A typical example is constituted by the contractual preemption right which is based on this very mechanism[31]. This type of understanding is specific to civil law, such privison not being included in the labour law, as the negotiations actors are defined by law. Accordingly, a collective labour agreement may be negotiated just between the employer or the investors' organization and the syndicate or the employees representatives, as the acse may be, which envisages the reguklation of labour or work related relationships between the to parties;

4. The unilateral promise to contract is that preliminary contract whereby one of the parties undertakes to contract with the other party is the former wishes. Such convention must observe the conditions of the envisaged or promised contract (article 1279 of the Civil Code). A version of the unilateral promise to contract seems to be the so called „option pact" – regulated by article 1278 of the Civil Code- according to which: „when the parties agree that one of them remains bound by its own statement and the other may accept ot refuse it, such statement is deemed an irrevocable offer and has the effects stipulated under article 1191 (referring to the irrevocable offer). This last contract seems to pertain, as per the law maker, just to the irrevocability of the contracting will of one of the parties[32]. If the beneficiary of the pact declares that it

[25] L. Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *qouted workes*, p. 95.
[26] L. Pop, *qouted workes*., p. 210 and following.
[27] J. Goicovici, loc. cit., „ Formarea progresivă a contractului", p. 113 and following.; L. Pop, op.cit., p. 213 and following;
[28] L. Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *qouted workes*, p. 95; the scoring was included in the Romanian doctrine from the French law which, in its turn, took it from the German law.
[29] J. Goicovici, loc. cit., „ Formarea progresivă a contractului", p. 48 and following.
[30] J. Goicovici, loc. cit., „ Formarea progresivă a contractului", p. 41 and following.; L. Pop, op.cit., p. 214 and following.
[31] L. Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *qouted workes*,p. 95.
[32] *Idem*.

understands to conclude the contract within the contractually established term, the agreements is deemed concluded as of the date when the option is exercised, reson for which the validity conditions of the envisaged or promised contract must be contained by the option pact and, respectively, by the act whereby option is exercised [matter which is expressly provided by article 1278 paragraph (5) of the Civil Code. Theoretically, in such situation, upon the interested party's rquest, the court of law may acknowledge the existence of the contract. Law no. 130/1996 (currently repealed by law no. 62/2011) stipulated the possibility to register a collective labour agreement without the signature of all parties representatives if: a) some investors representative associations or organizations of syndicates were invited to negotiations, but were not present thereto; b) some investors representative associations or organizations of syndicates participated to negotiations, agreed with the negotiated clauses, but refuse the signing of the contracts, situation which has to result from the acts submitted by the parties; c)the parties representatives upon negotiations which have not signed the collective labour agreement represent less than a third of theunit's employees number, less than 7% of the employees of the respective branch or less than 5% of the employees of the national economy, as the case may be.

5. The bilateral promise to contract is a preliminary contract involning the obligation undertook by both parties to conlude at a certain future moment an agreement. Such mechanism is regulated under article 1279 of the Civil Code (whoch seems to include all promises to contract, hence the unilateral ones, as described above). The promise to contract „must contain all clauses of the promised contract in lack of which the parties could not perform the promise [article 1279 paragraph (1) of the Civil Code]. Moreover, in case the promise to conclude the contract is not observed the entitled party may request damages (article 1279 paragraph 2 of the Civil Code) or evern the issuance of a court decision replacing the contract (article 1279 paragraph 2 of the Civil Code), the requirement being that iof the legal requirements concerning the validity of the contract to be observed[33]. This tupe of legal deed is not regulated under the labour law.

6. The frame contract is the agreement wherebythe parties establish the main rules which would govern the execution of future contracts between them. The contracts concluded within performance of the frame contract are called „execution" and „application" contracts[34]. For this category, the law maker itself gives a general definition in article 1176 of the Civil Code: „the frame contract is the agreement whereby the parties agree to negotiate, to conclude or to maintain contractual relationships whose elements are determined by the latter". On the other hand, „the manner of perming the frame agreement, particularly the term and volume of obligations, as well as, should the case be, their price, are established in subsequent conventions" (article 1176 paragraph 2 of the Civil Code). Such regulation was also contained by law no. 130/1996 on collective labour agreement,

[33] L. Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *qouted workes*, p. 96.
[34] L. Pop, *qouted workes*, p. 217 and following.

which established the negotiation of a sole collective labour agreement at national level. Under the new labour legislation, the collective labour agreement at units' groups or business ector level can be considered a frame contract.

The legal regime applicable to negotiation (as a pre-contractual pahse)

In order to establish the legal regime applicable to the pre-contractual phase it is necessary to take into account the distinction between the sources of the obligations incident in this phase. Thus, as detailed above, the obligations during the contract's negotiation phase may have a legal nature (expressly provided bythe legal provisions or implicitly resulting from the legal provisions) or a conventional nature (resuming legal obligations or creating other obligations). The legal regime will be generated by the source of each such obligation. Hence, if non observing legal obligations is concerned (for instance, the general good-faith obligation), the engaged liability is a delictual one,whilst, if non observing contractual obligations is concerned, the liability will be of contractual nature and will be subordinated to the rules established by the preliminary agreement concluded[35].

Before closing the discussion relating to the legal regime applicable to the pre-contractual phase, it is necessary to make some considerations regarding the law applicable to the pre-contractual phase in case an international contract is envisaged. The law applicable to the pre-contractual phase is considered to be the law applicable to the envisaged contract. Therefore, irrespective of the qualification of the liability generated by non observing the obligations during the negotiations phase, the national law to be applicable will be that of the final contract, as per article 12 of Roma II Regulation regarding the law applicable to extra-contractual obligations, the only conditions being the fact that the non observance of the pre-contractual obligations are included in the in contrahendo[36] guilt. Thus, the law applicable to the pre-contractual phase shall be finally determined by the rules established by article 2 and the following of Roma I Regulation regarding the law applicable to contractual obligations.

Finally, from a chronological standpoint, the moment of the finalization of the pre-contractual phase is that of the wills' agreement. The importance of such phase is significant from more points of view for the contractual pahse as well. Amongst others, in the negotiations phase, elements of a potential consent flaw may be found, as well as elements of a potential interpretation of the contract based on instruments used in the pre-contractual phase[37].

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[35] L. Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *qouted workes*, p. 98.

[36] I. Bach, P. Huber, în P.Huber(ed.), „ Rome II regulation. Poket Commentary", p.313 and following.

[37] A. Bonomi, „The Rome I Regulation on the Law Applicable to Contractual Obligations-Some General Remarks", în „ Yearbook of Private internatinal Law", volX/2008, p. 165 and following.

CRITICAL REMARKS ON DISCIPLINARY LIABILITY OF CIVIL SERVANTS IN ROMANIA

Cătălin VASILE*

Abstract: *Human society wouldn't have progresses if it wouldn't have been created a social body, which started to function thru it's staff who carry out specific activities in functions settled over time. Diversity of tasks that need to be fullfilled by public administration requires a wide range of activities from public services and also a personell with diverse training. Daily need of the community, of the man who lives in organized groups is the essential purpose and the only justification for public administration. The public servant has special rules when it comes for disciplinary liability. These legal texts, shall be reviewed and modified in order to be addapted to society current needs.*

Keywords: *public servant, society, administration, liability, diciplinary offense, disciplinary sanction, misconduct.*

All transformations that took place in social life caused many problems to society, especially for administrative reason. Members needs led to the civil service and public officials, who take part to their achievement and meet the overall objective of the administrative system.

In other words, human society wouldn't have progresses if it wouldn't have been created a social body, which started to function thru it's staff who carry out specific activities in functions settled over time.

Civil Servant Statute, provided by Law no.188/1999, is the framework law regarding public office in Romania. This law is part of the tradition of interwar Romania, ans it's also justified by other countries legislations.

Diversity of tasks that need to be fullfilled by public administration requires a wide range of activities from public services and also a personell with diverse training. Daily need of the community, of the man who lives in organized groups is the essential purpose and the only justification for public administration, which is so diverse, especially in its benefits to the population. Sociologicaly, public administration isn't anything but a sum of human communities which organize some activities for other people. From this point of view, the problem of people working in public administration is considerably important.

The independence of the public servant implies some incompatibilities. The incompatibilities aren't just a protection measure to the position for which they were established, but to those for whom this position becomes incompatible. Their

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cumulation is prohibited, because it's in the damage of both positions, of impartiality, objectivity and of independence that their exercise properly involve.

Incompatibility means the inability to perform some functions or professions by a public servant under law.

There is a difference between our contry and other democratic states. In Romania public servants ethics has a particular importance. Ignoring ethical development of the public servants, as the law enforcement is enough, it's the same thing as ignoring the fact that public servants are humans, not performers, that they have their own values, that they have different backrounds, and their wish to professional asserting isn't limited to conformism, salary, penalty, award, because their professional identity becomes part of their personal identity. Professional fullfilment is part of human fulfillment and self-esteem condition. The etich of public servents is particularly sensitive as it's concerned to maintain public confidence in the functioning of institutions, trust without which democracy is just a political show.

By comparison to private system, civil servants in romania have some major shortcomings, as:

- lack of political and managerial culture of public servants;
- the conservatorism manifesting as resistance to change;
- difficulty in completion knowledge with succefull experiences as in other countries;
- poor knowledge of foreign languages;
- lack of direct knowledge of situation in the field and taking many untrue decisions;
- lack of information and communication regarding facts and actions successfully performed by other similar institutions.

Public servant play a very important ethical perspective. The reasons for which we believe he should have this role are the following:

- the civil servant controles public information (information control is an essential form of power);
- any government program, no matter to whom it's addressing, should be implemented and this depend on public servants;
- conformity, obedience to rules, precedes personal beliefs and it's a maintenance and promotion criteria.

Labor discipline is also specific to social work relations. The obligation to respect work discipline is a synthesis obligation, which summarize and implies all duty obligations, including etiquette in the institution, which are mentioned in the individual labor contract, related with tasks and duties implementation of the function.

Therefore, work discipline is a complex obligation of each employee. It refers to all duties of civil servants as employed persons in a public authority or institution. Only the legal duties arising from employment contract are part of labor discipline.

The main method of achieving labor discipline is the belief (the employee consciously and by conviction accepts discipline rules at work) and rewarding work (salary, bonuses, etc.).

Taking into account these issues, we may say that disciplinary liability is a subsidiary way of strenghtening labor discipline, by punishing the employees who disturb order at work.

Regarding civil servants disciplinary liability, their illegal acts are, as the law provides, disciplinary offenses.

Before Law no.188/1999, disciplinary misconduct was defined, as culpable violation of duties by a public servant. After that, disciplinary offense was defined as culpable violation by civil servants of duties they hold and of professional and civil conduct.

Disciplinary misconducts are expressly provided by Article 77, paragraph 2 of the Law no.188/1999 regarding Civil Servants Statute. The legislator provided these deviations in a limited way, by imperative texts. The reason for this way of regulation is the need to avoid arbitrariness in disciplinary actions regarding civil servants and the restriction of the discretionary power of the superior by giving this problem to be dealt by court.

In order to undertook disciplinary liability, a person who works in a public service, has to commit a misconduct. Disciplinary offense is the only condition needed for starting disciplinary liability. In current doctrine, the disciplinary offense was defined as the guilty act committed by a public servant that violates the obligations he has and which affects hes socio-professional and moral status. In other opinion, disciplinary misconduct is known as a culpable offense related to work duties that isn't a crime, and that is regularly punished by administrative bodies and not by court. However, disciplinary offense is a real actthat should be considered in all its elements: subject, object, objective side, subjective side, penalty and legal rules that define it must determine all these components.

Disciplinary sanctions were created by real cause, such as criminal sanctions failure, which are too heavy, too loose and in all cases unadapted to administrative needs, and on the other hand the slowness of judicial repression, whose yield is random. Thus disciplinary sanctions have been established in order to ensure public services activity, targeting certain actions to be administrative supervisioned. Disciplinary retraints have an educational character and they are required by law in order to defend internal order, developement for responsibility concerning performance on duty, etiquette and preventing indiscipline. When the disciplinary sanction is individualized it will be considered reasons and gravity, the circumstances the offese was committed, guilt degree and its consequences, general behaviour of the employee and wheather he is has history that wasn't cleared.

Disciplinary sanctions can be imposed only after the preliminary investigation and after hearing public official. Hearing civil servant shall be recorded in writting, unde nullity sanction. His refusal to appear at hearings or to sigh a statement regarding disciplinary ofeenses he committed is written in a minute. So, it's

established preliminar investigation, and a very important step of it is hoe the hearing is made, beacause there are some rules that must be respected.

Given all the discussion above, we're concluding:

- In Civil Servant Statute there is mentioned a hierarchy and an overview of public functions, showing at what level or for which group operates this prohibition. Thus, this includes even the most important functions as decision ones, coordination in both central and local administration.
- The project of Civil Servant Statute shall clearly determine the notion of function stability, especially for those administrative servants who take part in law implementation in order to meet the citizens interest, which is not possible without a minimum guarantee od stability.
- The idea of long career is more and more justified, and it shoul be contained in the statute, particularly for administrative servants. It is necessarily tu ensure the continuity of administrative activity as the proffesionalism requires.
- The Statute shall contain special criteria regarding the access to a public function in administration, which can interwoven with legal requirements for determining a career servant.
- Public Servant Statute shall contain a clear and unambiguous rule concerning the right to strike.

Ferenda bill

a) A representative of the trade union takes part in the commission of disciplinary prior investigation as observer. If the public servant who is investigat isn't part of the union, who will assist him? In this case, the union member is no longer part of the commission. The same situation occurs when in that institution there is no union.

Bill: in the legal text shall be mentioned that in case of prior disciplinary investigation, the public servant has the right to be assisted, by hes choice, by another public servant from the same unit with his agreement.

b) Law provides that disciplinary sanction can't be imposed before making a prior disciplinary investigation. The employer is obliged to summon the public servant to carry out the disciplinary investigation. If the public servant didn't came by no reason, the employer has the right to impose the sanctioning without disciplinary investigation. Thus, there are provided two procedures to implement disciplinary sanctions:

- when he's obliged to perform the disciplinary investigation;
- when disciplinary investigation is mandatory.

Bill: preliminary investigation shall be performed whether the public official respond or not to employer's invitation, and the sanction to be imposed according to the investigation result (civil servant may not appear by no reason, but basically, he didn't committed any disciplinary offense; failure to perform preliminary investigation would mean to dismiss a not guilty person).

c) Disciplinary offenses aren't individualized by law as crimes and misdemeanors are, in order to establish the proper sanction for each one.

Bill: disciplinary offenses shall be individualized and described in detail just as crimes and misdemeanors, cleary specifying disciplinary sanctions. This method is found in other states. The nomination of disciplinary offenses is rigorous, clear and precise, eleminating the possibility of assessing by the committe and by the employee, and also eliminating law abuse.

d) The public servant who committed a disciplinary offense has the right to defense. This right is more needed when the sanction is dismissal. In this situation, the act thru which the person is convocated to hearing, must contain the seriousness of the offense, but it doens't.

Bill: to achieve effective enforcement of the defense of a civil servant suitable for dismissal, the convocation act should be more detailed. It should contain the reason for which the employee is called to hearing and also the fact that he's suitable for dismissal. Law should stipulate the obligation, for those who perform the disciplinary investigation, to inform the investigated person about all the preliminary acts and to offer him the possibility to be defended, including by a lawyer, and upon request to give him a resonable time to prepare his defense. It is also important that it should be established a resonable period between the date set for meeting and the date the convocation paper is issued or is received. In this way, the employee will be corectly and completly informed, he will know all the allegations so that he will defend properly.

e) There are frequent situations when courts decisions regarding reintegration in function are enforced with great delay.

Bill: it's required a strict procedure to achieve reintegration in function, by clearly establishing of the ways of enforce courts decisions. It is necessarily to be provided by law, the period in which the court decision is enforced, the person who must have the initiative and the way of action (whether is needed a legal act and which is it). Although, function reintegration can be made as soon as the decision is issued by court, as it is final and enforceable, in practice is waited until the decision is written and communicated. Execution is delayed because between the time of delivery and time of writting is running a while acting against the interests of that public official. In the absence of a precise rule, the employer or the public servant, willingly or abusively, can claim that they didn't know when reintegration should have taken place. The employer may refuse to rejoin the civil servant, claiming appeals; he can delay intentionally the presentation to work in order to increase the amount of compensations; he can dismiss the employee for absence from work, taking advantage of the fact that he didn't expressed his intention to be reintegrated, as he was waiting for the appeal solution. We believe that in this case, it's the employer obligation to enforce voluntary the court decision and notifying the public servant to come to work.

WHERE IS THE ELECTIVE DEMOCRACY IN ROMANIA HEADING TO?

Claudia GILIA*

Abstract: *The aim of our study is to analyze different types of elections implied by the Romanian political system designed to appoint parliamentaries and to highlight their gains and losses. Another step of our research is to describe the last suggestions over the legislative framework changes in Romania in terms of elections and to express some critical opinions regarding these suggestions.*

Elective democracy in Romania is now at the crossroads. A major change within our electoral system will definitely act upon the political scene and upon the Romanian electorate's behavior, who will have to learn under way the new rules and electoral proceedings.

Keywords: *democracy, representative democracy, elective democracy, citizens, electoral system*

1. Preliminaries

We often wonder: „What is democracy?" Democracy is a concept that basically can't be defined. Democracy is a type of moral perfection. It regulates both the organization and function of the authority in order to humanize it, as well as the citizens' way of life in order to shape it. It's ages since people imagined a political system whose members are politically equal, govern together and posses all the necessary qualities, resources and institutions for self governing.

According to the Italian politologist Giovanni Sartori, democracy is now representing a „civilization" or rather a political goal of the Western civilization[1]. Today it stands as a major standard of the Western area. The concept of democracy is diffused and has multiple meanings. Our society is now acquainted with several aspects[2] that democracy achieved during its evolution: *direct democracy, representative democracy, participatory democracy* or *elective (electoral) democracy*[3]. Technical literature also mentioned other types, such as: *political democracy* (the most frequent meaning), *social democracy* (democracy as the state of society), but also *industrial and economic democracy*. All these meanings are

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[1] Giovanni Sartori, *Teoria democraţiei reinterpretată,* Polirom Publishing House, Iaşi, 1999, p. *31.*

[2] For further details, please go to Jean Grugel*, Democratizarea. O introducere critică*, Polirom Publishing House, 2008, pp. 25-43

[3] Olivier Ihl, *Le vote*, 2e édition, Monhtchrestien, Paris, 2000.

legitimate, but they are mostly responsible for the confusions that emerge whenever we refer to the concept of democracy[4].

Elective democracy comes in to play during the elections. This is when the demos is reactivated and becomes the *sovereign*. The elections are an extremely important moment for a state. They appoint the governing structures. The expression of the will of electors in large numbers gives these governing structures a consistent legitimacy. But most of the times, citizens do not express a rational opinion, but rather incoerent feelings, made of impressions and emotional effusions[5].

The citizens vote, their personal options are quantified and transformed into mandates for the political parties. The number of mandates a party has won varries from one electoral system to another. The electoral system is a mechanism that converts votes into mandates: it truthfuly or not duplicates the structure of the electoral body into the chosen body. At the same time, it indirectly has an influence on the electorate's behavior itself[6]. Electoral systems are those who generate the party system and determines the shape of representatives. They are an essential tool for elections and for a democratic and representative government[7].

2. The stake of choosing an electoral system

Choosing one or another electoral system depends on those who hold the power in a state at a certain moment. So the political system is the one that creates the electoral system. The governants are always trying to draft an electoral system meant to give odds to them for the next elections. The electoral systems can only support some tendencies that aim to change the political systems, but they are usually chosen to enhance a certain state of fact. All over the world, changing the electoral system is a politically based decision. No matter the voting system would be, it will favor a certain political tendency.

Whenever somebody wants to change the electoral system, there must be observed some premises:

- no system is perfect;
- each system has several drawbacks;

[4] Giovanni Sartori, *op. cit*., p. 35.

[5] For many electors, Sartori says, political preferences are like culinary preferences. They both originate in ethnic, regional, class and family traditions. They both show signs of stability and resistance to change when talking about individuals. But as far as society at large is concerned, as generations succeed to one another, it shows signs of flexibility and adaptation capacity. They both seem to relate rather to emotional predispositions than to „rational preferences". While both of them react to condition changes and unusual inputs, they are quite invulnerabile to direct arguments, Giovanni Sartori, *op. cit*., p. 106.

[6] Ramona Delia Popescu, *Răspunderea Parlamentului în dreptul constituțional*, C. H. Beck Publishing House, Bucharest, 2011, p. 156.

[7] Ştefan Deaconu, *Instituții politice*, C. H. Beck Publishing House, Bucharest, 2012, p. 118.

- no electoral system is easy to be applied and understood because each one of them has its oen mathematical complexity. From this point of view, the electorate will never be prepared to assimilate and decipher it. The understanding comes along, empirically.

Such reorientation is possible – in order to achieve the expected results – only by means of successive, gradual changes of the electoral system.

- changing the electoral system must be done with at least one year before the elections and following some ample debates, which should include professionals with expertise in electoral law.

- an electoral system does not only mean the electoral method or the method of transforming votes to seats. An electoral system includes the electoral lists, the electoral logistics, the electoral organisms, the electoral campaign, the run for an office, the poll process, the punishments for breaking the law, the electoral legal framework, the liabilities of public authorities regarding the organization and the course of elections. These aspects can and must be the subject of a distinct legislative process in order to avoid the alteration of rules regarding the electoral proceedings everytime the election method is changing[8].

- it is not advisible either to „force" the electorate by going from one extreme to another on the poll scale systems[9].

Changing the electorate system can be caused by multiple factors: it doesn't chime with the political realities anymore, or the intention is to change the structures it stands for (eg. the switch from a two-chamber to a one-chamber system or vice versa, or it doesn't answer the need of representing the citizens, or it didn't prove its viability as a system in use at a certain period of time.

Choosing the electoral system has to meet three criteria: *rightful, clear* and *effective*. The *rightousness* of a poll method means its quality to reflect as precisely as possible the popular will and to allow each and every option to express itself with the appropriate intensity. The *clarity* of an election is that quality which enables the electorate to be aware what he is voting for and who is going to be elected in case his political option is the most popular one. The *effectiveness* is that quality which enables the election of an unitary group of people able to build up a solid majority in order to govern the country[10]. But is not enough to choose a certain type of electoral system (major, proportional or mixed). The whole electoral normative framework should be in harmony with the new electoral changes, and the electoral rules should be well defined, clear and short-spoken.

The author Elena Simina Tanasescu highlights the importance of the electoral legislation within a democratic state: „the quality of the electoral rules is of great importance, and this quality can be a more important factor in leading to a civic

[8] For further details, please go to: http://www.roaep.ro/ro/section.php?id=85&l2=88&lm=curren*t.*

[9] Ştefan Deaconu, *op. cit*., p. 119.

[10] François Borella, *Le Gouvernement des Français*, de l'Epi Publishing House, 1960, p. 78 apud, Ramona Delia Popescu, *op. cit.,* p. 157, nota 3.

atitude of citizens than any other punishment system, no matter how severe it might be. An authentic democratic electoral system, inspired by the real will of those who hold the power within the state, is able to set the basis of a civic atitude and enforces an electoral bahavior to the parties and alliances which take part in the elections"[11].

3. Critical thoughts on the Romanian electoral system

Following the events of 1989, Romanian society has been set on new constitutional basis. The creation of some new authority structures enforced the enactment of new rules designed to nominate them. Until the adoption of the Constitution in 1991 and the adoption of the first electoral law, the pre-constitutional organisms had been formed on the strenght of Decree-law no. 92 of 14 March 1990[12]. This Decree set the rules for electing a new Parliament as well as for the election of the President of Romania. The poll chosen to nominate the parliamentarians was the *proportional representation*.

The legislative framework for the elections of 1992 was set through a new electoral law, that is Law no. 68 of 15 July 1992[13]. The new electoral law stated within Art. 1: „*The Camber of Representatives and the Senate are elected by universal, equal, direct, secret and freely expressed suffrage*". Deputies and senators were elected in constituencies on the basis of *ballot lists* and independent candidatures, according to the *principle of proportional representation*[14]. This way, the electoral law was establishing a basic principle of the Romanian electoral system, that is: *proportional representation*. The establishment of this principle shows a legislator willing to adopt an election system designed to ensure a well balanced representation of the electorate's options. The legislative elections of *1996* and *2000* also took place on the strength of Law no. 68/1992. The legislative elections of *2004* have been regulated by Law no. 373/2004[15] regarding the election of Chamber of Representatives and Senate. This regulatory document gather together all the legal dispositions regarding the election proceedings adopted throughout a decade.

The new regulation took over some of the paragraphs of Law no. 68/1992, such as those refering to the election method, the representation norm, the use of election ID cards etc. Although there were made a number of suggestions for changing the electoral system regarding the election of the legislator bodies, the parliamentary parties, through the agency of their representatives in the commission for elaborating legislative proposals regarding the election of Chamber of Deputies and Senate, choose to mentain the *proportional representation principle*.

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[11] Elena Simina Tănăsescu, *Legile electorale. Comentarii şi explicaţii,* All Beck Publishing House, Bucharest, 2004, p. VIII.
[12] Published in the Official Journal of Romania, Part I, no. 35 of 18 March 1990.
[13] Published in the Official Journal of Romania, Part I, no. 164 of 16 July 1992.
[14] Art. 3 indent 1 of Law no. 68/1992 regarding the election of Chamber of Representatives and Senate.
[15] Published in the Official Journal of Romania, Part I, no. 887 of 29 September 2004.

The list ballot, based on proportional representation, used in Romania until 2008, was blamed that it strengthens the role and the influence of political parties. The elector is not acquinted with his parliamentarians, he doesn't give his vote to a person, but to a programme put forth by a party. In his turn, the parliamentarian considers that his chances to be elected once again do not depend on his contacts with the electors, but rather on the seat his party is going to keep for him on the list. It is not the candidate's personality that will be crucial during the elections, but his faithfulness towards the party.

The further evolutions on the Romanian political scene brought to light the instability of the political class, the need to reform this class, but also to provide governmental stability. For that purpose, the political class, several non-governmental organisms and public opinion intiated an ample public debate concerning the reform of the Romanian electoral system from the perspective of the up-coming local, parliamentary and even European elections.

Within the debates held by different forums, whether politic or civic, it has been brought into discussion the introduction of uninominal majority poll for nominating the parliamentarians and the president of the county council. Thus, it has been adopted Law no. 35/2008 for the *election of Chamber of Deputies and Senate and for changing and augmenting Law no. 67/2004 for electing the authorities of local public administration, Law of local public administration no. 215/2001 and Law no. 39/2004 regarding the Statute of local elected*[16]. The legislator made an option for electing the parliamentarians for the *uninominal majority poll with a single ballot, according to the principle of proportional representation*. The creation of a new legislative framework on electoral matters was the result both of fervent debates within the legislative forum, and negociation between political parties combined with political compromise. Because there was no option for a pure uninominal system (*First Past The Post*), within the Romanian Parliament there have been elected parliamentarians who ranked 2nd and 3rd[17] in their colleges, or who won their mandate with 34 votes[18].

The negative effects of this original type of poll implemented in Romania continued over the 2008-2012 legislature. Parliamentarians proved to be ordinary lieutenants, carrying into practice the decisions made by the chiefs of parties. They were nothing but „voting machines". The quality of the legislative act has been also affected by the poor professional trening of those who were sent to represent the

[16] Published in the Official Journal of Romania, Part I, no. 196 of 13 March 2008.

[17] The 2008 election results showed that only 21% of senators and 26 % of deputies obtained seats in Parliament by direct vote (over 50% +1 of the votes cast) and the remaining candidates have benefited from a system of redistribution, the it possible for a candidate who has obtained 16,000 votes in his favor does not come into Parliament, while other candidates to gain seats with only 1,000 votes or 34 votes. (http://www.roaep.ro/ro/section.php?id=85&l2=88&lm=current -).

[18] The UDMR candidate Mr.Joseph Koto ran from the College no.4, Constituency no. 43 – Overseas and obtained a total of 34 valid votes then obtained a mandate only 2% of the votes cast in his college. While the PSD candidate Lucian Balut, ranked first in the College of Constanta who gain 49.6% of the vote, did not obtain a seat in Parliament.

interest of citizens. The laws are good as long as they are made by people with vision, with knowledge and expertise in their area of activity, not by amateurs, conjunctural passengers through the public life[19]. The errors made while looking for an electoral proceeding meant to effectively impulse the construction of a constitutional democracy in our country are part of a defective understanding the foundation that lays at the basis of an authentic, genuine democracy, not just a formal one, and this understanding reflects itself both in the way people elect their leaders and in the way the candidates reflect themselves throughout the competition, obeying or disobeying the rules of the competition between the parties who aim for the governance[20].

The severe deficiencies of the electoral system implemented in 2008 determined the political class to initiate a new approach in order to modify the electoral legislative framework. The option for local elections was to elect the mayor and the president of the county council by *the uninominal majority system in one poll*. The local councils and the county councils were elected by *list ballot, according to the principle of proportional representation*. For the legislative elections there have been suggested several electoral system versions.

The Democratic Liberal Party (PD-L) was in favor of the pure uninominal poll together with a reduction in the number of parliamentarians from 471 to 300. UDMR's chief, Kelemen Hunor[21], insisted that: „One system that we consider to be appropriate for the moment is the German system, a mixed system. Half of its colleges should be uninominals, just as they are right now, while the rest of them should be on a national list, ready to be stamped, not one which hasn't been seen by the citizens. The mixed system balances the representation of local communities, of citizens, so that each vote transforms itself into a mandate where the vote has been expressed". At the same time, the UDMR leader suggested the representation in the Senate of two senators from each county, no matter their size on the map. In this case, the number of senators is less than 100.

In March 2012, there has been establihed a special commune commission – *The Commission for drafting the electoral code*[22], which adopted the mixed ballot in the first instance. Afterwards, the commission proceedings have been canceled.

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[19] Unfortunately, the selection of candidates hasn't been done on quality criteria. The financial support enjoyed by the candidate played an important role in his selection. The lack of a genuine selection of candidates by the parties had consequences in terms of the quality of elected candidates. This meant a low quality standard in the legislative process and parliamentary activity throughout the 2008-2012 legislature.

[20] Ioan Alexandru, *Democraţia constituţională. Utopie şi/sau realitate*, Universul Juridic Publishing House, Bucharest, 2012, p. 134.

[21] „*The mixed system can stand as a version and alternative and we have done all the possible and impossible reckoning. with"*, also stated the presidet of UDMR (http://www.agerpres.ro/media/index.php/politic/item/90672-Kelemen-Hunor-UDMR-agreeaza-sistemul-mixt-de-vot.html).

[22] For details: http://www.cdep.ro/pls/parlam/structura.co?cam=0&idc=113

The USL (PSD + PNL) representatives initiated a legislative proposal regarding the alteration of the present electoral legislation. Their suggestion was to introduce the uninominal majority poll into a single ballot while electing the parliamentarians[23].

The initiators also suggested that a second ballot should be organised in case of a tie vote. This should take place two weeks after the first one and only the candidates in tie vote have the right to attend. After the second poll, it should be announced the candidate who won the largest number of available votes. The proposals has been adopted on 8 May 2012 in the Senate, with 77 votes „for", 17 forbearances and 9 votes „against"[24]. The Chamber of Representatives, as a decisional Chamber, voted for the law project on 22 May 2012 [25], with some ammendaments[26]: if there is a county where its inhabitants, whether they belong to Romanian-speaking community or to a minority group, in compliance with the final official data of the last census, exceed 7% of the county population and where no candidate of the electoral competitors in that community didn't poll a mandate according to indent (11), then the candidate with the highest score in the community election will poll a mandate in the Chamber of Representatives. This is an extra mandate assigned to that particular county. The second passed ammendament expels from the law text the 5% electoral limit, which enables the independent candidates to enter the Parliament based on the votes they have won, without having a party affiliation.

The USL proposal triggered ample debates between the political parties and also inside the civil society[27]. Pro Democracy Association agressively criticized the adoption of the majority system in one single poll, noticing that it can cause severe distorsions to representative democracy and it is probably unconstitutional. The compeer character of the vote for Parliament, mentioned by Art. 62 of the Constitution, is disobeyed by the majority systems, especially by the single poll system. Moreover, the one poll majority system causes nonconsensual governing that might intensify the social tension given the present crisis background. The artificial supra-representation of the first parties enhances the political risks and the

[23] The PNL leader, Crin Antonescu, stated that at present the political class has to choose between „the formula in which almost all the reponsibilities fallback on the perties, that is the list formula, or the formula in which the responsibility falls over the shoulders of the electors", that is the formula of pure uninominal vote (http://www.hotnews.ro/stiri-politic-12197097-senatul-dezbate-luni-proiectul-lege-privind-votul-uninominal-initiat-victor-ponta-crin-antonescu.htm - accessed on 19 May 2012)

[24] The text can be checked at: http://www.senat.ro/Legis/Lista.aspx?cod=16675

[25] The legislatory proposal received 180 votes „for", 30 votes „against" and 26 „forbearances"(UDMR).

[26] For details: http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=12698

[27] In an open letter to the presidents of the four parliamentary parties titled "In defense of democracy – We require a majority system preventing the adoption tour (uninominal pure)", several NGOs (Centre for Sustainable Policies Ecopolis, Pro Democracy Association, Association for Protection Human rights in Romania – Helsinki Committee (APADOR-CH), etc..,) have shown concern about a possible majority uninominal system in a safe tour before legislative elections in November 2011For details: http://www.apd.ro/comunicat.php?id=298

possibility of a anti-democratic drift. The short term vision, along with the party selfihness, can drag the country into a risky adventure[28].

From our perspective, the introduction of the uninominal majority ballot in a single poll for electing the representatives and senators with only few months before the elections is not good neither for the political forces, nor for the Romanian citizens. And we have plenty of arguments, starting with the deficiences in representing all the political views along with the fact that a high percentage of those who express their vote are not represented in the Parliament. Here are few other arguments: the way in which candidates are selected, the high costs of the electoral campaigns[29], the demagogic promises[30] made by some candidates who, once they are elected, they either start to negociate them, or they cannot fulfil them. Or the fact that citizens do not elect the best professionals, but the most popular, nice or attractive ones[31] etc.

At the same time, this type of poll features the states with a small number of parties that can enter the Parliament (two, three or four parties at most). Romania doesn't meet the case, it traditionally has a multi-party system. Although the specialits in constitutional law, electoral law or political sciences mentioned the frame principles that lay at the basis of a fair electoral process, the politicians in Romania permanently ignored the good practices regulated by these documents[32] and changed the electoral

[28] Please check the press release of the Pro Democracy Association of 10 May 2012 „Una vorbim, alta fumăm" (http://www.apd.ro/comunicat.php?id=297 – accessed on 19 May 2012).

[29] Party election campaign will be accompanied by the candidate's individual campaign. Thus, the campaign cost increases. Some parties are unable to sustain a double campaign, so candidates have to appeal to all kinds of funding, not always comply with the law or moral. If an MP use different means to be elected, he will create certain obligations to illicit its sponsors, which will see the need to meet during his mandate, the legislative proposals made in the interest of sponsors, parliamentary lobbying for their influence peddling various authorities in their favor, not to mention how he will vote in Parliament. Consequently, majority voting may lead to a real moral decay. For a critical analysis of this type of election see the symposium "*Contemporary Electoral Systems*" organized by the Chamber of Deputies, Ed by the „Official Gazette", Bucharest, 1996, pp. 151-158.

[30] Analyzing the discourses in the electoral campaign of 2008, we noticed that politicians tend to promise the fulfilment of some objectives that are rather related to local administration than to their quality of legislators.

[31] The vote is thus sentimental, affective and less rational. The case of Ionel Bratianu is famous. He is one of those who created Romania Mare, but lost the elections of 1920 against an innkeeper from Braila county, very popular at local level, who offered a few hundreds of buckets of wine to win the elections.

[32] European Commission for Democracy Through Law (Venice Commission), CDL-AD(2002)023, *Code of good practice in electoral matters,* Venice, 18-19 October 2002, Explanatory Report, *2. Regulatory levels and stability of electoral law:*

„63. Stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy.Rules which change frequently – and especially rules which are complicated – may confuse voters. Above all, voters may conclude, rightly or wrongly, that electoral law is simply a tool in the hands of the powerful, and that their own votes have little weight in deciding the results of elections.

64. In practice, however, it is not so much stability of the basic principles which needs protecting (they are not likely to be seriously challenged) as stability of some of the more specific rules of electoral law, especially those covering the electoral system per se, the composition of electoral commissions and the drawing of constituency boundaries. These three elements are often, rightly or wrongly, regarded as

legislaton as they pleased, without taking into account the citizens' interest, even during electoral years. From our point of view, the introduction of a new type of electoral poll takes time to be debated in order to fiind the best electoral formula that can fully turn into advantage the votes expressed by the Romanian citizens. The citizens must be informed in due time about the new electoral rules so they can be acquainted with the electoral proceedings before going to vote and to be able to make a choice that later will be found in the legislative forum.

4. The Romanian citizen – is he a piece on the Romanian political chessboard?

The substantial change of the electoral system in Romania will trigger important changes regarding the party system and the Romanian citizen's behavior. Concerning the political parties, the adoption of the uninominal majority system in one poll will reduce on a large scale the number of political formations with representatives in Parliament, the national minorities will have a small number of representatives. Those who will come out on top will be large parties, with local functional organizational structures and enough resources to support a strong electoral campaign. As for the Romanian citizen, the effects on him will be rather negative, in the sense that certain political options will no longer be represented in Parliament if his favorite candidates didn't have a majority of votes.

Romanian citizen permanently looks like a lasb mouse for the politicians who are testing new electoral systems. *Il demos votante*, the way Giovanni Sartori used to call them, are less interested with the political class since they are disappointed with them all. Their disappointment towards the parties and their programmes means a high vote absenteeism. Given these circurmstances, *do our representatives enjoy legitimacy anylonger? Are they real representatives if they are voted by 30% or 40% of those 30% or 40% who express their vote? Could the Romanian citizen be blamed in this political equation?* His role is elementary since hei s the one who is making the choice,

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decisive factors in the election results, and care must be taken to avoid not only manipulation to the advantage of the party in power, but even the mere semblance of manipulation.

65. It is not so much changing voting systems which is a bad thing – they can always be changed for the better – as changing them frequently or just before (within one year of) elections. Even when no manipulation is intended, changes will seem to be dictated by immediate party political interests." (http://www.venice.coe.int/docs/2002/CDL-AD(2002)023-f.asp – accessed on 19 May 2012).

European Commission for Democracy Through Law (Venice Commission), CDL-AD(2005)043, Venice, 16-17 December 2005), *Interpretative declaration on the stability of the electoral law:*

I. The Code of good practice in electoral matters (CDL-AD(2002)023rev, item II.2.B) states: „*The fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law.*"

„5. *In general any reform of electoral legislation to be applied during an election should occur early enough for it to be really applicable to the election"* (http://www.venice.coe.int/docs/2005/CDL-AD(2005)043-f.pdf – accessed on 19 May 2012).

the one who has the civic and moral duty to take part in assigning his representatives in the legislative forum. He has to make a choice, as rational as possible, based on the electoral offers displayed by the parties, on the candidates' qualities and expertise, and not on eventual material drives offered by the parties. Unfortunately, the lack of a civic and political culture, the economical, financial and social realities in Romania influenced the last elections in our country. Accoprding to the doctrine: „at present, the elections are increasingly resemble with a quiet, formal and resigned visit payed to a hopeless sick person: and that's because the relationship between the electors and the elected ones is damaged, thus triggering an increasingly lack of trust in the politicians who – always the same faces, incapable or too busy to satisfy their own interest – can't fiind glibly solutions to provide a decent life for those who are governed by them"[33].

Representatives reflect our image in the mirror, they represent our affective, emotional or rational choices. We don't know yet if the reform will enhance the quality of our representatives and the political act, or, on the contrary, the new electoral rules will lead to a degradation of the political life. Do we make reform only for the sake of making reform or to improve the life of our electors? By reform do we set solid rules for the future or just for a precise electoral moment?

We'll see if the new electoral regulations will change the way in which politics is made in Romania and if they will motivate the electorate to attend the elections.

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COMMERCIAL OR ADMINISTRATIVE CONTRACTS? CASE STUDY

Marta-Claudia CLIZA*[1]

Abstract: *When we are dealing with a contract in which, in one form or another, appears involved the idea of public power, how do we make the distinction if this contract is an administrative or a commercial contract? Precisely this aspect is attempted to be cleared by the present study, starting from certain theoretical approaches and finalizing with a case study. For practitioners, such as approach is extremely useful. Not lastly, the presentation of the judicial practice has its importance in clearing up certain interpretation aspects.*

Keywords: *commercial contract, administrative contract, applicable law*

The genesis of administrative contracts is lost in time. For instance, in ancient Rome, the lands conquered by the Romans were transformed into ager publicus (property of the Roman state). The state, subsequently, assigned those lands for the use of the patricians, by means of a public law contract, different from the one in private law through the existence of exorbitant clauses (derogatory from the common law) in the form of an praetorian interdict (order) – interdicta de precario – which guaranteed to the state the possibility to request the return of ager publicus from the patricians anytime, without any grounds in this respect[2]. Therefore, the public law contract had, at that time, two functions: a predominant economic function (valorization of lands) and a political one, less apparent (formation of a political camarilla by means of granting lands by the power holder).

If we make a bridge between the ancient and the contemporary period, we shall notice new valences and reasons for the existence of the administrative contract. Today, the administrative contract justified its existence particularly through its social function first and then through its economic one (economic being seen, though, as a means to achieve the social). It appears today as „a current form of valorization of public property[3]“ achieved in the interest of social welfare.

Nowadays, administration will outline new leverages and action fields, gaining a self-supporting structure within the executive power. Public administration, having the role to achieve political values with an accentuated social character, is performed today by means of a multitude of organizational forms making up the administrative subsystem, integrated in the wider system of global social organization.

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In the analysis of the contemporary notion of the administrative contract, we must start from the fact that public administration currently has two meanings: a material– functional one and a formal – organic one. In material – functional sense, public administration represents an activity for the organization of the execution and the concrete execution of the law by the public authorities, in view of satisfying the general interests, achieved through actions with the character of disposition or actions of providing public services. In formal – organizational sense, public administration can be understood as a system of bodies comprising different administrative structures which execute the activity of organizing the execution and of concrete execution of the law[4].

The theory of administrative contracts formed in the modern French law, as a creation of the State Council jurisprudence, subsequently undertaken and developed by the French administrative doctrine[5].

In establishing the notion of administrative contract, governed by the rules of public law, it was considered the competence of the State Council, as administrative contentious court, in judging litigations between individuals and public administration[6].

Through their jurisprudence, the administrative contentious courts and, first of all, the State Council, qualified as administrative contracts only those contracts in which, apart from the simple participation of a public administration, a certain purpose is found – the assurance of the functioning of a public service, respectively, a certain public law legal regime[7].

In the administrative law doctrine, we define the administrative contract as being an agreement of will between a public authority, in a position of legal superiority, on the one hand, and other subjects of law, on the other hand (individuals, legal entities or other state bodies, subordinated to the other party), by means of which it is targeted the satisfying of a general interest, by providing a public service, performing a public work or valorizing a public asset, subjected to a public power regime[8].

At present, there can be identified the following main traits of the administrative contract[9]:

a) it represents an agreement of will between a public administration authority or another subject of law authorized by a public administration authority, on the

[4] C.S. Săraru, Contractele administrative. Reglementare, doctrină, jurisprudență, C.H. Beck Publishing House, Bucharest, 2009, p.22 and the following.

[5] A. Iorgovan, Tratat de drept administrativ, volume II, 3rd edition, restructured, reviewed and added, All Beck Publishing House, Curs universitar collection, Bucharest, 2002,p. 98

[6] R.N. Petrescu, Drept administrativ, Accent Publishing House, Cluj-Napoca,2004, p. 335

[7] A. Iorgovan,Tratat de drept administrativ, volume II, 3rd edition, restructured, reviewed and added, All Beck Publishing House, Curs universitar collection, Bucharest, 2002,p. 110

[8] V. Vedinaș, Drept administrativ și instituții politico-administrative, Lumina Lex Publishing House, Bucharest, 2002, p.127.

[9] A. Iorgovan,Tratat de drept administrativ, volume II, 3rd edition, restructured, reviewed and added, All Beck Publishing House, Curs universitar collection, Bucharest, 2002, p. 115

one hand, and an individual, on the other hand;

b) it presupposes the performing of works, the provision of services etc. by the individual, in exchange for a payment;

c) the parties must accept certain clauses of regulatory nature, established by law or on the grounds of the law, through Government Decision;

d) the public administration authority cannot assign interests, rights or obligations, except to another public administration authority, and the individual may assign them, in his/her turn, only with the approval of the public administration;

e) when the public interest requires it or when the individual did not fulfill, due to his/her fault, the contract obligations, or when the execution becomes too burdensome for the individual, the public administration authority may unilaterally modify or terminate the contract;

f) the parties understood they will be subjected to a public law regime;

g) litigation solving us due to the administrative contentious courts, except for the situations when, through special law, another competence is established.

If we were to briefly analyze between the commercial and the administrative contract, the following aspect can be noticed: the commercial contracts are subordinated in full to the principle of contractual freedom, such as the parties will decide themselves, depending on the negotiations between them, the contractual clauses, while the administrative contracts are characterized by the subordination of the principle of contractual freedom, to the principle of the public interest.

This is translated by the existence in the administrative contracts of a regulatory section, established by law, from which the parties cannot derogate, and of a conventional section, in which the parties are free to establish the conditions for the exploiting of the public asset or the public service that makes the object of the contract.

Also in the case of administrative contracts we see limitations, but limitations of the principle of contractual freedom.

It is a matter of the dictated (adhesion) contracts. Thus, in certain activity sectors, especially in those were the traders hold the monopoly on certain services, the conclusion of commercial contracts is no longer the fruit of the manifestation of will of the contracting parties. In these contracts, partner selection is not always possible, and the contract clauses are imposed by the supplier or the provider, the beneficiary having only the liberty to adhere to the clauses proposed or to not conclude the contract.

Thus, a first resemblance is contractual freedom, fully manifested in case of commercial contracts, and subordinated in case of administrative ones, with the mention that also in case of commercial contracts we can speak of a restraining of this principle, but only with exceptional character.

A second similarity results from the number of persons participating to the conclusion of the contract, being a matter, in both cases, of two or more persons. We mention this, because specific to administrative law is the administrative act and not the administrative contract, and the administrative act is, typically, a

unilateral act of a public authority. In the case of the administrative contract, which is an atypical act in administrative law, we shall meet two or more parties, out of which one is a public administration authority, and the other, an individual. This point will also constitute a differentiation criterion, which we shall largely analyze in the section dedicated to the differences between the two types of acts.

In what concerns the validity conditions, the administrative contracts borrow these conditions from private law, this constituting another resemblance point between these acts.

With respect to the form taken by the two types of acts, in both cases we meet the obligation of the written form, regulated in the commercial field with the title of exception, and in the administrative one with the title of rule.

Other similarities refer to the contractual clauses, which are approximately the same for both types of contracts: clauses regarding the object of the contract, the contracting parties and their identification data, the terms, the rights and obligations of the parties, the contract end or cases of contract termination.

In what concerns the onerous character, it is characteristic to both types of contracts: in case of commercial ones, it derives from the notion of „contract price", and in case of the administrative ones, from notions such as „royalty" or „remuneration".

Both types of contracts are susceptible of being attacked before the competent courts, if the parties are unable to amiably solve the litigation arising from their interpretation, with the observance of a conciliation procedure or prior procedure.

If, with respect to similarities, they are few and derive especially from the contractual character of the acts, both being born, therefore, through the execution of an agreement of will between the contracting parties, the differences are multiple and derive firstly from the applicable legal regime and from the fact that one of the parties is always determined, being a public administration authority, which will have in this contract a position which will allow it to impose on the other contracting party certain contractual clauses.

In what concerns the legal regime applicable to the administrative contract, it borrows certain characters from private law, such as the contract validity conditions, but distinguishes from it by means of two essential elements, namely: it is based on the parties' legal inequality and the public authority, party to the contract, does not dispose of a freedom of will identical to the one regulated in private law. The competence of the public authorities or of the public law legal entities is determined by law, circumcised to the achievement of the general interest and, for this reason, it is expressly determined through the constitutive act or the normative act for the organizing and functioning of the respective authority.

Being a contract with the help of which the administration achieves part of its duties, the legal regime applicable to administrative contracts is an exorbitant one, of public law especially, also having negotiated clauses, which confers it a mixed regime, of public and private law. The public law prerogatives at the hand of administration consist of the fact that administration concludes the contract for the

execution of public interest duties, aspect which places it in a privileged situation, with the possibility to impose exorbitant clauses in the contract, to control the contract execution manner and, not lastly, to unilaterally decide the contract termination.

The administrative contract targets a better functioning of the public service, and not the satisfaction of particular interests, as is the case of commercial or civil contracts. In case of civil contracts, there is the principle of the equality of the contracting parties, at an equal level, while in case of administrative contracts the parties are not on the same position, since the contracting administrative authority aims to satisfy the interest of the collectivity. Thus, public administration expresses its will, and its will is superior to that of the individual.

In case of administrative contracts, the elaboration of the contractual clauses is not a process resulting from the negotiation between the contracting parties, because one of the parties – the administration – unilaterally establishes the content of the clauses, and the other party can only accept or refuse them as a block.

Most times, the assignment of administrative contracts presupposes the observance of a procedure (bidding – open or open with pre-selection – or direct negotiation), which, obviously, does not happen in case of commercial contracts.

Related to the execution of administrative contracts, two rules are distinguished, namely: on the one hand, administration has, in relation to the contracting parties, prerogatives without equivalent in the private law contracts and, on the other hand, the inequality deriving from the prerogatives conferred to the parties during the contract execution has a financial type of limit, in the sense that the contract parties benefit from guarantees in relation to the administration, guarantees that private law ignored in the matter of civil and commercial contracts.

As can be seen, the law plays a much stricter role in case of administrative contracts compared to the commercial ones.

Also, in case of administrative contracts, it is unconceivable their conclusion between absent parties, aspect become rule in case of commercial contracts.

Another difference is that of the courts competent to judge litigations deriving from commercial or administrative contracts.

If in case of commercial contracts the parties will address the commercial courts, according to the rules established through the Civil Procedure Code, not the same is valid in case of administrative contracts.

In this matter, competence will belong to the administrative contentious courts, aspect derived from the dispositions of Law no. 554/2004.

The law also foresees the solutions the administrative contentious court may give. When the object of the petition is an administrative contract, the court may:

- order its annulment, in full or in part;
- order the public authority to conclude the contract;
- impose on either party the fulfillment of an obligation;
- make up for a party's consent, when the public interest claims it;
- order to the payment of compensations for material and moral damages.

This is also an aspect of clear differentiation between administrative and commercial contracts.

In practice, there were situations when the issue of the material competence of the court invested to judge litigation was raised. Parties to such litigation were: a trading company with fully private capital/plaintiff and a trading company in which the single shareholder was a local council/respondent.

The litigation was brought before a commercial court. On the first trial date, given the fact that one party had as single shareholder a local council/public authority, the issue of the issue of the material competence of the commercial court was raised, and the matter was declined to the administrative contentious court, considering that we are in the presence of an administrative contract. The case was declined to the administrative contentious court, given the fact that the contract awarding procedure was the one established in Government Ordinance no. 34/2006[10]. The matter was declined to the administrative contentious court which judged the whole litigation.

In recourse, the court invoked ex officio the lack of material competence of the administrative contentious court, considering that the case should have been tried by a commercial court.

The parties showed that the act concluded between the parties does not fall under the provisions of GEO no. 34/2006, since it is not a public procurement contract.

According to the dispositions of this ordinance:

- art. 3 letter e1) contract - *any public procurement contract or frame-agreement;*
- art. 3 letter f) public procurement contract – the contract that includes as well the category of the sectoral contract, as defined in art. 229 para. (2), with onerous title, concluded in writing between one or several contracting authorities, on the one hand, and one or several economic operators, on the other hand, having as object the execution of works, the provision of products or services, in the sense of this expedite ordinance;
- Art. 8 – Is a contracting authority in the sense of this expedite ordinance:

a) any state organism - public authority or public institution – that acts at the central level or at the regional or local level;

b) any organism, other than one indicated at letter a), with legal personality, which was established in order to satisfy general interest needs without commercial or industrial character and which is at least in one of the following situations:

- it is financed, in majority, by a contracting authority, as defined in letter a), or by another public law organism;
- it is in the subordination, or is subjected to the control of a contracting authority, as defined in letter a), or by another public law organism;
- in the composition of the board of directors/management or supervision body more than half of the number of its members are appointed by a contracting authority, as defined in letter a), or by another public law organism;

[10] Government Expedite Ordinance no. 34/2006 was published in the Official Gazette of Romania no. 625 of July 20th, 2006.

c) any association formed by one or several contracting authorities of the ones indicated in letters a) or b);

d) any public enterprise performing one or several of the activities indicated in chapter VIII section 1, when it awards public procurement contracts or concludes frame-agreements destined to performing the respective activities;

e) any subject of law, other than those indicated in letters a) - d), which performs one or several of the activities indicated in chapter VIII section 1, on the basis of a special or exclusive right, as defined in art. 3 letter k), granted by a competent authority, when it awards public procurement contracts or concludes frame-agreements destined to performing the respective activities.

- Art. 9 – This expedite ordinance applies for:

a) the awarding of the public procurement contract, including the sectoral contract, in the latter case being applicable the provisions of chapter VIII;

b) the conclusion of the frame-agreement;

c) the awarding, by a legal entity without the quality of contracting authority, of a contract for works, in case the following conditions are fulfilled cumulatively:

- the respective contract is directly financed/subsidized, in proportion of more than 50%, by a contracting authority;

- the estimate value of the respective contract is higher than the equivalent in lei of 4,845,000 Euros;

c1) the awarding, by a legal entity without the quality of contracting authority, of a contract for services, in case the following conditions are fulfilled cumulatively:

- the respective contract is directly financed/subsidized, in proportion of more than 50%, by a contracting authority;

- the estimate value of the respective contract is higher than the equivalent in lei of 193,000 Euros;

d) the awarding of the public procurement contract by a contracting authority, in the name of and for another natural/legal person, in case the respective contract is directly financed/subsidized, in proportion of more than 50%, by a contracting authority.

In the case at hand, the only applicable text possible to apply is art. 9 letter c) of GEO no. 34/2006**.**

Or, in no case, the legal text can be applicable, because the two conditions are not cumulatively fulfilled, respectively the contract was not directly financed/subsidized, in proportion of more than 50%, by a contracting authority.

The recourse court considered that, according to the competence rules, related to the quality of the parties and the object of the contract, the parties are simple traders.

Under these conditions, the matter was sent for re-trial by the competent court.

Conclusions

This study wanted to underline that although the border between a commercial and an administrative contract is very thin, aspect which may influence the parties in interpretation or the court of law in appreciation, one must always resort to the theoretical matters underlined, in order to not mistake the interpretation. Theory plays, therefore, a primordial role, must be treated with full attention and must be interpreted in context, in order for the parties to be fully protected by law.

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THE OBSERVANCE OF SYSTEMIC UNITY OF LAW - PRINCIPLE OF ELABORATION OF THE NORMATIVE ACTS

Mihai GRIGORE[*]

Abstract: *The present study is a theoretical and practical approach of an important principle to be observed in the laborious activity of initiating, elaborating and drafting normative acts by participants in the drafting process, namely, the principle of observance of systemic unity of law. The study discusses the important activity of organic integrating of a draft normative act in the normative system, activity that involves both a horizontal and vertical correlation and a national, European and international correlation. Therefore, the study makes an analysis and a description of the correlation activity of a draft normative act with the general principles of law and the rules of the Constitution, then with normative acts with the same legal force or a legal force superior, with international treaties and reglementations of Community law.*

Keywords: *legislative drafting, normative act, horizontal correlation, vertical correlation, systemic unity of law.*

Introduction

After following the natural steps of development, in its process of becoming, a normative act must be integrated into the normative acts system, system that forms a unitary complex in which there are hierarchical relationships and also correlation, compatibility, interdependence etc.

The interaction position of the normative acts, in the legislative overview, imposes a strict correlation of each of these normative acts with rest of the system, in order to avoid a possible contradictory state of two or more laws. A new law can not act with the prejudice of another normative act. It „enters" into a unitary legislative system, joins the existing normative acts that should not „be bothered" creating discrepancy and non-correlation, which can lead to breaking the systemic unity of its anterior normative acts[1].

Any modern legislation involves a conscious effort of technical organizing, of national, communal and international correlation and each normative act and each article must be linked both horizontally and vertically with the other normative acts[2].

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[1] I. Mrejeru, *Tehnica legislativă* (Bucharest: Romanian Academy Publishing House, 1979), 157.

[2] V. D. Zlătescu, *Introducere în legistica formală* (Bucharest: „Rompit" Publishing House, 1995), 113.

In this regard, the dispositions of the article 12 from the Law no. 24/2000, republished[3] foreseen that the normative act must be organically integrated into the legislation system, for which purpose:

a) the normative act draft must be correlated with the dispositions of superior or same level normative acts with which it is connected;

b) the normative act draft, based on a superior level normative act, can not exceed limits established by that jurisdiction and can not act contrary to its principles and dispositions;

c) the normative act draft must be correlated with the reglementations of European Community and also with the international treaties to which Romania is party.

1. The normative act project correlation with the law general principles

The first correlation to be made and which, moreover, applies to all normative acts regardless of the position held, is to link the general principles of law with the normative act draft.

Without intending to make an analytical presentation of these principles, it is widely accepted by both the theoreticians of Law, as well as by practitioners that the whole system of Law is governed by certain ideas of extreme generality, which subordinates both the activity of creating the Law, as well as the activity of interpreting and applying the Law.

Prof. Sofia Popescu defines the general principles of law as „a set of guiding ideas that, without having the precise and concrete character of the positive law norms, orients the applying of the Law and its evolution" [4].

The developing of legal norms – points out Sofia Popescu – is guided by the fundamental principles of the Law that are usually above one single branch of Law, and that they usually have a greater longevity, comparing to the legal norms, serving to interpret new legal norms and their integration in existing Law[5].

The general principles of law are, according to Prof. Nicolae Popa, „ the fundamental prescriptions, that are leading to the creation of the Law and its applicability", they being drawn from constitutional dispositions or deducted by way of interpretation[6].

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[3] Law no. 24/2000 *regarding the law-making technique rules for drafting normative acts* (republished in the Official Journal of Romania, Part I, no. 260/21 April 2010).

[4] S. Popescu, *Teoria generală a dreptului* (Bucharest: „Lumina Lex" Publishing House, 2000), 163. Regarding other definitions of the general principles of law, see N. Popa, *Teoria generală a dreptului* (Bucharest: „Actami" Publishing House, 1998), 109; I. Craiovan, *Teoria generală a dreptului* (Bucharest: Military Publishing House, 1997), 126; Gh. Mihai, *Inevitabilul drept* (Bucharest: „Lumina Lex" Publishing House, 2002), 194; Michel van de Kerchove, François Ost, *Le système juridique entre ordre et désordre* (Paris: Presses Universitaires de France, 1988), 101 etc.

[5] S. Popescu, *op. cit.,*164.

[6] N. Popa, *op. cit.,* 117.

Prof. V.D. Zlătescu appreciated these principles as superior to even the constitutional ones that, undoubtedly, must reflect them, because they are above the branches of law, including constitutional law[7].

These general principles –V. D. Zlătescu also mentioning - are to be claimed from philosophy, morality and religion of the society, reflecting the essence of civilization, philosophy, morality, and religion imposing, undoubtedly, certain lines of thought and action defining the civilization in question[8].

The role of law principles, appreciated Prof. Nicolae Popa, is first outlined in the relation that is specific to the legislative creation process, meaning that the legislature is considering the general principles when constructing legal solutions to meet the needs of life[9].

The general principles are common factors, the constant ideas drawn from the entire legislation, and if their genesis is found in the philosophical and moral concepts of society, their concrete formulation is influenced largely by existing texts of normative acts.

According to Professor Sofia Popescu, the general principles of Law are the substrate of positive Law, the author pointing out also that, unlike the principles of legal texts, which provide accurate solutions for specific legal issues, the general principles of Law provide more general and flexible orientations in order to help the activity of the jurists[10].

Reflecting the general principles of law in the process of creating the legal texts is considering the compliance of the legal solutions from certain normative acts with the requirements arising from these maximum generality rules[11].

Romanian system of Law, knows, in the opinion of Professor Nicolae Popa**,** the following *general principles*:

1) ensuring legal bases for functioning of the state;

2) the principle of freedom and equality;

3) the principle of responsibility;

4) the principle of equity and justice[12].

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[7] V. D. Zlătescu, *op. cit.,* 114.

[8] *Ibidem*, 114.

[9] N. Popa, *op. cit.,* 111.

[10] S. Popescu, *op. cit.,* 164.

[11] I. Vida, *Legistică formală (Introducere în tehnica şi procedura legislativă)*, fourth edition (Bucharest: „Lumina Lex" Publishing House, 2010), 130.

[12] N. Popa, *op. cit.,* 117 and 127. Regarding other classifications of the law general principles, see also S. Popescu, *op. cit.,* 165 and the next one; S. Popescu, „Principiile generale ale dreptului, din nou în atenție", *Studii de drept românesc* 1-2 (2000): 13-19.

The general principles of Law received also an international consecration, and these are considered general principles common to different national legal systems[13].

It should be noted also that the general principles of Law are the foundation of general principles of each branch of Law, which are located, of course, at a lower level of generality than those relating to the whole system of Law[14].

2. The correlation of the normative act draft with the constitutional dispositions

The correlation of the normative act draft with the constitutional dispositions represents the next step of the correlation of the normative act draft.

It is known that in the internal normative act pyramid, the top is occupied by the Constitution, which is the fundamental Law of any state, all other acts being in a relationship of subordination to it. The Constitution has, therefore, legal supremacy over all other laws or normative acts issued by the state, and meeting the basic principles expressed in the Constitution must be a primary concern in drafting laws and other normative acts[15].

The postulate, that has always said that all the dispositions of the normative acts must be in accordance with the fundamental law's dispositions, finds in the contemporary legal life new shades in the constitutionalization process of the new branches of law, as Professor V.D. Zlătescu highlighted[16].

Based on the significance of constitutionalization process, which consists of the action to ensure the compliance with the Constitution of all the legal dispositions which are the subject of each law branch, regardless of the legal force of the documents by which they were promoted, Professor V. D. Zlătescu shows two meanings of this process: a *positive-creator* meaning (it is accomplished by the lawmaking process)[17] and a *negative-destructive* (it is achieved by removing from the legislation of all dispositions contrary to the Constitution) [18].

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[13] Are considered as general principles with transnational character the principles consecrated by the European Convention on Human Rights and by European Union treaties, principles that must be respected and applied by the member states, the Court of Justice of the European Communities having the role to apply them and to fill gaps of the communal law that, for example, stated the human rights observance is a general principle of law (S. Popescu, *Teoria generală...,* 171 and the following).

[14] For example, in civil law, there is the principle of mutual consent, in criminal law, the principle of legality of criminal offences and punishment, in public international law, the principle of the treaties observance etc.

[15] I. Mrejeru, *op. cit.,* 157.

[16] V. D. Zlătescu, *op. cit.,* 116.

[17] All newly adopted normative act (newly created) must be in strict accordance with the Constitution's dispositions. Of course, in this work an important part is the one of the Legislative Council, whose opinion must relate to the constitutionality of the proposed texts, but also of the Constitutional Court acting towards the preventive control.

[18] V. D. Zlătescu, *op. cit.,* 116.

The correlation of a normative act's dispositions with the ones of the Constitution derives from the fundamental duty stated in article 1 paragraph (5) of the Constitution, according to which the observance of the Constitution, its supremacy and of the laws is obligatory. The correlation of a normative act's dispositions with the ones of the fundamental law considers any normative act, from the constitutional law drafts and to the normative dispositions of the mayor. Ensuring the concordance of a normative act's dispositions with the ones of the Constitution aims, on the one hand, ensuring compatibility of the norms contained in the normative act's draft with the material type rules and, on the other hand, with the procedural ones, enshrined in the Constitution[19].

From the material point of view, the equilibrium between the norms enshrined in a normative act draft and the constitutional ones concerns the registration of the new legal reglementations in letter and spirit of the Constitution. This requirement is achieved thorough a detailed knowledge of the fundamental law, of the internal connections between its different component elements, but especially of its spirit, knowledge that goes beyond the literal interpretation of the constitutional dispositions and which appeals the principles, the concepts and notions with a deeper content than that given by the letter of the Constitution.

From the procedural point of view, the correlation between the dispositions of the normative act's drafts with the constitutional norm envisages the procedural dispositions foreseen by the fundamental law in the adoption process of normative act's drafts[20]. The one who develops or adopts a normative act draft, for which the Constitution establishes certain procedural rules, is obliged to ensure during the drafting and the adoption of the normative act the compliance of the dispositions enshrined in the fundamental law.

The compliance of the fundamental law's supremacy in the elaboration process of the normative acts must be first done by the redactors of the normative act's draft themselves, and then, if they commit any violation of the Constitution dispositions they strike the first „barrier", namely the negative notification of the Legislative Council[21], care, which according to the article 3 paragraph (1) and to

[19] I. Vida, *op. cit.,* 133.

[20] Such procedural norms enshrined in the Constitution of Romania are those regarding the adoption of the constitutional laws, organic and ordinary, of the parliamentary decisions regarding the regulations, the ordinances and emergency ordinances of the Government and also of the Government decisions.

[21] *Law no. 24/2000*, republished: Article 9 –"(1) The notification of the Legislative Council shall be made and submitted in writing. It can be: positive, positive with objections or suggestions or negative.
(2) The favorable notifications including objections or proposals, as well as the negative ones, are motivated and may be accompanied by the documents or by the information that support them.
(3) The Legislative Council notification is a specialized opinion and has a consultative status.
(4) The observations and the proposals of the Legislative Council regarding the compliance of the legislative technique norms will be considered in finalizing the governmental decree draft. Their non-acceptance must be justified in the act of the project presentation or in an accompanying note".

the article 4 paragraph (1) from Law no. 73/1993, republished[22], must be required in the case of the law drafts and of the legislative proposals, and also in the case of the ordinances and Government decisions with normative character.

The Legislative Council has, according to the article 2 paragraph (1) letter e) from Law no. 73/1993, the power to examine the compliance of the legislation with the dispositions and principles of the Constitution and to notify the permanent offices of the Chambers of Parliament and, where appropriate, the Government on the observed cases of unconstitutionality.

The correlation operation of the normative act draft with the constitutional dispositions represents also the application of the article 154 paragraph (1) of the Romanian Constitution, republished, which provides that „Laws and all the other normative acts remain in force only if they do not contravene to the present Constitution".

The constitutionalization of the legislation adopted after the entry in force of the Romanian Constitution in 1991 is the problem to be solved of the Constitutional Court taking into account both the anterior and the posterior control, according to the articles 146 and 147 from the Romanian Constitution, republished[23], and also according to the dispositions of Law no. 47/1992[24].

3. The correlation of the normative act draft with the dispositions of superior level normative acts

The correlation of the normative act draft with the dispositions of superior level normative acts, also known as *vertical correlation*[25], is about the correlation with superior legal force documents (except for the Constitution).

The necessity of correlating a normative act draft with superior level documents results, mainly, from the hierarchical principle of the normative acts, which are in subordination relation one to another, depending on the institution that adopts them.

Given the relationship of subordination of one document to another, each normative act must be in accordance (in terms of solutions it promotes) with its the hierarchically superior documents.

In elaborating a normative act, of a certain rank, must therefore be taken into account that the offered solutions must be fully compatible with the dispositions of the acts on that matter issued by the higher authority institution.

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[22] Law no. 73/1993 for establishment, organization and functioning of the Legislative Council (republished in the Official Journal of Romania, Part I, no. 1122/29 November 2004).

[23] Constitution of Romania – 1991 was republished in the Official Journal of Romania, Part I, no. 767/31 October 2003).

[24] Law no. 47/1992 *regarding the organization and the functioning of the Constitutional Court* (republished in the Official Journal of Romania, Part I, no. 807/3 December 2010).

[25] V. D. Zlătescu, *op. cit.,* 118.

The correlation of the normative act draft with the dispositions of superior legal force normative acts is required under the hierarchy principle of the normative acts, according to which, the normative acts are on different hierarchical levels, depending on the position emitting institution in the public authorities system, of their membership in the legislative or executive power and of the type of social relations they regulate[26].

The correlation of the normative act draft with the dispositions of superior legal force normative acts must be respected not only when is the case on emitting some normative acts subordinated to the law (decisions, orders, instructions etc.), but also in the laws and ordinances case[27].

The fundamental principle is that these acts should not exceed the frame set by the act with superior legal force and should not include top solutions that contradict them, because, if it exceeds the remembered frame, it becomes, for the part that exceeds it, a primary reglementation which may be inadmissible, especially in the case of Government decisions, and for what it is contrary to the frame, an exemption; and we know that an inferior act can not obtain an exemption from a superior act, the exemptions being allowed only between the normative acts with the same legal power[28].

In the event of adopting a decree of superior nature that promotes new concepts, which are not in compliance with some solutions provided by inferior decrees, the institutions that have adopted the latter acts have to reconsider, or by replacement with other acts, either modifies them to match the superior decree.

Violation of the rules regarding the hierarchy of the normative acts implies non-applicability of the dispositions existing in the normative acts with a lower legal force that are opposing the superior normative acts. If, however, such dispositions shall apply, they may be challenged and canceled, either through constitutional contentious matters or the administrative courts.

4. The correlation of the normative act draft with the dispositions of the normative acts at the same level

The Correlation of the normative act draft with the dispositions of the normative acts at the same level, also known as *the horizontal correlation*[29], refers to the correlation with the normative acts that have equal legal power.

[26] I. Vida, *op. cit.,* 139-140.

[27] Thus, the dispositions of the ordinary laws and ordinances emitted by the Government under an empowerment law must be in accordance with the previsions of the organic laws or with the emergency ordinances, which foreseen legal reglementations from the domain reserved to the organic laws.

[28] V. D. Zlătescu, *op. cit.,* 118-119

[29] V. D. Zlătescu, *op. cit.,* 117.

To maintain a state of harmony in legislation, undoubtedly that the normative acts at the same level, can not promote solutions that are not compatible with each other, because otherwise it would create adversarial state of all consequences arising there from. Regarding the correlation of the normative acts of the same level, I. Mrejeru considers that is important to make some distinctions depending of the nature of reglementation included by them, underlining, however, that legislative practice shows that some normative acts, although are issued by the same institution they are still claiming a certain „legal ascendancy" from the other „sister acts", in the sense that the latter must align to the solutions promoted by the first ones, even though they are not acts of inferior level. We are talking about the so-called „framework laws" that are governing in a note of generality a wider field of some social relations, their characteristic of these laws being that they are promoting some macro-concept solutions to be respected also in other reglementations of the field (narrower) even though legal, this is realized also at the level of law[30].

The correlation of the normative acts with the same legal force that is referring to the rapports between the general laws and the special laws will be governed by the principle *lex specialis derogat lex generalis*, according to which the dispositions of the special law receive an exemption from the dispositions of the general[31]. According to art.14 from the Law nr.24/2000, republished, a reglementation from the same matter and at the same level can be contained in another normative act, if it has special character to the decree that contains the general reglementation in matter, the special character of a reglementation being determined accordingly with its object, illustrated to certain types of situations, and accordingly with the characteristic of the legislative solutions established by it. The reglementation obtains an exemption if the legislative solutions that are referring to a certain determined situation contain differed decrees in rapport with the framework reglementation in matter, the latter maintaining its general character, mandatory for all the other cases.

5. The Correlation of the normative act draft with international treaties which Romania is part

The correlation of a normative act draft with the dispositions of the international treaties which our country is part intervenes within the principle of respecting the international treaties, bringing thus into question the relationship between domestic law and an international treaty[32].

[30] I. Mrejeru, *op. cit.,* 158-159.

[31] The emergence of a general law that does not repeal the contras dispositions from a special law in force, makes these dispositions remain in force.

[32] *Constitution of Romania* – 1991, republished: Article 91 – „(1) The president concludes international treaties on behalf of Romania, negotiated by the Govern and submits them for ratification, in a reasonable term, to the Parliament. The other international treaties and agreements are concluded, approved or ratified according to the procedure established by law".

A treaty is binding upon the parties and must be strictly respected, that is to be executed in good faith, the international treaty, by definition, including a rule of mandatory conduct on the contracting parties and the legal commitment assumed must be (*pacta sunt servanda*) [33].

Compliance with international treaties (*pacta sunt servanda*) is a problem in essence in the relations between states, international legality and the normal development of good neighborly relations and cooperation between states can not be developed without compliance with the treaties in accordance with universally accepted principles and norms of contemporary international Law.

Pacta sunt servanda is a principle recognized in international practice, is not only a fundamental principle of the Law of Treaties, but also of general international Law, being consecrated in numerous international documents[34].

The principle *pacta sunt servanda* will find him also written in art. 11 from the Romanian Constitution, republished, which states in Para. (1) that „The Romanian State pledges to fulfill accordingly and in good faith the obligations deriving from the treaties to which it is party".

Regarding the relationship between domestic Law and the dispositions of an international treaty to which our country is a party, Para. (2) provides that „The treaties ratified by Parliament, by law, are part of the internal Law", stating in Para. (3) that „If a treaty Romania is to become part contains dispositions contrary to the Constitution, its ratification can take place only after the revision of the Constitution".

From an international treaty to which our country is a party and our domestic Law there can be no discrepancies. To accept the contrary thesis would lead to a situation in which our domestic Law would make inoperable the dispositions of the treaties, which would lead to failure of the assumed obligations.

The correlation of a normative act draft with the dispositions contained by the international treaties which our country is part intervenes also within the principle of the priority of the international treaties in the matter of human rights, provided by article 20 of the Romanian Constitution[35].

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[33] I. M. Anghel, *Dreptul tratatelor,* vol. II (Bucharest: „Lumina Lex" Publishing House, 1993), 648 and following.

[34] *Declaration of the London Conference from 17th of January 1871*, *O.N.U. Carta* and *the Convention of the law of treaties* (*The Vienna Convention from 1969*).

[35] *Constitution of Romania* – 1991, republished: Article 20 – „(1) The constitutional dispositions concerning the rights and freedoms of the citizens shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the agreements and other treaties Romania is a party. (2) If there are inconsistencies between the agreements and treaties on fundamental human rights to which Romania is a party and the internal laws, the international reglementations shall be prioritized, unless the Constitution or the national laws comprise more favorable dispositions".

6. The correlation of the normative act draft with the reglementations of European Community

Regarding *the correlation of the normative act draft with the reglementations of European Community*, our country, following the acquisition of membership of the European [36], has, like any other European Union member state, the obligation to correlate the internal legislation with the communal one by transposing and implementing in the legal internal order of the acquis communautaire [37], which means that every internal normative act must be in full compliance with the reglementations in this matter contained in the communal law.

The national legislation correlation with the acquis communautaire must be provided starting from the fact that the communal and national law relations are not reducible to a single pattern, but are reflected in four key ways: *substitution* - case in which the communal law will supersede national law that Member States' authorities have lost the power to develop it (mainly in the case of regulations); *harmonization* - in which case national law continues to exist, but lacks the ability to determine its own aims (mainly for directives); *coordination* - in which case the national rights are not affected, the communal law only interfering in terms of effects, to coordinate them in the benefit of the right subjects belonging to several of the states which coordinate their legislations; *coexistence* - in which case the communal law and the national law are applied simultaneously when they govern the same object, but in different dimensions.

The obligation to harmonize the romanian legislation with the communal legislation was assumed, since 1993, during the conclusion of the *Europe Agreement*[38] signed by Romania, on the one hand, and by the European Communities and their Member States[39], on the other hand, which involved the compulsory consultation of the existing legislation in the European Union and the adoption of laws or other normative acts in accordance with the communal legislation.

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[36] Romania became member of the European Union on 1st of January 2007, at the entry into force of the Accession Treaty of Bulgaria and Romania to the European Union (signed by Romania at Luxembourg on 25th of April 2005 and ratified by the Parliament of Romania on 24th of May 2005).

[37] *Acquis communautaire* represents the totality of the legal norms which regulates the activity of the European Union institutions, the communal actions and politics.

[38] Romania signed the 1993 the *European Agreement* that established an association between Romania, on one hand, and the European Communities and their Member States, on the other hand. This agreement was ratified by Law no. 20/1993 and came into force on 1st of February 1995.

[39] Within the agreement were set out a series of *principles*, and one of them was considering that in the *legislative domain* shall be adopted governmental decrees with economic character and for other sectors, *by mandatory consultation of the existing European Union legislation, every passed normative act must include a statement, according to which the law is in conformity with communal legislation*.

To meet the requirements of a modern legislation, communal harmonized, in line with the practice of some Member States of the European Union; the normative acts that are transposing the *acquis communautaire* must state expressly this thing, signaling for the Romanian citizen the connection to the European norm[40].

The correlation obligation is strengthened by article 148 paragraph (2) of the Romanian Constitution, as it was revised, which provides that after the Romania accession, „the European Union constituent treaties previsions and also other the reglementations of European Community with mandatory character have priority over the contrary dispositions from the internal laws, respecting the dispositions of the accession act", and in paragraph 3 of the same article, also stipulating that the dispositions of paragraph 2 will properly apply also for the accession on the revising acts of the constituent treaties of the European Union.

Conclusions

The integration of the normative act draft in the legislation system is an objective of the work of systematization and unification of legislation, under which the elaboration activity of the normative acts must not conflict with the elements that represent the legislative system.

The normative act, along with its entry in force, enters in the assemble of the normative acts of a state, assemble characterized by a lot of correlation between its component elements, in which the legal norms are rounding each other and acquire specific meanings arising of their membership of the legislative system.

Therefore, in order to assure the organic integration of the new created normative act in the system of legislation, it is necessary to *correlate its dispositions with the general principles of law and with the Constitution's dispositions,* then with *same or superior legal force normative acts*, which are in force and in connection, also with *the international treaties and with the legal norms of the Community law.*

[40] *Law no. 24/2000,* republished: Article 43 - „(1) In the situation of the normative acts which directly transpose community norms in the internal law, after their enacting part a reference is made to include the identification element of the community act which was considered after the following model: „The present ... (it is mentioned the type of the normative act) transpose the Directive no. .../... regarding ..., published in the Official Journal of the European Communities (OJEC) no. .../...".
(2) If through a normative act is transposed only partial a communal act the mention foreseen on paragraph (1) must specify in detail the transposed texts (section/articles/paragraphs after case)".

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DISCUSSION OF LIMITATION ON THE REGULATION OF PROPERTY BY THE RIGHT OF CROSSING IN THE NEW CIVIL CODE[1]

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Abstract: *Even though absolute, the right of ownership may be subject to limitations, in order to maintain a balance between individual interests and general interests.*

In the concept of the Civil Code, we can notice the possibility to classify these limitations, or by reference to the attributes of ownership, or by reference to categories of legal limits, conventional or legal.

One of the legal limitations that excite interest in the context of new civil norms, is the regulations on the rights of passage, on which the legislature choose to bend the rules fairly laborious

Keywords: *property rights, limit, right of way*

Depending on the legal regime applicable we distinguish between public ownership and private ownership. So, according to article 136 par. 1 of the Constitution, the fundamental forms of property in Romania are public property and private property and this classification is reversed on article 552 Civil Code „Public or private property."

The right to private property is „real right gives its holder the main attributes of possession, use and disposal (possidendi jus, frutendi jus and abutendi jus) on private property as it is appropriate, attributes that can be exercised absolute, exclusive and perpetual within the materials and the legal limits of them, „and the restrictions imposed by the legislature in the exercise of ownership does not limit the absolute character of its"[2].

According to article no 44 from the second thesis of the Constitution, the content and ownership limits are established by law.

First note that ownership restrictions can take the form of:

- restriction of the ownership right,

[1] Civil Code. Law no. 71/2011 on the implementation of Law no. 287/2009 of the Civil Code, published in "Official Gazette", Part I, no. 409 of June 10, 2011.

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[2] C. Bîrsan, Civil. Real rights. Hamangiu Publishing, Bucharest, 2008. p.47.

- limitations relating to the object[3] of the ownership rights,

- exceptional restrictions, which may even lead to loss of ownership by the holder, through expropriation in the public interest in the law[4].

In the matter of the boundaries of the right to private property, we have to note the existence of limitations in accordance to the Civil Code (article 556 and article 602-630) and in consideration of the provisions of article no.1 ofrom the Protocol no. 1 of European Convention on Human social rights.

Into the concept of the Civil Code, the limitation of ownership should be subject to discussion both in terms of *attributes* such as a limit, and in terms of classification of the Civil Code, to *legal* limitations, c*onventional* and *judicial.*

1. Limitations of the owner ship right.

Possession, use and disposal are the three attributes of ownership that make substantial element of property[5]. The owner of the property directly and immediately exercised, without the intervention of another person, the powers of the property is the subject of his right.

The reduction of ownership in terms of its attributes can be:

- lawful: attributes may be limited exercise of ownership by law. However, boundaries of ownership to the law should respect proportionality[6] and should be established by organic law[7]. Proportionality between the means employed and the limitations to the right to property is shown, in fact, by the practice of European Convention on Human social rights.

- conventional the reduction of ownership by the will of the owner, except as provided by law.

1.1. Limitations of the right to dispose on certain categories of goods.

Provisions of article 553 par. 4 Civil Code provide that: „property object of private property, regardless of ownership, shall be and remain in the civil circuit, unless the law provides otherwise. They can be disposed of, may be prosecuted and may be acquired through forced otherwise provided by law". Limiting analysis to dispose of certain categories of goods applies to inalienable goods temporaryinalienable goods and to the goods that are alienable under condition[8].

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[3] *M. Cantacuzino*, Course of Civil, House Industries, Craiova, 1949, p. 147; *E. Safta–Romano,* Public and private property rights in Romania, Graphix House, Iasi, 1993, p. 37.

[4] E. Chelaru, Civil. General, C.H. Beck House, Bucharest, 2009, p. 34.

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[6] Constitutional Court Decision no. 19/1993, published in the Official Gazette, Part I, no.105 of 24 May 1993.

[7] Constitutional Court Decision no. 6/1992, published in the Official Gazette, Part I, no.48 of March 4, 1993.

[8] M. Nicolae, Discussion of legal prohibitions of alienation of immovable property, Dreptul no. 7/2001, p. 58-59.

1.2. Limitations of the right to use.

a. Limitations of the right to use certain goods under special circumstances.

The possibility to establish an obligation of the owner of the property to yield the property of his own good, in certain situations is regulated by the Constitution and other special laws. This certain situations include: forced sales of private property for recovery of debts were not paid voluntarily, confiscation of illicitly acquired or used for committing crimes or misdemeanors and expropriation for public use.

b. Limitations of the right to use the basement property by a public authority.

c. Limitations resulting from neighborly relations.

2. Legal limitations, conventional and legal property right

2.1. Legal restrictions to ownership (art. 602-625 Civil Code.)

Ownership obliges the holder to comply with a number of tasks which devolve upon him by law or custom, including the tasks of environmental protection and ensure good neighborliness.

The law may limit the right of property both in public and in private interest, and when it does, for private legal limits may be modified or abolished temporarily by agreement. Note that in order to be be invoked against third parties it has to respect the formalities for publication provided by law.

Civil Code provides a number of legal limitations that can be made to the private property rights, namely:

- water use (art. 604-610 Civil Code.). It establishes a set of rules concerning: the natural flow of water, the caused water flow, the expenses on irrigation, the excess of water, the use of sources.

- drop gutter (art. 611 Civil Code.). One homeowner is required to do so as a pinnacle from rain water can not flow due to the neighboring owner.

- distance and intermediate required for certain construction works, works and plantations (art. 612-616 Civil Code.). Law aims to establish minimum distances between buildings and between trees, but also the view over the property of a neighbor.

- the right of way (art. 617 – 623 Civil Code).

2.2. Right of way. A new civil legal landscape is how governing the „*right of passage*" limitation legal ownership. Laws distinguish between:

- right of way (art. 617 Civil Code.),
- right of passage in special situations (art. 618 Civil Code.),
- extent and manner of establishing right of way (art. 619 Civil Code.),
- limitation of action for damages and restitution damages received (art. 620 Civil Code.),
- right of way for utilities (Art. 621 Civil Code.),
- right of passage for performing works (Art. 622 Civil Code.),

- right of way for repossession (art. 623 Civil Code).

In order to exercise his right of ownership over a property, in general and respectively over a certain fund, the owner must have access to it.

Thus, if its substance has no public road access, the owner is entitled to ask to be crossed due to his neighbor to fund their operation, conditioning.

The condition is that the transition must provide a minimum performance hampered to the fund that has access to public road and, if there is such a situation that more neighbors funds have access to public road, the follow passage is estabish on the fund which generates the minimum damage.

Right of way itself, the access right is imprescriptible and its existences is off only when the fund acquires another public road access. This does not mean that right of way on a particular fund itself is imprescriptible.

From the provisions of art. 617 Civil Code providing general rules, it derogates the provisions of art. 618 Civil Code „right of passage in special situations".

In order not to end up abused, the law expressly provides that if no access comes from the sale, exchange, partition or another legal act, the transition will not be required than those who acquired the land that was before passage. It is natural and right that the owner of the fund without access right of way to ask those who have acquired land that was previously passed through and no other neighbors.

When no access is attributable to the owner who claims the passage, it can be established only with the consent of the owner of the fund who has access to public road and pay double compensation. In this way the legislature intends to create a situation more difficult the one who was wrong and this one is the owner that is guilty.

Regarding „the extent and manner of establishing right of way" (art. 619 Civil Code.), we observe that this can be establish by parties, on an agreement, by the court, on a decision, but also due to the continuous use during a period exceeding 10 years.

Action for damages that the owner of the dominant fund has is prescriptive, and his term shall begin to run when the right of way is establish. ("*limitation action for damages and restitution damages received*" (art. 620 Civil Code.).

If right of way stops, the owner of the dominant fund is obliged to refund the compensation received, less the damage suffered in relation to the duration of the right of way.

Finally, the legislature expressly states on the „right of passage" of the following situations: the right of passage for utilities (article 621 Civil Code.), the right of passage for performing works (article 622 Civil Code.) and the right of passage for repossession (article 623 Civil Code).

a. *The right of passage for utilities (Art. 621 Civil Code.).*

The law provides that the owner of land must accept that his fund can be crossed by the municipal networks serving the same neighborhood or area.

This municipal networks may be on the nature of water pipes, gas or the like, ducts and electrical cables, ground or air, as appropriate, and any other facilities or materials for the same purposes, noting that this obligation arises only for the situation which passes through another part would be impossible, dangerous or very costly.

In the cases presented, the owner is entitled to a fair compensation further, and if the utilities are new, the owner must be received a prior compensation.

The exception to this rule is established by article 621 par. 4 that is provided exception for the funds were are built „buildings, their yards and gardens", if the utilities are underground channels and pipes and its are new for this area.

We observe that the constitutional text expressly provides underground use by a public authority, while the Civil Code does not distinguish as utility switching is performed by a public authority or not.

b. *The Right of passage for performing works (Art. 622 Civil Code.).*

The ownership of a fund is putting the owner of this fund in a position to carry on a number of necessary works (maintenance, conservation) or pleasure works.

The owner of the fund is obliged to allow the use of its fund for necessary performing works nearby, but also he has to permit the access of his neighbor for cutting branches and fruit collecting. This obligation subsists for the owner as long as the passes through another part would be impossible, dangerous or very costly.

If the owner of the fund on which is permited the access ask and prove that his was harm as a result of carrying out actions, he will be compensated.

c. *The right of passage for repossession (art. 623 Civil Code.).*

Such a limitation of the right to property is established for the fund owner who can not prevent access of another person who try to regain possession of his best, if he, the owner, has been notified in advance.

The law provides that the owner of the fund is entitled to fair compensation for damage caused by the repossession, as well as to those that were caused to the fund by the object of the repossession.

We find therefore a restriction of the owner of the property fund, which should enable access to recovery of possession of an object.

Requesting access must not be necessarily the property owner.

The law allows and asset holder may request access to his recovery. It is thus protected ownership of the property owner and the right use of its owner.

It utilizes the term „good ... arrived by chance „on a property, which can generate discussion. Fall within this provision where the property has reached the merits due to negligence his owner, the owner of the fund, a natural eventiment, and unknown intrinsic nature of the good times because of its dynamics.

The legal provisions excludes intentional situations. It therefore ruled that the fund owner intends placed himself good background. It ruled also that the property owner intends to learn about that property located in the background (for example, a person hide, stored on property fund resulting from a crime which he committed or property obtained by committing a crime by another person who was entrusted for safekeeping).

Rules of civil law are not unique in terms of „the right of way" rules. The national legal landscape identify specific regulations, and rules that include departures from common law that, generally, on the exploitation of public property assets. Such rules are set by Law no.107/1996 (water law), Law no. 238/2004 (oil

law), Law no. 85/2003 (mines law), Law no. 13/2007 (electricity law).

According to article 28 of Law no.107/1996[9], was established riparian servitude. So, the riparian are obliged to grant right of way through certain specific areas agreed to by the „Romanian Waters", without charge, to:

- passage or movement of personnel with tasks to perform duties in water management,
- location in the riverbed and banks, the equipment and facilities necessary for the execution of studies on water regime and access to maintenance facilities for these activities;
- transport and temporary storage of materials and equipment necessary for interventions against flooding;
- transport and temporary storage of materials, equipment, and their circulation and staff for execution of maintenance, repair and hydrogeological pumping test for wells that are part of the national network of observations and measurements „.

In conclusion, how the Romanian legislator choose to rule „rights of passage" in the Civil Code is a new national law on which its opinion is welcome because, on the one hand there is an answer that materialized the factual necessities, and on the other side is clear enough in order not to create a lot of contrary interpretations.

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THE PRINCIPLE OF GOOD - FAITH, TRADITION AND MODERNITY

Valeria GHEORGHIU*

Abstract: *Good faith should guide the behavior of contractors not only in negotiating the contract, but during its execution. If one or more terms of the contract is illegal or abusive, their use can be prevented or punished by the court. If a social right promised by law will be rejected later for reasons of austerity, the court could redress the balance. Although good faith is a legal concept, it is based, however, sociological or ethical concept: good common sense. As for the common man, we familiar with legal concepts, is common sense, should be common sense and lawyer. The acting by good common sense, is in good faith. And good faith is the normal state of man, have not so proven, only asserted.*

Keywords: *Good faith, negotiation, contract, breach of law, liability*

1. Psychological facts covered by good faith

Good faith is a very complex concept. He originates from psychological facts which fall within the moral norms in social relationships and acts constituting legal relations mobile [1] and producing effects in the various areas of law.

At its starting point, good faith has the appearance of psychological facts, but not any facts, but only some of those which comply with moral rules. That psychologically defined: „a moment of conscious life that it isolates our attention, is important for us in certain circumstances"[2]. Psychological facts in accordance with moral norms specific to each type of society is one that is about honesty, loyalty and integrity, prudence, temperance.

In terms of how psychological facts act in good faith formation we refer to the definition of the Cicero good faith, that brings definition to the „honesty in words (veritas) and fidelity (constantia) in commitments"[3]. From this definition, we can say that psychological acts of good faith generators create two states for compliance or compliance: on the one hand compliance between what man thinks and what he said (sincerely in words), and on the other part, the conformity between words and his actions (fidelity commitments).

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[1] „Mobiles supporting legal acts is limited to the general notion of good faith in which they melt to lose their individuality" (L. Josserand, *Les mobiles dans les actes juridiques de droit prive*, Paris, 1928, p.209)

[2] Roustan, *Lecons de philosophie*, vol.I, 1934, p.124, citat de Robert Vouin, *La bonne foi. Notion et role actuels en droit prive francais*, These, Paris, 1939, p.12

[3] Marcus Tullius Cicero, *De officiis*, L I, 7.

2. Intrinsic elements of good faith

Referring to the intrinsic elements of good faith, should stress the „honesty" as the moral foundation of good faith, and moral values of honesty components. The notion of honesty, this in Roman law, individual life consists compliance with moral norms. It is conditioned by moral conscience and therefore could be defined as the compliance of individual consciousness and the group with the general rules of moral life. Making a parallel between the concept of good faith and honesty, it is found that although honesty has the same content or moral values and the concept of good faith, its action is restricted to individual life and the moral behavior of society, without to be related to the legal relationships with other people.

Recalling the moral values of honesty components, we list the following:

a. *Loyalty*, synonymous with probity, was defined as a psychological fact refers to the rigorous observation of moral duties, as well as of a right conduct, both leading to mutual trust between members of society.
b. *Prudence,* consisting of psychological fact that consciousness determines human person to provide and to avoid mistakes and dangers.
c. *Order*, the psychological fact, involves channeling human actions within the limits established in social norms.
d. *Temperance*, being a feature of human consciousness moderate desires and passions, limiting them to what is allowed by the principles of ethics.

Regarding the elements of good faith, we mean the *right intention*, the result of the loyalty and probity, always implies the absence of deception, fraud and violence, and fidelity to commitments, also, probity or lack of loyalty train doubt, ignorance correct and evidence, which is called as *excusable error*. The second element of good faith is considering diligence, prudence correspondence moral value, which causes the commission of acts or acts of providing their results in circumscribed by law. The third element is tender, that is committing acts of legitimate content, that facet juridical order that moral value. Refraining from injury or pagubirea another, the fourth element of good faith, derives from the moral value of temperance, being equivalent perceptive to novel *non alterum laedere*. Comparing moral and legal is important to note that honesty is a moral notion with exclusive content, while good faith is only the social relations founded on moral values and stated that, governed by legal rules, legal relations.

3. To a traditional definition of good faith

Since Cicero and to the current legal literature, were given a series of definitions of good faith, each constructed from the angle it was viewed and analyzed.

Definition of good faith viewed through a synthetic and global conception brings forward all its complexity, is necessary to take account of all its legal aspects, the consequences that can occur in different areas of law and fundamental or moral. In this respect, one of the most important definitions was given by Italian Professor Lo Monaco, namely: „good faith is safe consciousness observing all the conditions required to perfect a legal relationship."

Such a synthetic definition was given in our juridical literature, search for the essential aspects to be covered by good faith: „Good faith can be conceived as a psychological state of a subject as individually, involving a state specific activity of the individual or purely intellectual attitude of ignorance or error can be appreciated and ethics upon which, starting from a rule of law, to be able to trigger legal effects.

From analytical point of view, definition of good faith can be based on the tripartite theory, bipartita theory, or the theory of fundamental unity, so we draw the sides of the concept of good faith in science and law practice, resulting in:

a. a determined group of psychological facts, that make honesty (loyalty, prudence, temperance and order) and having an ethical content
b. A group of elements within the scope of law as a consequence of psychological facts mentioned, namely: are right intention, diligent, liceity and refraining from the damage
c. two forms of manifestation of legal relations:
   - Honest activity, loyal and mutual trust completely to the conclusion and implementation of legal, obligations generally, and contracts in particular.
   - Faith excusable wrong and protected as such by law, by equating it with a right, which was called in German theory „guter Glaube", this meeting is to third parties in good faith.[4]

4. The principle of good faith in the New Civil Code

Rationale of subjective rights is to satisfy a need or interest protected by law. If the right is diverted from this reason, it is not protected by law, and the owner or be held responsible for abuse, since exercise of the right is anti-social[5]. Therefore, the right recognized and protected individual power of law ceases where abuse begins[6], as individual freedom stops where freedom begins all other members of society.

[4] The two sides of the fundamental concept of good faith were put in relief in *Encyclopedie juridique*, Dalloz, Paris, 1972, the term: bonne sheets, as well as older work of Louis Josserand, Vocabulaire juridique.

[5] Louis Josserand, *Cours de droit civil positif francais*, Sirey, Paris, 1930, p.206; C. Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu, *Tratat de Drept civil roman*, vol. II, Ed. Nationala, Bucuresti, 1929, p.761.

[6] Marcel Planiol, *Traite elementaire de droit civil*, tome II, Librairie Generale de Droit et de Jurisprudence (LGDJ), Paris, 1909, p.286. The authour believes that the concept of abuse of rights is an *oximoron*, since an act can be both under and contrary to law and that, in fact, what is called "abuse of rights" is a distinct category from the act (that) illegal.

Individual has a moral duty not to harm others. The „dispute" between *individualism* and *solidarism* contract, good faith and fairness weigh in favor solidarism contract. Indeed, no derogation from the rules Conventions individuals who are interested in public policy and good morals, good faith and fairness are the foundations and deep sense of duty to require the parties to their contract default clause true[7].

On a more general plan, abnormal exercise of any right is a „mistake" that can substantiate the right holder's civil liability [8]. *Abuse of rights* is disproportion between the injury and the advantage obtained by the holder of another right.

German Civil Code in paragraph 226 provides that the exercise of a right is only illegal if *aimed* at causing injury to another. Swiss Civil Code provides in art. 2 as *manifest* abuse of a right is not protected by law. The new Roman Civil Code provides in art. 15 that no right can be exercised in order to harm or injure another or in an excessive and unreasonable, contrary to good faith. The new Civil Code contains a text (14) which is marginal name „good faith", but the text does not define good faith, but established principle of law *normally* exercise, an exercise that requires good faith in accordance with public order and morals. The text of Article 14 Paragraph 2 new Civil Code has, in fact redundant, as good faith is presumed. Corroborating this time the „definition of" abuse of rights (which is not a definition but a negation), it follows that, in the New Civil Code Roman system, rights are not protected by law only if exercised in good faith, without order prejudice to another and according to public order and morals.

But not only rights are susceptible of abuse, but simple powers or attributes of powers conferred by law. On the other hand, can be abused and a situation or economic situation, political or legal. Thus, abuse of law is only a species of *abuse of power*. Therefore, the concept of abuse of law subsumes the abuse of power. Abuse of power is not only intended to harm anyone, but that take advantage of a situation such as market domination of goods or services or legal or factual monopoly held by some professionals in the trade. Abuse of dominant power is an illegal practice in terms of competition, though one that has gained dominance of the resources spent for this purpose and, therefore, can not say it was in bad faith when it acquired that dominant position, but when he began to abuse it, distorting competition and others causing unfair prejudice. Therefore, competition law imposes penalties of abusing its economic power, either as fine or as compensation payable to the victim, or as invalid clauses imposed by abuse of dominant position. Abuse or gearing effects of circumstances such as those of the consumer credit *boom* of 2004-2008 or the period of economic crisis, is an abnormal exercise of rights or powers held by the professional who profit from the *boom* or crisis, while supporting business partners unjustly only loss all the risks inherent in the crisis is past due first. Therefore, consumer protection legislation and labor legislation

[7] Philippe Malaurie, Laurent Aznes, Pierre-Zves Gautier, *Drept civil.Contracte speciale*, Editura Wolters Kluwer, Bucureşti, 2009, pp. 402-405.

[8] Georges Ripert, *La regle morale dans les obligations civiles*, LGDJ, Paris, 1925, p.171.

corrects contracts that are part of professionals or by declaring that unfair terms ineffective or invalid, or by the professional order to pay damages for abuse of power. Moreover, the penalty for abuse of power is not specific to private law, but is a generic solution applicable in public law. For example, abuse of administrative power, may be canceled or regulations and individual administrative acts, in addition, may award to the victim in the Law on Administrative no.554/2004[9], be sanctioned as arbitrary authority to restore balance and to restore fairness in relations between individuals and authority.

Victims of abuse of power can be simple and holders of interests protected by law and not only holders of subjective rights. For example, new Civil Code in art. 1359, decide that the illegal act is obliged to repair the damage caused and when it is due to the damage to a *legitimate interest* of others, if the interest is serious, the way it manifests itself, creates the appearance of a subjective right. Also, new Civil Code in art. 630, provides, in material legal limits of property rights that exceed normal neighborhood nuisance permit the court that the victim's request*, on grounds of equity*, to order the owner to compensation for the benefit of the injured and restore the previous situation if possible (eg noise pollution or discomfort, operating in unsanitary conditions or leaving property in its decay, congestion caused by excessive exploitation of property, industrial pollution, etc.). So it is not itself an illegal act of the owner, but a *liability for infringement founded on equity* interests of neighbors.

With the talk of *abuse of power* and not an abuse of law (which requires a right to be abused and that is a species of abuse of power), means that the abusers can be as good faith, not generate offense or fault liability, but the damage risk „happened", turned into damage. In fact, damage, and no illegal act is the mechanism that triggers liability. Similarly, the amount of damage (since remedied) is not given the seriousness of the offense, but the extent or severity of injury. Infinite nature of possible damage, lack of defense of the victim damages, evidentiary difficulty, in consequence of which the complexity of legal goods, product or service reaches the consumer, its complications in selecting or identifying the author of the damage to be sued for damages etc., are necessary and sufficient to verify the existence and extent of the damage court, without worry about the imputability of the offense, but the unjust character of damage suffered by the victim. Simply unreasonable exercise of the right which causes harm to another is sufficient to give rise to damages[10]. or other compensation

[9] By civ. sent. no. 4913/6 December 2010, pronounced by the Court of Appeals, the administrative department (unpublished) has noted that "in the execution of the office administrative provisions necessary to ensure a steady and certain guarantees for private equity, as the authorities' actions public can not be discretionary, and the law must provide the individual adequate protection against arbitrary ". [...] Abuse of administrative power is cited as shoulder, "the nature of creating an imbalance between the general and fundamental human rights protection imperative."

[10] Sache Neculaescu, *Ambiguitati ale teoriei abuzului de drept*, Dreptul nr.3/2011, p.94.

arrangements. We, therefore, in the presence of *strict liability*[11], which is based on risk and not on guilt: the damage itself creates an obligation to be repaired.

For example, in terms of consumer protection in contracts professionals, one who opposes an abusive clause, being a victim of abuse of law, not bound to prove the evil intent of the professional. Consumer - the victim of an unfair term is not simply a debtor who has to fulfill a contractual obligation, but the holder of a professional liability actions against abuse of economic power. Significant imbalance between rights and obligations of parties to contracts between professionals and consumers is enough for a clause which creates the rights and obligations to be considered abusive. So-called „preliminary draft European code of contracts" (also called *Gandolfi Code*, after the promoter of this project) suggests that contracts between a professional and a consumer, non-negotiable clauses be considered „no effect" if they create an imbalance to the detriment of consumers, *even if it is a bona fide professional.* The difference with Community law and our right to unfair contract terms is given by stating that good or bad faith of professional *indifference* as long as there is this imbalance. The question is reduced, but the way it interprets the term „clause without effect" to the consumer, as legal and judicial means available to reach consumers in this respect is poor, as noted above.

But compensation is not only unfair contractual or tort liability, but in repair in nature. Review contract's reconstruction based on balanced clauses, clauses etc. nullity., May be ways to repair the damage or removal of abuse. Therefore, abuse of power theory, which finds its normative foundations of the Civil Code or special laws, may be used as *a way of normative way of principle demonstration of solidarism contract* leaving the judge, in applying the theory of abuse of power (or right) to decide which is the legal nature of the abuse liability involved, ie, if it's a contractual or tort liability. However, differences in legal effects of the two types of liability are not essential, since, as noted above, establishing liability for the abuse of rights is not mandatory, unjust nature of injury is sufficient in itself to substantiate liability and in terms of abusive clauses inserted in contracts of adhesion or responsibility for consumer products and enjoying the presumption of bad faith presumption of professional and imbalance, which is specific contractual liability.

[11] French doctrine is commented in a case where a builder has built an office block in an area where houses were erected and arranged cultural and educational and sports facilities. Although the manufacturer had all the necessary permits, so he had no fault in causing the injury was considered in jurisprudence that the mere existence of the block area is detrimental to the neighbors, who have seen their value diminished by the appearance of the building construction and the builder was required to pay damages. See: J. Flour, J. L. Aubert, E. Savaux, *Droit civil. Le fait juridique*, 13eme edition, Sirey, 2009, pp.144-145.

5. Sanctioning break in bad faith contract negotiations

Most times, the conclusion of a convention, meeting when the agreement of wills occurs when the signature or the signature on an earlier date, but which can not be accurately verified. However, there are times when concluding an agreement requires extensive prior work of negotiating the conditions under which parties will exercise their rights and fulfill their contractual obligations.

However, contract negotiations is not, in light of new regulations, the pure discretion of the parties, it must be subject to principles defined by law.

Perhaps the most important rule in concluding contracts in light of the New Civil Code is good faith in negotiations. This principle is found in art. 1183 Civil Code and is confined essentially to the fact that the party engages in a negotiation is required to comply with the requirements of good faith. This obligation may be limited or excluded by agreement between the parties. Moreover, the new Civil Code establishes the general principle of good faith principle, stating that any natural or legal person must exercise their civic obligations in good faith, it is presumed until proven guilty. Freedom to contract is a right granted to anyone who has the ability to have his civil rights, even in the absence of any, should govern and contract negotiation stage.

The principle of good faith must be found, according to current regulations, both the initiation and continuation of contractual negotiations and when negotiations break. So, at any stage of contract negotiation, a party can show that the other party does not exercise its rights of step training contract in good faith, may request compensation for damage resulting therefrom.

From situations that constitute a breach of this obligation, the Civil Code reminds initiation or continuation of negotiations with no intention to terminate the contract. Party initiating, continuing or break negotiations contrary to good faith of the other parties responsible for damage caused. This injury will be determined taking into account the costs incurred for negotiations, giving up other offers and any other similar circumstances. From these rules result beyond doubt that if a person moves an offer without intention to conclude a contract, while the other charges made on this occasion (for example, conducting a market study or undertake service charge a person skilled), tenderer of bad faith may be required to pay all expenses incurred. Similarly, by not acting in good faith will be required to pay amounts that were lost by the party aggrieved by the refusal of other offers to contract, due to the illusion that the contract will be concluded with the acting in bad faith.

Basically, the current regulatory Civil Code provides party has wasted time and resources in a contract no longer conclude, because of the bad faith of the other party, can recover all the resources wasted by contract negotiations. This regulation is without doubt a step in the regulation of contractual negotiation, since the old regulation to recover these expenses was more than an illusion, the case law in rejecting the majority of such requests. This is due to the fact that it was extremely

difficult to prove that that continuation of negotiations with no intention to contract caused harm to the person truly „misled" and in the costs of these negotiations, in the absence of legal regulations, most times it was thought that the person ordered to pay these expenses continued negotiations would be a burden.

However, even if at present Civil Code provides that the aggrieved party to recover expenses incurred, there remains the problem of determining, on a case by case, good or bad faith in contract negotiations. This problem exists in the old regulation, remains a current issue. The explanation is that good faith, although it may be illustrated by some concrete action taken by a person remains an element of a person's internal attitude. Therefore, both current and former regulators have established that good faith is presumed until proven guilty, namely that a person usually works in the sense neprejudicierii others.

Given all the above mentioned, the current regulation was intended as a framework for establishing comprehensive report that is generated by specific contractual negotiations. It remains to be seen to what extent it will meet specific needs of society and to what extent the excessive burden the parties will engage in negotiations.

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THE JURIDICAL NATURE OF THE PUBLIC SERVANTS' SERVICE RELATIONS

Doina POPESCU[*]

Summary: *The notion of „public service/function" is a fundamental notion of common law, generally speaking and specifically of the administrative law, closely linked to the notions of „body", „authority", „administrative activity". The public service and the civil servant are legal institutions of common law, generally speaking and specifically of the administrative law, which have been shaped under the continuous debate between doctrine, jurisprudence and regulations. All countries have a tradition referring to the laws on public service, which don't have to be yet mistaken for a general statute. The public service/function within public administration can be defined as „a set of attributions established by law or legal documents issued on grounds of and to the execution of the law, attributions that an individual employed in a public administration body fulfills while ha/she has the legal ability to fulfill these attributions of the public administration". In the Romanian law system, access to public functions is subordinated to the constitutional principle comprised in the fundamental Law of our state regarding equality of rights between all citizens, irrespective of race, nationality, ethnicity, sex, opinion, political affiliation, wealth or social origin.*

There is a special preoccupation in Romania regarding the training and improvement of civil servants' abilities, through specialty training sessions that the graduate and post-graduate educational institutions organize. Along the time, several systems of recruiting for a public position have been employed, starting with the „selection by chance", as in Antiquity, followed by the „heredity" system, then by the „election" system for certain categories of public positions and the „appointing" system for other categories. The current judicial system in our country uses both the election and the appointing systems for public positions. The Constitution settles two ways of recruiting personnel for a public position: appointment and election. The Statute of the Civil Servants agrees on one only method of recruitment, that is the appointment.

Keywords: *public function,civil cervant,statute,Constitution,public authority*

1. Introduction

The juridical nature of the service relation of the public servant gave rise to numerous debates in specialized literature. A clear definition of the juridical nature of this service relation is of great importance because, only based on it, the rights and the obligations of those who are qualified according to the law as public servants, will be individualized. According to a first opinion it is asserted the

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theory according to which the public function and the public servants are institutions which belong exclusively to the administrative law, any association with the labor law not being permitted, being made a clear distinction between the public servants and employees. It has been argued that to refer to the labor law as to a conjoint law for both categories would affect the juridical identity of the public function institution. According to another opinion, consecrated more by the authors in the labor law area, the public function and the public servants are considered juridical institutions which belong to the labor law which, in its turn, belongs to the private law not to the public law. The partisans of this theory base their thesis on the unique character of the juridical service relation, which is based on the individual labor contract. According to a third idea, they have tried to reach to a compromise between the two variants, being [1]stated that even when there is Status of the public servants in the specific framework of the administrative law, there are however elements common to the labor law applicable to the employees.

Synthesizing, within the present doctrine, concerning the status of the public function and the policy applicable to him as well as the juridical nature of the document from which the juridical relationship of public function results, the following can be stated:

1. this relation has its origins in a private law contract, being thus assimilated with the juridical service relation of the employee;
2. the public function juridical relation results from a unilateral document of public power;
3. the public function juridical relation results from a public law contract.

According to the opinions expressed by specialized literature and taking into account the peculiarities of the functions performed by the public service officer, we will try further to establish the juridical nature of the juridical service relation of the public servants by a distinct analysis of the elements within the frameworks of these relationships.

Therefore, we share the same opinion expressed in specialized literature by the majority, according to which the juridical service relation of the public servants *has a statutory nature being a sort of juridical sevice relation of the employee resulted from closing the individual labor contract, with the mention that the source of the juridical service relation of the* public servants *is represented by the unilateral act of designation, which will be presented subsequently*. This thesis is especially based on the existence of numerous common characteristics of the juridical service relation of the employee, characteristics which can be found in the framework of the juridical service relation of the public servants, as for example:

[1] Constanța Călinoiu, Victor Duculescu, „Principii ale unei viitoare reglementări privind statutul funcționarului public", *Revista de Drept Public*, Anul III, nr.1, ianuarie-iunie, 1998.

- the reciprocity of the rights and obligations of the two parts of the juridical relationship, characteristic to any synallagmatic contract;

- the object and the cause of the relationship (the public servant performing the work , being in return remunerated for the performed work by the authority or public institution in which he works)- the subordination relationship between the public servant and the public authority which exists in the service relationship of the employee as well;

- to follow a work schedule and to maintain the discipline within the public institution, the right to have an annual leave, the right to have a social insurance, the right to strike a.s.o;

All in all, the juridical service relation of the public servants can be considered atypical forms of the juridical service relation[2] of the employee. We may also say that the public servant is at the fine line between the public and private law. It has been stated within the doctrine[3] that „ in the absence of a Status of the public servants who would particularly give to this institution the institutional character specific to administrative law, it must be admitted that we witness a mixed institution: administrative law and labor law

2. The subjects of the juridical service relation

One of the first peculiarities of the juridical employment relationship of the public servants is constituted of the quality of the legal subjects. A first subject is represented by *a legal person* - public authority or institution - and the second is a *natural person* through whom the public authority or institution develops its activity or exercises its competencies or prerogatives. The public servant is the holder of the public authority.As like in the case of the juridical service relation of the employee, from the juridical service relation of the public servants results that one of the subjects is always a natural person, a qualified one however. In the case of the public public servant, being known the fact that he exercises the prerogatives of the authority in which he operates, juridical relationships are formed between the public servant and the beneficiaries of their services as well; but in the next lines we will refer just to the relationship between the public authority or institution and the public servant .The main distinction between the service relation of the public service officer and the service relation of the employee results from the peculiarities of the juridical act which is the base of the two types of juridical relationships formation. Therefore, the juridical service relation of the employee always originate in the individual labor contract, a juridical and synallagmatic act

[2] Sanda Ghimpu, Alexandru Țiclea, *Dreptul muncii*, Editura All Beck, Bucureşti, 2002,p 28

[3] Antonie Iorgovan, Valentina Silescu, *Drept administrativ şi ştiinţa administraţiei*, Bucureşti, 1986, p. 220.

which has juridical effects by a simple agreement between the contracting parts and which confers the attributes of an employee. Instead, the service relation of the public servant originates in the designation act that is a unilateral document issued by a public authority, which the natural person abides it by being sworn in, an administrative act which confers the character of a public service officer.

Regarding the form of the two juridical acts they differentiate as well. Therefore, concerning the individual labor contract, the asked written form is *ad validitatem.*A common feature of the two juridical acts is that both acts have an *intuitu personae* character, being concluded and issued taking into account the individual's physical and psychical abilities.

There are peculiarities regarding the expression of the public servant's consent as well. Therefore, unlike the employee, whose will to acquire the employee position is expressed at one time at the concluding of the labor contract, the public service officer's consent is expressed in hierarchical order, and not *uno icto*. In a first phase he expresses himself previous the designation, through the participation at the contest or at the examination organized by the public authority for the occupancy of a public vacant function, and in the second phase by being sworn in (subsequent to taking the contest or to promoting the exam) regulated by the constitutional stipulations or through the statutory ones. Not being sworn in involves the revocation of the proposal of designation. Furthermore, unlike the case of the employee, the consequences and the object of this consent are different. If in the case of the employee, this aims at their rights and obligations, the work conditions in the case of the public servant are stipulated exclusively by law. Therefore, the public service officer cannot influence the content of the juridical relationship of a public function, this being exclusively the legislator's duty. By swearing in, the public service officer takes the obligation only to respect it.

As far as the ability of the parts of the juridical service relation of the public servant is concerned, some specifications are to be made. It is well known the fact that in the labor law a person gets the right to sign a labor contract at the age of 16, according to the 13th article from the Labor Code, and in certain conditions at the age of 15.

In order to obtain the attribute of a public servant one must have the full capacity of action, namely, the age of 18 years (article 54, letter C and D of the Law no. 188/1999). Obviously there are, as in the case of the employees some sort of interdictions determined by the nature of the exercised public function according to which some public functions can be occupied only be persons who reached the full age, age stipulated by legal dispositions. It is excluded the occupancy of a public function by a person who doesn't have the full capacity of action. Hence, what is a rule in the Labor Law, in the case of the public service officer it is inadmissible.

As far as the position of the parts in the service relation of the public servant is concerned, this is specific to the authority relationships, being characterized

through the subordination of the public servants towards the other subject (the authority or the public institution). It is a matter of both a juridical and of an economical subordination.

3. The Amendment of Public function Juridical Relation

The amendment of public office juridical relationship is defined in doctrine as representing the transfer of the public service officer to another post within the same institution or another temporarily or definitively.

One of the principles that underlines the prosecution of any public office is the principle of public office stability, according to which any amendment of the public office juridical relationship, including its discontinuance, can only be done according to the law. The same principle governs also the juridical employment relationships which cannot be temporary or definitively amended. Without breaking this principle, one can notice a characteristic of the special status of the employees, who develop their activity within public authorities and institutions, namely the mobility of the employees, a recognized institution by the juridical systems of other states. This mobility is recognized according to the art.87, 1st paragraph of the law no. 188 /1999 for satisfying two types of conveniences: that of the authority of public institution in order to make efficient the activity and that of the public service officer for developing a career in the public office.

A differential element for the amendment of the labor contract is represented by the way it is done. Hence, regarding the amendment of the individual labor contract, in labor law it is presumed that it underlies the general and previous consent of the employee, given when the contract is signed. The amendment of the individual labor contract by mutual agreement is not under any restriction. But it cannot reflect on the employees' rights, as they were brought under regulation by legal dispositions. It is forbidden the unilateral amendment, being only permitted on special cases under law. Therefore, in the labor law, the rule is represented by the amendment of the individual labor contract by mutual consent, and the exception, its unilateral amendment by the employer, but only in special case under law. In the case of juridical office relationship, it being the result of an unilateral act, its amendment is not possible by mutual consent, but also by a similar juridical act.

The amendment of public office juridical relationship is defined as representing the transfer of the public service officer to another post or activity within the same public institution or outside it, temporary or definitively.

The article no. 87 of the law 188/1999 states that the amendment of the juridical employment relationship is realized by: delegation, detachment, displacement to another department of the public authority or institution, having a temporary administrative job.

Depending on the duration of the amendment of the juridical office relationship one can identify the following types: temporary (delegation,

detachment, having a temporary administrative job, the temporary displacement to another department of the public authority or institution), indefeasible (the transfer, the definitive detachment to another department of the public authority or institution).

Delegation consists of the discharge of some responsibilities by the public service officer, specific to the job that he/she has to another place than to the usual work place of the public service officer, to the convenience of the public authority or institution where he/she develops his/her activity.

Detachment consists of the discharge of some responsibilities of the public service officer specific to his post, to the convenience of a different public institution or authority than the one in whose staff he is. From the article 89 of the law 188/1999 ensue the following characteristics of detachment: detachment is an obligatory measure, detachment is temporary (it can take place for a period of maximum six months, being prolonged only by the public service officer's consent) detachment is realized to the convenience of different public institution or authority than the one that the public service officer was initially appointed, during detachment the public service officer receives the counter value of the transport and accommodation costs and of a detachment emolument, detachment has as objective changing the public service officer's job during its duration, while he is detached, the public service officer keeps his job and his employment rights. He cannot be paid less than he/she usually was at the institution he/she was appointed, but he can accept a superior salary to that one. Being an obligatory measure, the detachment must be carried out by the public service officer. However, the public service officer can refuse the detachment under the following circumstances: pregnancy, he is a single parent of a minor child, if the detachment is to be in a place where he is not offered proper accommodation, in case his health condition-proved by a medical certificate-contraindicates the detachment, he is the only one who supports his family, every time there are solid reasons regarding his family the refusal of detachment is justified.

Promotion represents a way to definitively amend the juridical public office relationship. It is realized as a result of evaluating the individual activity and performances of the public service officer, if there are reached the performance criteria established by A.N.F.P

The transfer as a way of amending the public office relationship can be realized between the public institutions and authorities, either to the convenience of the job, or if requested by the public service officer. The employment transfer can only be realized by written consent of the public service officer to be transferred. In the case of the employment transfer in another place the public service officer to be transferred has the right to an emolument similar to his net salary evaluated to the level of his salary from the previous month, to have the transport costs covered and to a five-day paid leave. These costs are to be supported by the authority towards which the transfer is realized. The required transfer is realized by to a public office equal to the public office that the public service officer had.

4. The Ceasing and Desisting of the service Relations of the civil servants

According to the principle of legality of the public office, any public office can be created or eliminated only by law, thus the means of ceasing and desisting of the juridical employment relationships are expressly provided by the Law no. 188/1999 (Article 97).

According to the law, the ceasing and desisting of the service relations of the public service officers occurs in the following circumstances: rightfully; by mutual agreement; by written agreement; by being relieved of the post office; by dismissal from the public function; by resignation. The service relation ceases and desists in the following circumstances: at the date of the public servant's decease, a case in which the capacity of practice ceases; at the date of the irrevocable court judgement declaring the death of the public servant; in the case in which the public servant does not meet the condition of being Romanian citizen and does not have the domicile in Romania any more, or he does not meet the condition regarding the capacity practice and the specific conditions related to the public function provided by the law; at the date of receiving the decision of retiring for limit of age or the invalidity of the public servant; in case of the absolute nullity of the act by which he was appointed to the public function, from the date in which it was acknowledged by irrevocable court order. The law makes reference only to the absolute nullity of the act of appointment in the public function and not to the relative one, although we opine that the relative nullity should call forth the rightfully ceasing and desisting of the service relation as well, in the case in which the public servant was convicted by irrevocable judgement for an action that belongs to the following categories: crimes against humanity, against the state or against the authority, related to the job, that prevent from obeying the law, forgery or certain corruption actions or of a crime committed deliberately, that are incompatible with practising the public function, except from the case in which rehabilitation appeared, as well as in the case in which a certain sanction involving deprivation of liberty has been imposed, from the date of the irrevocable decision of the conviction. Therefore, in this case the public service officer must have committed a criminal offence that makes him incompatible with the public office or he must have been irrevocably convicted and a sanction of deprivation of liberty was imposed as an interdiction of practising the public function, as a security measure or as a supplementary penalty, from the date of the irrevocable decision through which the interdiction was imposed. The court judgement must be irrevocable and the interdiction of exercising the profession of public office must be imposed as a security measure or as a supplementary penalty, at the date of the expiration of the deadline for which it was exercised, temporarily, the post office.

The ascertainment of the ceasing and desisting service relationis done, in 5 working days from its issuing, by administrative act issued by the head of the

authority or public institution. The Administrative Act will be communicated to the National Agency of the Public Servants in 10 working days since its issuing.

The relief from the public function can be ruled, in the terms of the law, by the head of the institution or public authority, for reasons not attributable to the public servant, in the following cases: the authority or the public institution stopped the activity or it was moved to another locality, and the public service officer refuses to go there. The refuse of the public servant to follow the public authority represents the effect of the right recognized by the law that allows every person to choose the place and the type of work he/she wants. As a result of this fact, this reason of relief from the public function is considered as not being attributable to the public servant, the authority or public institution reduces its staff as a consequence of the reorganization of the activity, by relieving the post of the public servant. The ceasing and desisting of the service relation for this reason implies that the reorganization of the activity must be effective and must have a real cause (the effective characteristic refers to the cancellation of the public servant's post from the state functions and personally, without this appearing as vacant.). Changing the name of the post does not justify the cease and desisting of the service relation, as a result of the agreement of giving the public office occupied by the former public servant to another public service officer, released or relieved of the public function by unfounded reasons, at the date of the irrevocable decision of the agreement. For the ceasing and desisting of the service relation for this reason, two conditions must be fulfilled: there must be an irrevocable decision of reintegration into the post office and the integrated person must manifest effectively his intention to return to his old job; for professional incompetence in the case of obtaining the 'unsatisfactory' qualification at the evaluation of his individual results, in the case in which the public servant does not fulfil the specific conditions stipulated for exercising the public function the physical or/and the psychical state of health of the public servant, certified by a decision of the competent organs of medical expertise, does not allow to the public servant to fulfil the correspondent responsibilities of his public function. The ceasing and desisting of the service relation as a result of medical reasons is stipulated in the Law no. 188/1999, found also in the category of the reasons that are not attributable to the public service officer.

Unlike the relief from the public function, dismissal from the public function is ruled by the head of the public institution for reasons that are attributable to the public servant.

Resignation from the public function was defined as a form of divestment innitiated by the appointee of the public function. [4]

The resignation of the service relation by the public servant arises from the basic principle of work, established by the Articles 41 and 42 from the Constitution. In the inter-war literature on the subject it was sustained that 'the

[4] V. Vedinaş, Verginia Vedinaş, *Statutul funcţionarilor publici*, comentat, Editura Lumina Lex, Bucureşti, 2010 p. 365

resignation is governed by the principle according to which the public servant cannot leave the job until his resignation was not accepted and he has not given the documents to the one entitled to receive them[5] The term of resignation is used in the labor law, meaning the termination of the individual employment contract by the initiative of the employee.

Resignation has formally legal effects after 30 days from the record and does not have to be justified. The contemporary initiators of doctrines [6]arised the question whether the authority or public institution can give up, totally or partially, to the term of 30 days. But this does not mean that the authority or the public institution, for whose benefit this term was established, could not give up to it earlier, that is partially or totally, but the effects would occur after 30 days.

During all this term, the public benefits from all his rights and he bears the accomplishment of all the responsibilities that represent the complex juridical content of the public office.

5. Conclusions

The reform of the public administration represented for each governance after 1989 one of the primary objectives. „The serious financial constraints, the lack of political determination, the poor experience regarding the alternative-admistrative structures, the lack of instruction of the politicians and of the public servants to meet the requirements and demands that arise from from the fast change of the environment, the lack of clear regulations regarding the staff and the administrative structures, inadequate definitions of the jobs and discrepant salary ratings"[7] have always been an obstacle in having an efficient and impartial public administration.

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[5] Ion Traian Ştefănescu, *Demisia*, in *Revista Română de Dreptul Muncii nr. 3-2003*, p. 7.
[6] V. Verdinaş, *op. cit*., p.365
[7] The Government's Decision no. 1006/2010 for adopting the Government's strategy regarding the acceleration of the reform in public administration, published in the Official Gazette no. 660/19.X.2010

THE LOGIC OF SOCIAL NORMS AND THE ANOMIC SOCIETY

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Abstract: *This paper examines the logic of social norms in an anomic social space. Starting from the concepts of social order, social norms and anomia, the author analyzes the construction of social norms on introversion dyad (acceptance), externalization (constraint). As any norm can be seen as such (its ideal purpose), and its spirit (its realism and real purpose), the author shows that intrinsic construction of its spirit ensures proper reporting to its meaning and an extrinsic construction leads to inefficient reporting, by setting up the anomic state through widespread similarities of these individual constructions.*

Keywords: *social order, social norms, anomia, intrinsic and extrinsic rules*

Society as an organized system of human existence, must combine aspirations, interests and expectations of individuals and create benchmarks for their behavior. Diversity of society creates specific behavioral manifestations of chaos, disorder, social entropy, for each individual by his conduct, despite the commitments made, trying to maximize the chances to achieve their own interests, regardless what the organized system needs. This situation, far from being a state of exception is the norm in any society.

But as it is easily understandable that a company cannot accept this, because it calls into question his own existence and by that the selfish individuals, means that society develops certain mechanisms by which it continually warns individuals about the need to transform individual absolute freedom - to do what you want, in understood individual freedom – to do the right thing. How this transition occurs varies from individual to individual, for some it is easier for others it is more difficult and for others it is almost impossible. To make the transition from absolute freedom to the understood one, the individual must receive from others insurance that he will remain free. It has to be built a form of organization, with all it entails - tasks, rules, values, symbols – within which the individual feel free and able to allow others to feel themselves free. When this is achievedwe are talking about a balanced state or the social order. Basically, through the social order the individual goals are coordinated with each other[1].

We consider that the social order refers to stability and social balance, determined by the specific way to regulate social relations between individuals or

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[1] See, Ştefan Prună, Prelegeri de sociologie juridică, Lucman Publishing, Bucharest, 2008

groups, using certain regulations (laws, rules, customs, rights and obligations), socially recognized at some point.

It is a tool that regulates the diversity of behavior, the actions of the individuals or their relations and requires certain conditions[2]:

- a legal framework, rules, moral norms to warn the individual on the way he has to behave within the social area. There have been many debates on the idea that the essence on the social order lays within a set of regulations or it has to be reported to ensuring a social balance and stability. We consider in our definition that the finality of the social order lays in achieving a state of balance. Like an individual feels the balanced state in his life, in the same way the society feels when this condition has been reached and the social order manifest itself.
- setting up social institutions whose independent activities allow good functioning. Good functioning is one of the most important predictors to acknowledge this state. Specialization and profesionalization obliged societies to give this service to well defined institutions that work together but independently to implement the state of welfare.
- all positions in the social hierarchy that make it possible to coordinate activities, development and fulfillment of decisions (the manifestation of authority). For Weber manifestation of authority was important to explain how to carry out intersubjective relations between individuals. Noticing that the relationships are asymmetrical - one individual is dominant and the other dominated – the German sociologist wonders why the individual accepts to be dominated. Thus, the study of authority and its legitimacy is important to understand the meanings that individuals give their action and others and to understand the rationality of society at large.

At the basis of social order there are structured the social norms, or better say, the system of social norms, which are designed to supervise the daily life of individuals. Thus, social norms contribute to the rationalization of social life, providing a system of rights, obligations and prohibitions which materializes various interests[3]. But what happens when the social equilibrium is broken, when the social order is damaged? To understand how the logic of social norms changes we have to understand why individuals agree to respect the social order, which are their real reasons that contribute to the rationalization of social life?

Primarily, out of interest, out of the fact that their targets, their purposes require this. Interest is a need which has, at a certain moment, a great importance for the individual and directly determines the behavior and conduct. Although people are naturally gregarious, that means for most of them isolation produces pathological symptoms of unhappiness[4], there is a kind of individualism primarily generated by absolute freedom every individual wants, the effect of how selfish

[2] Sorin Rădulescu, Homo sociologicus, Şansa SRL Publishing, Bucharest, 1994, p.40
[3] Dan Banciu, Sociologie juridică, Lumina Lex Publishing, 1995, p.78
[4] Francis Fukuyama, Marea ruptură, Humanitas Publishing, 2002, p. 193

individuals will achieve their goals. We agree with Mary Ann Glendon[5], who insists on the idea that people are „lonely rights holders",that means individuals with no natural inclination for society, but who associate and cooperate in various activities to enable them to achieve particular purposes, for instance interests.

Secondly, out of imitation. People respect the social order simply because those around them do the same. It is a kind of mental contagion, using a term from psychology of crowds. Gabriel Tarde'[6] imitation law is one of the most interesting attempts to explain the role that imitation plays in our lives. We can easily see a large number of similarities in social behavior which are not only results of social contexts but of repetition. Ion Ungureanu considers that the imitation laws provide researchers possible trajectories of social phenomena, the movement of values, rather than groups and social beings. It is important to underline that the basis for imitation is the value, the idea, rather than the person itself[7]. We imitate, for example, respect for the law, fairness, honesty, seeing what others do, people we trust, we cherish and appreciate. Imitation occurs from the bottom up; higher values promoted by superior people are imitated. Children repeat many of their parents' behaviors.

Thirdly, people respect social order out of obligation. It is possible that the individual does not want to obey a certain order but he cannot avoid this because its physical or psychical integrity would be endangered. It is possible, on the other hand that the individual interiorizes the obligation and to wilfully want to respect it. In any of these situations the strategy of action starts from the existence of a limitation (any obligation imposes limits by its nature) which has to be obeyed, this ensuring a psychological confort for the individual.

The logic of social obligations (characteristics)[8]:

- it is general in nature, since it provides specific requirements, applicable to all individuals who are in similar social situations
- it has an impersonal character, as it is the emanation of the collective will, of the social group, community or society that has adopted the requirement
- it is applied according to a complex system of rewards and punishments. What do i gain if I obey the obligation? What do I lose if I do not respect the obligation?
- it implies freedom of action and will of individuals who, in carrying out action they have to eliminate the influence of favorable circumstances. Obligation must develop responsibility and freedom understood. Obligation creates social cohesion / solidarity respect for authority.

Social order creates rights and obligations. People do not see, unfortunately, anything else but rights. Obligations, although they are fundamental, and the socialization process must emphasize this, are considered a necessary evil, a place of no one. No human group is set up to fulfill obligations but to promote rights. Social

[5] Mary Ann Glendon, Rights Talk, Free Press, New York, 1991
[6] Gabriel Tarde, Les lois de l`imitation, Paris, F. Alcan, 1895
[7] Ion Ungureanu, op. cit., 1990, p.174
[8] Sorin Rădulescu, Homo sociologicus, Şansa SRL Publishing, Bucharest, 1994, p.39

life is conceived in terms of rights, education is made in relation to individual rights, human rights exist, there is a universal charter of human rights, there is even a law on human rights. There is no chart of human duties or human obligations, instruments that would make obligation natural and normal. As if rights are for granted and obligations would only be understood by reference to rights. This universal management strategy for social obligation turned into a „black cat" or a „bad mood", and that requires action outside normal to overcome it.

These disturbances, disruption of social order are called anomic states. The concept of anomie is today a concept discussed in the specialized literature. Used by J. M. Guyau, meaning the gap between ideal norm - which aims ("letter of the law") - and internalized norm - as manifested in reality ("spirit of the norm"), it was developed by Durkheim who uses it to describe a dysfunctional situation of the society which no longer manages the integration of its members[9]. Going forward, Merton[10] shows that sometimes society can push individuals to deviant behavior and nonconformist that as between socially desirable goals of individuals and diversity of socially acceptable ways conflict may occur. Thus Meton defines anomia a weakening of the rule through the gap that appears between goals and legitimate means.

Thus, to adapt to this state of disorder falls not only under the competence of social structure but also the individual has a chance to readjust. Merton identifies five ways to adapt between which individuals oscilate in their many social activities without being trapped in one of them. The behavior of individuals in such a state of disorder takes the following forms: conformity, innovation, ritualism, evasion and rebellion.

- **conformity** refers to the acceptance of goals and means proposed by the company and is, according to Merton, the most common behavior in society;

- **innovation, renewal**, refers to the acceptance of goals, but rejection means accepted by the society and looking for others that often can be immoral, illegal and socially undesirable;

- **ritualism** refers to socially desirable goals, but to accept the proposed means of society. According to Merton, ritualism abandons the ideal of success and rapid ascent and descent and lowernig standard of that ideal to the level at which aspirations can be satisfied by submission to social norms. Those types of behaviors that estimate that modest aspirations provide satisfaction and safety while too high ambitions threaten to produce deception.

[9] Michael Behrent, Le debat Guyan-Durkheim sur la theorie sociologique de la religion, in Archives de sciences sociales des religions, no142, 2008.

[10] Merton, Robert, Social Stucture and Anomie, in Social Theory and Social Structure, Illinois, The Free Press of Glencoe, 1957

- **evasion** refers to the denial of socially desirable goals and means accompanied by self marginalization of the individual in communities and areas on the outskirts of society. Refusal of success may be an option and not a sign of failure.

- **revolt** refers to the rejection of both goals and means socially desirable accompanied by the desire of individuals to replace them with others. It is about behavior foreign to the values and norms of society who are also seeking to introduce new social structures. Merton points out that members of higher classes organize and gather them into revolutionary groups.

The working hypothesis of the article is based on the idea that a society becomes anomic by damaging how the individual relates to the social norm. Interest, imitation and individual responsibility determine an individual to have a subjective interpretation of the rule and the similarities of these interpretations, when we talk of more individuals creates anomia. To better understand these issues we have to look at how to build regulation and what is the purpose.

The system of social norms

There is no single definition of social norms. Some definitions are necessary to understand the issues that the study covers the rules and highlights some similarities and differences in this matter.

Dan Banciu defines rules as „rules of conduct and behavior on which runs the actions of individuals and society can constrain us to obey them by external pressure more or less intense" in other words social rules contain rules applicable to individuals that describe the values to be respected and legitimate behaviors associated with them[11].

Eric Posner, the „Law, Economics and Inefficient Norms" defines rules as tools to constrain people's attempts to satisfy preferences. In this way rules are more a limitation of freedom of action, an indication of what must be some kind of cost to be borne by the individual.

David Kingsley[12] believes that the rules structure predispositions, what people think and their choices, helping them to develop, profoundly influencing people's identities, their views about life, how they think and how to plan ahead.

These definitions promote the exhaustive nature of rules, their role as indicator of behavior, both in terms of formal rules, written, institutional, and in the informal rules.

Research on social norms refers to the impact they have in society. For us, for example, social norms have direct effect on how individuals and groups understand the mechanisms by which justice is divided and also acknowledge that social norms „manage" by their simple functionality.

[11] Dan Banciu, 1995, op. cit., p.78
[12] David Kingsley, Human Society, Macmillan, New York, 1948

An important effect of the rules is to **standardize** behavior in that, by these rules, great variety of social behaviors of individuals is structured by requirements or restrictions determined by the rules. People report their conduct to some socially accepted behavior patterns that describe the most important social activities: how to walk on the streets, how to drinve, how to work, how to do shopping etc. Behavioral patterns or operational occurred when the individual had not done what he wanted, but what he had to.

Another effect of the rules is the **predictability** of behavior. A theoretical premise like this: all people who respect traffic rules tend to develop predicted behavior one to another is correctly formulated. In traffic, functionality and efficiency, to use a term from economics, does not depend only on rationality of one of the drivers, but the rationality of others. A driver passing the green light is calm not because he passes at the green light, but because others are on red light. If one would not have this certainty, if he could not foreseen the behavior of others, it would be impossible to drive.

Finally, one last effect that we consider here is the appearance of **punishment**. A rule is accompanied by a penalty. We agree with Ross that emphasizes the importance of sanctions in the rules intended to promote conformity[13]. Even if it is a positive punishment - reward, or a negative one - punishment, its role of warning or compliance remains.

Regarding the process of compliance it is very important to follow how to do it. In other words what kind of rules lay at its basis. We are speaking, in this case, about two sets of rules: intrinsic and extrinsic. As an effect of quality of socialization, socialization through introspection or through determination, the two categories of rules describe two ways that people create confomism-internalization (acceptance) or externalizing (imposing). When we make the connection between rules and social regulation then the effect is essential. Most researchers have realized that it is a big difference between the rules accepted by the individual through introspection and imposed, even if the name given to the two rules is different.

Fukuyama speaks of social capital as a means of developing intrinsic procedures. When we refer to this type of rules we consider the meaning given by Amitai Etzioni in his „The Moral Dimension" and which refers to the feeling one has when acting in accordance with his moral commitments. An intrinsic rule is a rule that comes from moral conscience of an individual or even the „receiving agreement" moral conscience. Extrinsic rules cover the situation where the individual complies against his will, out of fear or obligation.

Fukuyama believes that the setting up of intrinsic regulations is the social capital, the positive informal set of values that are shared by group members and

[13] Henri Ross, Perspective son the Social Order. Ridings în Sociology, New York, McGraw-Hill Book Company, 1986.

allows them to work together[14]. Through social capital the order can be built from bottom-up. Conventional politeness, standing in line, to give place for the elderly on public transport, to refund a sum of money found on the street are intrinsic rules developed from the bottom up. The author argues that the systematic study of how social order can occur free, spontaneously, are important ways of action. Anomic society distorts this way of internalization. Breaking the ties between individuals in terms of their personal freedom leads to an exaggeration of constraint in the operation procedures. Rules do not get the moral consent of the individual. Informal rules suffer from psychosocial change, individual departs from tradition, customs, he minimizes the importance of cultural history, lives in the present and is concerned only with the present.

Friedrich von Hayek, speaks about „extended order of human cooperation", meaning all rules, norms, shared values and behaviors that enable people to work together and refers to the same principle of analysis of social order. Etzioni makes a clear distinction between „treating social norms as part of the environment" in the evolving individual (extrinsic rules) and which involve costs and constraints, and „treatment as factors that shape predispositions" (intrinsic rules).[15]

The distinction refers to the levels of compliance with social norms designed, the level of social order maintained and relative costs implied by the rules. Considering these distinctions it is easy to understand why intrinsic and extrinsic rules are so different.

If people follow the requirements and prohibitions imposed by social norms because they see the latter as some constraints or costs they will tend to break them when their benefits from compliance are less than the gains and risks arising from the breach. Example: leaving garbage on the street where the storage location is farther[16]. On the example given, we can say that in our country it raises a big question mark leaving garbage in the street while the garbage location is very close. If for Etzioni the „gain" is that you lose no time to go to the place of storage, in the example given by us, there is no gain, except an „unjustified evil." If rules are intrinsic, conformity is unconditional, adherence being a source of intrinsic affirmation. Example: a person walking down the sidewalk with paper in hand, cannot find a basket, but prefers to keep the paper and not to throw on the street, which is dirty anyway.

Richard McAdams and Robert Cooter make an analysis of extrinsic and intrinsic rules when talking about the difference between shame - generated externally and guilt - generated from within. Individuals motivated by shame will tend to cherish resentment against the social costs imposed by the rules, striving to avoid or change them. If they are motivated to come, they will tend to blame

[14] Francis Fukuyama, 2002, op. cit.
[15] Amitai Etzioni, Societatea monocromă, Ed. Polirom, Iaşi, 2002, p.187
[16] ibidem, p.187

themselves when not up to expectations, and try to change behavior rather than rules. Therefore, conformity based on intrinsic forces, such as guilt it is less expensive and more stable than that based on extrinsic forces, such as stigma[17]. Implications that interests us are upon the law. Considering the „billions of transactions a day," [18] a social order based on law can be maintained without massive constraints only if most people respect social principles underlying the law, and the transactions are sufficiently regulated by social norms, with no need for constant intervention from the public authority. Laws work best and are least needed when social norms are followed intrinsic.

Etzioni says that despite the views of jurists that do not care if the rules are internalized or imposed, as they will continue to serve to reduce illegal behavior, „not only that there are significant differences in costs and stability of the law enforcement supported by two different sources of social rules, but understanding these sources results in very different pragmatic policy. For example, the more one ignores the importance of interiorization the more inclined to increase fines and jail sentences to reduce crime; but the one who will understand the internalization and the ways in which it can be enhanced will be based more on education of character „[19] or exclusion from a particular group.

The logic of rules in an anomic society consists precisely in its passage from intrinsic building to extrinsic. Constraint from psychosocial point of view is a mechanism that exaggerates individualism, breaks relations between individuals and makes the transition from cooperation with one another to cooperation against one another. It does not even matter if the rules are written. Written rule can be analyzed in itself or its spirit. The perception in itself is given by how it is perceived the analysis of its spirit: in an internalized or externalized form. An individual who will analyze the rule in its spirit, through interiorization, acceptance, will respect in a higher proportion letter of the law. If analysis of the rule in its spirit will be done by „coercion", dissatisfaction, then reporting to the letter of the law will fall, the individual seeking to use the norm in his advantage, ignoring what people want from him.

[17] see Richard McAdams, The Origin, Development, and Regulation of Norms, in Michigan Law Rewiew, 1997, see also Robert Cooter, Descentralized Law for a Complex Economy: The Structural Approach for Adjudicating the New Law Merchant, University of Pennsylvania Law Rewiew, 1996.
[18] Amitai, Etzioni, 2002, op. cit. 188
[19] ibidem, p.189

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THE OPTION TREATY AND ITS IMPLEMENTATION IN THE SALE OPERATION UNDER THE UNILATERAL PROMISE OF SELLING OR BUYING

Dumitru VADUVA *

Abstract: *The new Civil Code regulates for the first time the option pact in the general theory of the contract, but makes special reference also to its applying in the special contracts, respectively contracts as the selling one referring to it as the unilateral selling or buying promise. The option treaty is a useful tool in the contractual practice, especially in sales operations. Its character and defining elements individualize the concept. Being a contract and not a unilateral act, its formation will reflect this character and its shape are dictated by the legal operation's nature that is prepared by and by its nature. Through its effects the option treaty reveals its originality.*

Keywords: *precontract, the promise to conclude the contract, option right, the promise foreclosure procedure, the promise annulment*

The option treaty, as preparing operation for concluding an individual contract, is used in practice, especially in the form of the unilateral sale or purchase promise. Prefiguring the sales[1] contracts of future buildings, for example, of the apartments that are to be built in residential areas. It is also used very currently, especially in complex contracts concluded by practitioners under the urge of privatization law: real estate from the patrimony, former state enterprises rented to the small and medium enterprises with the promise of selling the property, the management location with promise of selling the management of a store, of a section etc., we also find it in the leasing contracts of the valuable assets, one of it being the unilateral promise of selling the rented asset etc[2].

1. Definition, characteristics

The selling or purchasing promise is an agreement exercised in a certain amount of time through which the promissory person agrees to buy or sell an asset

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[1] E Safta-Romano, *Contracte civile, încheiere, executare, încetare*, Polirom Publishing House, Iaşi, 1999, p. 29

[2] In literature some authors do not recognize to the unilateral promise the pre-contract character. See also: I. *Lulă, Natura juridică a promisiunii unilaterale de vânzare*,in Law magazine no. 6/1998, p. 43-50. This option is criticized by the most authors . See also D. Chirică, *Tratat de drept civil. Contracte speciale*, C H Beck Publishing House, Bucharest, 2008, p.195; I. Popa, *Contractul de vânzare-cumpărare*, Universul Juridic Publishing House, Bucharest, 2008, 88

at a determined or determinable price to the beneficiary, on demand (article 1278, paragraphs 1-1279 and article 1668 from the Civil Code).

Unilateral selling or purchasing promise is a *contract*, both parties agreeing to its completion, also *called unilateral*, the only one obliged the promissory person, is compelled by the obligation to do, to conclude the contract, upon the beneficiary's request[3].

2. Validity conditions

- **Essentials conditions** In the absence of specific legal rules of training, the selling or purchasing promise must meet all the validity conditions of the contract according to *general rules.*

1. **Capacity.** Even if at the completion date of the promise it is not born the obligation to sell, respectively to buy, if the beneficiary will agree to buy or to sell, the promissory person must have the capacity to perform onerous acts at the shown moment; otherwise the *beneficiary* must have this capacity to buy or to sell at the acceptance date that.

- **Object.** The commitment taken by the promissory person, to sell or buy, provided to the beneficiary, for a limited period, is the object of the contract; the obligation's object being the asset, respectively the price. The latter, essential elements of the foreshadowed sale contract must be determined or determinable, so that the promise to prefigure all the sales' elements so the refinement of the contract to be done without further negotiation (paragraph 3 article 1278 from the Civil Code). If they are not determined, the agreement is void and the promise can be considered as a stage of negotiation in which the made progress has been fixed.

2.1.3. Shape. Both the promise and the acceptance must have the provided form for the sale contract that prefigures it (article 1278 last paragraph Civil Code). Consequently, it is *consensual*. Nevertheless if, for example, the object of the envisioned transfer is a tabular right, it should be completed in authentic form, under the cancellation sanction (article 1244from the Civil Code) and the registration formalities should be completed in the cadastral register (article 1168 paragraph 2 from the Civil Code), invoking only the opposability.

2.1.4. Exercising term of the option[4]. Specific to the unilateral promise is also the *duration* of option exercising right, respectively of that the promissory person commitment. Without an express term, the promise is not void, it is presumed to be understood that the obligation is extinguished in the three years

[3] St. Cărpenaru, L. Stănciulescu, V. Nemeş, *Contracte civile şi comercile*, Hamangiu Publishing House, Bucharest , 2009, p.14-15

[4] See also I. Dogaru, *Drept civil, contracte speciale*, All Beck Publishing House, Bucharest, 2004, p. 39

prescription term[5]. The promissory person might be though interested to limit the period of his/hers commitment, for this being able to address the court to fix the option term, through the injunction procedure (article 1278 paragraph 2 from the Civil Code).

2.1.5. The option right. Through the unilateral promise *the option right* is conferred to the beneficiary: to accept or to refuse the conclusion of a contract. In the case in which there was allocated an amount of money as an immobilization allowance title, he/she will lose this amount if he/she chooses not to conclude the contract.

Without it there is no pact but an offer of selling or buying.

In the hypothesis in which, the object of the selling promise is a tabular, the option right is written in the cadastral register (article 1668 from the Civil Code) because it constitutes a restriction of the property right, having the duty to protect third parties. The alienation of this asset from the promissory person may be cancelled as the third buyer party was in bad faith and competed with promissory person to breach the obligation as he/she knew or could have known the promise existence.

The option right is excluded from office if by the deadline of the option term there was not entered the option exercising declaration, accompanied by the proof of its communication to the other part (article 1668 paragraph 3).

3. Accessories clauses

3.1. The immobilization allowance; the guarantee deposit; the promise price

3.1.1. Legal nature. In contractual practice, especially in buildings construction area, for example, the insertion of a clause is used through which the manufacturer is obliged to sell an apartment from the built ones, with the beneficiary's commitment to buy or to lose the agreed amount of money, made available for the manufacturer. Sanctioning this practice, under the name of „the promise price", the legislator (article 1670 from the Civil Code) suggests that the parties may stipulate a clause regarding the amount of money to be paid to the promissory seller person, with an indemnity title, for then non-availability[6] of the promised asset throughout all the period of the option right of the beneficiary, when he/she chooses not to sign the contract. He is though free to agree to indemnify the promissory person if he/she will not accept to conclude the promised contract, for example, with recorded or promised amount of money, which represents 10% of the selling price.

The name given by the legislator, „the promise price", suggests the nature of the amount recorded or promised with this destination as being an „immobilization pay" in compensation for the losses incurred by the promissory seller person, for

[5] E. Safta-Romano, op. cit. p. 28
[6] D. Chirică, op.cit. p.197

the immobilization of the values promised by him without the agreement of the beneficiary to purchase; respectively a deposit to guarantee the reliability of the purchasing promise.

The allowance, respectively the guarantee deposit are not a penal clause since the selling promise beneficiary has no obligation to respond for the damage caused by its violation; same, the promissory buyer person does not indemnifies the seller because the flowing of the time, as long as his/hers asset was restrained, was caused by him/her on the elapsed period until he decided to sell. Deposited or promised is kind of a surety made by the promissory buyer.

The advanced or promised amount is not an earnest if from the contract it does not result that both parties buy their free not to close the contract.

If from the contract it does not specifically results the nature of the advanced or promised amount by the buyer, the law presumed it to be a part of the price (article 1670 from the Civil Code).

The purchasing promise can not be rationally stated an allowance from which the beneficiary-seller to be held, because the asset, object of the foreshadowed selling, is his/hers. However, there is no incompatibility as the promissory-buyer to ensure the reliability of his/hers offer through an amount of money that would have the same legal status as the one engaged by the beneficiary-buyer[7].

3.1.2. The clause effect regarding „the promise price". In the selling promise case, if the beneficiary - buyer agrees to purchase, the allocated amount will represent an advance payment[8]. Same in the purchasing promise case. But if the beneficiary - buyer will not accept to purchase, he/she will lose the shown amount, as an allowance title for the suffered loss suffered by the promissory seller, and respectively if the promissory buyer does not agree to purchase, he/she will lose the deposited amount as a guarantee of his/hers commitment seriousness.

3.2. The unilateral promise method. Nothing prevents to agree of a method of unilateral selling or purchasing promise by stipulating, for example, a suspensive or resolutive condition, such as the purchasing promise to which the obtaining condition of a loan from the bank is attached. In the first case the running of the option term is suspended until the loan obtaining; in the second one, the promissory persons' obligation is extinguished if the loan was not obtained.

3.3. The beneficiary substitution clause. Finally, because the beneficiary is not obliged to anything, the selling promise, which prepares an onerous document, mainly without *intuitu personae* character, may contain a clause that entitles him/her to convey his right to another person when, for example, he/ she predicts an event that could prevent him/her from buying the promised property and knows

[7] T. Dîrjan, *Antecontractul de vânzare-cumpărare,* in Law magazine no. 3/2000, p. 55 şi urm.
[8] D. Florescu, *Contracte civile*, Universul Juridic Publishing House, Bucharest, 2011, p. 20

that there is another interested party. This transmission is a conveyance subordinated to the communication formalities (article 1578 from the Civil Code).

3.4. The clause through which it is organised the closure of the foreshadowed selling contract. To prevent disputes regarding *the evidence* of the property transfer and *the moment* of the sale concluding, of executing the price payment obligation, etc., given the fact that acceptance does not do this proof, it is absolutely helpful for the parties to foresee in the agreement that the sale will be determined through a notarial document, acquiring thus a title (*instrumentum*), and the moment when the property transfer will take place.

Taking into consideration the economic value and the real estates importance, it is even more justified the stipulation reason in the pact of a conclusion contract condition, in authentic form, stating the selling and that at the fulfilment date of this formality the ownership will be transferred. Such a condition could not be considered of no consequence, in terms of article 1242 of the Civil Code, and the stipulation in the pact of this measure is nothing but a conventional *organizing* method of the executing the promise.

4. Effects

The unilateral promise is a preparatory selling contract, which will become the perfect selling through the beneficiary choice of becoming buyer (seller), or will become shaky by his/hers refusal. The unilateral selling or purchasing promise effects are different in the two phases: before agreeing to sell or to buy, respectively after the acceptance**.**

4.1. Until the option exercising. Unilateral selling or buying promise bears the unilateral *obligation* of the promissory person of selling or buying. It is not *irrevocably* bound of this *obligation* because the beneficiary has received it, leaving him/her to choose within the given time (article 1278, paragraph 1 and article 1191 and article 1668 from the Civil Code). Therefore, it is forbidden to him/her *to withdraw* the promise, for whatever reason, throughout the engagement.

Naturally, for the promissory-seller to execute the obligation to which he/she is irrevocably held, the promised asset for selling is made *unavailable* for the whole duration of the commitment (article 1668 paragraph 1 from the Civil Code)[9].

The beneficiary is not committed to anything; he/she does not receive the promissory person's commitment, establishing in this way the elements of the foreshadowed selling contract: the asset, the price, etc.; and it is offered to him/her

[9] See also D. Alexandresco, *Explicaţiunea teoretică şi practică a dreptului civil român*, 8th Tome, second part, Bucharest, 1916, p.43

a deadline to decide whether he/she concludes the proposed contract, knowing that it depends only on his/hers will .

To the selling promise, the beneficiary - buyer has a *legal* claim right, to demand the promissory person not to dispose of the asset, object of the selling promise, *ope legis* unavailable (article 1668 paragraph 4 from the Civil Code).

Instead, the beneficiary-seller, creditor of the obligation to which is unilaterally taken the promissory-buyer, can alienate the shown asset as he/she is not held, on him/her depending the contract concluding, and through alienation or constitution of some tasks upon the asset it is understood that he/she did not choose to accept the conclusion, the promissory person's obligation being extinguished (article 1669 paragraph 4 from the Civil Code).

4.2. The beneficiary has chosen to accept the promised selling or buying. The property transfer. The clause necessity to conclude a contract, in an authentic form. The acceptance made by the beneficiary is sufficient to conclude the contract, the promise transforming itself in the designed contract, or the acceptance shall bear only the obligation of the two parties to conclude the contract.

In the event in which the foreshadowed contract may not be concluded through a simple acceptance, because of some necessary formalities, such as the obtaining of some permits etc., the acceptance transforms the unilateral promise in selling under the fulfilment condition of the formalities, or, when existing the two consents the unilateral promise will transform itself into a bilateral promise?

4.2.1. **The transformation into a perfect selling or buying contract. The property transfer.** Through the beneficiary' exercising of the purchasing or selling option, the unilateral promise changes into perfect selling contract because the beneficiary will perfectly harmonize with the promissory person will, person who must firmly and irrevocably sell or buy. This effect is quite clear from the text of the article 1278 paragraph 4 according to which „*the contract is concluded by exercising the option in accepting sense by the beneficiary of the will declaration of the other party, under the agreed conditions by the pact."* The same solution results from the text interpretation of the preceding paragraph from the same article (article 1278 paragraph 3 of the Civil Code) according to which the foreshadowed contract through the option treaty is concluded „*by the simple acceptance of the beneficiary option"*. Moreover, the promise is a stronger commitment than the offer and if the accepted offer by the recipient forms the sale (article 1182 from the Civil Code), moreover the contract through which the sale was promised should have this effect.

Upon the acceptance date, the sale being perfected, *the property transfer* of (movable) promised asset takes place. However, for the hypothesis in which the sale's refine is conditioned, conventionally or legally, by the performance of a formality, previous to the acceptance, such as the obtaining of an authorization, the promise remains an autonomous act, distinct from the selling, or if necessary, has a selling value under condition.

In practice though, in many cases, the parties conventionally move the selling effects to a later time, stipulating in the pact that in executing the promise the selling effects shall occur at the date on which formally a contract of notarial sale ends.

4.2.2. The promise of selling or buying the real estates. The unilateral promise that prefigures the selling or the purchasing of a real estate, like the acceptance, must be authentic in order to be valid (last paragraph, article 1278 from the Civil Code). If the requirements of the promise of acceptance authentic form are reunited, the real estate selling will be completed, knowing that the alienation act of the real estates should take the authentic form (article 1244 from the Civil Code)?

We believe that there is no obstacle to admit that the real estate sale contract was concluded because the authentic form condition is met through the existence in this form of the promise and of the acceptance.

4.3. Transformation into synalagmatic promise. Interpreting *a contrario* the shown texts, especially the ones from article 1278, paragraph 3 from the Civil Code, it results that in the hypothesis in which the simple acceptance is not sufficient for completing the sale, being suspended by the need to meet, subsequently to that, of some essential formalities or conditions, provided by law or by the promise, the acceptance of the promissory person declaration of will does not conclude the sale or the purchase.

Same solution results also from the articles 1279 and 1669 of the Civil Code which foresee that the instance will not give a sentence to replace the contract unless „*all the other validity conditions are met* (except for promise acceptance, alleged in the text hypothesis)".

Not any element prevents the sale concluding, but only the essential ones, meaning those provided by law or essentialized by their stipulation in the agreement.

It is thus, for example, the unilateral selling or purchasing promise that indicates the *real estate* selling of a building site for which the parties have stipulated that the sale will be concluded after the building permit or the urbanism certificate will be obtained as other technical documents certifying that the land is physically fit and that the government regulations permit the construction of a dwelling, of a suite of dwellings, of a private development, of a production hall, of a industrial park etc. To the extent that these elements are essential, meaning that they represent a prerequisite stipulated in the pact, or if the law would provide such a condition, the acceptance could not conclude the sale.

It is the same for the hypothesis in which it is prefigured the sale of *movable* assets when conventionally, a formality that could be qualified as *essential* was stipulated, such as the need to obtain authorization to engage in sales activity, or the authorization to sell certain goods such as medicines, which have a certain regime, etc., without contradicting the text of article 1242 paragraph 2 of the Civil Code.

Knowing that there are two wills, the one of the promissory person, and the one of the beneficiary who accepted to join, the unilateral promise will turn into a

bilateral promise[10]. The beneficiary becomes under these circumstances the creditor of a *real estate* obligation, meaning that he does, he demands the conclusion of the selling contract and he does not alienate the respective property, nor does he buy it from another person.

4.4. Transformation in selling under condition. If the shown item would not be essential but it had the value of an accessory item, the acceptance would transform the unilateral promise in selling under condition, its concluding taking place at the emission date of the acceptance option, and property transfer taking place at the date of the conditions fulfilment.

4.5. Date when the effects are produced. Effects are produced at the acceptance date and not retroactively[11]. From this shown date the selling or the purchasing is concluded.

But the parties change the property transfer moment when they agree to conclude the ascertainment selling document.

5. The promise circulation

Unlike the contract offer, which is extinguished through the offerer's death, the promise circulates both actively and passively by successional transmission.

The selling promise's beneficiary can transfer his/hers claim rights even then when there was not foreseen a clause in the contract to ascribe him/her this right. Nothing can prevent the promissory-seller person to sell to the new beneficiary.

From the promissory-buyer perspective, even if there is a transfer of debt, he/she also can be substituted by another person as the contract conclusion depends on the beneficiary-seller will and nothing prevents him/her to refuse the asset selling to the new promissory person.

It is not the same in the beneficiary-seller's case because the promissory person committed to purchase a specific asset possessed by the beneficiary, for example, a real estate. For the same reason either the promissory-seller could not be substituted. In both cases, the property transmission to a third party represents a selling acceptance refusal, respectively a breach of the selling promise.

6. Execution of the unilateral promise

Execution of the obligations arising from *the acceptance* by the beneficiary of the promissory person declaration of will is representend by the closure of the

[10] See also C. Macovei, Contracte civile, Hamangiu Publishing House, Bucharest, 2006, p.21
[11] E. Safta-Romano, op. cit. p. 28

prefigured contract, by the selling or purchasing of the asset at the established price and the property transfer; these being accomplished, as shown above, immediately at the acceptance date by the beneficiary, by turning the promises in a sale (purchase).

Notwithstanding, in the contractual practice, although the right sale is perfect in the conditions given above, its conclusion can be conventionally moved to a subsequent moment, through a clause stipulating that the closure is carried out to the conclusion date of the prefigured contract, in authentic form. Under these conditions for *executing* the promise, accepted by the beneficiary, the obligation of concluding the prefigured sale contract will have to be met also, in an authentic form.

It remains to analyze how the acceptance effects of the will declaration of the promissory person can be executed when the parties have agreed to conclude a contract and one of them refuses; also it must be decided whether, if the option agreement does not transform into a perfect selling or buying perfect contract, due to the need to fulfill a condition posterior to the acceptance, as it was noted above, the obligation to conclude the contract can be enforced when one or other of the parties is opposing.

On the other hand, we must also verify the right to obtain the execution in the hypothesis in which the promissory person revoked the promise before the beneficiary could have exercised the option right or has alienated the promised asset to sell.

Response difficulty arises from the fact that the obligation to conclude the contract is an obligation to do, not to give, which in principle he can not be forced to execute, and the beneficiary has no real right over the promised asset but a claim right.

6.1. The solution of the foreclosure procedure is different in the case in which the promissory person revokes his/hers promise before the beneficiary could have exercised his/hers option

6.1.1. If the beneficiary has chosen to accept the promissory person's declaration of will, even after the revocation, the foreshadowed contract is concluded if, in individual conditions of the agreement, the simple acceptance is sufficient for this, the retraction made by the promissory person being irrelevant because it is irrevocable.

If the parties have foreseen in the agreement the completion in authentic form of the selling contract, at the beneficiary's request the court may issue a decision to take the place of contract, as it will be detailed below[12]. Parties usually foresee in the agreement the date when the authentication formality should be fulfilled, the notarial office, the proceedings for noting the refusal to execute the obligation to conclude the contract. The lack of one of the parties from the notary at the fixed date entitles the other party, if it has fulfilled all its obligations, for example, to

[12] D. Florescu, op. cit. p. 20

note the amount of money that is the owed price and to communicate the receipt, when engaging the liability of the respective party and at the request of the foreclosure procedure.

Under these conditions, even if agreeing to conclude the contract, the beneficiary has no real right over the asset and has neither the buyer or seller quality, but it makes though the unilateral promise into selling contract, however imperfect. Under the claim right, the beneficiary may request the court to issue a sentence that would take of authentic selling document so in this way the condition essentialized by the parties can be fulfilled in order to conclude the sale. The chosen solution in our law, in the shown hypothesis, is a way of executing in nature the obligation to do. According to article 1279, paragraph 3 and article 1669, paragraph 1 and 3 from the Civil Code, „*when one of the parties (...) refuses (...) to conclude the selling, it can be requested a state of a decision to take the contract place (...)".*

The term in which the action can be exercised is of 6 months (article 1669 paragraph 2).

The moment from which the limitation term starts is different. When retraction occurred within the option term, prior to the beneficiary joining, the term runs from the date the promissory person has retracted the promise, from this time on the beneficiary's right to request the foreclosure procedure was derived.

If the refusal occurred after the accession, the solution is different as through it the selling was concluded, the buyer becoming owner, or creditor of the property transfer obligation, in the real estates case, or it has not been concluded, such as in the existence case of the excution clause of the promise accepted by concluding a contract, authentic or not etc. In the latter case, the creditor may request, if he/she has fulfilled his/hers own obligations, the state of a decision to take the contract place, according to the rule given above (article 1279 paragraph 3, article 1669, paragraphs 1 and 3 of the Civil Code).

a. If the promissory-seller has alienated the asset of a third party, without a real right over the good, the beneficiary can accept the promise which is further available throughout the established period, and he can ask for damages - interests (paragraph 2 article 1279 from the Civil Code). It is not admissible though the annulment selling request, because the promise is not enforceable against a third person, except if he knew about it.

In the hypothesis in which, the option object is a tabular right and it was registered in the cadastral register, the beneficiary may request the cancellation of the contract drafted with a third person because he/she knew or could have know the restriction of the promissory person right on the asset.

b. If the contract completion would require some formalities, other than the authentic form, or essential conditions or essentialized ones, subsequent to the acceptance, that could only be fulfilled by the promissory person, at least in theory, it is more difficult to accept the solution of the foreclosure procedure in nature, because the court will not issue a decision to take the place of the contract, because the text of articles 1169 paragraph 1 conjuncted with paragraph 3 states that it gives

in the shown directions „*if all other validity conditions of the contract* (other than the promissory person lack of will) *are met* „.

As it was noted above, in this hypothesis the envisioned contract is not concluded and, when there are two wills: the promissory person's commitment and his/hers acceptance by the beneficiary, the unilateral promise becomes a bilateral one.

The promissory person may be compelled to execute the essential conditions which completion can be achieved only through his/hers personal activity, utilizing the comminatory fine technique.

Without these conditions, the penalty that may be imposed for violation of the duty to conclude the promised contract is the obligation to damages – interests (article 1279 paragraph 2 from the Civil Code).

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SOME CRITICAL OBSERVATIONS REGARDING THE DIFFERENCE BETWEEN THE PREPARATORY ACTS AND THE EXECUTIVE ACTS

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Summary: *The author analyzes the differentiation between the preparatory and the executive acts. In the literature was mentioned the difficulty to find a convincing criterion to distinguish the preparatory acts from the executive ones, by adopting a single theory. In reality, each of these theories mutually complete eaqch other, a theory offering a correct solution for certain groups of situations, while other theory being available for different situations.*

Keywords: *the preparatory acts, the executive acts, theorie, the criterion, the literature*

1. The issue of finding a precise criterion to *distinguish* between *the preparatory* and *the executive acts* has always represented one of the most difficult problems in the science of the criminal law.

The differentiation between *the preparatory* and *the executive acts* as regards their nature is not always is to make, given the multiple situations in which they have a close significance.

To this difficulty is added that provoked by the tendency of the modern jurisprudence to amplify continuously the sphere of the executive (and punishable) acts over the preparatory acts, introducing in the category of executive acts some acts that through their nature are at the border between preparation and execution, with the motivation that thus is provided a more efficient protection of the social values defended by the criminal law.

2. Professor Dongoroz[1] in his Treatise in 1939 systematized the theories concerning the criteria of differentiation between the preparatory and the executive acts, classifying them in four groups: *subjective theories, objective theories, formal theories and mixed theories.*

a) The subjective theories are based on the idea that the differentiation between the preparatory and the executive act is conditioned by the precise knowledge of the criminal decision-making that led to the crime commitment, this involving a deep analysis of the psychic mechanisms of the criminal decision-making. The category of this theory includes:

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[1] V.Dongoroz, *Drept penal (Tratat),* 1939 edition republished, Editura Societății Tempus, Asociația Română de Ştiinţe Penale, Bucureşti, 2000, p.262.

- *the theory of equivocation* – according to it, a preparatory acts is any act that *per se* and through its substance does not reveal the aim and the thoughts for which it was done (does not betray the psychic state of mind of the criminal). The criterion was sustained by Carrara and was imposed both in the doctrine and in jurisprudence, although is relative and insufficient, because other acts that objectively are equivocal can, in the context of other external circumstances either objective, or subjective, turn from the preparatory acts into a real executive act[2].

Carrara admitted the weakness of the criterion of equivocation trying to complete it with other secondary criterion, sustaining that an equivocal act anytime it goes beyond the sphere of the activity strictly delineated by the individual free activity can break into and threaten the sphere of another person's rights, that act will become an executive act. Thus, the deed of a person to be on the watch armed at a late hour, knowing that every night only a certain person passes there, represents an breaking into that person's sphere of rights, and consequently will be an executive act.

Yet, the theory of equivocation proved inappropriate when confronted with situations in which the same act could have been considered equivocal as referred to some crimes and non-equivocal as concerns others.

Following this trend of thinking in the legal practice has been demonstrated that the sphere of the executive act in the case of certain crimes is larger than the sphere of the acts that commit the action described in the norm of incrimination, and this character an be displayed also by those acts that take place very closely to the moment of the commitment or represent a substantial step beyond which can exist only the acts that inevitably lead to commitment. In such a view, with the executive acts can be assimilated acts that according to their structure could have the character of preparatory acts for the crime.

b) The objective theories

According to these theories, it is not taken into account the capacity or incapacity of the act to reveal the criminal decision-making, but the dynamism of the act, that is its position in the dynamic process that should lead to the commitment of the crime. These theories include:

- *the theory of the act incidence*, conceived and sustained by Carrara. In any criminal illicit activity – Carrara notes – there is a primary subject (criminal), a secondary active subject (the means, the instrument of the commitment), an active/passive subject of the attack (the thing or the person on which the activity is reflected upon) and a passive subject of the commitment (the person who will suffer the consequences). Any act that refers to and falls directly upon the active subject is a preparatory act – for example, carrying out the plans for committing the crime, the acquisition of the means, the preparation of the instruments – and the acts which are directed to and fall upon the passive subjects are executive acts – for instance pointing the gun to the victim, breaking down the door to enter, poisoning the victim's food.

[2] I.Tanoviceanu, *Tratat de drept şi procedură penală*, Ed. Curierul Judiciar, 1912, p.417.

- *the theory of the inert causality*, formulated by Impallomeni. According to it, preparatory acts are those acts that did not receive a determined direction, *i.e.* they are not meant to be the cause, as they have not been directed against someone (*inert cause*)[3], for example buying a poison, mixing it with aliments, wrapping the aliments to send them, are preparatory acts as they are not directed against a certain person.

c) Formal theories

The formal theories take as a base of evaluation of the preparatory act and of the executive act the typical action described or indicated by *verbum regens* in the norm of incrimination.

According to this theory, the executive act is any act that begins or enters the typical action, and the preparatory acts are those remaining outside them. In all the formal theories the base is represented by the typical action described or indicated by *verbum regens* in the norm of incrimination. It will be executive any act that begins or enters the typical action, preparatory acts being those that remain outside.

d) Mixed theories

Many authors considered that the wisest thing is to combine some of these criteria to obtain a persuasive result.

A first attempt to eliminate the faults of **the subjective and objective theories** (through the unjustified extension of some criteria valid only for certain situation, to all the hypotheses) has been made by the theories that aimed to combine the two criteria for the evaluation of the preparatory and executive acts, characterizing as executive act that act that reveals the intention to commit a determined deed and at the same time enters the sphere of the acts of carrying out the typical action described in the norm of incrimination (Rossi, Merckel ş.a).

The German penal law adopted a mixed conception, putting together some elements of the objective conception (objective-subjective conception). In this view any external manifestation is punishable to the extent where it interferes with the collective trust in the lawful order, under- mines the feeling of legal security, prejudices the citizens' attachment to law.

A certain valorification of subjective elements next to the objective ones in characterizing the attempt is present in Garraud's[4] opinion too.

In this author's view, the executive act is characterized by the existence of a serious will towards committing the crime (the subjective aspect) and at the same time through an objective manifestation, susceptible in itself to be a voluntar break through in the juridic protected aria of values, belonging to another person, to be an attack which endangers these values; this action has a dangerous character even if it did not have the wanted result (objective aspect).

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[3] Vintilă Dongoroz, *Drept penal,* 1939, op.cit. p.264.

[4] Garraud, I, *Drept penal general*, Dalloz, 1975, pp.475-476; Pradel, *Droit pénal special,* 2 édition, Cujas, Paris, 2001, p.374.

To the same category of the mixed theories belongs also the French[5] modern jurispridence which takes into account in the characterization of the executive act, the univocal intention reveled by the act (even when this is committed in a further moment than the moment of the crime) and by the circumstance that the act was in deirect relation with the planned crime or tended to commiting it.

Another attempt to overrun the faults of the preceding theories and to identify a convincing criterion to differentiate between the preparatory acts from the executive ones and at the same time to answer the concrete need for criminal policy, is constituted by the Anglo-American theory of closeness which distinguishes between the preparatory act and the executive one from a mainly spatial perspective.

The theory of dangerous closness or of the substantial step is meant to overrun the faults of theory of equivocation, becoming the determining criterion in delimiting the punishable executive acts from the unpunishable ones (preparatory acts). The punishable executive acts are those acts which represent an important step, a dangerous closness to the moment of the crime. From this point the decisive criterion is not the content of the acts to be done until the crime is committed, but the content of the acts effectively done up to this very moment[6].

At the same time the substantial step is revealing not only for the intention to commit the crime, but also for the author's criminal perseverence in attaining this goal.

In the literature[7] was mentioned the difficulty to find a convincing criterion to distinguish the preparatory acts from the executive ones, by adopting a single theory. In reality, each of these theories mutually complete eaqch other, a theory offering a correct solution for certain groups of situations, while other theory being available for different situations.

That is why it has been proposed that starting from the formal theories which give priority to the manner in which the norm of incrimination describes the typical action, to be enlarged the executive act as compared to the other theories, respectively the equivocation and the inert causality theories.

[5] Pradel, op.cit., p.376; Merle, Vitu, op.cit., pp.359-360; Salvage, *Droit pénal général*, Edit. Press Universitaires de Grenoble, Grenoble, 1994, p.35.
[6] George Antoniu, *op.cit.*, p.85
[7] Ibidem, p.95.

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WOMEN'S INVOLVEMENT IN HUMAN TRAFFICKING AND THE SOCIO-ECONOMIC FACTORS DETERMINING IT. THE STAGES OF THE HUMAN TRAFFICKING PROCESS

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Abstract: *Everywhere in the world, human trafficking is a factor of immorality that leads to the degradation of the human being and the ruin of civilization. It is a form of transnational crime and at the same time a breach of man's fundamental rights. But, in our region, the issue is even worse: this human trafficking is threatening our nations' development. Criminal networks have developed because of the recent conflicts from the Balkan area and have taken advantage on the weaknesses of the East European states and societies, which are now going through a process of transition. The abundant profits obtained from human trafficking, illegal drug trade and so many other illicit activities feed the black economy, contribute to the increase of corruption, go against the law and the public order and, very probably, contribute to the financing of the international terrorism.*

Human trafficking has been continually growing during the last years, becoming a national and international problem.

This phenomenon is not an episodic one, involving a large number of people, having deep social and economic connotations, demonstrating the profound violation of man's fundamental rights and becoming a problem whose gravity continues to increase.

In this context, it is necessary to formulate coherent policies for preventing and fighting against human trafficking, a process nevertheless facing a series of difficulties coming, first of all, out of the ignorance of the real dimensions of this phenomenon, due to the very significant mobility, to the intense transnational circulation for both people and goods, and secondly, due to the obscurity of this phenomenon, assured by the maintaining of its manifestations within the context of some apparently legal activities.

Regionally, the Balkan crisis of the last decennium favored the development of this phenomenon, Romania being quoted as origin country and transit country for the great women trade networks, dealing with women coming mainly from Asia, but also from neighboring countries such as Ukraine, Moldova or Belarus, going towards the countries of the former Yugoslavia (especially the region of Kosovo), as well as Turkey, Greece or the countries of Western Europe.

Although this phenomenon is increasing worldwide, not just in Romania, it is present especially in the area where there is no adequate legislation and no efficient system of cooperation between the governmental institutions and the civil society.

Keywords: *human trafficking, crime, man's rights, conflict stages, socio-economic factors.*

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Human trafficking is an international criminal phenomenon – a complex and unique one in its way – made up of several elements, as the UNO definition has shown.

The prevention and the fight against human trafficking (which concern especially women and children) constitute aspects claiming from all the countries (origin countries, transit countries, destination countries) a global and international approach, the adoption of efficient human trafficking prevention & punishment measures, while protecting the victims.

From the definition of human trafficking, comprised in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, additional to the UN Convention against organized transnational crime,* also result the forms in which this crime can be substantiated, in relation to the people that can be victims and organizers of this crime, the goal pursued and the interest aimed, the nature of the reasons that generated the phenomenon, the social implications and the specifics of the social values violated (human rights).

Human trafficking – determining factors[1]

According to a study made on the request of the International Organization for Migration[2] in Romania, a series of factors have been identified determining the human trafficking vulnerability of young girls, which constitute as many causes determining and preceding the appearance of human trafficking, namely: „advantageous" geographic location; groups of belonging; family abuse and disfunctionality, lack of family communication and social disintegration; personal acquisitions and aspirations.

The three main elements are:

- In the countries of origin, human trafficking organizers will always have a large number of sources „supplying" them with victims;
- In the destination countries, the „sex market" has been continually growing, determining a constant demand of victims and services;
- The organized crime networks control the market's „offer and demand" obtaining huge profits out of human trafficking activities, by exploiting their victims.

[1] This chapter relies on the following works: "*Crime and slavery: a presentation of women trafficking for prostitution in the newly independent States*", Global Survival Network, 1997; „*The human trafficking in SE Europe: an inventory of the present social situation and the fight against human trafficking in Albania, Bosnia and Herzegovina, Croatia, the Federative Republic of Yugoslavia and the former Yugoslav Republic of Macedonia*", UNICEF, 2000 ; „*Socioeconomic factors determining women in the Republic of Moldova to join prostitution, human trafficking and sexual slaverynetworks*", Clara Beata Bodin, 2001.

[2] The International Organization for Migration, Bucureşti Headquarters, „*Vulnerabilitatea tinerelor din România faţă de traficul de fiinţe umane*" (The vulnerability of young women in Romania to human trafficking), a research carried out by the Center for Urban and Regional Sociology (CURS), The Institute for Life Quality Research (Institutul de Cercetare a Calităţii Vieţii - ICCV) and Mercury Research and Marketing Consultants, 2001.

On the one hand, it is clear that human trafficking is a criminal phenomenon whose evolution can be resumed to a simple economic equation of the „demand and offer" type; on the other hand, the roots and the features of this phenomenon are much more complex.

Otherwise, the reasons of human trafficking can be related to three coexisting levels: human trafficking meant for sexual exploitation, labor force exploitation and organ donation.

Human trafficking for sexual exploitation remains the widest and most important form of human trafficking, for the simple reason that it will always represent the most important source of profit for its organizers.

So, we can say that poverty, unemployment, discrimination on the labor market, domestic violence and abuse determine in women and young women, in general, the birth of a desire to „evade to a better world", so that the deceiving human trafficking organizers' offers are easily accepted.

Women discrimination

The periods of crisis determined by conflicts or by increasing unemployment are often accompanied by the return of the stereotypes of the kind: „men earn money, and women take care of the home chores". In certain countries, even though the national legislation forbids discrimination on sexual grounds, the respective law contains no clear definition on discrimination, or it operates with a definition created from the legal practice. The absence of a clear definition prevents the application of the law. Women discrimination is not foreseen as a distinct discipline in the faculties' curricula and there are no lawyers and judges trained in the sense of this aspect or with experience in this domain[3]. For this reason, the people guilty of sexual discrimination are not punished and the victims cannot ask for the reparation of the damage incurred, neither judicially nor in any other way.

Discrimination on the labor market

On the labor market, women are the last ones to be hired and the first ones to be fired. In order to earn a living, they see themselves forced, more and more often, to accept to work „on the black market". One of the most dynamic black market sectors is the sex industry, in which women run great risks[4]. To conclude, when these women have no access to legal and regulated jobs, they are obliged to work in criminal networks, without social protection, being sexually exploited or working in families (as woman servant) in inhuman conditions.

Moreover, the discrimination on the labor market also appears under the form of sexual harassment. For instance, in a large number of Russian firms, there is nothing strange for a boss to ask his secretary to have sexual relations with him. In newspapers, the advertisements often announce the search for secretaries „without

[3] *Idem*.
[4] UNICEF, *Women in transition*.

complexes" and everybody knows that this expression refers to women who want a sexual relation[5]. Certain states, including Russia, have not yet included the interdiction of sexual harassment its work legislation or its Civil Code.

Social factors

The research carried out during the last few years has shown that there are also other reasons, beside the economic ones, determining a large number of East or South-East European women to go abroad for prostitution. During the economic crises, in general, in society will appear austerity tendencies during which the patriarchal structures and the differences between men and women play a much more important role than before. Women, who have been anyway in a situation of inferiority compared to men, have at that moment an even lower „value". In these European regions, many women and girls are socially conditioned to consider their own body and their own sexuality as a „resource" – often these women consider it as their only „resource". These conceptions determine the perpetuation of the marginalization and discrimination phenomena regarding women in the daily life, as they no longer have the possibility to play an active role in the transformation and evolution of society in general[6].

Violence against women

Violence against women, especially family (domestic) violence is another reason for women's vulnerability to human trafficking. Family violence determines a large number of women and young girls to leave their families and their country of origin as they get no help or protection from the respective State. For unemployed women, victims of family sexual harassment and violence, the promise of a better paid job abroad appears as the promise of a magical solution in a better world.

The „push" factors determining women to leave their living environment are, among others: unemployment; poverty; poor training and professional education; women discrimination; violence.

Beside these negative discrimination factors, there are also a series of „pull" factors, attracting women and girls to the advantages of life in a rich western country, which makes them even more vulnerable to human trafficking: the hope of a job and a salary; the prostitutes' hope to earn much money; the access to an easier life in the West; the hope to obtain a better social position and a more humane treatment; the perception of the West as a place of extreme luxury; the demand of women „for reproduction"; the demand for „exotic" prostitutes; the demand for cheap labor force.

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[5] „*Crime and slavery: a presentation of women trafficking for prostitution in the newly independent States*", Global Survival Network, 1997.

[6] „*Human trafficking in SE Europe, an inventory of the present situation and anti-trade measures in Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia*", UNICEF, 2000.

Four basic recruitment methods

There are four basic methods when recruiting women for human trafficking[7] :

1) Total constraint by kidnapping or forced abduction. This method is no longer as rare as before. There are increasingly more such cases in Albania and in Kosovo, and in certain Asian regions it is an ordinary method.

2) Deceiving the victims with promises of legal work or legal entrance in the destination country – these women are persuaded that they will work in offices, restaurants, bars or that they will conclude marriages.

3) Deceiving the victims with half-true promises, such as, for instance, work in the „show-business", dancing or even the striptease domain.

4) While some women are perfectly aware that they are leaving their country of origin to work in prostitution, they are not aware about the level of the debts that they will incur, about how intimidated, exploited and controlled they will be.

One of the most attractive promises for young women in Central and Eastern Europe is the offer of a dwelling place of their own, which represents a level of unimaginable independence in their country of origin. The women victims of the human trafficking are made to believe that they will leave for a rich West European Country where they will soon earn important sums of money that they will be able to use for themselves or for their families, to get rid of poverty and despair.

New human trafficking tendencies

Initially, the tendency of human trafficking was to direct victims from poorer countries of origin to richer destination countries in the West. This situation is submitted to permanent changes, considering the fact that certain origin or transit countries have prospered economically, becoming in their turn destination countries.

As far as human trafficking for sexual exploitation is concerned, the ethnic origin plays an increasingly important role in the criminal demography, as the clients ask for a woman from an ethnic group different from their own. For instance, we could find victims coming from SE Europe in the sex industry of SE Asia, victims of Africa in the sex industry in Europe and European victims in the sex industry of Central America.

So, this kind of trade can be considered an example of globalization, especially as far as the sex industry is concerned.

But the most shocking tendency is the fact that in most of the regions, the victims' average age has been constantly decreasing, and in this case the offer is determined by the clients' demand, perceptions and specific requests. For instance, we find more and more children victims of this trade, as the clients are convinced that they risk catching a sexually-transmitted disease less if their sexual relations involve children.

[7] *European Council*. Textbook: Advice and work tools for trainers.

The transit state – the transport

After recruitment, the transport and transfer stage follow, which also suppose hosting and receiving the victim in several stages, including the initial reception and transfer of the victim on the territory of the country of origin. During the voyage in the respective country and abroad, it is possible for the fundamental rights of the respective person to be seriously violated, as this person may be submitted to abuses and other offenses.

Many of the victims have never been abroad before and totally depend on their exploiters. Some women leave their country of origin without a valid passport, either because they were told that they would not need one, or because they were promised that they would receive one later on. If the victims do have a passport, it is confiscated and remains in the possession of the exploiter as a guarantee for the victim's submission.

The victims who are illegal immigrants are all the more vulnerable in front of the whims of their exploiters, who know that it is very unlikely for these victims to obtain the protection of the police or of the respective State, in case the transfer were to be interrupted or if the victims were to ask for help out of their own initiative. We must underline the fact that some women willingly leave their families to search for a better life and it would be false to suppose that all the women discovered or suspected of illegal immigration are human trafficking victims.

At the same time, the police will need to remember the fact that the measures of fight against human trafficking need to be applied without violating anyone's fundamental rights and dignity, especially those of the human trafficking victims, of the migrants, of the people who left their domicile and are still in the same country, of the refugee and asylum-seekers.

Moreover, the measures meant to fight against human trafficking must not hinder the persons' freedom of movement.

When the police come into contact with victims during the transfer stage, they need to carefully analyze the case, to provide assistance and to detect the eventual offences committed against the victim.

Victim control and exploitation

The main aim of the human trafficking agents is to obtain large sums of money by exploiting their victims during a long period. They want to protect their investment, which means that they will do their best for the victim to continue to work without trying to run away. That is why human trafficking agents will want to exert a permanent control over their victims.

To control the human trafficking victims, during the exploitation stage, several mechanisms are used. Each of them can be used separately, yet in most cases several of them are simultaneously used, to create a situation of real or psychological captivity.

The constraint caused by debts

One of the basic mechanisms is the constraint determined by debts. The victim is asked to pay exaggerated sums of money, by pretending that the arrival in the destination country cost lots of money. To these sums, huge and cumulative interest rates are added, as well as very expensive rents for the boarding or for the work in a brothel, the costs for the advertizing of the prostitution services and for the transport. All these pretentions lead to ever growing sums and simply become impossible to pay.

Isolation through the confiscation of the identity documents and/or travel documents

Usually, the victims' identity and travel documents are confiscated as soon as they arrive in the destination country. So, they are stolen their official identity and they are confirmed their status of illegal immigrants. They can no longer ask for asylum or run to another destination country. Taking into account the fact that many of the victims come from countries in which the police is not considered as an institution obliged to provide help, but rather as a form of oppression, it is clear that such women will not ask for police help.

Human trafficking agents support this perception by saying to the victims that they can contact the police any time, but the result will be their immediate expulsion and repressions in the country of origin. The experience confirms the fact that human trafficking agents do not always lie by saying so, as in the EU States, most of the human trafficking victims detected by the police and having no valid documents are immediately expulsed instead of being treated as victims of major offences.

Or, in other cases, human trafficking agents tell the victim that it is useless to ask for police help, as the police are corrupt and they have already been paid by the respective human trafficking agents. Human trafficking agents use the lack of documents and the awe inspired by the police to make sure that the victims will not try to escape or to testify against them.

If human trafficking victims were to receive the right of residence, it would not only be in the victims' interest, as their rights would be respected in this way, but it would also be in the best interest of the criminal investigation officers. But most destination countries refuse to give human trafficking victims the right of temporary residence. They do not get protection, support or help; their residential status remains impossible to solve; under these circumstances, victims will rarely collaborate with the police and the judicial institutions.

To eliminate this deficit, the *Stability Pact – the Workshop for the fight against human trafficking* recommends the provision of a residence right out of humanity reasons to human trafficking victims and of a temporary stay right of at least 6 years, which would allow them to have access to a series of social and medical facilities.

Using violence and fear

Another efficient way of controlling the victims is to use the threat of violence and the violence. To get the victims to submit, they are often beaten, raped, locked, isolated for long periods of time, deprived of water and food, drugged or tortured with knives or burnt by cigarettes. Abuses can be a punishment to women who have not obeyed, or a warning to other people, for the victim to know what would happen to her if she disobeyed again. In other cases, the only reason is the sexual sadism of the human trafficking agents.

In the situation of sexual exploitation, shame is also a powerful control mechanism. Human trafficking agents threat the victim that they will announce her family about the fact that she works as a prostitute. Often, human trafficking agents take pictures of the victim while she is raped and then uses them to get her to be submissive and to oblige her to obey their orders.

Depending on the culture the victim comes from, psychological constraints are also used. For example, for West African women (Nigeria), voodoo rituals are a source of terrible fright and their use guarantees the submission of these women. Another example is the double impact of the threat with denouncing their work as prostitutes in the case of Muslim women – in certain cases they risk being mistreated even more violently by their families than by the human trafficking agents.

Threatening the victim that her family would be punished

The most efficient threat that can seriously prevent the investigation of the human trafficking offences is the threat that the family would suffer violent repressions in the countries of origin. The human trafficking agents endeavor to find out a series of details on the victim's family situation (name, nickname or address of a close relation or of another loved person). It is not necessary to know many details about the respective family; to control the victim, it is enough that the respective threat and perception work in her mind. The victim's problem is that she cannot risk the life and security of the people she loves, as she cannot check whether the human trafficking agents are lying or, on the contrary, they would really use violence against those whom she loves, in case she might try to oppose their projects or run away.

Captivity and psychological torture

To conclude, if we take into account all these control mechanisms put together, the concrete result is a regime of captivity and psychological torture. The important thing is to see the situation as the victim sees it.

The victim is alone in a foreign country, isolated from her compatriots and cannot communicate using her native tongue. She has no identity or travel documents. She is forbidden to communicate with her family; she is disoriented because of the permanent change of address and locality; she is submitted to repeated physical and sexual abuses. She cannot ask for police support because she

is afraid of the consequences; she is forced to practice dangerous sexual relations from all the perspectives, she risks getting sick because of working a large number of hours every day with clients with whom she cannot communicate verbally; she is submitted to a regime of threatening and repression pointed against herself and/or her family.

If we take into account all of these factors, it is not hard to understand why very few victims try to get rid of this captivity. So, the police have an essential role in the fight against human trafficking.

Human rights and sexual discrimination

"The international convention for the elimination of all the forms of discrimination against women" (CEDAW) can be used as a legal international instrument, as it has been ratified by most of the European States. The first article of the CEDAW[8] convention reads:

"To accomplish the goal of the present convention, the term of 'women discrimination' designates any difference, exclusion or restriction based on sex which has the effect or purpose to annul the recognition of women's rights, of their joy of living or their activity ...

...regardless of their marital status, based on the equality between men and women, respecting human rights and the fundamental freedoms in the political, economic, social, cultural, civil domain etc.".

According to the CEDAW convention, the member States:

- *will take all the adequate measures (a) to modify the social and cultural behavior models for men and women, in order to eliminate prejudices, customs and other practices based on the idea of inferiority or superiority of one of the two sexes or the stereotype roles of men or women, (b)for family education to be able to include the correct understanding of motherhood as social function and the recognition of the common responsibility of men and women in the education of children; it is implicit that all the above need to serve the child's interests, which have priority under any circumstances (article 5);*
- *all the adequate measures, including legislative measures, will be taken to eliminate any woman trafficking forms and prostitution (article 6).*

The international law, the European Convention on Human Rights and the national constitutional laws are international legislative instruments admitting the difference between sex and gender and contributing to the implementation of the equality men-women, as fundamental right.

The police must apply and assure the implementation of these legal instruments.

The police get in touch with women especially in the following situations: in case of offence or incident; during an intervention determined by a domestic

[8] The international convention concerning the elimination of all the forms of discrimination against women (*CEDAW*), adopted by the UN General Assembly on December 18, 1979.

incident; female victims of an offence, for instance in the case of human trafficking; women withheld or arrested for prostitution; women arrested or in prison.

In this type of situations, women are very vulnerable, and so the issue of respecting and protecting their rights should be considered more carefully.

Conclusions:

Out of all the issues marking the political debate in the European area, the issue of clandestine migration and human trafficking is by far the most important one. Moreover, due to the constant increase of the migratory flows to the rich EU countries, and due to the identification of numerous human trafficking networks, related to the world of organized crime, this issue draws an alarm signal for the EU states and also for those hoping to adhere to it. At the same time, the application of this strategic goal involves the development of an international partnership in the economic and social domain but also police cooperation to manage together these migrating flows.

This clandestine immigrations phenomenon, which, until recently, the Europeans knew only by means of the stories coming from poorer world regions, is now a reality extending over our continent as well. Clandestine human trafficking – estimated to four million people a year worldwide (the numbers were provided by the International Organization for Migration - IOM), of which up to a million for sexual exploitation purposes, is a modern form of human trafficking. Without risking being wrong, we can estimate that the benefits are colossal for the criminals (according to the Interpol, an agent would earn about 100 000 euro a year for each person he obliged to prostitute). Children are also victims of the abuses present on the illegal adoption markets, pornography markets and organs trade markets. Nowadays certain groups have turned their attention rather to human trafficking than to drug trafficking as it seems that there are higher gains and lower risks. Worldwide, IOM estimates that human trafficking generates an $8 billion profit per year. Very probably, other clandestine people will continue to come in large numbers in the future in the European countries, because of the international conflicts, civil wars and diverse persecutions from numerous world regions. The zero option in matters of migration seems therefore less realistic.

In the European Union or, more generally, in Europe, it is truly necessary to put into practice a more supple and more coherent migration policy to put an end to clandestine migration and human trafficking. However, it is also justified and imperative to become more severe with the criminals who exploit migration candidates by human trafficking. The issue is all the more complex as Europe does not cease to get even more closely integrated, as certain countries from the EU border are at the same time source and transit territory for refugees. Globalization is a supplementary reality to which Europe needs to find a rapid or adapted answer.

In order to decrease the speed of clandestine immigration and to reduce human trafficking, it is urgent for the developed countries and particularly for the EU

countries to endow themselves with efficient laws that will allow the stabilization of the emigration rates adapted to the market conditions, which will facilitate the reception and political asylum for the refugees (who are frequently mistaken for clandestine immigrants); this will also help the development of the countries of origin of the clandestine migrants. The European governments should also stipulate longer terms in prison for the criminals convicted for human trafficking. This step has already been taken in Great Britain – the main European destination for asylum seekers – where now human trafficking agents risk a ten year of prison punishment, which means much more than anywhere else in Europe.

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ATTITUDES VS. BEHAVIOR IN ORGANIZATIONAL COMMUNICATION

Mihaela PRUNĂ*

Abstract: *This paper examines the perspective of organizational communication in terms of styles of communication, managerial communication and behavioral pattern developed by them. Organizational communication is now an interdisciplinary field of study that focuses on both horizontal organizational communication, professional peer communication and vertical communication, managerial communication.*

Keywords: *Organizational communication, attitude, organizational behavior, freedom of movement, organization*

Introduction: organization, organizational behavior and organizational communication

The concept of organization is now researched and analyzed from multiple perspectives and the specialized literature gives us an interesting picture of the organizational space. For the logic of the present article we have considered four aspects of organizational reality and the complex relationship between individuals within the organization[1].

Primarily because work has become increasingly complicated that one man cannot do it alone from start to finish. We realize this because our existence involves the division of labor, cooperation, specialization, thus considering them natural. Other authors[2] derive necessity from the fact that people need to cooperate as a single individual has a limited power of choice and action. The limits are defined as barriers or obstacles on the way of our desire to do what we plan to. We are caught in a labyrinth and cannot exit without peers, subordinates, bosses, etc. cannot exit without cooperation.

Secondly, it should be noted that much of our life is spent in organizations promoting organizational strategies - based on efficiency and profit. Approximately 8 hours a day we live within an organization, sufficient to understand that our own individuality is limited by that of others, having the same rights and obligations as we do.

Thirdly, the organization becomes a mediator between individual and society. Organization, together with other institutions is required to find the solution for the

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[1] See, Mihaela Prună, Comunicarea şi relaţii publice, 2nd Edition , Prouniversitaria Publishing, Bucharest, 2011

[2] Barnard, Chester, Organization and Management, Cambridge, MA, Harvard University Press, 1952

individual to live freely together with other free individuals. It is not just purely an economic space, where they create profit, but becomes a cultural space - in the sense that we speak of a culture in which individuals socialize. An organizational system that will quickly understand this will win. Organization is one of the most important institutions in postmodern societies.

Fourthly, the organization builds organizational man, a man who, like the organization in life is guided by the principle of efficiency - man does not begin actions if he knows that he will lose, who makes decisions according to personal goals, a man who understands the importance of cooperation and competition and translates them into everyday life. Despite empirical evidence, namely that common sense invading the organizational sense, because it is prior, a careful analysis shows that in fact organizational sense affects common sense, being better organized than the former and with greater consistency. Just as the saying says - „a subordinate goes to the Chief with ideas and leaves with those of the boss", we can say that an employee goes to work with the „philosophy" of common sense and returns home with the „philosophy" of the organizational sense.

Organizational man and his behavior

The concept of organizational man is researched by many specialists in the management field and psycho-sociology and the analysis starts with the impact the organization has on the individual. Through the complexity of professional relationships through formal and informal dimensions of communication space, through the system of organizational communication the influences on the individual are obvious. Since 1956, when the psychologist Robert White defined „organizational man" as the individual recreated and re-socialized by the organizational environment, many research and studies have revealed the direct influences of the organization on the individual - subordinate or boss. Synthesizing the most important studies and research, Mielu Zlate[3], brings into question the main models of organizational man developed by management psychology. These models are important because they show the nature of concern in the behavior analysis of individuals within organizations and also illustrate the general attitude displayed by these behaviors.

Firstly the pattern of the economic rational man. This stems from hedonistic doctrines, doctrines that see the human creature as calculating its shares according to his purchased pleasure. Since he aims at achieving maximum satisfaction, it is necessary to provide the means that will allow him to achieve of such a goal, or the economic ones which seem the most appropriate to use. This type of model is at the basis of the pattern of the modern world capitalists. Among the fundamental assumptions of the pattern are:

[3] Mielu Zlate, Tratat de psihologie organizațional managerială, Polirom Publishing, Iași 2008

(a) the person is motivated by the gainand this perspective and acts so that the benefit become larger;

(b) because the organization distributes money as incentives, it will manipulate and control the individuals treated as a kind of passive agents;

(c) the man shows irrational reactions that should hinder, hence the need to calculate what serves its interests;

(d) the organization will be set up in such a way that it can monitor and neutralize irrational, unpredictable tendencies.

Secondly, the social man pattern, with several theoretical and pragmatic sources, primarily the work developed by George E. Mayo[4] and his associates, the discovery of the Hawthorne effect which insisted on the importance of psychosocial factors in motivating workers. Basic characteristics of the pattern are:

(a) the man is driven especially by social necessities, gaining the fundamental meaning of personality in relation with his peers;

(b) higher rationalization of the work drew loss of economic interest of employees, as to be found in work relations;

(c) the person is more sensitive to its peers group forces than the incentives and control of the boss;

(d) the man is receptive to interventions of hierarchical superiors only when they meet their social needs.

Under the change of perspective, human social model has many advantages: it gives a more realistic view on human beings, contributes to the improvement of organizational climate and helps the achievement of congruence between formal and informal, obligations and rights, structures and feelings, increases overall efficiency.

Thirdly, self-updating human pattern, which takes its origin from the famous pyramid of needs invented by A. Maslow[5]: at the base there are placed the primary needs (physiological and safety), in the middle, affiliation needs, esteem and status, cognitive and aesthetic, and the top, the need for self-actualization, a meta-need consisting in fulfilling the most of their individual potential, the „self", the aspiration to create and enrichment. Fundamental assumptions of self-updating man:

(a) due to the routine and fragmented work performed, just the satisfaction of superior needs is restricted;

(b) to enable them to show their capabilities, the individual must be given a degree of autonomy and freedom and also time to improve them;

(c) the man is rather motivated and controlled by himself, external pressures being felt as improper intrusions and even threats, forcing him to adapt to circumstances;

(d) there is no contradiction between self-fulfillment and the goals of the organization, thus, if allowed, he will integrate individual interests and personal goals with the team.

[4] Elton Mayo, The Human Problems of an industrial Civilization, Routledge, London, 2003
[5] A. H. Maslow, Motivație şi personalitate, Trei Publishing, Bucharest, 2007

The model has the greatest gain that emphasizes the role of needs and aspirations of people in potentiation of their activity, while the focus moves from extrinsic motivation (money, income, satisfaction of socio-human contact) to the intrinsic (the psychic comfort coming from accomplishing his own disponibilities), approaching more to the universe of human subjectivity that which inhabits it.

Finally, fourth, complex human model proposed by Edgar Schein (1994)[6] on the basis of detection of limits underlying other models (found to be too simplistic) and changes including consideration of recent changes occurring in the industrial-technological society type. Man is a being much richer and complicated from psycho-behavioral point of view than previous attempts try to depict. The assumptions of this model are the following:

(a) man is not only complicated but also variable par excellence: the needs, interests, his motives are hierarchized, but change over time and according to conjunctures, as they interact or combine in high complexity scheme;

(b) due to experiences that he lives within the organization, the individual purchases new motivations, and they interfere and are associated with previously acquired ones;

(c) the motivations formed within the organization or some of its sectors are dynamic and sometimes with inaccuracies: for example, someone who feels alienation and frustration in the formal structure mat get refuge and satisfy himself in the informal structure;

(d) not only motivation provides satisfaction and organizational effectiveness, counting also the type of task performed, skills and expertise, human nature etc.;

(e) men respond differently to different modes and styles of management as not to impose a universal recipe.

In terms of behavior and organizational man or organizational behavior it must be noted that there is no universally accepted definition but definitions covering this issue largely. For G. Johns[7] organizational behavior refers to „attitudes and behaviors of individuals and groups in organizations", but the task being to understand and manage them effectively. On the other hand, McShane and Von Glinow[8] believe that this subject is the study of what people think, feel and do in organizational contexts. An interesting point of view has Greenberg[9] and Baron emphasizing that it refers to knowledge of all aspects of behavior in organizational situations through systematic study of individual, group and organizational processes, this knowledge is the primary purpose of obtaining organizational effectiveness and individual welfare. An interesting point has M. Zlate[10] who defines organizational behavior as the whole of adaptive responses of an individual

[6] Schein, E.H., Organizational Psychology, Prentice Hall, Inc. New Jersey, 1994
[7] Jonhs, Gary, Comportamentul Organizațional, Economic Publishing, Bucharest, 1998
[8] McShane, S., Von Glinow, M., Organizational Behavior, Emerging realities for the workplace revolution, Irwin, McGraw-Hill, Boston, 2000
[9] Greenberg, J., Baron, R., Behavior in Organizations, Allyn&Bacon, Boston, 1993
[10] Zlate, Mielu, op. cit. 2004

or group, global manifestations of mental activity, individual or organizational group. Facing such diverse definitions Organ and Bateman[11], 1986, have achieved a synthesis organizational behavior being defined in three ways:

- organizational behavior as a set of psychosocial phenomena. Psychosocial phenomena are such a large area that the authors make some useful guidelines. Thus, into this new category enters that facilitated behavior determined by the organizational processes. Also, it is assigned a behavioral organizational relevance.
- organizational behavior as an area, subject described and explained with a series of concepts and theories and investigated with specific methods. Important in this respect are the criteria used to evaluate behavior. The authors promote the two categories of criteria, namely efficiency - productivity, profit, growth, innovation, adaptation to change and criteria of human advantage - satisfaction, personal development, physical and mental health, quality of life.
- organizational behavior as a center of interest for certain groups, this sense emphasizes the usefulness of organizational behavior for different groups related to the organization.

Organizational communication, freedom of movement and attitudes

Non-organizational or extra professional communication, freedom of movement of people communicating, with few exceptions, is almost equal. What is freedom of movement? The individual freedom of movement means that the individual can interrupt the communication process when this is no longer convenient. In the language of common sense means no one forces us to communicate if you do not want to. There are some exceptions. Before going to work, exceptions are parents and teachers. Regarding parents, affect which accompanies this communication is sufficient to counteract the restriction of freedom. Parents are intimately related to us and if sometimes we get tired of them and refuse to communicate, do not cause large imbalances due to emotional connection.

The teachers, the second category of people is a more powerful threat. Internal discipline, meeting with an authority the fact that you have to do what others say are things important to the child and that was not taught at home. Although it represents a cut in the communicational strategy, meeting with teachers is also emotionally charged. Think of our teacher, the school years and then the large group of teachers. The child's age, different personalities of teachers, low responsibilities of children are factors which may explain some events free rather free than restricted.

[11] Organ,D., Bateman, T., Organization Behavior. An Applied Psychologial Approach, Homewood, Illinois, 1986

The most important cut in the communication strategy is meeting with the boss. A complex character who has sufficient authority to impose terms, a person you depend on 8 hours per day. We dare to say that the communication process with the boss is the most complex and largest energy consumer factor. The individual who succeeds to manage this relationship in his favor will benefit most. From this perspective, organizational communication refers to management communication, head-subordinate communication. There are certainly other communication relationships in organizations, the horizontal - with colleagues, but they depend directly on the relationship with the boss.

From this point the individual really understands what is authority and how to answer it. If the communication strategy of the heads is a permissive, things are not so complicated. But what if it is restrictive and authoritarian? In this situation we must found immediately effective solutions. Why?

- one cannot fight with the boss forever;
- you depend on him 8 hours per day;
- by non-verbal communication, which is hard to demonstrate, you can be kept under pressure;
- the boss can make your life miserable according to the rules. It is one aspect to comply with the rules in their meaning and other to obey them in their spirit. In order to show you what he is capable of it is enough for the boss to comply with the regulation literally and you will be finished after 8 hours;
- it is difficult to get up in the morning and to go to work with fear;
- when you are not on good terms with the boss you will have to be more effective and not be late even one minute; you cannot leave earlier you cannot smoke as much as you used to or drink coffee;
- eventually the boss can ask you to leave the company

For these reasons you will have to be quick and adjust accounts with the boss or leave work. This second solution is inefficient. Think you have some experience at work, a new boss comes and arguing starts. It is better to purchase communication skills and you can handle all kinds of bosses.

Communication styles and organizational effectiveness

Organizational communication styles and attitudes are also analyzed in relevant literature. Research has identified several different communication styles. It refers to how an organization considers to structure their communication processes and to promote a certain style of communication. Obviously, the most important here it is management system that, by authority that shows, decides on the direction. There are other related aspects: quality of labor, nature of activities carried out, the organizational culture of the department or institution, size of the organization.

Dealing with these problems, Maier, 1989, focuses on four major styles of communication used in organizations: the „accusatory" style, the „leading" style, „influence" style, „proactive" style.

These styles are radiographed by Maier after a series of items[12]: the main purpose of communication, style of communication behavior, managing feelings, motivation for acceptance of the behavior, results obtained using a specific communication.

The „accusatory" style

The aim of this style of communication is to find the „scapegoat". It's like we hunt only mistakes, errors and shortcomings. We go quickly after things done well, and the bad are charged with a fine irony. This type of communication induces the idea that things are going well until something goes wrong. At that time everything that has been done good is forgotten. The emphasis is on the prosecution, the negative labeling and not on the causes and reasons that could cause the situation. It is a style very stressful and that causes panic.

The manager who uses this style seems to be somewhere above all that is happening, but he does not advise people but denigrate them as an official accuser who chases mistake as if it is his purpose daily. Communication is a monologue, an aggressive, edgy and ridiculed one. Tags are extreme, the language is tough without reply, the subordinate has no chance to justify himself. In fact, the justification is not accepted as it would break some of the authority of the boss. At the affection level it is generated hostility, tension or fear. In fact, it's all about managing these feelings and not to solve real problems. It is noticed the way affection is traded from the chief of subordinated and vice versa, as a thing in itself. The manager will be right even when he doesn't, a situation which will bring no benefit. Communication is based on the strength of formal authority that subordinates will accept as a necessary evil.

Most times, these events break communication, load it with aggression and the effect is easily understood. Organizational culture is a negative one, the management system is broken, both within and in its relations with subordinates. What remains is resentment, tend to expect instant vengeance, search of faults, not accepting who works harder sometimes makes mistakes.

The „leading" style

The purpose of this style is excessive information. Subordinate receives information about how to perform the work. The less effective part is that he

[12] see Rodica and Dan Cândea, Comuicarea managerială, 1996, Expert Publishing, Bucharest

receives information and when there is not the case. This leads easily to the information overload, which is as dangerous as its absence. The subordinate has no initiative, because he is not allowed to. It should be noted that when labor quality does not allow the initiative, this style can be effective. Imagine a working group that requires the chief at all times to tell them what to do and they follow his directions exactly. In this case it is not the boss at fault. People actually want to be directed precisely. Organizational culture would suffer, but at the level of the management system there is a constant concern to find solutions to the requirements of subordinates. Communication should be blocked because it would not work than from the top down.

In this situation there should be ne unclear aspects, because subordinates are willing to listen without comment to the head. It might be created some sort of balance because some talk – the boss - and some listen - subordinates.

This kind of communication stops at the professional level, leaders would not give indications on personal problems, subordinates would not want to receive such guidance. Affection is lower, but it has practical importance in the economy game. It comes down to professional tasks and to solve them efficiently.

Lack of initiatives impoverishes any organization, and when this is pursued deliberately it leads to cooling of communication in a state of passivity which gradually becomes tired. What remains is an effective communication style if it is promoted by subordinates and the organizational culture already accepted as a routine behavior.

The „influence" style

The management system wants a confirmation of their provisions and instructions. Between the management system and the subordinates it aims to create a bridge needed to generate performance. Influence is mutual communication, feedback, listening and reasoning. We discussed the interpersonal relations, the role influencing plays in communication. The most important element worth emphasizing is that influencing builds bridges of communication. With this style, even if it seeks domination, obedience, this is done by comparing the positions. The strongest will dominate the informed will be heard, the most rational followed.

The management system can take the initiative from the subordinates, if they comply with its philosophy of life. In principle there is no negotiation, the organization's strategic perspective, the policy is the prerogative of management. The rest can be negotiated. Influence is primarily intended to yield the subordinates to get involved.

An important role is played by rewards, especially those material because they compensate the subordinates effort to understand the reference system in which play. Play by the rules of management, with management cards. However there appear initiatives, new things that the leaders take into account.

Such communication may bring together at emotional level, leaders and subordinates, for victories and good results. Alliance is cemented by results and, indirectly, paves the way for a new communication style.

The „proactive" style

The importance of this style is that it paves the way to partnerships. Within organizations the most effective are those between bosses and subordinates. Merging interests of the individual with organizational objectives is a condition that leads to efficiency and organizational balance. Developing a participative management style promotes this style of communication. Subordinates' initiative is not limited by organizational principles and strategies that he cannot pass over.

If there are revolutionary initiatives then they will simply revolutionize the organization. The opening is total and the position of players is not asymmetric in terms of authority. Subordinates and management face each other on an equal footing. Although there are regulations or statutes, organizational culture brings together the two categories of staff. We are talking now about managerial and executive elite.

Communication does not stop at the level of professional duties, it can continue to the personal problems level, thereby accepting affection is openly promoted. The partnership thus formed can last a long time and may help to improve mutual learning. It supports the idea, fundamental to modern organizations, that everyone can learn from everyone. In a world of over specialization this reasoning seems most justified. Only through partnership, specialization can be shared to employees of an organization. Although management will be self-limiting to some of its formal authority, it will win at the level of informal authority and the premises will create partnerships outside the organization.

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THE REGULATORY ROLE OF THE COMPETITION AUTHORITY

Manuela NIȚĂ*

Abstract: *The Competition Council as an authority in the domain of competition has the role to ensure a healthy, normal competitional environment on the market.*

The functioning principles of this authority provide it with a high degree of autonomy, independence compared to other similar administrative authorities in Romania, even if its decisions comply with the judicial control.

Its special status is also given by the functions performed by the Competition Council: normative, jurisdictional and of control. They are accomplished in an appropriate, particular way that does not allow the confusion of the competition authority competences with the judicial court or Parliament attributions.

Keywords: *competition, market, Competition Council, consumer.*

The preservation of competence has constituted an essential component of the integration process and the competition policy has permanently contributed to the integration of national markets in an unique market.

In this context, to elaborate and apply a competition policy compatible with that of the European Union, it was imposed the need to constitute authorities abilited to function in the domain. It thus took birth the Competition Council[1] - administrative autonomous authority.

Competition Council has sequentially acted in developing the free competitional market and in stimulating the economic agents to create a normal competitional environment on a level with the requirements demanded by the European Union. Competition Council is the Romanian administrative autonomous authority in the domain, with legal personality, representing our country in the relations with the organisations and international institutions of the domain. This has the central office in the city of Bucharest, it also has territorial structures named inspectorates.

According to the provisions of Law nr. 21/1996, the Competition Council seeks the enforcement of legal dispositions regarding anticompetitional practices(anticompetitional agreements and abusive use of the dominant position) and controls the economic concentrations(fusions and acquisitions), towards maintaining a normal competitional environment, protecting and stimulating competition, promoting consumers' interests.

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[1] Competion Council started functioning on 6 of September 1996.

1. Legislative framework

The Competition Council functions under law nr 21/1996, as amended[2]. Therewith, its activity is provided by own rules of organisation, functioning and procedure developed for this purpose.

At European level, the existence of the Competition Council is approved by Regulation nr. 1/2003,on the implementation of competition rules, provided in art. 81-82 of Discourse CE, that allows state members to choose their institutions to be designated as national competition authority and to establish their attributions.

2. Functioning principles of the Competition Council

1.The independence and business, political non-involving principle of Competition Council members.

According to the law the members of the Competition Council „do not represent the authority that named them and are independent in taking decisions"(art. 17 paragraph 6).

This phrase precisely expresses the dispensation the law intends to give to these public officials of not being obliged to express themselves in a certain way imposed by the Competition Council. These superior public officials are protected by certain easements,dependencies,by the essay of partisanship and by the interdiction of taking part in a party, political organisation, by the interdiction of having another remunerated activity except for that of teaching in the higher education. Also, they cannot be administrator directors of some economic agents, experts, judges, they cannot make direct trade acts or through intermediaries.

Conditions requested by law to be called member of Competition Council refers to superior studies, high professional competence, civic probity, a good reputation and a seniority of at least 10 years of activities in the economic or judicial domain(art. 17 paragraph 3 of Law nr. 21/1996).

Besides the conditions for obtaining this status, the law establishes also certain prohibitions for the membership mandate holders. Thus, Competition Council members cannot hold any other professional or consulting activities, directly or through intermediaries, in the management or administration of public or private entities or are incompatible with holding office or dignity. They cannot be designated experts or judges by the parties or the law court or by any other institution(art. 17 paragraph 5 of Law nr. 21/1996).

[2] Last substantial change is produced by the Emergency Ordinance nr.75/2010, published in the Official Gazette nr. 459/06.07.2010, approved by Law nr. 149 on 5 of July 2011, published in the Official Gazette nr. 490/11.07.2011

2. The principle of colegiality

According to this Competition Council operates in plena and committees.

This principle is significant also in the situation where not all its members participate at the level of one activity and if the quorum meets, the respective act is considered to belong to the entire board.

The Competition Council Plenum is a collegial body, formed of 7 members, with the following structure: a president, 2 vicepresidents and 4 competition councilors[3].

Collegiality does not mean an unity of point of views, differences may exist. This is approved by art. 20 of law, stating that the Competition Council Plenum meets valid in the presence of at least 5 of its members and decisions are adopted by a majority vote of the Plenum members.

Competition Council works also in committees, formed by three members-a vicepresident and two competition councilors, appointed for each case, by the president. The Committee works valid in the presence of the 3 members, decisions are taken by majority vote. Of these advisors one will perform the Competition Council spokesman rank(art. 7 paragraph 9 of the Regulation on organisation, functioning and procedure of the Competition Council).

At the same time the principle of collegiality means an activity and development, adoption of council acts by an unique expression of the will of its members.

3. The principle of officiality

According to this Competition Council internally demands, it does not need a formal complaint. The law does not deprive those interested of the possibility to appeal to the Competition Council, so this officiality does not signify that an investiture of the Council can be considered invalid if it occurs following a referral of a natural or legal person or any other authority(art. 34 of Law).

4.The principle of the decisive vote in the deliberations of its structures that occur in committees and plenum.

In the deliberation process, each member has one vote, and in equality cases the casting vote belongs to the president(art. 21 par.5 of law).

5.The Principle Of Judicial Control.

According to this decisions adopted in the plenum by the Competition Council are attackable in the Court of Appeal of Bucharest, under the law no. 554/2004 of the Administrative Court, as ammended and supplemented. In other words this single designated court performs the judicial control of the justice on the judicial activity of the Competition Council.

[3] According to the art. 23 of law,Competition Council chairman rank is assimilated with that of minister, vicepresident or that of Secretary of State, and that of competition councilor with that of subsecretary of state.

3. Competition Council Functions

The Competition Council realizes the following functions: the normative, jurisdictional and of control.

Control function:

- concerns attributions according to which this authority identifies the situations where the law in the domain of competition is broken;
- concerns the accomplishment of studies,monitoring,reccomendations forms, proposals, the compilation of notifications regarding facts, competition phenomena;
- concerns the enforcement of its decisions, asks other authorities to take certain measures to reglement efficiency requirements, its normalization.

Mainly, these attributions are the following:

a) conducting effective investigations to better understand the market[4] ;

b) following the enforcement of legal dispositions and other normative acts concerning competition [5];

c) Government notification on the existence of monopoly or restricting competition. Government notification of cases of interference of local administration institutions in the enforcement of the competition law (art.26 letter h) and letter k) in law).

d) the enunciation of recommendations to the public administration institutions to take measures concerning competition market(art. 26 letter m)).

e) the proposal of enforcing some disciplinary measures against public administration institutions' staff who does not obey the legal provisions of the Competition Council[6];

f) carrying out studies, reports and providing Government, public, specialized international organisations with information(art.26 letter o) and p)[7]);

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[4] Art. 26 letter g) performs, by its own innitiative, investigations regarding a certain economic area or a certain type of agreement in different areas, when price rigidity or other circumstances suggest the possibility of competition limitation or denaturation on the market. Competition Council may publish a report regarding the results of the investigation concerning certain economic areas or certain agreements in different areas and invites interested parties to formulate observations;

[5] Art. 26 letter a) carries investigations regarding the enforcement of the provisions of art. 5,6,9,15 and art. 46 paragraph (3) of the present law, as well as of provisions of art. 101 and 102 of the Discourse regarding the activity of the European Union, also see art. 26 letter j) in law;

[6] Art.26 letter n) proposes the Government or local public administrative institutions to take disciplinary measures against staff under their ferule, in case this one does not obey the compulsory provisions of the Competition Council;

[7] Art.26 letter o) realizes studies amd makes reports regarding its area of activity and provides the Government, public and international institutions in the domain with information regarding this activity;
Art.26 letter p) represents Romania and promotes experience and information exchange in the relations with organisations and international institutions in the area, as a national competition authority, the Competition Council is responsible with the relation with European Union Institutions, according to the relevant provisions in the European legislation and cooperates with other competition authorities;

g)ensuring effective implementation of its decisions (art. 26 letter f)[8]).

Jurisdictional function

The function of enforcing the regulation concerning competition in certain illegal, conflictual situations situations in relation to those regulations.The implementation is made through deliberative papers.

The Competition Council acts like a jurisdictional institution but with a special competence and procedure(it is not a part of the justice system).

Attributions of the jurisdiction function:

a)prosecuting cases of violation of normal competition rules through anticompetitional practices, through abuse of dominant position, through economic concentrations(art.26 lett. b)[9] i d)).

b) accepts commitments and imposes interim measures, as provided by law;

c)withdraws, by decision, the benefit of exemption for agreements,decisions of associations of enterprises or concerted practices to which apply the provisions of one of the European regulation of exemption under categories, according to the provisions of art. 29 paragraph(2) of the Council Regulation(CE) nr. 1/2003(art.26 letter e));

d)referral to courts for them to decide in case of competition rules' violation (art.26 lett.i)).

Normative function

This function has the following attributions:

a) approval of draft decisions that affect competition(art.26 lett.l));

b) proposes amendments to normative acts that influence competition(art.26 lett.l));

c)targeting of policy and of state aid schemes and the control of those rules.

d) adopting ***regulations and instructions,*** the issue of ***orders*** regarding the domain of competition, its own procedure, the development and verification of competition policy issues including the meaning of some terms competition law operates with. Also it takes ***decisions*** and formulates ***notices***, makes ***recommendations*** and issues ***reports*** in enforcing law provisions[10].

According to art. 27 paragraph 2 of the competition law, *regulations* are adopted particularly in domains regarding the organisation, functioning and procedure, economic concentrations, anticompetitional practices; the establishment and enforcement of sanctions under this law; charges for notification, access to

[8] Art.26 letter f) ensures the effective enforcement of own decisions, including monitoring ordered measures and effects of economic concentrations conditionally authorised by decisions;

[9] Art.26 lett. b) takes decisions privided by the law for the breach of the provisions of art. 5,6,9 and 15 of this law, as well as of provisions of art. 101 and 102 in the Discourse concerning the functioning of the European Union, found after investigations made by competition inspectors; art. 26 lett. d) takes decisions provided by law for the cases of economic concentrations;

[10] Competition Council Regulations may be attacked in the Administrative Court of Appeal of Bucharest, under Law nr. 554/2004 of the administrative Court of Appeal, with subsequent amendments and supplements(art 28 par. 2 of competition law).

documentation and issuing of copies or extracts; competition inspectors; staff disciplinary regime.

Also,according to paragraph 3, Competition Council adopts *guidelines* particularly in the following domains: analysis of economic concentrations, analysis of anticompetitional practices; interim measures and commitments; the calculation of the turn-over; defining the relevant market for determining the significant market share; the payment of fees and charges provided by competition law and regulations.

Any initiative of a regulation or instruction draft, including the change of the existing ones, preliminary requires the notice of the Legislative Council, whereafter they are adopted in the Competition Council Plenum and implemented by order of the Competition Council president.

Another tool the Competition Council has at hand is the *order,* which implements, suspends or repeals regulations adopted in the plenum, orders the performance of investigations, ensures the internal management and that of staff under ferule, as well as any other measures necessary to fulfill the strategy and competition authority mission. Another tool that the Competition Council has at its hand is the *order,* which implements, suspends or repeals regulationns adopted in the plenum, orders the performance of investigations, orders inspections, takes measures regarding internal management and the staff under the ferule as well as any other necessary measures to fulfill the strategy and the competition authority mission.

Decisions issued by the Competition Council have the legal nature of unilateral administrative acts with individual character, whereby it is stated the violating of this law's provisions and there are applied appropriate sanctions, there are stated measures necessary to restore the competition environment, it is permitted the access to confidential information and it resolves complaints made under this law, as well as under requests and notifications concerning economic concentrations. *Notices* are expressed, *recommendations* and *proposals* are made, *points of view* are expressed, *reports*[11] are prepared and communicated, as appropriate, published, according to the competition law provisions.

The normative function of the Competition Council is not to be understood in the broad sense of the notion of normativity, it is known the role and the function the legislative has, the executive exception to legislate, to norm, to issue regulations.To norm is to regulate. In our case regulations concern the protection, maintaining and stimulating competition and a normal competitive environment, to promote consumers' interests. The entirety of attributions that Competition Council perform allow us to appreciate that this autonomous administrative authority in the domain of competition has also the function of normativity.

[11] Competition Council draws up an annual report regarding its activity and how economic agents and public authorities observe competition rules. The Report is adopted in the Plenum of Competition Council and is published (art.31 par.1 and 2).

To fulfill the purpose for which this authority was created, the Competition Council has the obligation to communicate its point of view on any aspect in the domain of competition politics , at the demand of: the Presidency and Romanian Government;parliamentary committees, senators and deputies, authorities and institutions of central, local public administration; proffessional organisations and employers to the extent that they have legal attributions of regulation in the working areas; consumer organisations;courts and prosecutors.

If the Competition Council should express a point of view in a particular case regarding the privatization policy, respectively the branch or sectoral policies, will consult with resort ministries and other central or local public administration bodies, as well as employers' organizations concerned. They are required to respond to the request in 30 days, to be attached to the report on the case under investigation.

Conclusions

The absence of a well regulated and organized authority on the market leads to chaos, the excess of the merchants who own dominant positions, enables the accomplishment and implementation of illegal agreements as well as abuses of the public administration authorities.

The functioning of the competition authority on the strength of a clear legislative framework, coherent without regulatory gaps, leads to a normal, healthy competitive environment, to a solid market, based on fair competition that leads to progress.

The observance of functioning principles of Competition Council ensures its efficiency on the market. Not infrequently allegations were made about the inaction of the authority, the gentleness of taken measures or the delay of making a decision on a given situation.

The independence of Council members in their decisions, their non-engagement in business are factors that lead to the adoption of objective measures, not imposed by a certain force. Decisions are taken by the principle of collegiality through an unique expression of the will of its members. They may be challenged in the court respecting the principle of judicial control, eliminating any abuse of authority.

Competition Council does not replace the legislator, given its normative function. He gives him support, by elaborating specific acts that implement the law or initiates drafts of legislative acts.

Also, it does not replace the court but acts as a jurisdictional institution.

Control function is maybe one of the best known of the three functions because it comes to complete the picture of tasks Competition Council has.

Council's role is major on the market and the importance of national authorities is recognized by European and international institutions, being a mediator between consumers, merchants and other authorities.

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NEW COORDINATES REGARDING THE SCIENTIFIC FUNDAMENTATION OF THE ACTIVITY OF ELABORATION AND OF THE CORRELATION OF THE INTERNAL LEGISLATION SYSTEM

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Abstract: *The Romanian legislator, in the process of creating governmental decrees, is required by the new law changes of elaborating governmental decrees, to take into account the European Convention on Human Rights, the jurisprudence of the European Court of Human Rights and the European Community law, giving the fact that those are sources of law, and in this case the national court is obliged, in the process of settlement the disputes, to take them into account.*

Keywords: *Legislator, legal norm, the case law of the European Court of Human Rights, unification of law*

Social life requires rules that are meant to function as organizing forces of human interaction[1].

„The need for other, as Hegel said, imposes the law"[2]. The conduct's standardization is therefore the crucial element for one social action. It derives from the need of the society to fulfil a purpose that comes from the very reason of its existence: *order, harmony and social security*.

The activity of legislative consecration of the social general interests in legal governmental decrees is founded on scientific principles, which must be respected both in parliamentary legislative practice and in the regulatory activity of other public authorities with legal powers. The choice of techniques of regulation by the legislator is not arbitrary, as behind this action stand some principles drawn from the constitutional rules of legislative technique or methodology.

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[1]Nicolae POPA, *Teoria generală a dreptului*, 3rd edition, C.H. Beck Publishing House, Bucharest, 2008, p. 117.

[2]Nicolae POPA, Ion DOGARU, Gheorghe DĂNIŞOR, Dan Claudiu DĂNIŞOR, *Filosofia dreptului. Marile curente*, All Beck Publishing House, Bucharest, 2002, p. 23.

The legislature does not build the legislative solutions (legal norm) randomly, in a chaotic way, but through a complex process based on a thorough and comprehensive scientific study of reality, of social needs, which must ensure the necessary correspondence between facts and law. Through shallow or insufficient knowledge of the facts you can reach inefficient and unsustainable legal solutions, with negative consequences in terms of its application. Such a law that was created without taking into account the real social needs will be faced with the phenomenon of rejection, of rebellion of the facts against the laws[3].

Therefore, lawyer and sociologist Dimitrie Gusti said that the legislative „mania" that turns the Parliament into a „factory of laws" should be avoided.

Scientific substantiation of a legislative draft must include:

2. *The description of „the facto" situations which will transform into „the jure" situations*;
3. Analysis of value judgments on determining „de facto" situations which must be transformed, changed, and are „in contact" with the value judgements that inspire change, determination, the effective anticipation of possible future regulations;
4. *The social cost* of future legislative reform;
5. The need for regulation, which means determining the right timing for the legislature to intervene.

In the conceptualization phase of governmental decrees, are used, usually the following procedures[4]: the inventory of existing legislation subjected in the field of future regulations, notification of deficiencies that exist and appreciation of future regulations that are proposed; preparation of economic and sociological studies on the evolution and trends of the phenomena and relationships that are the subject of legal regulation; review of legislation in other countries[5].

[3] Nicolae POPA, *Teoria generală a dreptului*, op.cit., p. 173.
[4] Gheorghe BOBOŞ, *Teoria generală a statului şi dreptului*, Didactică şi Pedagogică Publishing House, Bucharest, 1983, p.150.
[5] Ilariu MREJERU, *Tehnica legislativă*, Academiei R.S.R. Publishing House, Bucharest, 1979, p. 29.

Scientific substantiation of the principle of law-making activity can be verified by *knowledge of the presentation tools and motivation*[6] that must accompany the draft legislation (art. 6 of the Law no. 24/2000 concerning the technical rules of legislative drafting, republished[7] and modified) namely:

- statement of reasons for draft laws and legislative proposals;
- *fundamentation notes* regarding the Government ordinances and decisions; the ordinances which must be submitted to the Parliament, according with the enabling law, and Emergency Ordinances must be forwarded to the Parliament accompanied by the explanatory memorandum to the draft Law for their approval;
- *approval reports* for other regulations;
- *impact studies* for projects of importance and extremely complex laws and draft laws for approval of orders issued by the Government under an enabling law and subject to approval by Parliament.

But the legislator brings a very important new element. Thus, it is bound by law that „*in the work of documentation to substantiate the draft law, to examine practice of the Constitutional Court in that field, the jurisprudence of the European Court of Human Rights the practice courts in applying regulations and doctrine litigation"* (art. 21 of he Law no. 24/2000 republished).

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[6] These tools of presentation and motivation shall include:

a) the reason for the issue of the enactment – the demands which require the intervention of regulatory requirements, with special reference to the inadequacies and inconsistencies regulations; basic principles and purpose of proposed regulations, identifying new elements; results of studies, research papers, statistical evaluations; references to policy documents or governmental decree to which that project implementation is developed. For emergency ordinances objective elements will be presented separately of the extraordinary situation that requires immediate settlement, the use of emergency parliamentary procedure not enough and any consequences that might occur in the failure to take legislative measures proposed;

b) socio-economic impact - effects on macroeconomic environment, business, social and environmental, including assessing the costs and benefits;

c) financial impact on the consolidated budget in the short term for the current year and long term (5 years), including information on costs and incomes;

d) impact on legal system - the implications that new regulations have on legislation; compatibility with Community rules, determining them exactly and, where appropriate, further harmonization measures to be taken; Court decisions of the European Union and other relevant documents for the transposition or implementation of those laws; implications on national legislation, the ratification or approval of treaties or international agreements and the necessary adaptation measures; the preoccupations towards harmonization of laws;

e) the consultations undertaken to develop draft legislation, organizations and professionals consulted, the essence of the recommendations received;

f) public information activities on development and implementation of regulations;

g) implementation measures - institutional and functional changes in the central and local government.

The final form of presentation and motivation tools to draft legislation should include references to the opinion of the Legislative Council and, where appropriate, of the Supreme Defence Council, of the Court of Auditors or the Economic and Social Council.

[7] Republished under Article II of Law no. 60/2010, approving Government Emergency Ordinance no. 61/2009 amending and supplementing Law no. 24/2000 on rules of legislative drafting technique, published in the Official Gazette, Part I, no. 215 of April 6, 2010, giving the texts a new numbering

What characterizes the Roman-Germanic legal system based on written law, is that legal rules do not all have the same force[8], which causes them to constitute a *normative order*[9]. This principle of hierarchy of norms includes in the liberal view, two aspects: *the existence of a constitution and rule of law*, which is the impossibility of the existence of any constraints in the absence of a legal act in force[10].

So, *the rule of law*, completed by *the supremacy of the constitution* opposes the legislature itself. Thus, the law itself represents a „safe source"[11].

Exercise of the three functions of the state is subject to compliance with *the fundamental principle of legality*[12], and legal norms of different content and ranking, in this „regulatory cascade" are subordinated to one another, ranked in a descending order according to the issuing body (formal criteria hierarchy) or by the content of the decree itself (material criteria of classification). All these are equally mandatory forming „the block of legality"[13].

As for ordering and prioritizing written sources of law, they are based on the content of legal norms and on the position occupied, in the system of state bodies, by the public issuing authority, elements that, together, reflect the degree of the enactment and settlement to the hierarchy, respectively *its legal force*[14]. On the other hand, if between different categories of legal rules there are contradictions; the question arises, which of them are applicable? The hierarchy of norms is what sets the priority rules in relation to others, reporting to each other, and not to the individual.

Consequently, these relations constitute the normative hierarchy of priority between legal norms.[15].

From the above we might conclude that the hierarchy of legal norms refers only to written sources, and not to the unwritten ones (case law, custom, general principles of law)! In fact, the text of art. 4 of Law no. 24/2000 concerning the technical rules for legislation drafting,[16] provides that „normative acts are

[8] We make the difference from the „law appliance" notion; see in this regard Nicolae POPA, *Teoria generală a dreptului*, op.cit., p. 190; Gheorghe BOBOŞ, *Teoria generală a statului şi dreptului*, op.cit., pp. 162- 165.

[9] Tudor DRĂGANU, *Actele de drept administrativ*, Scientific Publishing House, Bucharest, 1959, p. 63.

[10] Ion DOGARU, Nicolae POPA, Dan Claudiu DĂNIŞOR, Sevastian CERCEL, *Bazele dreptului civil*, Vol. I. *Teoria generală*, C.H. Beck Publishing House, Bucharest, 2008, p. 48; Mihai GRIGORE, Tehnica normative, C.H. Beck. Publishing House, Bucuresti, 2009, p. 43.

[11] Ibidem, p. 49.

[12] Failure to observe this principle of legality (sitting on the constitutional principle of rule of law) brings the nullity sanction (absolute / relative) or even the inexistence of the act.

[13] P. PRESCATORE, *Introduction en la science du droit*, Centre Universitaires de L'Etat, Office des imprimes de L'Etat, Luxemburg, 1978, p. 180.

[14] Lucian CHIRIAC, *Respectarea caracterului ierarhic al normei juridice. Supremaţia legii*, in volume *Pentru o teorie generală a statului şi dreptului*, op.cit., p. 172.

[15] Ion DOGARU, Nicolae POPA, Dan Claudiu DĂNIŞOR, Sevastian CERCEL, *Bazele dreptului civil*, Vol.I. *Teoria generală*, op.cit., p. 59.

[16] Law no. 24/2000 on technical rules for legislative drafting, republished in the Romanian Official Gazette no.260/2010

developed according to their hierarchy, their category and to their competent public authority to adopt them".

The creation of governmental decrees shall take into account their employment in the legal system which forms a whole and involves multiple links between legal rules, so that between them there must be a certain hierarchy, correlation, compatibility, interdependence, etc.

Article 13 of Law no. 24/2000 republished provides that the governmental decree must fit organic law system, for which purpose:

a) the draft legislative act must be correlated with the provisions of normative acts of superior or of the same level, with which it is in connection;

b) the draft legislative act, prepared on the basis of an superior level can not exceed limits established by that act jurisdiction and can not contravene the principles and provisions of this act;

c) the draft legislative act should be linked with Community regulations and international treaties to which Romania is part of. As soon as a new law appears it is necessary that all governmental decrees which have lower legal force (judgments, orders, etc.) should be repealed and tied in with the new legal regulation. For example: Art. 154 Paragraph 1 of the Constitution republished provides that „laws and other categories of governmental decrees shall remain in force, since they do not contravene the Constitution".

d) the draft legislative act should be linked with *the European Convention on Human Rights and its additional protocols*, ratified by Romania, and with the jurisprudence of the European Court of Human Rights.

The basis of that relationship is the principle of hierarchy of the legal system of legal norms. The normative documents are developed according to their hierarchy, their category and to their competent public authority to adopt them. A hierarchy criterion is the position occupied by the issuing state (Article 4 of Law no. 24/2000 republished). Only in this manner it is possible to keep the unity of the governmental decree adopted by the legislature and to maintain the unity of the system of law.

Furthermore, regarding the relationship between national and Community legislation and international treaties, the legislature is obliged to harmonize *the legal systems with European Union legislation, the provisions of international treaties to which Romania is part of, the dispositions of the European Convention of Human Rights and its additional protocols and the jurisprudence of the European Court of human Rights* and to this end were made, by Law. 29/2011 last changes in Law. 24/2000 republished, which provide that:

- „Legislative solutions proposed by the new regulator should consider regulations on European Union, ensuring compatibility with them" (Art.22 Para.1);
- „The provisions mentioned apply properly in terms of provisions of international treaties to which Romania is part of, and to the case law of the European Court of Human Rights" (Article 22 para.2);

- „Where appropriate, proposals to amend and supplement the internal legal acts will be made to those whose provisions are consistent with those acts to which Romania is a party or to those that are incompatible with Community law or with those that are in contradiction with the case law of the European Court Human rights „(Article 22 Para.3);

- „Government, within 3 months from the communication of the European Court of Human Rights decision, shall submit a draft law on amending and supplementing or repeal a legislative act or parts of it, which are in contradiction with the European Convention human Rights and its additional protocols, ratified by Romania, and with the decisions of the European Court of Human Rights „(Article 22 Para. 3).

In conclusion, recent changes to the law on internal drafting demonstrate and reinforce the idea that the role of ECHR jurisprudence[17] is essential in the domestic legal order of each member of the Council of Europe.

Among its most current U.E. objectives we mention joining the Convention on Human Rights and Fundamental Freedoms, this being the legal basis of Art. Article 6.2 of the Lisbon Treaty European Union (TEU).[18] Once the European Union will

[17] Jurisprudence of the Court is very rich, as it interprets and explains the ECHR and its additional Protocols. Thus, the provisions C.E.D.O. can not be interpreted and applied only with reference to systematic jurisprudence.

[18] Entry into force on 1st December 2009, of the Lisbon Treaty has reopened the question of EU accession at European Convention on Human Rights and Fundamental Freedoms and how practical it is to be achieved. The legal basis lies in Article 6 Para. 2 TEU that „the Union shall accede to the European Convention on Human Rights and Fundamental Freedoms [...]", and in the institutional aspects of the protocol detailing and materials that must be considered during negotiations.
EU accession at C.E.D.O. will allow the unification of jurisprudence in the protection of human rights across Europe, thus reinforcing the level of protection to EU citizens to enjoy. EU Court of Justice (ECJ) has jurisdiction to enforce the laws of the European Union will cooperate in a modern legal framework provided by the future EU accession treaty at ECHR, with the Strasbourg court, according to the principle of complementarity. Moreover, the current jurisprudence of the Luxembourg court takes into account the jurisprudence of the Strasbourg court, and the Declaration 2 annexed to the Treaty of Lisbon „becomes aware of a dialogue between the Court of Justice and the European Court of Human Rights (...)."
Moreover, Union currently recognizes the rights, freedoms and principles in the Charter of Fundamental Rights of 7 December 2000 (adopted on 12 December 2007 in Strasbourg). The Charter has the same legal value as the Treaties. Legal force of the Charter is a major step forward and translates the political will and legal protection to ensure the highest possible human rights in Europe and the need for legal certainty. Thus, it can be argued that with the entry into force of the Lisbon Treaty, the European Court of Justice also became a Court of Human Rights.
EU accession to the ECHR will create the necessary legal framework for people who believe that their rights had been violated under the European Convention by an act or omission of the European institutions to have access to legal means to call the European Union to face court Strasbourg, seeking damages, on the same terms that would address such a request today from the Member States whose nationals are. Currently, negotiations between the EU and the Special Committee appointed by the Council of Europe for EU accession at C.E.D.O. are about to be finalized. „Text completion is expected at late 2011 and signing the agreement as soon as possible in 2012". Information taken from the official website: http://www.mae.ro/node/4492.

join the European Convention on Human Rights[19], there will be a harmonious development between the ECJ case law and European Court of Human Rights case law, providing a coherent system of protection of human rights and fundamental freedoms throughout the continent.

It was natural that the Romanian legislator, in the creation of governmental decrees to be bound by a binding legal instrument, to take into account the European Convention on Human Rights, the European Court of Human Rights and European Community law but, given that they are sources of law, the national judge is required, as in the settlement of disputes, to take them into account.

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[19] Protocol 8 attached to the founding Treaties of the European Union speaks of an "agreement" on European Union accession to the European Convention on Human Rights.

PROVISIONAL MEASURES FOR THE DEFENSE OF NON-PATRIMONIAL AND INTELLECTUAL PROPERTY RIGHTS

Paul-George BUTA[*]
Gheorghe BUTA [**]

Abstract: *The New Civil Code contains a broad regulation of the non-patrimonial rights, providing by art. 253 of the Civil Code ("The defense means") the categories of civil actions that may be submitted in front of the court by way of the ordinary law procedure, while art. 255 ("Provisional measures") provides the conditions and categories of provisional measures that can be taken by the court upon the request of the person harmed in its non-patrimonial right.*

The draft Law for the enactment of the New Civil Procedure Code provides the introduction therein of the Chapter titled „Provisional measures in intellectual property rights matters", where there are regulated the provisional measures also proposed by the Civil Code, but which will be applied not only to the non-patrimonial intellectual rights, but also to those having a patrimonial content.

In both cases – non-patrimonial and intellectual property rights – not only the categories of provisional measures for the defense of such rights and the conditions for the application are identical, but also the procedure of taking such measures, which is the one of the presidential ordinance, with all legal condition related to such procedure, but also with specific aspects.

Keywords: *Civil Code; Civil Procedure Code; non-patrimonial rights; defense means; provisional measures; intellectual property rights.*

1. The defense means of non-patrimonial rights in the New Civil Code

The New Civil Code comprises in Book I (About persons) Title II (The natural person), Chapter II (Respect owed to human being and its inherent rights) and in Title V (The defense of non-patrimonial rights) an ample regulation of the non-patrimonial (or extra-patrimonial) rights, also designated as rights of personality. As an absolute novelty, the New Code refers to the non-patrimonial rights of the legal persons as well (art. 257). This regulation is made by both substantive law norms – especially, but not exclusively, by those of arts. 58 – 97 and arts. 225 – 230 – as well as by procedural law norms – especially those of arts. 253 – 257.

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The means of defense of the non-patrimonial rights are regulated by art. 253, having the marginal title „Means of defense" and by art. 254, with the marginal title „Defense of the right to name". Article 253 is a text of general application, for all non-patrimonial rights, regardless the category they are part of, while art. 254 aims only at the defense of the right to name and pseudonym.

Article 253, at paragraphs (1), (3) and (4), provides the categories of civil actions that may be introduced in front of the court by the natural person and – by the reference made to art. 257 – by the legal person the non-patrimonial rights of which were breached or threatened.

We notice that the New Civil Code, although comprising, as already shown, a broad regulation of what is designated by the syntagm „personality rights", makes no express reference, in the entire Chapter II of the Title II of Book I to the intellectual property rights. This is because the legislator probably departed from the fapct that such rights are specifically regulated by special laws.

In exchange, in Title V, dedicated to the defense of the non-patrimonial rights, art. 252 ("Protection of human personality") shows that „any natural person is entitled to the protection of the values inherent to the human being" and, while exemplifying such values, it also specifies the „scientific, artistic, literary or technical creation", alongside other values regulated within the Code.

From this we believe we can draw the conclusion that the defense of the intellectual property rights can be made also by the defense means made available through the provisions of arts. 253 and 254 of the Civil Code, but only as to their non-patrimonial component. The defense of the intellectual property rights with patrimonial content shall continue to be made through specific legal means.

The choice of the legislator to specify among the protected values „the scientific, artistic, literary or technical creation" seems to be excluding, from the sphere of the non-patrimonial rights, the moral rights of the artists interpreting and performing (provided by art. 96 of Law no. 8/1996), the moral rights of the sound recording producers (provided by art. 104 of Law no. 8/1996), the moral rights of the audio-visual recording producers (provided by art. 106^2 of Law no. 8/1996), as well as any right on the trademarks, all these being protected independently of the performance of any creation effort. We underline that in the case of the trademarks such non-patrimonial right is not granted by the special law either, the right over the trademark being one of exclusive patrimonial content.

A teleogical interpretation would lead to the conclusion that the legislator did not understand to exclude from the sphere of the protected non-patrimonial rights the moral rights of those holding title over rights connected to the copyright shown above, and in this respect the listing of the protected values from art. 252 is an exemplificative one as well, fact that it is confrmed by the use of the expression „as they are" and that it did not understand to create any new non-patrimonial right over the trademarks.

But art. 104 and 106^2 of Law no. 8/1996, texts of law that provide the content of the non-patrimonial rights of the producers of sound and audio-visual recordings

specify that „In case of reproducing and distributing [the recordings]... the producer is entitled to inscribe on their supports, inclusively on covers, boxes and other wrapping materials, among the mentions concerning the author and the interpreting or performing artist, the titles of the works, the year of first publishing, *the trademark*, as well as the name or denomination of the producer" (emphasis added - P.G.B., Gh. B.).

Thus, there might be discussed the existence of a new non-patriomonial right, when using the trademark (by the producers of sound and audio-visual recordings), susceptible of being protected by the means regulated by the New Civil Code.

We underline that the right of the producers of sound and audio-visual recordings of inscribing their own name or denomination on their respective supports, inclusively on the covers, boxes and other wrapping materials might be protected also on the ground of the provisions of art. 254 of the New Civil Code, as to the denomination of the producer legal person, by coroboration with the provisions of art. 257.

However, considering that save for the right of using the trademark by the producers of sound and audio-visual recordings, the other non-patrimonial rights are protected by specific means provided by special laws, the provisional measures that might be taken for the defense of such rights, on the ground of art. 255 of the New Civil Code, might be of interest for the titleholders of such rights.

2. The provisional measures for the defense of the non-patrimonial and intellectual property rights

The special means for the defense of the non-patrimonial rights provided by art. 253 and 254 of the new Civil Code, consisting in various actions in court available to the harmed party will be used by way of the ordinary law procedure, with all procedural guarantees provided by the law for all parties. This fact determines that, on the one side, the measures taken by the court shall be irrevocable (or final, after the enactment of the new Civil Procedure Code) but, on the other side, that such measures be taken after a relatively long period of time since the breaching or the commencement of the illicit deed breaching the non-patrimonial right or since the submission of the action in court. During this entire period of time, if we limited ourselves only to the above mentioned defense means, the protection of the non-patrimonial rights would be suspended.

For that exact reason, in order to ensure a rapid and efficient protection of the non-patrimonial rights, ever since the commencement of their breaching, or even prior to this moment, the legislator provided the possibility of taking, in an urgency regime, of some defense provisional measures, that would last until the court shall settle the action on merits on the ordinary law procedure.

Article 255 of the New Civil Code, having the very marginal title of „Provisional measures" provides both the conditions under which such measures

can be taken and the categories of provisional measures that can be taken by the court upon the request of the person „considering itself harmed" in its non-patrimonial right. We feel the need to underline that the provisional measures provided by this text of law aim at defending all non-patrimonial rights of a person and not only the right to name or pseudonym.

Considering the specification in art. 252 of the scientific, artistic, literary and technical creation as values of the human being that must be protected, as well as the general provisions concerning the „non-patrimonial rights", without any distinction, those of art. 255 but also taking into account the insertion of all these provisions in the Title V „Defense of non-patrimonial rights", we can state that the provisional measures available to the harmed person can be taken also in case of breaching some intellectual property rights, but we underline that it is only the case of those with *non-patrimonial* content or only with regard to the *non-patrimonial* content of such rights.

This last specification explains why, under the conditions of the existence of art. 255 Civil Code and its application to the non-patrimonial intellectual property rights, there was felt the need and there was proposed the supplementing of the Civil Procedure Code, adopted but not enacted[1], with dispositions referring to provisional measures in the matters of intellectual property rights. The explanation is even clearer from the perspective of the contents of art. 964^1 paragraph (1), as it is proposed to be introduced, which has the marginal title „Application field": „The dispositions of this chapter regulate the provisional measures necessary for the defense of the intellectual property rights, *regardless of their patrimonial* or non-patrimonial *content* (emphasis added - P.G.B., Gh.B.) and of their origin".

It therefore results that, wanting to ensure an increased protection of the intellectual property rights, especially to grant to the intellectual property rights of *patrimonial* content the same protection as the one given to the non-patrimonial rights (inclusively those of intellectual property of non-patrimonial content), by art. 255 Civil Code there was proposed the insertion of Chapter IV in the Book VI of the Civil Procedure Code.

Art. 964^2, which is proposed to be introduced in the Civil Procedure Code stipulates, at paragraph (1), who is the titleholder of the action in court with a view to the taking of the provisional measures, respectively the person that has, from the perspective of this text of law, the active procedural capacity: „the titleholder of the intellectual property right or any other person exercising the intellectual property right with the titleholder's consent". This differs from art. 255 paragraph (1) Civil Code, which reads that the taking of provisional measures can be requested in court

[1] The Civil Procedure Code was adopted by Law no. 134/July 15th, 2010, and it was to enter into force at a date to be established by the Law for its enactment. In the draft Law for the enactment of the Civil Procedure Code, at art. 13 item 280 there was provided the introduction, in the Book VI, „Special procedures", Title IV „Provisional and precautionary measures", of a new Chapter IV „Provisional measures in the matters of intellectual property rights".

by the „person considering itself harmed", syntagm that must be understood from the perspective of the specifications made by art. 253 paragraph (1): „a natural person whose non-patrimonial rights have been breached or threatened".

The legislator thus maintains the sphere of the persons with active procedural legitimacy to introduce such requests for the defense of the industrial property rights provided by the Government Emergency Ordinance no. 100/2005 which shown, under art. 4, that such capacity is enjoyed by the titleholders of the rights and „any person authorized to use the industrial property rights, especially the licence beneficiaries", such persons being able to be considered as the same with those „exercising the intellectual property right with the titleholder's consent".

We underline that art. 1 paragraph (2) of GEO 1005/2005, qualifying the nature of the protected rights as industrial property rights excludes from its sphere of application the copyrights and the rights connected thereof. In fact, the Law for the enactment of the New Civil Procedure Code provides the supplementation of Law no. 8/1996 with dispositions similar to those applicable to the industrial property rights, according to GEO no. 100/2005.

Besides the specified difference, the text of art. 964^2 „Provisional measures" proposed to be introduced in the Civil Procedure Code is identical to the one of art. 255 „Provisional measures" of the Civil Code, so that the comments in their regard shall be similar.

3. Categories of provisional measures

If the conditions required by the above mentioned provisions are met, the court will be able to order the taking of provisional measures. According to paragraph (2), the court may order, especially:

a) The forbidding of the breach of the non-patrimonial right [paragraph (2) letter a) 1^{st} thesis]

Although not expressly provided, as in the case of the 2^{nd} thesis of letter a), the forbidding of the breaching can be ordered only provisionally, on a period of time precisely determined, this being of the essence of the provisional measures and the procedure of the presidential ordinance.

The possibility of provisionally forbidding the perpetration of the future deed could not be requested, upon a strict interpretation of the text of law, not even in the case of the industrial property rights, on the ground of GEO no. 100/2005, as art. 9 paragraph (1) letter a) provides the possibility of requesting the forbidding „under provisional title, that the alleged breaching to continue". Subsequent to the modification of GEO no. 100/2005 by the Law of enactment of teh New Civil Procedure Code, the provisional measures that can be requested are harmonized at the level of those specified by art. 964^2 of the respective Code.

This measure aims at provisionally forbidding the perpetration of the illicit deed, if such deed is imminent, as the forbidding for the future of the illicit deed,

which has already started and continues, makes the object of the measure provided by the 2nd thesis.

b) The provisional cessation of the breach of the non-patrimonial right [paragraph (2) letter a), 2nd thesis]

This time, the legislator provided expressly the provisional character of this measure. The measure aims at the cessation for the future of the illicit deed, if such deed is still ongoing.

c) The taking of the necessary measures to ensure the preservation of evidence [paragraph (2) letter b)]

The „preservation of evidence" can be realized, in the case of breach of some non-patrimonial rights as well as in the case of a breach of intellectual property rights of patrimonial content, even in the absence of this provision from the New Civil Code, respectively from the New Civil Procedure Code, through the procedure of preserving the evidence, provided by arts. 235 – 238 of the Civil Procedure Code in force or the one of „preserving the evidence" regulated by the New Civil Procedure Code by arts. 353-359. It is true that the analyzed text uses the syntagm „preservation of evidence", while the preservation of evidence, according to art. 235 Civil Procedure Code in force and art. 353 of the New Civil Procedure Code is made through the „collecting" of those evidence facing peril of disappearance or that would be difficult to be produced in the future, but the most used and useful manner of preserving evidence – if not the only one – is to produce such evidence prior to its alteration, destruction or disappearance.

The measures the court might consider necessary for the preservation of evidence and which it might take envisage for the most part, in our opinion, those measures considered by art. 253 Civil Procedure Code: acknowledging the confession of a party, opinion of an expert, situation of goods, movable or immovable, recognition of a writ, fact or right.

Although the text refers to the *preservation of evidence* (emphasis added – P.G.B., Gh. B.), we believe that a teleological interpretation allows us to state that the court will be also able to order measures for the acknowledging of a certain situation of facts that might cease or change until the producing of evidence. But, even if the court will consider that the text of paragraph (2) letter b) of art. 255 of the New Civil Code does not allow it to do so, it would still be able to order such measure, if considered necessary, on the ground of art. 239 Civil Procedure Code, respectively of art. 353 of the New Civil Procedure Code.

Subsequent to the modifying of GEO no. 100/2005 by the Law for the enactment of the New Civil P Rocedure Code, the measures for the preservation of evidence will be ordered according to the provisions of art. 964^2 of the respective Code.

In the matters of provisional measures for the defense of the industrial property rights, GEO no. 100/2005 also provides the possibility of requesting the obligation of „the persons presumed to have breached a protected industrial property right ... to constitute a guarantee meant to ensure the indemnification of the protected right's tit'eholder" [art. 9 paragraph (1) letter b)].

The provisional measures provided by paragraph (2) letters a) and b) are those the legislator considered as being the most frequent and useful for the provisional protection of the non-patrimonial rights and that is why it stipulated that the courts may order them „especially", therefore not exclusively. Consequently, the harmed person may request the court and the judge may order the taking of provisional measures other than those expressly provided, however in observance of the conditions imposed by paragraph (1) and, as the case may be, paragraph (3) of art. 255.

4. The conditions necessary for the taking the provisional measures

A first condition provided by paragraph (1), in order for the court to be able to take a provisional measure, is that the person considering itself harmed must make the credible proof of the fact that its non-patrimonial rights are the object of an illicit action. It results that the claimant has to prove both the action of breaching of its non-patrimonial right and its illicit character.

A second condition provided by the text of law is that the illicit action invoked by claimant should be actual or imminent, only in this case being justified the urgency for the taking of the provisional measures. The mere evidencing of the actual or imminent character of the deed is of a nature to grant legitimacy to claimant's enterprise, from the point of view of the urgency, because, in the cases when there is provided by law the taking of measures by way of presidential ordinance – as it is our case – the court must no longer verify such condition, for it is presumed by the legislator.

The third condition imposed by the text of paragraph (1), in order to be able to take the provisional measures – and which also falls under the general conditions of the presidential ordinance – is the existence of the risk that the illicit action causes a prejudice difficult to recover. It is about an imminent prejudice which has not occurred yet but will certainly occur, if the circumstances presented by the claimant do not change, so it is not about a possible prejudice. On the other side, the request is admissible not only if the prejudice that may occur could not be repaired at all, but also if its subsequent repairing would be possible, but with difficulty.

Paragraph (3) provides some supplementary conditions for the taking of provisional measures, in case of prejudices brought through the means of the written or audio-visual press. Thus, the court will not be able to order the cessation, under provisional title, of the prejudicial action unless: a) the prejudices caused to the claimant are severe; b) the action is not evidently justified, according to art. 75; and c) the measure which the court is to take, upon claimant's request, does not appear as disproportionate relatively to the caused prejudices.

The three supplementary conditions provided by paragraph (3) for the taking of the provisional measures in case of prejudices brought through the means of written or audio-visual media impose on the claimant a supplementary evidencing

effort, while on the judge impose a deeper and more restrictive analysis in the taking of such measures, inclusively from the perspective of the international treaties and conventions Romania is a party to and to which art. 75 of the New Civil Code refers, indicated by the very text of paragraph (3). From this perspective the judge is to analyze the seriousness of the prejudices, the obvious non-justified character of the action and the proportionate or disproportionate character of the provisional measure to be taken, relatively to the caused prejudice.

In the final part of paragraph (3) it is specified that the provisions of art. 253 paragraph (2) remain applicable, which means that the court will be not able to order, by way of presidential ordinance, under the title of provisional measure, the forbidding of an imminent illicit deed, in case of breach of non-patrimonial rights by the exercising of the right to free speech.

If GEO no. 100/2005 imposed, in the matter of industrial property rights, with a view to the taking of provisional measures other than the preservation of evidence, only the first two conditions specified above (respectively the existence of an actual allegedly illicit action or with imminent effect), in case of the measure of preserving the evidence, the legislator not only imposed the satisfaction of all three conditions specified above, but in regard of the prejudice, the latter had to be „irreparable" and not only" difficult to be repared". Subsequent to the modification of GEO no. 100/2005 by the Law for the enactment of the New Civil Procedure Code, the measures for the preservation of evidence shall be ordered according to the provisions of art. 964^2 of the respective Code.

5. The procedure of taking the provisional measures

The procedure of taking the provisional measures for the protection of the non-patrimonial rights and intellectual property rights of a person, regulated by paragraphs (1) – (3) and indicated, as exampleand underlined, in the case of paragraph (2), is provided by paragraphs (4) – (8) of the same articles, respectively art. 255 Civil Code and 964^2 Civil Procedure Code.

Paragraph (4) provides that „*The court settles the request in line with the provisions concerning the presidential ordinance, which apply accordingly*". Consequently, when taking the above mentioned provisional measures, the court will apply the ordinary law provisions of the special procedure concerning the presidential ordinance, respectively those of arts. 581 – 582 of the Civil Procedure Code in force, respectively in art. 982 – 987 of the New Civil Procedure Code, although some of them have a „corresponding" application by reference to the specificity of the matter.

Considering this aspect, we limit only to stressing the manner in which the provisions of the Civil Procedure Code apply, insisting only on those aspects specific to the protection of the non-patrimonial and intellectual property rights.

From the perspective of the provisions of art. 581 paragraph (1) of the Civil Procedure Code in force and of art. 982 of the New Civil Procedure Code, the court will have to verify whether the case is an urgent one, respectively the urgency of taking the provisional measure. In the matter of presidential ordinance there is no main urgency, but the judge has to ground its decision and to point out the specific factual circumstances out of which it results, in the respective case, the urgency. This condition of urgency results specifically, as shown above, also from the provisions of art. 255 paragraph (1) of the Civil Code and respectively of art. 964^2 of the New Civil Procedure Code, which impose that the illicit action breaching the non-patrimonial right should be „actual or imminent", only this character of the illicit action giving legitimacy both to claimant's request and to the favorable solution of the court in respect thereof. The urgency, respectively the actual or imminent character of the illicit action, must persist during the entire judgment procedure, both in first court and during the exercising of the ways of attack, because if until the rendering of an irrevocable solution the urgency persists no more, there would be no need for the taking of a provisional measure.

Subordinated to the urgency of the measure that is to be taken is also the condition of the prejudice, of the damage that might be caused by the illicit deed. If art. 581 paragraph (1), respectively art. 982 of the Civil Procedure Code require that the „damage" be imminent and not recoverable if it had already occurred, art. 255 paragraph (1) of the Civil Code and art. 964^2 of the New Civil Procedure Code do not impose for the „prejudice" to be irreparable, but rather provide that a provisional measure can be taken even if the „prejudice" is only „difficult to repair". The imminent character of the prejudice/damage is present in both texts, expressly [art. 581 paragraph (1) and art. 982 paragraph (1) of the Civil Procedure Code] or implicitly [art. 255 paragraph (1) of the Civil Code and art. 964^2 of the New Civil Procedure Code].

The requirement of non-prejudging the merits of the case, respectively of non-analyzing the merits of the legal relation that makes the object of judgment, applicable in the case of the presidential ordinance, has to be met in case of taking provisional measures for the defense of non-patrimonial rights as well, even if it imposes on the claimant to make the „*credible proof*" that it's rights *„make the object of an illicit action*".

The temporary character of the measure ordered by way of presidential ordinance is another feature and essential requirement of this procedure, resulting either from the nature of the taken measure or from the content of the ordinance, whereby it is shown that it produces effects only for a certain period of time. The temporary character of the measures provided by art. 255 of the Civil Code and by art. 964^2 of the New Civil Procedure Code results from their very name in the marginal title, i.e. „provisional measures", as well as from the disposition of paragraph (2) letter a), in the meaning that the court may order the provisional forbidding of the breaching or its provisional cessation.

Most of the presidential ordinances, having as legal ground art. 581 of the Civil Procedure Code, concern the taking of provisional measures until the settlement of the action on merits, submitted subsequently or concomitantly with the request for a presidential ordinance. In this case, whether provided expressly or not in the ordinance, the ordered measure produces effects until the settlement of the litigation concerning the merits. The situations in which presidential ordinances are issued by the judge without an action existing on the dockets of the court concerning a judgment on the merits of the legal relations between the parties may be considered exceptions.

Paragraph (4), second phrase of art. 255 of the New Civil Code and art. 964^2 of the New Civil Procedure Code places at the same level the exceptions of so far – the request of presidential ordinance without action on merits – with the rule set by the provisions of art. 581 of the Civil Procedure Code, however without infringing the requirement of the temporary, provisional character of the measures ordered via presidential ordinance. Thus, it is provided that „in case the request is submitted *prior* to the submission of the actions on merits (emphasis added – P.G.B., Gh. B.), by the decision ordering the provisional measure there shall also be set the term within which the action on merits has to be submitted, under the penalty of the *de jure* cessation of the same measure", reference being also made to the provisions of paragraph (6), according to which „The measures taken according to this article *prior* to the submission of the action in court for the defense of the breached non-patrimonial right (emphasis added – P.G.B., Gh. B.) ceases de jure if claimant did not vest the court within the term set by the latter, but not later than 30 days since the taking of the measures".

The most important conclusion to be drawn is that the presidential ordinance is admissible regardless of the fact that an action on merits was filed or not, this aspect bearing no significance as to the provisional character of the taken measures, because this provisional, temporary character is imposed by law and the length of the measures shall be set by the court within the limits specified by paragraphs (4) and (6).

In case the request is filed prior to the submission of the action on merits for the taking of one or some of the measures specified by art. 253 of the Civil Code or of other measures imposed by other legal provisions, by presidential ordinance there shall be ordered the taking of one or some of the provisional measures specified by paragraph (2), setting at the same time the term within which the action on merits should be submitted, in order to keep this provisional, temporary character of the measure. The judge has a relative liberty in setting this term because, as resulting from the provisions of paragraph (6), it cannot set a term longer than 30 days for the submission of the action on merits. This term can be shorter, being left, under this aspect, at the discretion of the judge, depending on the nature of the right and of the breach, as well as on the ordered provisional measure or measures and other specific elements of the case.

The 30-day term shall be computed since the „taking" of the provisional measures, which cannot be other than the date when the presidential ordinance whereby the measures were „taken" was rendered, no matter if there was decided or not that the execution should be made without summons or the lapse of a period of time, this taking into account the enforceable character of the ordinance as well [art. 581 paragraph (4) of the Civil Procedure Code].

The provisional measures ordered by way of presidential ordinance prior to the submission of the action in court for the defense of the breached non-patrimonial right shall cease *de jure*, by virtue of law, respectively of the provisions of paragraph (6), if claimant did not vest the court with the action on merits within the term specified by the court, but not later than 30 days since the taking of such measures, regardless if a term longer than 30 days was set or not. As it is a „*de jure*" cessation, it must not be ordered by the court, but respondent may request the latter to acknowledge it or it can oppose to the initiation or continuation of the foreclosure, by way of challenge against foreclosure, invoking the *de jure* cessation of the measures.

Considering that by the presidential ordinance there can be taken provisional measures that can harm defendant's interests, the legislator provided, at paragraph (5), that: „If the taken measures are of a nature to cause a prejudice to the other party, the court may oblige claimant to pay a bail in the quantum set by the court, under the penalty of the lawful cessation of the ordered measure". Such provision, just as in the case of other provisions that impose the payment of bail, is meant to ensure the indemnification of the defendant for the prejudice suffered as result of the measures taken against it and which ultimately proved ungrounded and, not at the end, the avoiding of submission of abusive requests.

The court is not obliged but it can oblige claimant to submit a bail, *ex officio* or upon defendant's request, depending on the circumstances of the case and if it deems that the taken provisional measures are of a nature to produce a prejudice to the other party. We believe the text leaves the judge the liberty to order the submission of the bail prior to taking the provisional measures by way of ordinance or to order, by the ordinance, the payment of a bail. In this last case, the judge will have to set not only the quantum of the bail but also the term within which such bail should be submitted. Upon setting the term for the submission of the bail, the judge shall consider the quantum thereof and the claimant's possibilities of payment and especially that the term should not be too long, thus leading to the causing of a prejudice for which there is no guarantee of recovery from the bail.

In case by the date set by the judge claimant did not pay the bail, the provisional measures ordered via the presidential ordinance will cease *de jure*, defendant being able to oppose to the initiation or continuation of the foreclosure or to request the court to acknowledge the cessation of the provisional measures for that reason.

Paragraph (8) regulates the procedure for the restitution of the bail submitted by the claimant. Thus, upon claimant's request, the court will order, by decision

rendered with the summoning of the parties, the restitution of the bail if the other party does not request damages. In such a case, the request shall be judged in line with the provisions concerning the presidential ordinance, which shall apply accordingly.

In case defendant has already filed an action whereby it requests damages for the prejudice caused by the provisional measures in regard of which the bail was submitted, the court will overrule claimant's request for the restitution of bail.

Paragraph (7) establishes claimant's liability for the prejudice caused to the other party by the taken provisional measures. The law does not condition this liability on the prior payment of the bail and therefore the claimant will answer, in principle, no matter if it paid a bail or not, and if it did, its liability shall not be limited to the quantum of the bail paid but, in principle, will be liable for the entire prejudice.

Although art. 1349 paragraph (2) of the New Civil Code states the principle of the integral reparation of the caused prejudice, the legislator, probably taking into account that the defense of the non-patrimonial rights is a sensible matter, with a higher degree of subjectivism and that the efforts in defending such rights should not be inhibited from the perspective of an excessive liability, provides at paragraph (7), second thesis that „if claimant was not faulty or had a minor fault, the court, depending on the specific circumstances, may either refuse to oblige it to the indemnification requested by the other party, or may order their reduction".

The court may oblige claimant to repair the prejudice caused by the provisional measures taken only upon the interested party's request and if „the action on merits is overruled as ungrounded".

NEW ASPECTS CONCERNING THE COMPETENCE OF JUDICIAL COURTS, AS REFLECTED BY THE NEW CIVIL PROCEDURE CODE

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Abstract: *The procedure dispositions stated by the new Civil Procedure Code do, generally, respond to the necessity of solving with celerity the lawsuits and, more recently, to the necessity of ensuring an upmost predictability for the judicial procedure. Along with the desideratum of an unitary jurisprudential corpus, these imperatives do require, as first commandment, an adequate configuration for the institution of the judicial courts competence.*

In this matter, the new aspects, which occurs many times into the new regulation, are constituted of the generally accepted solutions provided by doctrine and jurisprudence, as of new ideals which could represent innovations, which are able to generate controversies, even in the stage of outlined sketches. This is why, an analysis dedicated to the norms which should rule the matter of competence would have to focus less upon what had the time to constitute itself as constant assets, either of theory or of judicial practice, than upon shaping the outline of the mechanism through which should function the new procedural instruments, enabling them to validate the legislator's options or, at least, to initiate its theoretical and practical justifying.

As the new Code's purpose, initially stated, was to accelerate and ease the flow of the usual judicial procedure, the creators of the new Code have acted upon some questions like the distribution of material competence, the rules concerning the competence's prorogating, the juridical regime of the non-competence exception. There are yet many aspects which have benefitted from a more vivid attention in this new regulation.

Keywords: *New Romanian Civil Procedure Code, judicial courts' competence, exception due to non-competence, competence conflicts, procedure incidents*

Introduction

In the matter of competence, as we can notice in the cases of other procedure institutions, the new Civil Procedure Code preserves the general physiognomy of this institution, as it is shaped in the actually enforced Code. Yet, it assimilates a series of solutions offered by doctrine and jurisprudence, which are by themselves innovating elements. The new Code also assimilates some legislative solutions which had risen in time, especially after 2000. Some modifications which, at their time, had proven to be pernicious, were, however, left as they stand[1]. The new

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[1] We have to remark that the Law for Applying of the new Code had brought into it some dispositions from the Law nr. 202/2010 on some measures for accelerating the resolution of lawsuits.

Civil Procedure Code also assumes some points from the jurisprudence of the European Court for Human Rights and integrates some of the Community`s norms.

Without ignoring some critical evaluations that already appeared in doctrine[2], we are able to assert that the new Civil Procedure Code represents a qualitative progress which, as we can see from the preliminary title, points out some already existing principles, but which were not sustained by efficient procedure mechanisms. New principles are also promoted, like the one of the right to an equitable trial, carried on within an optimum and predictable duration[3].

Among all its innovative moves, we ought dedicate a special analysis to the solutions it sustains in the matter of judicial courts` competency. The correct construction of this juridical institution of procedure not only should determine a more efficient development of the lawsuit process, but also should render possible the applying of the previously mentioned principles and, most of all, should render possible the fulfilment of the desideratum hankered for by whatever national justice, the one of ensuring an unitary practice, able to render the act of justice trustworthy.

Thus, firstly we have to underline the new shape given to the judicial courts` competence, in its material dimension, achieved in order to realize an equilibrium in the distribution of functional and procedural competencies, due to which an unitary judicial practice should be ensured and the accelerating of judicial procedure should be favoured.

In order to fulfill the aimed goal, the new elaboration of the competence`s institution had to be accompanied by the institution of some adequate procedural mechanisms that should have, straightly or indirectly, determine the efficiency of the respective norms. When we should analyze the new elements promoted by the new code, we would not ignore the matters of determining competence suiting the value of the request`s object, or the competence`s extent or prorogating, or either the procedure incidents concerning competence.

The new code`s project, by its solutions, has ruled upon the matter of competence choosing: to duly establish the fundamental principles of civil lawsuit, until now sustained by doctrine and jurisprudence; the non-competence exception does acquire a new juridical regime, meant to contribute to the causes` resolution within a reasonable term, the attack ways should be modified, in the sense that appeal would represent the only ordinary attack way being devolutive, while recourse would only promote the conformity control of the attacked decision regarding the applicable law rules; some new special procedures should be instituted, like the one which resolves petty value requests.

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[2] See I. Deleanu, *Observaţii generale şi speciale cu privire la noul Cod de procedură civilă (Law nr. 134/2010),* Dreptul nr. 11/2010, passim

[3] For further developments, Mihaela Tăbârcă, *Principiul dreptului la un proces echitabil, în termen optim şi previzibil, în lumina noului Cod de procedură civilă*, Dreptul nr. 12/2010, p. 42-56-

The new Civil Procedure Code also decides upon some doctrine disputes, offering solutions in the spirit of the principles we have mentioned above. In the matter of competence, the Code rules over questions such like:

- legal prorogating should be able to operate, even if the exclusive material territorial competence of another court would be infringed;
- instituting the value criterion for determining competence, regarding requests having as objects: annulments, resolutive procedures, cancellations, even if the restoring of the prior situation should not be sued for;
- the lack of an objection lodgedshould be incident in the matter of competence, if submitted to legal sanction;
- the conflict of competence among sections of the same court is regulated.

Material competence. The New Civil Procedure Code, in its Book I, Title III, does integrate more judiciously than the actual regulation the competence of judicial courts, situating it after the presentations of fundamental principles, of civil lawsuit and of participants in the civil trial.

If we should look upon the multitude of judicial courts and other organs with jurisdictional activity, and as well upon the variety and complexity of the occurring litigations in the civil domain, we would have to acknowledge that the new Procedure Code agrees to the traditional taxonomy of competence norms, which has been generally accepted by doctrine[4], after the legislative incertitudes of the years 2000-2005[5], when modifications brought to the competence matter, especially concerning the functional competences of tribunals and appeal courts had caused grave interruptions of the course of justice for civil lawsuits.

Juridical norms which rule over the justice courts` material competence were the objects of repeated changements, the intention being to provide the best equilibrium possible among justice courts, tribunals, appeal courts and the High Court of Cassation and Justice.

This trend had begun through the new judicial system instituted by the Law nr. 59/1993 and had continued by the substantial modifications brought by the Government`s Emergency Ordnance nr. 138/2000, approved and modified by the Law nr. 219/2005, creating, as end of the process, the Little Reform`s Law – the Law nr. 202/2010 on certain measures of accelerating the resolving of lawsuits. The new Civil Procedure Code brings new regulations concerning the justice courts` material competence[6] if compared to the actual Code.

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[4] I. Leş, *Tratat de drept procesual civil*, Ediţia 5, Ed. C. H. Beck, Bucureşti, 2010, p. 226-227; T. Bodoaşcă, *Competenţa instanţelor judecătoreşti în materie civilă*, Ed. All Beck, Bucureşti, 2002, p. 14-17.

[5] Government's Emergency Ordnance nr. 58/2003, approved and modified through the Law nr. 195/2004, G.E.O. nr. 65/2004, approved, with modifications, through the Law nr. 493/2004, the Law nr. 219/2005 on the approval of the G.E.O. nr. 138/2000

[6] The new Code has preserved this terminology, which is considered to be „controversial", because the approached „matter" is, often, the same. The syntagm: „attribution competence" is proposed. To this purpose, see I. Deleanu, *Consideraţii generale şi unele observaţii cu privire la proiectul Codului de procedură civilă*, R.R.D.P. nr. 2/2009, p. 39.

The matter is deeply modified. Contradicting the actual regulation (stated by art. 1), the legislator gives up about determining through exclusion the justice courts` competence. They had, until now, full competence as first judicial courts. As for the cases of tribunals and justice courts, the new Code chooses to enumerate the categories of litigations they now should have to state upon as first level courts. This regulation method leads to the conclusion that the concerned dispositions should be interpreted restrictively, analogy being excluded as a criterion for establishing competence[7]. When interpreting the code`s arts 92 and 93, our conclusion is that its general tendency is to impart to tribunals a full competence as first level courts[8]. Local justice courts do become exceptional courts in civil matters[9]. Their material competence is vowed to be restricted to less important causes, though, at least apparently, in our current economical status, the value criterion might mean a larger number of petty value causes..

The first level competence slides from local courts to tribunals. Thereby, the latters do loose their quality of common law courts in the matter of appeal, becoming exceptional appeal courts only, since their former function goes to the Appeal Courts.

The most important consequence of this new distribution of competence is the fact that the common law competence in the matter of recourse is granted to the High Court of Cassation and Justice only. So, this court has at hand the most efficient instrument enabling it to unify the lawsuits` practice at the level of the whole country[10]. The general aimed purpose was to establish a correct balance for material competence, in order to ensure the respect of the principles stated by the Code itself. The major changes occurring are the granting of full competence for:

- Tribunals as first level courts;
- Appeal Courts as ... appeal courts;
- the supreme court as unique recourse court.

*Determining competence in respect of the value of the request`s object*. The new Civil Procedure Code is proposing solutions for some special situations where the problem had risen of determining competence in respect to the object`s value. A rule is enforced: competence is determined following the value of the object claimed by the main point of the principal request. In order to establish this value, the incomes or expenses required as accessories to the main claim that might have reached to settling day or should be already due during trial should not be taken into consideration. We are speaking of interests, penalties, fruits and such like.

[7] Thus, local justice courts do not pronounce themselves about the requests concerning the matters of: adoption, establishment of paternal filiation, denial of paternal filiation, etc. I. Leş, *op. cit*., 2010, p. 243.

[8] In the same sense, see Violeta Belegante, D. A. Ghinoiu, *Succintă prezentare a sistemului şi soluţiilor legislative preconizate de proiectul noului Cod de procedură civilkă*, Dreptul nr. 2/2010, p. 18; I. Leş, *op. Cit*., 2010, p. 245

[9] I. Leş, *op. Cit*., 2010, p. 243

[10] V. M. Ciobanu, *Aspecte noi privind recursul în procesul civil în lumina Proiectului Codului de procedură civilă*, R.R.D.P. nr. 1/2009, p. 79-80

Periodical obligations arrived at settling date during the trial will also not be taken into consideration.

Doctrine has quickly reacted. It estimated that this new regulation leaves the determining of value, consequently the issue of material competence and, implicitly, the attack ways[11] to the claimant`s wish. We do agree that, since it could produce this kind of effects, in the matter of competence determining these objections are duly founded. Yet, if a legal contest should be forwarded, the concerned value would be established according to the presented documents and to the sides` forwarded arguments.

Competence` extent. Competence prorogation

For the competence of the court intimated with the main request, the matter of its extent is accepted by the new code as it is established by the rules discussed in literature and confirmed by a constant judicial practice. The new code does expressly include them, unlike the former one. But, in the matter of competence prorogation, innovative elements are brought, issued from the new perspective adopted by the Code`s authors upon the juridical regime of public order`s competence.

The new code, in its art. 119 par. 1, does complete the art. 17 of the actual code, introducing the category of additional requests. One of the most important cases of legal competence prorogation is, this way, expressly ruled upon. Thus, the competent court for the main claim becomes also competent to state upon accessory, additional and incident requests.

The second thesis of the concerned paragraph contains the innovation. It consists in the fact that prorogation would be due to operate even if the concerned requests should pertain to the material or territorial competence of another judicial court. The only exception is the case of requests concerning insolvency.

The same article contains another innovative expressed disposition, which we will also find in the matter of competences` conflicts. For incidental and accessory requests, prorogation might occur even when the law should attribute the competence of resolving the main claim to a specialized section or to a specialized court. In such prorogation cases, if the court should be exclusively competent in regard to one of the sides, then it would become exclusively competent in regard to all existing sides.

Procedure incidents concerning the court`s competence

Unlike the actual code, under this title, the new one rules, in an unitary way, all incidents that might happen in the matter of competence: non-competence, competence, competence conflicts, litispendency, connexity, re-location of trials and court`s delegating.

[11] I. Deleanu, *op. Cit*., R.R.D.P. nr. 2/2009, p. 41.

We do not insist upon theoretical aspects related to the previously enumerated institutions, but we will focus upon the innovations in the juridical regime instituted about the non-competence exception. Other institutions do not raise particular problems and are treated adequately by doctrine.

The new Civil Procedure Code assumes the already existing modifications brought by the Law 202/2010 to the actual Code and radically modifies the perspective upon the regime of invoking the non-competence exception.

Before the Law nr. 202/2010, relying upon the dispositions of Civil Proc. Code, art. 159, the juridical regime of the non-competence exception was differentiated in respect to the features of the infringed competence norm. Non-competence could then be: absolute or relative, respectively pertaining to public order or to private one[12].

In its ancient form art. 159 was presenting only the public order types of non-competence. From this we could deduce that the other categories of competence norms were dispositive. The new Code`s art. 125 assumes and completes art. 159 as it was modified by the Law nr. 202/2010. In this new context, non-competence may pertain to public order or to private order. Non-competence pertains to private order, including the territorial common law non-competence and alternative non-competence, in all cases except for the ones that follow, where non-competence pertains to public order. These are:

- when general competence should be infringed, when lawsuit is not pertaining to the competence of judicial courts;
- when material competence should be infringed, and lawsuit would fall under the competence of a judicial court of another rank;
- when territorial exclusive competence should be infringed, and lawsuit would fall under the competence of a judicial court of an equivalent rank, but the sides would not be entitled to remove it.

For public order regime the situation of the non-competence exceptions, more precisely, of material and territorial ones of public order (known as the exclusive territorial ones), was modified by the Law nr. 202/2010 which inserted art. 159^1 in the actual code. General non-competence for judicial courts, may still be invoked by sides or by court in whatever status of the trial.

But material and territorial non-competence of public order might be invoked by sides or by judge in the first day of summoning towards the first level court, but not later than the initiation of debates on the essence of causes. Under the empire of the previous regulation, it was unanimously accepted that, since material and territorial non-competences of public order were absolute, they could therefore be invoked at any moment during the trial.

In the new code, art. 126 preserves the same solution; the difference is that the notion of „first summoning day" disappears: „material and territorial non-competenceof public order could be invoked by sides or by judge at the first

[12] V. M. Ciobanu, *op. Cit*., 1996, vol. I, p. 442-443.

judgement, when sides are legally cited to appear at the first judicial court, but not later than the end of the trial`s investigation by will of the first level court". We are also able to notice that a substitution was preferred: the expression „ initiation of the debates about the essence of the trial" was substituted by: „the end of the trial`s investigation pursued by will of the first level court".

Imperative precepts, elevated to the rank of principles, of solving causes with high celerity, within an optional duration by anticipating the length in time of the trial, bound to be carried on within a predictable and reasonable term, even from the moment of their appearance under the form of the new code`s draft, and afterwards confirmed by the enforcement of Law nr. 202/2010, in spite of the argument lines brought up in order to perhaps justify them, had yet been submitted to a lot of critical objections uttered by doctrine.

It considered that the whole concept of the juridical regime imparted to public order competence was going to be invalidated upside down, with pernicious consequences upon the norms that establish this kind of competence and upon the access, for a person, to a certain jurisdiction level. The remark was also made that the solution chosen by the new code`s authors might lead some judicial courts to step over the attributions imparted to courts of other jurisdiction levels. But such a thing would not at all be suiting the principles which govern the matter of absolute competences, expressed through juridical norms.

Practically, the difference created by their own nature and peculiarities is vowed to dissapear, between absolute and relative non-competencies[13]. Another objection was raised versus the fact that: though the wish of the „reforming" legislator was genuinely to pledge for the general celerity of whatever judicial procedure, the new regime of absolute material and territorial non-competence consequently results in the sacrifice made of some essential and traditionally grounded principles of judicial procedure[14]. On the other hand, through the attempt of elucidating what reasons the legislator might have had to promote such deep substantial changes, the opinion was uttered that the existence of the possibility to invoke the material non-competence exception within whatever stage of the trial, even straightly during appeal or recourse, might determine a strong instability into the frame of procedural relationships and would cause the trial`s lingering, which sometimes could be justified in no believable way, in the case when the exception should be admitted within an advanced way of attack[15].

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[13] I. Deleanu, *Consideraţii cu privire la excepţiile procesuale în contextul prevederilor Proiectului noului Cod de procedură civilă*, R.R.D.P. nr. 4/2009, p. 54

[14] I. Leş, *Reflecţii – parţial critice – asupra modificărilor şi completărilor aduse Codului de procedură civilă prin Legea nr. 202/2010 pentru accelerarea soluţionării proceselor*, Dreptul nr. 1/2011, p. 17; some critical remarks have also been formulated by Livia Chiriazi, *Unele incidente procedurale privitoare la competenţa instanţei în noul Cod de procedură civilă şi în Legea nr. 202/2010 privind unele măsuri pentru accelerarea soluţionării proceselor*, Dreptul nr. 5/2011, p. 79-80.

[15] L. Zidaru, *Observaţii cu privire la condiţiile de invocare a excepţiei de necompetenţă în Proiectul noului Cod de procedură civilă*, R.R.D.P. nr. 1/2010, p. 254-

Practical realities do seem, indeed, to justify the legislator`s choice of such a juridical regime for the non-competence exception, should it be of public order, material and even territorial. The supporters of the solution to limit in time the possibility of invoking this type of exception had correctly noticed that the problems which might be raised are not inevitably connected to the necessity of verifying, within an initial and prior phase, the competence, especially for justice courts[16].

They could also be generated by the process of establishing the juridical nature of the cause itself or by determining competence in respect to the criterion of value, bearing consequences as well upon the qualifying of attack ways. In such circumstances, the court, but the sides too, are „stimulated" to analyze, in an early stage of the trial, the question of competence. It is by the peculiarity of having to be discussed *a priori* that competence is imperatively distinguished[17].

The new regulation assumes the text which, in this sense, does impose to the courts to pronounce, at first, its opinion upon the existence of procedure exceptions and upon the ones which might render useless the study of the cause`s essence.

Beyond these theoretical disputes, under the empire of the new code, the non-competence exception – of public order, material and territorial - ought to be invoked by the court or by the sides only in the presence of the first level court, at the first judgement term for which the sides are legally called, but not later than the end of the trial`s investigation requested by the first level court. The consequence of this fact seems to be that, except for the case of the general non-competence, even absolute non-competence could be eliminated if it would not be invoked under these conditions. Yet, the opinion has risen that, practically, the question of the moment until when this exception might be invoked does not mean that the solution at an one and only judgement term ought to become compulsory.

It is only necessary to invoke this exception at the first judgement term at which sides would be legally called. The solution could indeed be given after the elucidation of the facts that determine competence[18].

As an innovation, the new code expressly rules the possible conflict occurring between a judicial court and the High Court of Cassation and Justice Now, such a conflict is not recognized. The intended solution of this conflict ought be given by the supreme court, in its five judges` squad. In the same sense, the competence conflict occurring between a judicial court and another organ with a jurisdictional

[16] We have to remark that the authors of the new code did no more maintain (not even through the Law for Applying) the disposition which had been introduced through the Law nr. 202/2010: at the first summoning day, the judge is obliged, *ex officio*, to verify and to establish if or not the addressed to judicial court would be competent: generally, materially, territorially. The session' settling document ought state the lawful motivations in virtue of which competence is duly stated.

[17] There are discussions, in doctrine, about the resolution priority order imparted to some types of exceptions. We Would not step into further details, but it is beyond doubt that the non-competence exception is due to „compete" with all the other exceptions which ought to be searched for *a priori*.

[18] L. Zidaru, *op. Cit.*, R.R.D.P. nr. 1/2010, p. 261.

activity ought to be solved by the judicial court hierarchically superior to the court being a side in the respective conflict.

The new Civil Procedure Code expressly rules the possibility of a competence conflict between specialized sections of a same judicial court. Some disputes within doctrine are resolved this way[19]. The conflict between specialized judges` squads pertaining to the same court is also ruled.

Due to the new code`s art. 131, the conflict between specialized sections of the same court ought to be solved by the concerned section of the court which is hierarchically superior to the one where the conflict has occurred. Between two sections of the High Court of Cassation and Justice, the conflict ought to be solved by the five judges` squad. The same dispositions ought to be applied similarly for the case of specialized squads of judges.

As it has been obvious even since the phase of its draft, doctrine disputes about the new code would be intense. Practical cases awaited to appear should certainly offer arguments for both the two attitudes: either a critical analysis of innovative procedural mechanisms created or validating the legislator`s choices. When looking upon the innovative elements concerning the competence of judicial courts adopted by the new Civil Procedure Code, we are able to conclude that, in consideration of how these are presented at the regulations` level, yes, they might contribute to the achievement of the declared purpose of the Code`s authors. But only the first jurisprudential solutions provided as its consequences ought enable us to evaluate its impact upon judicial practice.

[19] I. Deleanu, *Observaţii cu privire la flexiunile argumentului de lege lata în procesul civil*, R.R.D.P. nr. 1/2007, p. 95-98; C. Coandă, *Discuţii în legătură cu interpretarea şi aplicarea unor dispoziţii legale referitoare la incidente procedurale în procesul civil*, Dreptul nr. 12/2008, p. 118-129; R. V. Sas, *Argumente privind admiterea soluţiei existenţei conflictului de competenţă în situaţia în care acesta se iveşte între secţii sau complete specializate ale aceleiaşi instanţe judecătoreşti*, Dreptul nr. 7/2008, p. 152-163; L. N. Pîrvu, Ana Maria Istrate, *Discuţii referitoare la aşa-zisul „conflict de competenţă" între secţii sau complete specializate ale aceleiaşi instanţe*, Dreptul nr. 1/2008, p. 165-170.

EXERCISE OF OWNERSHIP RIGHTS – GUARANTEES

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Abstract: *This research analyzes a part of ownership rights guarantees through the jurisprudence of the Constitutional Court. This keeps bringing the international law and European human rights, as well as the European law, to the attention of authorities in Romania, especially to that of the courts. The binding effect of Constitutional Court decisions reflects on the European Convention on Human Rights provisions and also on other provisions of international law. Adoption of the European Convention on Human Rights by the Constitutional Court of Romania is increasingly obvious, in line with other European constitutional jurisdictions, as an interpretation tool aiming at protecting the rights and the constitutionalisation of law.*

Keywords: *constitutionalization of law; human rights; Constitutional Court of Romania; constitutional justice.*

Constitutionalization of law is a topic of discussion in the legal landscape, both the Romanian and the later compared one[1]. Studies conducted so far in French[2], German[3] and Spanish[4] law have shown that, if in the various legal systems the notion of constitutionalisation has more or less the same scientific content, each national legal system knows its peculiarities in terms of implementation of this concept.

Constitutionalization of law is a complex legal phenomenon affecting the whole legal given system, by the interaction that is established between the legal rules of the fundamental law and the other legal rules inferior to the Constitution. If constitutionalization of ownership rights is considered, it resembles a long process started when adopting the Constitution of 1991 and continued under the control of Constitutional jurisdiction specially created.

Starting from the text of the Constitution, it should be observed that the phenomenon of constitutionalisation of property rights is accelerated by the effort

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[1] SE Tanasescu*, The Principle of Equality in Romanian Law,* All Beck Publishing House, Bucharest, 1999, p.161.

[2] L. Favoreu, *L'influence de la jurisprudence du Conseil Constitutionnel sur les diverses branches du droit*, Mélanges Léo Hamon, Op. cit., p.235 ff.; *L'apport du Conseil Constitutionnel au droit public*, Pouvoirs nr.13/1980, p.17; L. Favoreu, *La constitutionalisation du droit*, Mélanges en hommage à Roland Drago, PUAM Economica, Paris, 1997, p.25 ff;

[3] M. Fromont, *Les droits fondamentaux dans l'ordre juridique de la R.F.A*., Mélanges Eisenmann, p.9 şi urm.; J. C. Bèguin, *Le contrôle de la constitutionalitè des lois en RFA*, PUAM Economica, 1982.

[4] P. Bon, *La constitutionalisation du droit espagnol*, RFDC nr.5/1991.

of interpreting them. This interpretation is made by a constitutional judge. This possibility was opened by the very text of Law no.47/1992 on the organization and functioning of the Constitutional Court[5]. In the second paragraph of Article 2 it states that the lack of constitutionality of a law, must be related to the provisions and principles of the Constitution „.

Moreover, it should be noted that the Constitutional Court is not part of the judiciary, but is neither any other power. It is part of those state structures with the role of guarantors, counterweight and support of the separation of powers and of the balance between authorities and citizens. It is characterized by the rule of law as a guarantor of the Constitution's supremacy and as the authority of constitutional jurisdiction, independent of any other authority, obeying only the Constitution and its law on its organization and functioning „[6]. Therefore, „the content of certain principles, concepts and rules specific to various branches of law, enshrined in the decisions made, acquires constitutional value by the effect of deducting them out of their constitutional norm[7]. „

One of the very important roles of the constitutional judge is to ensure a concerted dissemination of constitutional provisions, which is largely facilitated by the binding force of his decisions[8].

Thus established, the constitutionalization process does not occur in the void, it assumes the preexistence of certain necessary prerequisites and has some specific effects. The first condition is obviously the very existence of a basic law.

A second condition is the normative character of the Constitution, character that must be reinforced by guaranteeing the supreme value of the rules contained in the fundamental law[9].

As result of „ the supremacy of the constitutional rule and its interpretation certified by Court decisions, on the one hand, and the erga omnes nature of its decisions, on the other hand, „constitutionalization of law is rather the result of the reasons that motivate decisions of the Constitutional Court[10] „.

The phenomenon of ownership rights constitutionalization was also accelerated by the procedure mentioned in Article 146 d) of the Constitution: the exception of unconstitutionality.

There have been many cases brought before the Constitutional Court on the unconstitutionality of provisions of various laws regarding ownership.

[5] Published in the *Official Gazette*. Part I, no.101 of 22.05.1992, published in the Gazette. Part I, 187 of August 7, 1997, amended by Law nr.232/2004 and republished in the Official Gazette. Part I, nr.643 of 16 July 2004.

[6] I. Muraru, M. Constantinescu, *Constitutional Jurisdiction in Romania*, Public Law Review No. 1/1995, p.51.

[7] I. Muraru, M. Constantinescu, *Constitutional Court of Romania*, Albatros Publishing House, Bucharest1997, p.164.

[8] Article 147 para. (4) of the Constitution provides that: '[...] decisions are generally binding and effective only for the future '

[9] S. E.Tănăsescu, *Op.cit*, p.166.

[10] I. Muraru, M. Constantinescu, *Constitutional Court of Romania,* Albatros Publishing House, Bucharest ,1997, p.164.

Interpretations and conclusions of the Court proved to be judicious and considered in finalizing these laws. Subsequent verification of the Constitutional Court, where it decides on objections of unconstitutionality raised before the courts or commercial arbitration by the parties in the dispute or ex officio, is a way to secure property rights and is at the reach of any litigant.

Ownership is the field in which constitutional and civil rules are in close and direct correlation. Constitutional rules give the dimensions of ownership, while the civil rules and civil procedural rules give practical efficiency to these dimensions.

One of the trends of constitutional justice is undisputedly the orientation towards protection of fundamental rights. Doctrinal debates[11] have been devoted to the increasing role of constitutional courts and European constitutional law focuses increasingly on law constitutionalization through fundamental rights. Certain constitutional jurisdictions have already built a solid edifice of judicial opinion regarding fundamental rights[12].

Constitutional Court of Romania is on the trends centered around rights protection. Law of recent years, especially that regarding the unconstitutionality exceptions, has mainly developed around determining the normative content of rights, but also to establishing their limits. Court has made important clarifications regarding ownership.

Another milestone in the Constitutional Court, confirming property rights protection, is the frequent inclusion in the field of reference standards of international law and European Human Rights provisions: the Universal Declaration of Human Rights, UN Covenants, the European Convention on Human Rights and European Court of Human Rights.

It is not wrong to say that the constitutional court is among the few authorities in Romania that base their decisions on the provisions, in fact binding, of these acts, and on the extensive jurisprudence of the European Court, which is also mandatory for the interpretation of the European Convention on Human Rights. If in the period 1992-2000, the Constitutional Court would only mention the European Court in its decisions, since 2000, a phenomenon of great magnitude has appeared. This phenomenon refers to the use of European case law arguments even in Constitutional Court decisions[13].

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[11] *Cours Constitutionnelles europèennes et droit fondamentaux*, Actes du II–e Colloque d'Aix-en-Provence, Economica, PUAM, 1982, *Cours Constitutionnelles europèennes et droit fondamentaux*, în AIJC, Economica, PUAM, Paris, 1991, *La protection des droit fondamentaux par la Cour constitutionnel*e. Actes du sèminaire UniDem organisè à Brioni, Croatie, 23-25 septembre 1995. Edition du Conseil de l'Europe, Strasbourg, 1996, F. Rubio-Llorente, *Tendence actuelles de la jurisdiction constitutionnelle en Europe*, în AIJC, 1996, pp.11-29.

[12] B. S. Guțan, *The Exception of Unconstitutionality and Constitutionalization of Law in the Constitution and Constitutionalism*, Hamangiu Publishing House, Bucharest, 2006, p.201.

[13] S. E .Tănăsescu, *Chronicle of the Romanian Constitutional Court Jurisprudence*, in ,'Public Law Review' no.2/2000, p.99.

Thus, the Constitutional Court constantly brings international and European law of human rights as well as European jurisprudence to the attention of authorities in Romania, especially to that of the the courts. The binding effect of Constitutional Court decisions reflects in the European Convention on human rights provisions and on other provisions of international human rights law, as well as on the jurisprudence invoked.

The adoption of the European Convention on Human Rights by the Constitutional Court of Romania, in line with other European constitutional jurisdictions[14], is increasingly obvious. The European Convention on Human Rights is a tool for interpretation, aiming at protecting the rights and constitutionalizing the law. 'The Europeanistic vocation of the Constitutional Court jurisprudence is increasingly valued, because of frequent use of the technique of interpretation under the European Convention on Human Rights, pursuant to Article 11 and Article 20 of the Romanian Constitution, giving the Convention provisions an over-and infra-constitutional legal status.

Moreover, as noted in the French doctrine, the constitutional judge's role is not limited to declaring the state of the system of fundamental rights, but it contributes to the very formation of a 'fundamental rights law', ie a true legal system based on domestic and international documents[15].

Romanian Constitutional Court relied on international legal rules on human rights in considerations of numerous decisions, even by their direct application under Article 20 of the Constitution: Decisions no.47/1994, no.59/1994, no.148/1998, no.146/2000, no.312/2001, and so on. It is interesting to note that, in its jurisprudence, the Constitutional Court has made direct or indirect references to the European Convention on Human Rights and to the European Court jurisprudence, making a 'consolidation and expansion of constitutional solutions meant to eliminate conflicting court solutions in the field of human rights', often giving the constitutional norm reference a new content, in relation to European law and international human rights law[16].

Legal protection of property rights must be made, first, internally. This is a very important condition for any democratic government, as without the inclusion of this right in the constitutional rules, without appropriate, concrete measures, provided by the national law to ensure it is guaranteed by the State, the property right would be inefficient and therefore ineffective. Procedures and mechanisms that can ensure legal protection of property rights domestically are under the national legal system, under the internal rules of the state.

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[14] Fr. Cocozza, *Les droits fondamentaux en Europe entre justice constitutionnelle „transfrontière" de la C.E.D.H. et justice constitutionnelle nationale*, RFDC nr. 28/1996, p.709.

[15] B. Mathieu, M. Verpeaux, *Contentieux constitutionnel des droits fondamentaux*, LGDJ, Paris, 2002, pp.20-21.

[16] I. Vida, *Mandatory Decisions of the Constitutional Court for the Courts - Stabilizing the Constitution, the ' Bulletin of the Constitutional Court*' No.7/2004, p.16.

Before considering the specific means of property protection, it necessary to highlight the relationship between international and domestic rules, showing that this is an indirect way of protecting property rights.

The principle to be mentioned is that enshrined in Article 20 of the Constitution, which states that: 'the constitutional provisions on citizens' rights will be construed and enforced in accordance with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is part of . If any inconsistencies exist between the covenants and treaties on fundamental human rights to which Romania is part, and national laws, international regulations shall take precedence, unless the Constitution or national laws comprises more favorable provisions.' This is the fundamental constitutional principle in the legal guarantees of human rights in our country, therefore, implicitly guaranteeing ownership. It underlies the whole policy of the Romanian state and is reflected in the activity of state authorities and institutions which are designed to help ensure the promotion and protection of rights and liberties.

Since the Constitution is the direct application, it is not interpreted and applied only by the constitutional court, but also by any other jurisdiction and public authority, all of which are bound to apply and enforce the provisions of Article 20 para. (1).

In the doctrinal research[17] on this problem three situations have been distinguished in which conventional international norms on human rights have a constitutional power, over constitutional and infra constitutional.

1. The strictly constitutional force of international conventional rules on human rights. In the case of international conventional rules that have the same drafting with a constitutional rule, their value is equal to the relevant constitutional rules.

2. The over constitutional force of international conventional rules on human rights. There are situations in which a human right is enshrined through a conventional rule and through a constitutional one, but differently, the constitutional provision being less favorable than the international standard. However, interpretation of the constitutional norm is possible because of generic text writing. In this hypothesis the more restrictive constitutional provision must be interpreted and applied in accordance with the conventional international provision that is more favorable, the latter having a higher power.

3. The infra constitutional force of international conventional rules on human rights There are three situations:

a) A situation in which the same human right is enshrined in the Constitution and in the international treaty, but the constitutional settlement is more favorable. It is a principle of international law of human rights, the principle of minimal level of international protection, from which, through internal regulations, one can not derogate, 'down', but that is permissible, 'to the top', adding nationwide increased protection.

[17] C.-L. Popescu, *Constitutional Court. Direct Contrariety between the Provisions of a Law (ordinance) and those of a Human Rights Treaty to which Romania is Part. Competence in Solving this Annoyance*, as "no.7/2003, p.206.

b) A situation in which the same human right is established only through an international rule, not through a constitutional one. Obviously, the constitutional provision stated in Article 20 para. (1) concerning the interpretation of constitutional norms in the light of the international ones is no longer applicable, as there is no constitutional provision on.

c) The situation in which a human right is enshrined in the Constitution and also by an international treaty. Between the two rules there is contrariety, the constitutional provision is more restrictive, but it is clear (not generic), so there is no possibility of interpretation. Since there is no need, no constitutional rule can be clearly interpreted, the provision of Article 20 para. (1) is devoid of purpose.

Analysing the content of the constitutional provision on international treaties on human rights, we conclude that there must be a line between them and internal regulations.

This line begins with the Universal Declaration of Human Rights of December 10, 1948 just to highlight the importance Romania attaches to this international act.

Regarding pacts, the ratification by Romania of the two pacts was considered, namely: the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, entered into force in 1976.

It should be noted that the constitutional regulation covers only pacts and treaties to which Romania is part, therefore those which have been ratified by our country.

Substantial obligation are incumbent on public authorities to negotiate, sign or ratify international treaties for Romania, as there must be internal consistency between the treaty and the Romanian legal system.

This is also because Art. 11 of the Basic Law states that the Romanian State pledges to fulfill in good faith the obligations deriving from the treaties to which it is party, or, treaties ratified by law, that are part of the law. If a treaty to which Romania is to become part contains provisions contrary to the Constitution, its ratification may take place after the revision of the Constitution.

With regard to the provisions of Article 20 para. (2) of the Constitution, there are two situations: that in which international rules are more favorable and that in which international rules are more restrictive in relation to internal legislative rules.

Due to the principle of subsidiarity consecration and international protection of human rights in relation to law, it is clear that, in case of conflict between international and domestic regulations, international regulations shall prevail and will remove the internal ones only in the event that they are more favorable. However, more favorable national rules, domestically providing increased protection to human rights, will not be removed from application by the more stringent international conventional rules, which provide only a basic level of protection[18].

In Article 11 para. (3) of the Constitution it was stated that, if there is inconsistency between the provisions of constitutional rules and those of an international treaty, the treaty can be ratified only after proper review of the

[18] *Ibidem*, p.208.

Constitution. We believe that the provisions of art. 20 contain an exception to this rule under a triple aspect.

Firstly, if there is a discrepancy between the Constitution and international human rights standards, but constitutional provisions are more favorable, these will apply with priority, without the need for constitutional revision. The solution is clear from the final Article 20 para. (2) of the Constitution.

Secondly, whenever the comparison of international rules with the constitutional results in ambiguity, the latter should receive the more favorable meaning of international rules. This conclusion follows from the provisions of Article 20 para. (1), which requires the interpreter to find in the constitutional provisions on rights and freedoms that meaning which is consistent with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party of. Moreover, as between international rules may exist inconsistencies, the interpreter will have to choose the most favorable international rule and give the correlative constitutional provision, which would seem to be unfavorable, the correct meaning.

Thirdly, if constitutional rules are clearly more unfavourable than the international ones, so that inconsistency can not be determined by way of interpretation, in this case international standards will apply. This solution has an indisputable basis of Article 20 in the final paragraph. (2). It no longer speaks only of national laws, but the Constitution is stated explicitly[19].

The priority of international regulation shall not apply if the Constitution or domestic law is more favorable than the international regulation. The rule stems from the fact that international standards are in favor of the citizen, so that it is not justified for it to take precedence over a domestic law that is more favorable, because if that would apply, it would be against him[20].

In its jurisprudence, the Constitutional Court has appealed to the interpretation of constitutional texts through the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and other international conventions. A separate issue in this matter is the European Convention on Human Rights, to which the Court made reference directly or indirectly through the European Court of Human Rights. By the decisions taken by the Constitutional Court on grounds arising from international regulations and especially by the European Court of Human Rights provisions, a consolidation and expansion of constitutional[21] judicial solutions has been made, with the aim to eliminate conflicting human rights and lead to the formation of a uniform judicial practice.

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[19] V. Stoica, *Civil Law. Major Real Rights*, Humanitas, Bucharest, 2004, p.237

[20] M. Constantinescu, I. Muraru, A. Iorgovan, *Revision of the Constitution-Explanation and comments*, Rosetti House, Bucharest, 2003, p.17.

[21] Decision No.139/1994 decision published in the Official Gazette. Part I, nr.353 of 21 December 1994, Decision no.157/1998 published in the Official Gazette. Part I, No. 3 of January 11, 1999, Decision no.161/1998 published in the Official Gazette. Part I, No. 3 of January 11, 1999.

The Romanian Constitution, for example, establishes that the restriction of certain rights or freedoms may be made by law and only if necessary, as appropriate, to protect national security, public order, health or morals, rights and freedoms, conducting a criminal investigation, preventing the consequences of natural disasters, of a disaster, or an extremely severe catastrophe. By he interpretation based on international treaties it was concluded that the scope of these restrictions is wider, the provisions of the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights leading to the current wording of Article 10 of the Convention for the Protection of Human Rights and fundamental Freedoms. This states that 'the exercise of these freedoms, that implies duties and responsibilities, may be subject to such formalities, conditions, restrictions[22] or penalties as are prescribed by law, which are necessary in a democratic society, for national security, territorial integrity or public safety, prevention of disorder or crime, health and morals, the reputation or rights of others, for preventing the disclosure of confidential information or for maintaining the authority and impartiality of the judiciary „.

The Constitutional Court, in several decisions of relevance to the topic, found that proportionality is a constitutional principle. Thus, it established that the inviolability of private property rights can not be absolute, its limits being established by law, and in consideration of the constitutional provisions it stated that 'Enforcement of an obligation [...], aimed at building a social insurance fund fall within these limits', ie, measures taken are appropriate for protection of ownership and for the purpose for which they were placed.

By more decisions the Constitutional Court rejected the exceptions of unconstitutionality regarding provisions of Article 7 of Law no.85/1992, holding that the regulations criticized by the authors of the exception are a rule of social justice. This happens as they enable tenants to buy homes that they have contributed directly or indirectly[23] to building them.

Under the principle of proportionality, the Court held that, under Article 44. (7) of the Constitution, the right of property compels to the observance of duties relating to environmental protection and ensuring good neighborliness. Consequently, the state is authorized by law to establish rules for crop, forestry, domestic animals protection. The Court determined that, 'taking into account the proportionality principle, these rules are constitutional only if they establish obligations that are reasonable'[24].

The Constitutional Court stated also that the limits established in accordance with paragraph 44. (1) provisions may be subject either to law or to its attributes,

[22] Decision no.32/1995 , cited above.

[23] Decision no.104/2004 published in the Official Gazette. Part I, No. 249 of March 22, 2004: Decision no.252/2004 published in the Official Gazette. Part I, 713 of August 26, 2004, Decision nr.388/2004 published in the Official Gazette. Part I, nr.1168 of December 9, 2004.

[24] Decision no.93/1996 published in the Official Part I, # 235 of September 27, 1996.

but they must be adequate to public interest, or to the rights of other persons, condition involving the principle of proportionality[25].

In a recent decision[26], the Court held that, 'in the case of a restriction of some rights or freedoms, justified by imperative defense of social values, the measure adopted must comply with the conditions expressly provided for in Article 53. (2) second sentence of the Basic Law, that is, 'to be proportionate with the situation that caused it, to be applied without discrimination and without prejudice to the right or freedom'.

Thus, considering the exception of unconstitutionality of article 96 par. (6) d) of EO no.195/2002, according to which: 'animal traction vehicles, when traveling on public roads where their access is denied, or on other routes than those established by local authorities [...] will be confiscated', the Court held that these provisions do not respect the principle of proportionality. Animal traction vehicles forfeiture for breach of rules on traffic on public roads is excessive, being in an obvious disproportion to the aim pursued by the legislature in its establishment.

Also, this measure affects the very existence of property rights, as it determines a deprivation of the owner's property, legally acquired, which is in contradiction with Article 44. (8) of the Constitution. According to these provisions, 'the property acquired assets may not be confiscated. Legality of wealth acquirement shall be presumed'.

Accordingly, as the Court noted that the reviewed legal provisions are against the provisions of paragraph 44. (8), which prohibits the confiscation of illegally acquired assets and of art. 53 on limitation of rights and freedoms, it admitted the exception of unconstitutionality of the aforementioned legal provisions. In other words, reasonableness of exercising ownership right limits represents an application of the principle of proportionality in the sense of adequacy of these limits to the need to secure the fundamental right.

By Decision no. 871/2007, the Constitutional Court found that GEO no. 110/2005 affects the constitutional provisions guaranteeing the right of private property.

Thus, it held that the deprivation of property imposes, therefore, that the State must compensate the owner as, without paying a reasonable amount, related to the value of the asset, the measure constitutes an unreasonable prejudice to the right of respecting possessions. The impossibility to obtain even a partial compensation, which is appropriate in the case of the deprivation of property, is a breaking of the balance between the need to protect property rights and general requirements.

[25] Decision no.51/1998 published in the Official Gazette. Part I, No. 160 of April 22, 1998.
[26] Decision no.661/2007 published in the Official Gazette. Part I, nr.525 of August 2, 2007.

THE JURIDICAL REGIME OF SANCTIONING THE PERFORMANCE OF AN ACTIVITY FOR THE BENEFIT OF THE COMMUNITY

Silvia Elena OLARU[*]

Abstract: *The sanctioning of performing an activity for the benefit of the community is always established alternately with the fine or penalty and certain deeds that constitute contraventions are sanctioned. This sanction may be applied only by the court.*

The activity for the benefit of the community is performed in the field of public services, for maintaining the places of recreation, parks and roads, for maintaining the cleanliness and hygiene of the localities, for conducting activities for the benefit of hostels for the elderly and children, for the orphanages, nurseries, kindergartens, schools, hospitals and other social-cultural establishments.

It is prohibited to oblige the child to perform an activity involving risks or is likely to affect his/her education or to harm his/her health or his/her physical, mental, spiritual, moral or social development.

Keywords: *offense, community service activities, irrevocable, supervising the execution, contravention, working programme.*

Introduction

Contravention imprisonment was introduced into the Romanian legislation by Decree no.329/1966 on sanctioning some deeds that constituted contraventions to the rules of travelling by train.[1]

It has first appeared as an exception to the common law, but then more regulations regarding the law stipulated the punishment of certain deeds with contravention imprisonment, although Law no.32/1968, which was the framework law on the contraventions regime, this sanction was not taken in the system of contravention sanctions.

Among the concerns of finding some alternatives to the sanctions involving deprivation of liberty on short term, which could protect the offender from imprisonment was Law no.82/1999 on the replacement of contravention

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[1] Decree no.329/1966 on sanctioning some contraventions regarding the rules for travelling by train, published in Of.B. (Official Bulletin) no. 21/03.05.1966, repealed by Law no.158/2004 concerning the declaring of certain normative acts as repealed, published in the Of.G. (official Gazette) no. 467/25.05.2004.

imprisonment with the sanction of obliging the offender to perform some activities for the benefit of the community.

By GO no.2/2001 on the juridical regime of contraventions, both contravention imprisonment and performing some activities for the benefit of the community were stipulated as the main sanctions.[2]

Due to the dysfunctions reported in the practice of the courts of law on the application and enforcement of these sanctions, this area was covered by special law, GO no.55/2002.[3]

In the ordinance it is stipulated that the sanction of the performance of an activity for the benefit of the community can be provided only in laws or ordinances of the Government, through which certain deeds constituting contraventions shall be established and sanctioned.[4]

The sanctioning of performing an activity for the benefit of the community is always established alternately with the fine or penalty and certain deeds that constitute contraventions are sanctioned. This sanction may be applied only by the court.

The activity for the benefit of the community is performed in the field of public services, for maintaining the places of recreation, parks and roads, for maintaining the cleanliness and hygiene of the localities, for conducting activities for the benefit of hostels for the elderly and children, for the orphanages, nurseries, kindergartens, schools, hospitals and other social-cultural establishments.

The local council establishes through a decision the fields of the public services and the areas where the offenders will perform activities for the benefit of the community.

The mayor is required to carry out the mandate of execution.

The sanctioning of performing an activity for the benefit of the community is carried out after the working programme, or, according to each case, the school programme of the offender, for a period between 50 hours and 300 hours, maximum of 3 hours a day, and during the non-working days of 6-8 hours per day.

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[2] GO no. 2/2001 on the regime of contraventions, published in Of.G. no. 410/2001, Law no. 180/2002 published in Of.G. no. 268/2002, amended through GEO no. 108/2003 published in Of.G. no. 747/26.10.2003, Law no. 526/2004 published in Of.G. no. 1149/06.12.2004, Law no. 182/2006 published in Of.G. no. 443/23.05. 2006, Law no. 352/2006 published in Of.G. no. 640/25.07.2006, GO no. 8/2006 published in Of.G. no. 78/27.01.2006, Law no. 353/2006 published in Of.G. no. 640/25.07.2006, Law no.293/2009 published in Of.G.no.645/01.10.2009, Law no.202/2010 published in Of.Gno.714/26.10.2010.

[3] GO no. 55 of 16/08/2002 on the juridical regime of sanctioning the performance of an activity for the benefit of the community and contravention imprisonment, published in the Official Gazette no. 642 of 30/08/2002, approved by Law no. 641/2002 published in the Of.G. no. 900/11.12.2002, amended by GEO no. 108/2003 published in Of.G. no. 747/26.10. 2003, Law no. 42/2007 published in Of.G. no. 163/07.03.2007, GEO no. 78/2008 published in Of.G. no. 465/23.06.2008.
The dispositions of the ordinance is supplemented by the provisions of the Code of Civil Procedure.

[4] Example - Law no. 61/1991 to sanction the acts of violation of some rules of social coexistence, of the order and public order, republished in Of.G. no. 387/18.08.2000, with subsequent amendments.

If the offender has the opportunity to execute the penalty every day of the week, and local public authorities, through the persons empowered, are able to supervise the offender's activities, the maximum duration of the working time cannot exceed 8 hours per day.

The sanctioning of performing an activity for the benefit of the community can also be applied to minors, if the crime was committed at the time they reached the age of 16 years. The activity is performed on a period between 25 hours and 150 hours.

It is prohibited to oblige the child to perform an activity involving risks or is likely to affect his/her education or to harm his/her health or his/her physical, mental, spiritual, moral or social development.

The procedure of applying the sanctions

In the case of contraventions for which the law provides for sanctioning with the fine alternately with sanctioning the performance of an activity for the benefit of the community, if the fact-finding agent considers that sanctioning with the fine is sufficient, he/she applies the fine in accordance with the provisions of the GO no.2/2001 on the contraventions regime.[5] If, in relation to the seriousness of the crime, it is considered that the fine is not sufficient, the fact-finding agent shall write a fact-finding report on the contravention and shall submit it, within 48 hours, to the court of justice.

The jurisdiction belongs to the court in whose district the offence was committed. The president of court fixes an emergency term, citing the offender and the fact-finding agent.

The bench is composed of a single judge.

The offender can be assisted by the defender.

If the offender is a minor, legal assistance is required. The court calls for the summoning of the parents or of the legal representative of the minor.

Participation of the prosecutor is required.

The court considers the legality and reliability of the reports or minutes and delivers one of the following solutions:

a) applies the sanctioning with the fine;

[5] GO no. 2/2001 on the contraventions regime, published in Of.G. no. 410/2001, Law no. 180/2002 published in Of.G. no. 268/2002, amended by the GEO no. 108/2003 published in Of.G. no. 747/26.10.2003, Law no. 526/2004 published in Of.G. no. 1149/06.12.2004, Law no. 182/2006 published in Of.G. no. 443/23.05. 2006, Law no. 352/2006 published in Of.G. no. 640/25.07.2006, GO no. 8/2006 published in Of.G. no. 78/27.01.2006, Law no. 353/2006 published in Of.G. no. 640/25.07.2006, Law no.293/2009 published in Of.G.no.645/01.10.2009, Law no.202/2010 published in Of.Gno.714/26.10.2010.

b) applies the sanctioning of performing an activity for the benefit of the community, if it considers that the application of the contravention fine is not sufficient or the offender does not have material and financial means to pay it;

c) cancels the minutes or the report.

If a person has committed multiple offences, found through the same report or minutes, in case for all the facts or only for some of them it has been stipulated the sanctioning of performing an activity for the benefit of the community, the sanctions added without being able to exceed the overall maximum established by the law.

These provisions shall apply as appropriately and in the situation in which the concurrent contraventions were found through different minutes or reports.

The decision through which the sanction was applied for the performance of an activity for the benefit of the community is irrevocable.

In all cases, the court may, by resolution, determine the nature of the activities to be performed by the offender for the benefit of the community, based on data provided by the mayor of the locality where he/she has his/her domicile or residence, taking into account his/her physical and mental skills, as well as the level of professional training.

The enforcement of the sanctions

The sanctioning of performing an activity for the benefit of the community is placed into execution by the court of law by issuing a writ of execution.

A copy of the decision, with the writ of execution, shall be communicated to the mayor of the territorial-administrative unit and to the police station in whose territorial range the offender is domiciled or resident, as well as to the offender.

The writ of execution shall be made in 4 copies and include:

- the court which issued it;
- the date of the issue;
- number and date of the decision that is being executed;
- the personal data on the offender: name, date and place of birth, domicile and residence, if necessary, and the personal code number; - the length and nature of the work to be performed by the offender.

The sanctioning of performing an activity for the benefit of the community is executed within the range of the administrative-territorial unit in which the offender resides or has his/her domicile.

The mayor is required to carry out the writ of execution.

In carrying out the writ of execution, the mayor establishes a once the type of activity to be performed by the offender, the conditions under which he/she executes the sanction, as well as the working hours, making the unit where the activity shall be performed aware of the measures taken.

When establishing the type of activity to be performed by the offender, the mayor will take into consideration the professional training and the offender's health, evidenced by documents issued according to the law.

It is forbidden to establish for the offender the performance of work underground, in mines, in the subway or in other such places with a high risk in performing activities, as well as in dangerous places or which by their nature can cause physical suffering or can produce damages to the person's health.

The sanctioning of performing an activity for the benefit of the community is executed in accordance with the rules of labour protection.

If the public service within which the offender performs work was granted to a company entirely owned or partly private, the counter value of the performed activities is paid at the territorial-administrative unit's budget in whose range the sanction is being executed.

The mayor, in carrying out the obligation to bring out the writ of execution, establishes the type of activities, the conditions under which it is done and the working programme of the minor.

The supervision of the enforcement of the sanctioning the performance of an activity for the benefit of the community is ensured by the mayor of the locality or by the mayors of the sectors of Bucharest, through authorized people, helped by the police stations, in whose territorial range the sanction is being performed.

The division of tasks and the coordination of the actions undertaken by the persons authorized by the mayor, as well as the ways of granting support by the police units in order to enforce the surveillance of the execution of performing an activity for the benefit of the community is done with the help of a program of supervision and control established by the mayor, with the agreement of the police unit in whose territorial range the offender is domiciled or resident. A copy of the program remains in the local authority's evidence and in that of the police unit with territorial competence.

Providing work for the benefit of the community is executed on the basis of guiding rules on work established by the mayor, making it possible to exercise control, at different time intervals, by those authorized with supervising the execution of the sanction.

The unit from the public service field in which the offender is executing the sanction is forced, at the mayor's request, to communicate the data and information required on the execution of the sanction.

The offender shall go immediately, but no later than 3 days after receiving the writ of execution, to the mayor of the administrative-territorial unit in whose range the offender is domiciled or resident, for being registered and for executing the sanction.

The beginning of executing the sanction consisting in performing an activity for the benefit of the community is made no later than 5 days after receiving the writ of execution.

The mayor has the obligation to provide records of the sanctions applied to the offenders and of the execution of the sanctions to enforce the sanctions, under this

ordinance. If the offender, malevolently, does not go to the mayor for being registered and for executing the sanction, avoids the execution of the sanction after the beginning of the activity or fails to fulfil the duties incumbent upon him/her at the workplace, the court, upon the mayor's notification, of the police units or of the unit's management at which the offender was required to go and provide community service activities, may replace this sanction with the sanction of the fine.

The execution of the sanction of performing an activity for the benefit of the community is prescribed within 2 years from the date of the remaining irrevocable of the court's decision that applied the sanction.

If until the enforcement of the writ of execution of the sanctioning of performing an activity for the benefit of the community or if during the execution of the sanction of performing an activity for the benefit of the community an irrevocable conviction decision has occurred concerning a freedom-privative, with execution, the contravention sanction shall not be executed anymore.

The fine is executed under the provisions on the enforcement of budget claims.[6]

Against the measures taken on the content of the activities, on the conditions under which it is being performed, as well as to the way in which the supervision is carried out, the offender may make a complaint, which is submitted to the mayor or, according to each case, to the police station to whom belongs the police officer who is in charge with the surveillance of the activity.

The complaint together with the verification of the issues apprised are submitted, within 5 days of registration date, to the court in whose district or range the sanction is being executed.

The complaint shall be settled within 10 days of its receipt.

If the court finds that the complaint is based, it provides, if necessary, the modification of the activity or of the surveillance measures.

The decision of the court shall be irrevocable and shall be communicated to the mayor or to the police unit to which the offender has lodged the complaint, as well as to the offender.

Conclusion

Under the provisions of Article 9 paragraph 5 from GO no. 2/2001, the contravention fine could have been replaced in case of non-payment, with a sanction for performing an activity for the benefit of the community, but this measure being subject to the consent of the offender[7] was never applied because

[6] GO no. 92/2003 on Tax Procedure Code published in Of.G. no. 941/29.12.2003, approved by Law no. 174/2004 published in Of.G. no. 465/25.05.2004, republished in Of.G. no. 560/24.06.2004, as amended by GO no. 47/2007 published in Of.G. no. 603 of 31/08/2007, GEO no. 19/2008 published in Of.G. no. 163 of 03/03/2008, GEO no. 192/2008 published in Of.G. no. 815 of 04/12/2008.

[7] GO no. 2/2001 on the contravention regime, published in Of.G. no. 410/2001, Law no. 180/2002 published Of.G. no. 268/2002, as published by the GEO no. 108/2003 published in Of.G. no.

no one ever gave their consent in this sense, they did not have incomes and were expecting for the prescription to intervene.

If the offender does not pay the fine within 30 days, the court shall replace the fine with the mandatory sanction to provide a community service activity, with his/her consent.

The replacement of the contravention fine with a sanction to perform an activity for the benefit of the community was subject to the consent of the offender, which lead to his/her exoneration of any other sanction, assuming that he/she did not have enough income that could be pursued, and closely connected to, under the conditions shown, the annulment of the contravention imprisonment is likely to deprive the state of the power of coercion to ensure the compliance with law.

This conditioning on the offender's consent is liable to deprive of efficiency the penalty imposed for committing an antisocial deed, with the consequence of violating the stipulations of Article 1. (5) from the Romanian Constitution, according to which „In Romania, the observance of the Constitution, of its supremacy and of its laws is mandatory."

In this respect there are also the similar provisions requiring the offender's consent to performing an activity for the benefit of the community which are found in Article 1 (3), Article 8 Paragraph (5) letter b) and Article 13 of Government Ordinance no. 55/2002 regarding the juridical regime of the sanction on performing an activity for the benefit of the community.[8]

These texts have the following content:

Article 1 paragraph (3): „The sanction on performing an activity for the benefit of the community can be applied only if there is consent of the offender."

Article 8 paragraph (5) letter b): „(5) The court considers the legality and reliability of the minutes or report and delivers one of the following solutions:

b) the application of the sanction on performing an activity for the benefit of the community, with the consent of the offender, if it considers that the application of the contravention fine is not sufficient or that the offender does not have the material and financial means to pay it;

Article 13: „In all cases, after taking the consent of the offender, the court of justice, by resolution, determines the nature of the activities that will be performed for the benefit of the community, based on data provided by the mayor of the city

747/26.10.2003, Law no. 526/2004 published in Of.G. no. 1149/06.12.2004, Law no. 182/2006 published in Of.G. no. 443/23.05. 2006, Law no. 352/2006 published in Of.G. no. 640/25.07.2006, GO no. 8/2006 published in Of.G. no. 78/27.01.2006, Law no. 353/2006 published in Of.G. no. 640/25.07.2006, Law no.293/2009 published in Of.G.no.645/01.10.2009, Law no.202/2010 published in Of.Gno.714/26.10.2010.

[8] GO no. 55 of 16/08/2002 on the juridical regime of sanctions for the performance of an activity for the benefit of the community and on the contravention imprisonment, published in the Official Gazette no. 642 of 30/08/2002, approved by Law no. 641/2002 published in the Of.G. no. 900/11.12.2002, amended by GEO no. 108/2003 published in Of.G. no. 747/26.10. 2003, Law no. 42/2007 published in Of.G. no. 163/07.03.2007, GEO no. 78/2008 published in Of.G. no. 465/23.06.2008.

where the offender has his/her domicile or residence, taking into account his/her physical and mental skills, as well as his/her professional training level."

In this regard the Constitutional Court through Decision no. 1354/2008[9] found that the phrases „***with his/her consent***" in Article 9 of the Government Ordinance no. 2 / 2001 on the juridical regime of contraventions, as well as the phrases „***only if there is the consent of the offender***," „***with the consent of the offender***" and „***the taking the offender's consent***" of Article 1 paragraph (3), Article 8 paragraph (5) letter b) and, respectively, Article 13 of Government Ordinance no. 55/2002 regarding the juridical regime of the sanction on performing an activity for the benefit of the community, as amended by Government Emergency Ordinance no. 108/2003 on the abolition of contravention prison are unconstitutional.

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Decision no. 1354/2008 of the Constitutional Court, published in the Official Gazette no. 887 of 29/12/2008.

[9] Decision no. 1354/2008 of the Constitutional Court, published in the Official Gazette no. 887 of 29/12/2008.

THE EFFECTS OF DISCIPLINARY RESEARCH

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Abstract*: Disciplinary research is the first phase of the disciplinary action. According to art. 251 paragraph 1 of the Labour Code no disciplinary sanction may be ordered before performing the prior disciplinary research.These regulations provide an exception: the sanction of written warning.*

The application of disciplinary sanctions and, especially, the cessation of employment relationship by the employer's unilaterally will, are allowed under some essence and form conditions strictly regulated by labor legislation, to prevent any abuse of the employer.

As a result of required disciplinary research, if it is necessary, the employer will sanction the employee. For this, first he will individualize the sanction and then will issue a decision which must include certain elements strictly required by law, actions that should be performed in certain deadlines required by Labour Code.

Keywords: *disciplinary misconduct, disciplinary sanctions, prior research, sanctioning decision*

1. Introduction

The only ground of disciplinary responsibility is disciplinary deviation. If, while for the other two forms of responsibility - penal and contravention – the Labour Code lists the facts which constitute as infractions, respectively contraventions, in the case of disciplinary responsibility, the Code does not include such determinations but only a definition of the only ground of this form of responsibility.

Stating the disciplinary deviation is the result of an investigation done by the employer named by the Labour Code *disciplinary research*. Not doing this analysis by the employer leads to the absolute nullity of the disposed measures.

Following this mandatory disciplinary inquiry it is established weather sanctions are or are not enforced onto the employee. If a sanctioning decision is emitted, the employer must respect certain procedural conditions in order for the decision to be valid.

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2. Individualizing and enforcing sanctions

When deciding the disciplinary sanction, the employer must take into consideration the provisions of Art.250 of the Labour Code, provisions which provide that the employer decides the disciplinary sanction applicable in report with the severity of the disciplinary deviation done by the employee.

Also, the following aspects must be taken into consideration:

a) the circumstances in which the deed was committed;
b) the employee's degree of guilt;
c) the consequences of disciplinary deviation;
d) overall behaviour at work;
e) eventual disciplinary sanctions suffered prior by the employee.

According to the legal norms, a sanction cannot be established only by the employer, which has disciplinary prerogative, but by respecting all the conditions shown above. The sanction must be individualised, taking into account the criteria stated by the law in order for the preventive role of the disciplinary responsibility to be accomplished.

For example, when the employer enforces an action „to harsh in report to the gravity of the disciplinary deviation done by the employee, taking into consideration the overall behaviour of the employee at work and the fact that he has not been disciplinary sanctioned before", will determine the court to replace the enforced sanction with an easier one (mainly 10% over a month with written warning – The Bucharest Appeal Court, section VII civil and for causes regarding work conflicts and social security, December no.3670/R/2007)[1] .

The sanctions provided by the Labour Code are in a gradual order, from the easiest – written warning, to the harshest – dissolving the work contract.

According to the criteria shown above, the employer can establish one of these sanctions, which have to be proportional to the gravity of the deviation. Still, it will be taken into account the extenuating circumstances like for example, the exemplary behaviour and the lack of any other deviation until that moment.

Thus, in such a cause it was understood that although the employee unquestionably committed serious deviations, in nature of attracting a disciplinary sanction in measure, braking the norms of behaviour at work and the work discipline, still the court decided for the objector who, for 23 years since he had been working in the same place, had accomplished all his duties correctly and had never been sanctioned, the severest disciplinary sanction did not justify [2].

[1] Alexandru Ţiclea, *Tratat de dreptul muncii, Ediţia a V-a revizuită*, Editura Universul Juridic, Bucureşti 2011, nota 5, p.800.

[2] Curtea de Apel Piteşti, secţia civilă, dec. nr. 274/2002, în „Revista română de dreptul muncii " nr. 1/2003, p.126-128, nota 9 din Alexandru Ţiclea, *Tratat de dreptul muncii, Ediţia a V-a revizuită*, Editura Universul Juridic, Bucureşti 2011, p.800.

According to Art.249 of the Labour Code, the employer cannot state the measure of the disciplinary fine, these being strictly forbidden in the dispositions of paragraph 1 of the mentioned article. This legal disposition defends the employee before the dominant position which the employer has, the latter having a discretionary power in the matter of disciplinary responsibility.

Another guarantee of the equilibrium on work relations is stated by paragraph 2 of Art.249. As such, the enforcement of more than one sanction for the same deviation is forbidden. The employee will be sanctioned only in one way, proportional to the gravity of the deviation.

In the doctrine it is shown that when the ethical code of profession is not respected or deviations regarding the profession are done, such an illicit act will draw on itself a *double disciplinary sanction* [3].

For example, in the specialised literature[4] is shown that in the case of the architect employee or public servant, after the enforcement of the disposed disciplinary action, according to Art.35 and the following from Law no.184/2001, the company whose employee (public servant) is the one in question for the grounds of enforcing such a sanction, must emit a secondary disciplinary sanctioning decision, but this time on the level of work legislation (the Labour Code or the status of public servants, if it is the case), according to this latter legislation.

3. The terms of enforcing disciplinary sanctions

Art.252, paragraph 1 of the Labour Code shows that „the employer disposes of enforcing the disciplinary sanction through a decision emitted in written form, within 30 monthly days from when he took notice of the disciplinary deviation, but no later than 6 months from when the deed was committed".

The Constitutional Court stated in regards to the constitutionality of this text[5], removing the criticism according to which „by enforcing the 6 months term, the right of action of justice is being restricted, in the sense that it prevents the accountability of the employee who is guilty of not following the discipline norms and regulations at the work place by sanctioning the committed actions". The Constitutional Court understood that the same prescription terms (of 30 days and 6 months) and also those instituted by the dispositions of Art.252 paragraph 1 of the Law no.53/2003 were also foreseen in the previous legislation (Art. 13 paragraph 4 of Law no.1/1970 regarding the organisation and discipline in socialist state

[3] Alexandru Țiclea, *Tratat de dreptul muncii, Ediția a V-a revizuită*, Editura Universul Juridic, București 2011, p.801.

[4] Șerban Beligrădeanu, *Legislația muncii, Comentată,* vol. XL (2/2001), Lumina Lex, București, 2001, p. 46.

[5] Prin Decizia nr. 136/2004 (publicată în Monitorul Oficial al României, Partea I, nr. 381 din 30 aprilie 2004), În Alexandru Țiclea-coordonator, Codul muncii comentat şi adnotat cu legislație, doctrină şi jurisprudență, vol.I, Ed. Universul Juridic, București 2010, p.355.

companies, abolished, provisions of which constitutionality was established through Decision no.7/1999[6]). Analysing the constitutionality of those dispositions, the Court stated, in the situation in which a prescription term to enforcing the disciplinary sanction would not exist, „enforcing the sanction, in the case of the employee of a commercial company, would be equivalent to the imprescriptibility of responsibility, an unacceptable and absurd consequence, from the perspective of general principles of juridical responsibility".

Within Art.252, paragraph1, the Labour Code provides two terms within which the employer must do all the disciplinary action: one of 30 monthly days and another of 6 months.

The two terms are closely linked. As such, the 30 days term runs within the 6 months term. The date from which the two terms begin is different.

The 30 days term, a term within which he/she must do all the papers regarding the disciplinary action, including the sanction of the employee, begins from the date on which the respective deed was taken into notice.

In practice[7] it was understood that „Art.252, paragraph1 of the Labour Code does not condition the passing of the 30 days prescription term from making the prior investigation, a condition which is provided distinctly, and neither does it establish that the starting moment of it is situated on the date on which it was deposited in the company's registry the final report drafted by the prior research commission, resulting as such, that it is calculated from the date on which the employer took notice of the respective deviation through a note of determination, report, official report, etc., which indicates the guilty person and having a specific date, through its registration in the company's general registry".

Also, it was understood[8], that „the date on which the employer took notice of the disciplinary deviation can be only the date on which the report was filed or a notification was made on the respective disciplinary deviation, even though, later on is necessary the completion of information which it contains.

In the case of a report or of another filed act, the mentioned date can be proven by any means of evidence, being a simple fact'.

The 6 months term in which the employer must enforce the sanction corresponding to the disciplinary deviation, starts from the date when the deed was committed.

From these dispositions, results that if the employer takes notice of the disciplinary deviations in 5 months and 10 days from when it was committed, the

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[6] Publicată în Monitorul Oficial al României, Partea I, nr. 352 din 26 iulie 1999.

[7] Curtea de Apel Bucureşti, secţia a VII-a civilă şi pentru cauze privind conflicte de muncă şi asigurări sociale, decizia nr.3617/R/2007, în Alexandru Ţiclea, *Tratat de dreptul muncii, Ediţia a V-a revizuită*, Editura Universul Juridic, Bucureşti 2011, p.803.

[8] Curtea de Apel Constanţa, Secţia civilă, pentru cauze cu minori şi de familie,precum şi pentru cauze privind conflicte de muncă şi asigurări sociale, Decizia civilă nr. 431/CM/2008, în Alexandru Ţiclea-coordonator, Codul muncii comentat şi adnotat cu legislaţie, doctrină şi jurisprudenţă, vol.I, Ed. Universul Juridic, Bucureşti 2010, p.360.

30 days term for making an entire disciplinary action (putting together the disciplinary commission, summoning the employee, the prior research, stating the sanction) will diminish considerably (20/21 days) in order not to pass the general 6 months term.

In specialised literature[9] was understood that „if the disciplinary deviation had a continuous character, the term of enforcing the disciplinary sanction must be calculated from the last action of the employee of breaking the work obligations".

The two terms will be calculated according to the dispositions of the Civil Procedure Code.

4. The sanctioning decision. The report between the proposition of the inquiry commission and the juridical act of sanction

The result of the so-called disciplinary inquiry done by the disciplinary commission will be noted, following the employee's defence and analysis of evidences, in a report or official report, in which it will be mentioned also the motivation for which the employee's defence was rejected, the sanctioning proposition and the proposition not to sanction and also the possible sanction. Also it will be noted the lack of participation of the employee to the summoning, if it is the case or refusal to defend.

The disciplinary inquiry procedure done by the commission will not void the employer's rights provided by Art.40 paragraph 1, letter e, of the Labour Code, which is the right to state the certain disciplinary deviation and to enforce the corresponding disciplinary sanctions, according to the law, of the collective work contract and internal regulation. So, the employer can take into account the commission's proposition or can decide on its own following the inquiry's result drafted by the commission.

As a consequence of this analysis, the employer's decision will materialise into the employee's sanctioning decision, if it is the case.

Paragraph 2 of Art.252 of the Labour Code provides the validity conditions of the sanctioning act, called by the legal norms „a decision".

Under the sanction of complete nullity, the sanctioning decision must have the following elements:

a) the description of the act which constitutes disciplinary deviation;
b) stating the provisions from the personal status, internal regulation, individual work contract or collective work contract which were broken by the employee;

[9] Ion Traian Ştefănescu, *Tratat de dreptul muncii*, Ed. Wolters Kluwer, Bucureşti 2007, p.463.

c) the reasons for which the defences formulated by the employee were removed during the prior disciplinary inquiry or the reasons for which, under the conditions provided by Art.251 paragraph2, the inquiry was not done;
d) the rightful ground in which base the disciplinary action is enforced;
e) the ground on which the sanction can be contested;
f) the competent court at which the sanction can be contested;

From the dispositions stated above it is to be understood that for the legality and validity of the sanctioning decision it must include all the elements enounced, a *sine qua non* condition for the remembered aspects. The lack of one of them will lead to the absolute nullity of the sanctioning decision emitted by the employer.

In regards to the absolute nullity which intervenes in the case of not following all the elements of the sanctioning decision, it is considered[10] that „this nullity has the character of express nullity, in which case the law institutes a *juris tantum* presumption of harm, so its beneficiary does not have to prove the action of harming, and only the lack in noticing legal forms. The character of the legal form is imperative, and breaking it draws on itself without question the sanction of absolute nullity".

The decision must contain the description of the action which constitutes disciplinary deviation, respectively of what the deed consists of, the way in which it was committed and eventually the aggravating circumstances, or on the contrary, attenuating. By this description the essential aspects which lead to the conclusion that the employee's action was done work related and with breaking the norms which submit him to certain behaviour must be pointed out.

Along side this detailed description of the employee's guilty deed, the decision will include also the date on which the deed was committed[11], in order to be verified that the legal terms regarding disciplinary action were respected.

Similar to the acts emitted by the courts regarding resolving litigations with which they are invested, but also the request of summons, the labour legislation provides for the decision of actual and rightful motivated sanction. If the actual motivation is made through the as thorough description as possible of the action, the rightful motivation is done by showing the provisions which were violated by the employee.

In practice it was shown that „the generic mention of the internal regulation, without individualizing an express disposition whose violation draws the qualification of grave disciplinary deviation of the employee, is not of nature to

[10] Curtea de Apel Galaţi, secţia conflicte de muncă şi asigurări sociale, dec. nr. 28/R/2007, nota de subsol nr.7 din Alexandru Ţiclea, *Tratat de dreptul muncii, Ediţia a V-a revizuită*, Editura Universul Juridic, Bucureşti 2011, p.804.

[11] Curtea de Apel Bucureşti, secţia a VII-a civilă şi pentru cauze privind conflictele de muncă şi asigurări sociale, decizia nr. 718/R/2007, în Lucia Uţă, Florentina Rotaru, Simona Cristescu, *Dreptul muncii. Răspunderea disciplinară. Practică judiciară*, Editura Hamangiu, Bucureşti 2009, p. 283.

comply with the request provided by Art.268 paragraph2, letter b (the actual Art.252, paragraph 2, letter b) of the Labour Code".

The sanctioning decision will include also the reasons for which the defence formulated by the employee during the prior disciplinary inquiry was rejected, or the reason for which an inquiry was not made.

Stating these reasons constitutes a guarantee of the fundamental right of defence which the employee has. But if the employee refuses to formulate a defence, this must be noted in the act drafted by the commission and also in the sanctioning decision.

Also, in the situation in which the employee admits for the fact with which he is accused, the employer is no longer forced to state why the employee's defence was removed, as there are none.

The Labour Code provides also showing the rightful grounds on which the sanction is enforced, the period in which it can be contested and the court to which the contestation can be made. In order to clarify these dispositions, the Labour Code provides in paragraph 5 of the in question article, the period in which the employee can address the competent courts in order to contest the decision of sanction, more precisely, 30 monthly days from the date of communicating this act.

As it can be noticed the legislator did not specify a certain court but used the term „competent court", appealing as such to the civil procedure norms, in order to establish this specific court.

As regards to the duration in which the sanctioning decision can be contested, the date from which it begins is the date on which it was communicated to the employee. In this regard, the Labour Code states in Art.252, paragraph 3 that the decision to sanction will be communicated to the employee in as long as 5 monthly days from the date when it was emitted.

The date from which the sanctioning decision comes into effect is not the date on which it was emitted, but, according to the same dispositions of the Labour Code, the date on which it was communicated.

From these dispositions it is to be understood that the lack of communicating the decision draws on itself the lack of any results, the date on which it was communicated being also the date when the employer can proceed in executing the sanction, and also the date when the 30 days term from when the employee can contest the sanctioning decision begins.

If the decision is not communicated within 6 months from when the deed was done, the employer no longer has the right to enforce the sanction, the decision becoming void.

The communication will be given personally to the employee, with a signature of receipt, or in case it is refused, through a certified letter, at the domicile or residence communicated by the employee (Art.252, paragraph4 of the Labour Code).

If new elements emerge, in favour of the employee, before a competent judicial body will rule, the employee can revoke the sanctioning decision, the revoking producing retroactive effects, from the date when it was emitted.

In practice it was raised the exception of unconstitutionality of the text of the article analysed in this subsection. The Constitutional Court states that „this text is amongst those who have the purpose to insure the stability of work relations, of their development in conditions of legality and respecting the rights and duties of both parties of the juridical work report. At the same time, they are meant to insure the protection of rights and legitimate interests of the employee, taking into account the dominant position of the employer in the development of the work relations".

Enforcing disciplinary sanctions and especially, terminating the work report from the unilateral will of the employer are permitted if certain basic and strictly regulated conditions by the labour legislation are respected, with the purpose of preventing eventual abusive conducts from the employer.

The mentions and specifications which the decision to enforce disciplinary sanction has to mandatory include, have the role, first of all, to actually and completely inform the employee regarding the actions, motifs and rightful grounds for which the sanction is imposed to him, including regarding the means of attack and the periods in which he has the right to state the validity and legality of the measures disposed from the unilateral will of the employer.

The employer, because he has all the information, evidences and dates on which the respective measure is grounded, must show proof of the validity and legality of the measure, the employee being able only to fight back through other pertinent evidence. So, the mentions and statements provided by the law text are necessary also for the courts, as regards to the legal and real settlement of eventual litigations determined by the employer's action.

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THE REFLECTION OF ART 4 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS IN THE ROMANIAN PENAL LEGISLATION

Ion RISTEA*

Abstract: *According to Art 4 of the European Convention on Human Rights, no one shall be held in slavery or servitude. Also, no one shall be required to perform forced or compulsory labour.*

For the purpose of this article the term forced or compulsory labour shall not include: any work required to be done in the ordinary course of detention imposed according to the provisions of Art 5 of this Convention or during conditional release from such detention; any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service.

Keywords: *European Convention of Human Rights, forced labour, compulsory labour, slavery.*

The European Convention of Human Rights signed in Rome on 4 November 1950 and entered into force on 3 September 1953 (ratified by the Romanian Parliament by Law No 30/1994) represents the most important document created by the Council of Europe (founded in 1949 and enlarged after 1980, having nowadays 47 Member States), for the protection and development of human rights and fundamental freedoms.

These principles influence the legislation of the European states, members of the Council of Europe (Romania was accepted as full rights member on 4 October 1993) laying efforts to modify their legislation in relation to these humanistic principles in accordance with the actual stage of development of social relations.

The adaptation of the national legislation to the principles of the European Convention also takes in our country.

Thus, starting with the Constitution (in force since December 1991, revised by Law No 429/2003), which has stated many of the principles of the European Convention, all important normative acts are in accordance with the solutions stated by the Convention.

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Also, in the penal doctrine studies on the European Convention were published[1].

The efforts of the Romanian authorities to harmonize the penal legislation with the requirements of the Convention are eloquent also in the area of the protection and guarantee of the human rights.

1. One of these rights is the protection of the person against slavery or servitude or against forced labour.

According to Art 4 (Para 1) of the Convention, no person shall be held in slavery or servitude. Also, no person shall be required to perform forced or compulsory labour (Para 2).

According to Para 3, for the purpose of this article the term forced or compulsory labour shall not include:

a) any work required to be done in the ordinary course of detention imposed according to the provisions of Art 5 of this Convention or during conditional release from such detention;
b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;
c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
d) any work or service which forms part of normal civic obligations (Para 3).

2. In the jurisprudence of the European Court emerged the issue of the forced or compulsory labour notion.

Regarding this aspect, the Court decided not to define as forced or compulsory labour the obligation of a lawyer to free legal assistance in the favor of a defendant without financial means, in the meaning of Art 4 Para 2 of the Convention, because the job has not exceeded the normal limits of the activity of a lawyer and was compensated by the advantages resulted for the profession (has contributed to the practical experience of the petitioner during his internship). On the other hand, these activities have not imposed an excessive workload and there is no discrepancy between the lack of remuneration and the obligation of every lawyer to offer judicial assistance (*Van de Mussele v Belgium*).

[1] G. Antoniu, Implicații asupra legii penale române a Convenției Europene a Drepturilor Omului, in the Romanian Law Studies Review, 4th Volume (37), 1992 no 1, p.5-13; G. Antoniu, Art 5 din Convenția Europeană a Drepturilor Omului in the Romanian Law Studies Review 5th Volume (38), 1993, No 2, p.167-184; G. Antoniu, Art 6 din Convenția Europeană a Drepturilor Omului, in the Romanian Law Studies Review, 5th Volume (38), 1993, No 3, p.257-270; O. Predescu, Convenția Europeană a Drepturilor Omului, Implicații asupra dreptului penal român, Lumina Lex Publishing-house, Bucharest, 1998, p.20 and next.

3. The exigencies of the Convention are found in the Romanian legislation.

First of all, Art 42 of the Romanian Constitution prohibits forced labour; for the purpose of this article forced labour shall not include the activities of doing the military service, as well as activities performed in lieu thereof, according to the law, due to religious or conscience-related reasons; the work of a sentenced person, carried out under normal conditions, during detention or conditional release; any services required to deal with a calamity or any other danger, as well as those which are part of normal civil obligations as established by law.

The Romanian Penal Code incriminates in Art 191 „the act of subjecting a person, in other cases than those provided in the law, to any kind of labour against his/her will or to any kind of obligatory labour" (the offence of subjecting a person to forced or obligatory labour).

This text was inserted in the penal law as a consequence of some international obligations assumed by Romania namely, the Convention No 39/1950 on forced or compulsory labour, ratified by our country by Decree No 213/1957.

Forced labour has been defined as the constraint of a person (against his/her will) to perform a certain labour; and by the subjection of a person to a compulsory labour it is understood the abusive constraint of him/her to perform any kind of labour as an obligation, though such labour is not part of the normal activities of that person nor it is included among the situations when, according to the law, such labour can be requested. In both cases, the constraint of the person to perform a certain labour is illicit, because it is violated the freedom of will; it is not the object of interest neither the nature of the labour to be performed nor its duration[2].

Also, Art 190 of the Penal Code incriminates the placing or keeping a person in slavery, as well as trafficking in slaves (the offence of slavery). This text was inserted in the Romanian penal law as a result of some international conventions ratified by Romania, namely: Convention on preventing trafficking in women and children signed at Geneva on 30 September 1921; Slavery Convention signed at Geneva on 25 September 1926 and ratified by Decree No 988/1931; Supplementary Convention on the abolition of slavery, the slave trade, and Institutions and practices similar to slavery signed at Geneva on 6 September 1956 and ratified by Decree No 357/1957.

4. From the comparison of the Romanian penal legislation with the solution of the European Court mentioned before, one can notice that the given result corresponds with the provisions already in force in our country.

Thereby, Art 24 Para 1 of the Constitution guarantees the right to defense, all throughout the trial, the parties shall have the right to be assisted by a lawyer of their own choosing or appointed *ex officio*. Likewise, Art 171 Para 4 of the Criminal Procedure Code states that when judicial assistance is obligatory, if the defendant has not chosen a defender, measures are taken for appointing one *ex*

[2] V.Dongoroz et al.,Explicații teoretice ale Codului penal român, 3rd Volume, p.304

officio; the activity of the ex officio defender is a legal obligation which he cannot avoid without being sanctioned. According to Art 198 Point c) of the Criminal Procedure Code, unjustified absence of the defender is sanctioned by judicial fine, as stated by Art 199 of the Code.

It is noticed that in the case brought before the European Court that the petitioner does not criticize the mandatory element of the ex officio defendant chosen by the court, but its free feature, assimilating the duty received with the performance of a forced or compulsory labour.

Such an objection could not be addressed to the Romanian procedural law which does not state the gratuity of the *ex officio* defender. In all cases, the fee of the *ex officio* defender is paid by the state and is included in the legal expenses incurred to the defendant (if he was convicted or punished for a civil guilt), by the victim, by the civil party or by the state.

Also, in this regard were given decisions by the Romanian courts. Thus, the defendant who had an ex officio defender shall pay the fee of the lawyer, if he has the necessary financial means or, otherwise, the fee shall be communicated to the Ministry of Justice, and the sum shall be included in the legal expenses supported by the defendant[3]; if the defendant is not convicted to pay the legal expenses, the fee of the ex officio defender shall be paid by the Ministry of Justice[4].

This regulation is contradictory with the European Convention (Art 6 Para 3 Line c)) which states that the assistance granted by an ex officio defender is free, because his services are offered only to those persons who do not have the necessary means to pay for their defender. In this regard, the arguments of the Court are pertinent, in the meaning that the activity performed by the ex officio defender does not represent forced or compulsory labor, prohibited by the Convention, but is part of the daily activities performed by a lawyer.

It should also be considered the case in which a future regulation would not state the gratuity of the activities performed by the *ex officio* defender when the court considers that the interests of justice require the presence of a defender and the beneficiary of such presence would not have the necessary financial means to pay for it. We do not consider that the activity of the *ex officio* defendant, free regarding the defendant, should become a source of prejudices for the defender (who could state that it is proposed to him an activity similar to forced or compulsory labor). It should rather be maintained the actual partial system, in the meaning that the fee of the defender should be communicated to the Ministry of Justice, and if the defendant does not possess the necessary financial means to pay, the fee to always be paid by the state[5].

[3] Supreme Court of Justice, Decision No 1568/1988, Romanian Law Review, No 7/1989, p.77
[4] Supreme Court of Justice, Decision No 8/1972, Romanian Law Review, No 4/1973, p.134
[5] G.Antoniu et al. *Reforma legislației penale,* Romanian Academy Publishing-house, Bucharest, 2003, p.262

ORGAN TRANSPLANT IN THE ORTHODOX THEOLOGY LIMELIGHT: CONSIDERATIONS FROM GREEK THEOLOGIANS, DECISIONS AND SYNODICAL TEXTS FROM THE ORTHODOX WORLD PERTAINING TO TRANSPLANTS AND THEIR THEOLOGICAL-MORAL IMPLICATIONS

Ion CROITORU*

Abstract: *Transplantation, which is the transfer of organs, tissues and cells, has begun many centuries ago as a primitive practice and has since evolved into a modern reality. Chronic organ diseases and the increasing demand for organ transplantation have become important health care issues within the last few decades. Further efforts to avoid and control the mechanism of transplants rejection led to the discovery of new drugs, still without complete overcoming the problem of the immune response. This article discusses, while presenting with various medical data, the problems concerning the medical practice of transplantation from the Orthodox Theology point of view, especially how it is lived and expressed by the contemporary Greek theologians, scholars and hierarchs; the axes of the moral-spiritual and dogmatic issues regarding especially the sources of transplants (donors), the notion of brain death, the presumed consent; the decisions and synodical texts in the Orthodox world concerning the transplants and their theological-moral problems; the vision of the Orthodox Theology regarding the transplants from the perspective of Greek theologians; the dilemma of the brain death (since this notion was introduced in the medical terminology by the ad-hoc Committee of the University of Harvard in 1968, it has generated many comments).*

Keywords: *transplantation, transplants, brain death, organ and tissue donation, consent, donor, recipient, mechanistic anthropology, Science, Orthodox anthropology, knowledge, spirituality, Orthodoxy, Orthodox Church, Theology, Fathers, patristic thought, body, soul, mind, heart, brain, deification/theosis, religion.*

1. Status Questionis

The progress achieved in the Medical and Bio-technological fields brings new hope for people and one of the innovative methods, intensely promoted, is the practice of organ, cells and tissue transplant[1].

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[1] Between 1960-1990, research in the transplants field has been awarded three Nobel Prizes, Sir Peter Medawar (1960), J. Dausse, G. Suell, B. Benaceraff (1980) and Joseph E. Murray (1990), see Νικολάου Μητροπολίτου Μεσογαίας καὶ Λαυρεωτικῆς, *«Ἀλλήλων μέλη». Οἱ μεταμοσχεύσεις στὸ φῶς τῆς Ὀρθόδοξης Θεολογίας καὶ ζωῆς*, Ἀθήνα 2005, p. 13, note 1 (= Νικολάου, *«Ἀλλήλων Μέλη»*).

The idea of transplants is not new, first transcripts dating back in the old mythology of Indian and Chinese[2], followed by examples from Christianity. With regards to the modern era in Western Europe, the first reference pertaining to transplants dates back to the 17th century, citing the plastic surgeon Gasparo Tagliacozzi of Italy, who became famous in rhynoplasty , using human arm skin transplant, procedure known even today as the *Italian method*[3]. It is worth mentioning that in 1771, the Scottish surgeon John Hunter (1728-1793), who performed transplant surgeries for teeth and tissues, used the term *transplant* for the first time[4].

Until the end of the 19th century, transplant procedures have not registered significant results and were more experimental. The unsuccessful attempts of the surgeon Emerich Ullmann, the *father of the transplants from one species to another*[5], were followed by a period of intense trial and research, with partially successful cases of recipients accepting the transplants, by the efforts of surgeons like Alexis Carrel, Charles Guthrie, Carlos Williamson, Emile Holman, MacFarlane Burnet, Peter Medawar, Yuri Vorony, etc.[6]. In addition to these names, it is also mentioned Saint Luke, Archbishop of Symferupolis and Crimea (June 11), who around 1924, therefore 10-12 years before Yuri Vorony, *successfully*

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[2] See Νικολάου, *«Ἀλλήλων Μέλη»*, pp. 17-18; Ἰωάννη Παπαδημητρίου, *Μεταμοσχεύσεις Ἱστῶν καὶ Ὀργάνων*, Ἀθήνα 1998, pp. 1-3 (= Παπαδημητρίου, *Μεταμοσχεύσεις*).

[3] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 18; Παπαδημητρίου, *Μεταμοσχεύσεις*, p. 3. In Romanian Historiography one can find the spatharus Nicholas Milescu (1636-1708), who lived in Berlin between the years of 1665 and 1666, with a purpose of establishing connections with the powerful elector Friederich Wilhelm the 14th (1640-1688); he then had a rhynoplasty surgery after an incident in 1661. During the first part of his life, the spatharus was involved in the political games and intrigues from the Romanian Countries. In consequence, he was punished by his colleague, prince of Moldova, Ştefăniţă Lupu (1659-1661), in the beginning of 1661, by cutting off his nose; for this reason, in the transcripts at the time, he was also known under the nickname *Nicholas the Snub-nosed* [Olga Cicanci, Paul Cernovodeanu, «Ştiri noi despre spătarul Nicolae Milescu şi relaţiile lui cu teologul anglican Thomas Smith», *Biserica Ortodoxă Română* 89/3-4 (1971), pp. 321, 329-330; Radu Ştefan Vergatti, *Nicolae Spătarul Milescu: viaţa, călătoriile, opera,* Bucureşti 1998, p. 85-86, 105-106].

[4] Νικολάου, *«Ἀλλήλων Μέλη»*, pp. 18-19; Παπαδημητρίου, *Μεταμοσχεύσεις*, p. 3. Specialized literature makes a difference, at the scientific level, between *graft* and *transplant*. *Graft* is defined more like a *procedure* that *involves the transposition and application of fragments from a person in other places of his/her own body*, whereas *transplant implies not only a procedure on the surface, but also the reestablishment of the blood flow*, see http://www.roportal.ro/articole/92.htm, 2.09.2008; http://www.bioetica.ro/bioetica/ie2/info.jsp?item=9855&node=1475, 16.02.2009.

[5] See Νικολάου, *«Ἀλλήλων Μέλη»*, p. 19; Albert Lyons&Joseph Petrucelli, *Medicine – An Illustrated History,* Abradable Press, New York 1987, p. 592.

[6] See Νικολάου, *«Ἀλλήλων Μέλη»*, pp. 19-20; Παπαδημητρίου, *Μεταμοσχεύσεις*, pp. 4-5; Σπύρου Δρακόπουλου, «Μεταμόσχευση Νεφροῦ», *Ἐκκλησία καὶ Μεταμοσχεύσεις*, Ἱερὰ Σύνοδος τῆς Ἐκκλησίας τῆς Ἑλλάδος. Εἰδικὴ Συνοδικὴ Ἐπιτροπὴ ἐπὶ τῆς Βιοηθικῆς, Ἔκδοσις τοῦ Κλάδου Ἐκδόσεων τῆς Ἐπικοινωνιακῆς καὶ Μορφωτικῆς Ὑπηρεσίας τῆς Ἐκκλησίας τῆς Ἑλλάδος, Ἀθῆναι 2002 (= *Ἐκκλησία καὶ Μεταμοσχεύσεις*), pp. 89-90 (= Δρακόπουλου, *Μεταμόσχευση νεφροῦ*).

performed a kidney transplant from a calf to a young person[7], a case which is more of a miracle than a medical success[8].

During the second half of the same century there have been registered the most significant landmarks in the history of transplants: the year 1954, when J. Murray (Nobel Prize in 1990) was successful in performing the first kidney transplant, at the Peter Bent Bringham Hospital of Boston; the year 1963, when J. Hardy accomplished the first lung transplant; the year 1966, doctors Kelly and Lillehei successfully conduct a transplant of a pancreas; the year 1967, when Christian Barnard performed the first heart transplant, in Cape Town, and Th. Starzl performed the first liver transplant, in Denver, Colorado; the year 1981, when B. Reitz performed and succeeded in the first heart and lung transplant, simultaneously[9], etc.

Finding solutions to the rejection of the transplanted organs (the use of Azathioprine in 1960, and of Cyclosporine-A in 1980), leads, after 1981, to a significant increase of the practice of the transplants, with a broadening of the transplant range[10]. The technological and medical progress have contributed to this increase, together with the attempt of redefining human death.

In reference to the Christian tradition, some theologians invoke the episode from the Garden of the Gethsemane, when our Saviour Jesus Christ healed the cut ear of Malhus[11], but this fact does not represent a relevant case[12], being rather a miracle of the Saviour, which is entirely different. A miracle pointing to the practice of the transplants, according to certain theologians, is that which is attributed to the Unmercenary Physician Saints Cosmas and Damian from Rome (July 1), considered the spiritual patrons of Doctors and Pharmacists. According to

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[7] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 124; Παπαδημητρίου, *Μεταμοσχεύσεις*, p. 6; Ἀρχιμ. Νεκταρίου Ἀντωνόπουλου, *Ἀρχιεπίσκοπος Λουκᾶς*, Ἀθήνα 2002[6], p. 124.

[8] See also Ἀθ. Ἀβραμίδη, «Μύθος ἢ θαῦμα; Τὸ «Ἐπιστημονικὸ Ἐπίτευγμα» τοῦ Ἀρχιεπισκόπου – Χειρουργοῦ Λουκᾶ», *Θεοδρομία* Ι΄/4 (Ὀκτώβριος-Δεκέμβριος, 2008), pp. 530-532.

[9] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 20; Παπαδημητρίου, *Μεταμοσχεύσεις*, pp. 6-13; see also Ἀ. Ἰ. Κωστάκη, «Εἰσαγωγή - Ἱστορικὴ Ἀνασκόπηση», *Μεταμοσχεύσεις Ἱστῶν καὶ Ὀργάνων. Δῶρο ζωῆς,* Ἀθήνα 2004, pp. 3-10; Δρακόπουλου, *Μεταμόσχευση νεφροῦ*, p. 87; Σπύρου Δρακόπουλου, «Μεταμόσχευση ἥπατος», *Ἐκκλησία καὶ Μεταμοσχεύσεις*, p. 107. In Greece, the first kidney transplant from dead donor was performed in 1968, and from live donor in 1970 (Δρακόπουλου, *Μεταμόσχευση νεφροῦ*, p. 92); the first heart transplants were performed in 1990 [Χρήστου Χαρίτου, «Οἱ καρδιακὲς μεταμοσχεύσεις στὸν κόσμο καὶ στὴν Ἑλλάδα», *Ἐκκλησία καὶ Μεταμοσχεύσεις*, pp. 59-61 (= Χαρίτου, *Οἱ καρδιακὲς μεταμοσχεύσεις*)]; the first liver transplant in 1992 (Σπύρου Δρακόπουλου, *op. cit.*, p. 108), etc. For a history of organ and tissue transplant in Romania see http://www.transplant.ro/Istoric.htm, 16.02.2009.

[10] Νικολάου, *«Ἀλλήλων Μέλη»*, pp. 21, 35; Παπαδημητρίου, *Μεταμοσχεύσεις*, pp. 5-6; Χαρίτου, *Οἱ καρδιακὲς μεταμοσχεύσεις*, p. 60; Δρακόπουλου, *Μεταμόσχευση νεφροῦ*, pp. 91-92.

[11] See *Luke* 22: 50-51; *Matthew* 26: 51; *Mark* 14: 47; *John* 18: 10-11.

[12] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 18.

the *Western Synaxarion,* these Saints put, in place of an affected calf of a believer's leg, the calf of a dead Mauritian[13].

It is worth noting that the miraculous deed of Saints Cosmas and Damian, was emphasized by the director of the General Hospital of Massachusetts (Boston). In May 1962, a 12 year-old boy was brought to the Hospital with his right arm cut just below the shoulder, as a result of a motor vehicle accident. The surgical procedure of reattaching the arm was so successful that the boy returned to his school baseball team. Following this achievement, the Hospital organized a press conference and, when asked by a journalist whether the Hospital claims such an unprecedented surgical intervention, the Director of the Hospital, surgeon E. D. Churchill answered, to the journalists' amazement, that the success should be attributed to another medical team, citing the case of Saints Cosmas and Damian[14].

2. The Science and Theology

The position of the Orthodox Church towards Science has never led to a conflict between Science and Faith, as it has been experienced in the West, particularly in the beginning of the 17th century. This conflict has been avoided due to the fact that in the teaching of the Orthodox Church we can distinguish between two types of knowledge: the knowledge of the *divine* or *from Above* and the *profane* knowledge or *from below*; the first is used by Theology and the second by Science, with two specific organs with two corresponding methods.

The knowing of the *divine* or *from Above* is the descending of the *mind* in the *heart,* and it has as the method, the *hesychia*[15], which identifies with the steps of spiritual perfection, starting with the Purification of the heart and ending with the Illumination and Deification of man. Therefore, this knowing is supernatural and offered by God. The *profane* knowledge or *from below* uses the human faculty of *reasoning* as the organ and the s*cience* as the method, in order to reach the scientific progress, for the use of humankind. Therefore, this kind of knowledge is natural and it is acquired by study and scientific research, following the ontological filiation of the human being, given by God in the moment of his creation.

The object of the *mind* is the knowledge of the Uncreated One, while the object of the *reasoning* is the knowledge of the created world. Between these two different knowledge there are not only a hierarchy and boundaries imposed by the

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[13] Νικολάου, *«Ἀλλήλων Μέλη»*, pp. 18, 121-123; Βασιλείου Κέκη, «Οἱ ἅγιοι Κοσμᾶς καὶ Δαμιανός: Ἡ πρώτη μεταμόσχευση», *Σύγχρονη Ἰατρικὴ Ἐνημέρωση* 5 (2002), pp. 77-81.

[14] *Ibidem,* p. 77.

[15] The term *organ* is not used verbatim, but rather as a process and the man's noetic mean of knowledge, fact that also leads to specific *methods* of achieving this knowledge. Thus, the terms *organ* and *method* shall not be interpreted verbatim or just scientifically, but rather from the human perspective as of a dichotomous being, *body* and *soul,* whose purpose is to reach the Deification, goal to which the people should aim through the strength of his whole being.

organs of the two knowledge, but also common issues and bridges in order to achieve the dialogue between them. To this kind of knowledge the man participates with the whole being, using the entire given image of God, granted to each one of us, according to our own inclination as one is cultivating one type of knowledge, another or both. For example, a scientist can achieve knowledge through his *mind*, as well as a Saint uses his *reasoning* enlightened by the powers of his mind and constantly renewed by the Grace of The Holy Trinity that dwells within his heart. The trespassing of the boundaries and the hierarchy without taking into consideration the common points[16] and the human purpose, which is deification (theosis), leads to a conflict between faith and science, to a transformation of science into metaphysics and of the Orthodoxy into Religion[17]. In other words, it leads to a simple search of those *from Above* or of those *from below* and their understanding by man only through the rational way. The reasoning, on one hand, does not accept the *supernatural,* and on the other, makes the human lose his noetic spiritual function, that is the capacity of thinking with the *mind* descended in the heart. Thus, the heart becomes then the throne of God, Who is present into it through the uncreated energies. Therefore, the mission of the Church, as the Body of Christ, is also to help the man to regain his noetic-spiritual function, function that is actually natural and based on his psychosomatic constitution[18]. In this regard, the Church was named by the Holy Fathers *spiritual hospital* (*πνευματικξν Ιατρε√ον*)[19].

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[16] Not only through his noetic-spiritual function and the specific to this function knowledge, the man deeply connects himself with the spiritual life which leads to deification, but also through his rational function, if this is used according to the ontological given of the human being, the man aims towards the knowledge and the living of moral laws, having always the option to choose between good and bad. God tells us that we have in front of us the *blessings and the curse* (*Deut.* 11: 27), *life and death*, *the good and the bad* (*Deut.* 30:15), *the way of life and the way of death* (*Jeremia* 21: 8), *fire and water and to which ever you wish upon you will reach them with your hand* (*The Wisdom of Isus Sirah* 15:16).

[13] It is important to note that the *religion* represents the search of divine by humankind, while *Orthodoxy* is not a *religion* among the others, but a *Revelation* and a concrete way of life which gives humans the possibility of deification, in other words to fulfil the purpose for which they have been created. This fact is assured by each individual's strive to acquire the truth revealed by the Faith, and to live his/her life as Jesus Himself lived it and as it is written in the organs of the *Revelation*, the *Holy Bible* and the *Holy Tradition.*

[18] See Γεωργίου Μεταλληνοῦ, «Πίστη καὶ ἐπιστήμη στὴν ὀρθόδοξη γνωσιολογία», *Σχέσεις καὶ Ἀντιθέσεις. Ἀνατολὴ καὶ Δύση στὴν πορεία τοῦ Νέου Ἑλληνισμοῦ,* Ἀθήνα 1998, pp. 178-179, 180-181. For a translation of the original text in Romanian refere to Pr. Prof. Dr. Gheorghe Metallinos, «Credința și știința în gnoseologia ortodoxă», translation and notes from Greek by Ion Croitoru, in *Omul de cultură în fața descreștinării. Simpozion Internațional Alba Iulia, 13 – 15 mai 2005,* Alba Iulia, 2005, pp. 144-161 [revised with a note of the translation printed in *Glasul Bisericii,* 66/5-8 (2000), pp. 60-72].

[19] Γεωργίου Μεταλληνοῦ, *op. cit.*, p. 176; see also St. John Chrisostom, *De Christi Divinitate. Contra Anomoeos XII, PG* 48, 804β΄; idem, *Despre milostivire. Omilia a III-a* (*About Charity, Homily nr. III*), *PG* 49, 297-298δ΄.

Hence, Orthodoxy should establish its grounds towards the new dilemmas brought up by the scientific progress, in this case, the Medicine and the organ transplantations, because these dilemmas refer to humans, who are body and soul, called to become in the likeness of God. The voice of the Church is spoken by those that are deified, those being the true theologians, to whom we add ourselves, the ones that have not yet reached that spiritual level, but who are trying to faithfully follow the teachings of those already deified[20].

3. The theological-moral issues regarding transplants

Even though many people can prolong their life using the medical practice of transplants[21], transplants are not only a medical subject but they have other social, juridical, moral and spiritual dimensions and connotations[22], especially that oftentimes the Church is asked to advise and assist with this matter[23].

The Church views the problematic of transplant from the moral and spiritual perspectives, taking into account the scientific data as well, and the *theological approach of all the contemporary issues is natural to be done*

[20] Moreover, the Patristic period is not ended. Each period in the life of the Church is also patristic by those who reached illumination and deification. The life of the Church enters history through the steps of the Saints, and those people who are on the way of perfection are being asked to preserve the ecclesiastic criteria of interpretation of the Orthodox Church, waiting for the voice of illuminated and deified people, in order to complete the teaching of the Church regarding the issues raised during each period [Ἱεροθέου Μητροπολίτου Ναυπάκτου καὶ Ἁγίου Βλασίου, «Ἡ θέση τῆς Ἐκκλησίας γιὰ τὶς μεταμοσχεύσεις», *Ἐκκλησία καὶ Μεταμοσχεύσεις*, pp. 338, 358 (= Ἱεροθέου, *Μεταμοσχεύσεις*)]

[21] The transplants are proven *to live* more than the organisms they belonged to. For example, we refer to a case of kidney transplant taken from a 96 y/o woman (this age is an exception, the age limit for donating organs is between 30 and 65 years); the kidney was transplanted to one of her relatives, who lived 25 more years, so the transplant reached the age of 121 years (Νικολάου, *«Ἀλλήλων Μέλη»*, p. 32; Δρακόπουλου, *Μεταμόσχευση νεφροῦ*, p. 94).

[22] Most worthy of remembering is the archbishop Hristodulos, the forerunner of the Orthodox Church in Greece, who noted that in *our era, for the first time in history, the humanity considers as a scientific approach, the utilitarian logics of the dominant one in connection with the mechanistic conception about man. It also tries to intervene in the life of the weak humans, such as the embryo, the elderly, and the terminally ill. It tries to have an intolerable authority on them and to use them in the interest of the dominant one* (Χριστοδούλου, Μακαριωτάτου Ἀρχιεπισκόπου Ἀθηνῶν καὶ πάσης Ἑλλάδος, «Ἡ κοινωνικὴ διάσταση τῆς δωρεᾶς ὀργάνων γιὰ μεταμόσχευση», *Ἐκκλησία* 9/Ὀκτ. 2004, p. 739).

[23] Μακαριωτάτου Ἀρχιεπισκόπου Ἀθηνῶν καὶ πάσης Ἑλλάδος κ. κ. Χριστοδούλου, «Πρόλογος», *Ἐκκλησία καὶ Μεταμοσχεύσεις*, p. 9; Ἀρχιμ. Νικολάου Χατζηνικολάου, «Πνευματικὴ ἠθικὴ καὶ παθολογία τῶν μεταμοσχεύσεων», *Ἐκκλησία καὶ Μεταμοσχεύσεις*, p. 281 (= Νικολάου, *Πνευματικὴ ἠθική*); Ἱεροθέου, *Μεταμοσχεύσεις*, p. 338.

through the measure of perfection, which is Christ's measure[24]. As long as we respect the mysteries of man in relation to the mysteries of life and death and these two are connected to achieve the God's likeness, the Church welcomes the problematic of the transplants by the *temerity of spiritual renewal*[25], not in the sense of receding its teaching, but rather of deepening the life mysteries based on the spiritual living of its members, in the light of the dynamic character of the *Holy Tradition*. The Christian Morals does not represent a code of moral laws, but rather an authentic way to live the life *in* and *for* Christ, having the deification of human life as centerpoint. From this perspective, it offers the moral criteria to humans, such as the respect for any human as the bearer of the God's image, showing us that every single man is unique and incomparable. The Christian Morals also offer the endless love for the neighbour, love that goes up to self-sacrifice[26]. Therefore, the transplantations also represent a dogmatic issue[27], because their practice touches directly or indirectly points of the Orthodox teaching, such as human person, human constitution, moment of soul's separation from the body, mystery of death and the afterlife, etc.

4. The Presumed Consent

The issues gain complexity when we take into consideration the *presumed consent,* generated from the desire to find a solution to one of the problems encountered in the transplant practice, the lack of organs. According to this principle, the donor is considered the one who never, during his lifetime, denied donating and the society comes in and legalizes the *presumed consent* or *agreement* based on the principle that the taken organs will save human lives[28].

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[24] Γεωργίου Ἰ. Μαντζαρίδη, *Χριστιανικὴ Ἠθική,* II, Θεσσαλονίκη 2003, pp. 611-612 (= Μαντζαρίδη, *Χριστιανικὴ Ἠθική,* II).

[25] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 15; Νικολάου, *Πνευματικὴ ἠθική*, p. 282; *Basic positions on Transplant Ethics,* The Holy Synod of the Church of Greece. Bioethics Committee, Athens 2007, pp. 35-36 (= *Basic positions*).

[26] Μακαριωτάτου Ἀρχιεπισκόπου Ἀθηνῶν καὶ πάσης Ἑλλάδος κ. κ. Χριστοδούλου, *op. cit.*, p. 9.

[27] Στεφάνου Στεφοπούλου, «Ἐκκλησία καὶ μεταμοσχεύσεις», *Θεοδρομία* Ε΄/1 (Ἰανούαριος-Μάρτιος 2003), p. 79 (= Στεφοπούλου, *Ἐκκλησία καὶ μεταμοσχεύσεις*, Ι).

[28] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 214.

The presumed consent caused serious criticism[29] among several theologians, philosophers and even physicians. The use of the *presumed consent* nullifies the donor's condition and his expression as a free person, and in their place is institutionalized *the opinion of a judicial committee*. *The idea of a donor represents* the expression of each person's *common right* to *spiritual life*[30], because *he not only gives the organs*, but also receives *blood of spiritual life*[31]. *A donor is considered only the one who freely donates organs; not the one who we take the organs from*. In the first case, the human being receives love and life through the respective transplant, in the latest, the man receives only the organs, based on a formal legal interest: *pump* (*heart*), *filter* (*kidneys*), *sponge* (*lung*)[32]. *The conscious agreement* or *consent* regarding the organs donation after death is characterized as a *holy* action of love and spiritual sacrifice, because its expression shows the donor's spiritual state concerning the awareness of the fact of the death which can supervene either to a very young age, either due to a tragic event (vehicle accident, etc.); therefore, through the organs donation we defeat the death and we extend the life of the recipient[33].

This is why, according to some theologians with authority[34], the Church should not adopt in any way the so-called *presumed consent,* and it ought to be completely against this kind of approach and settlement regarding the organs and tissues removal, which degenerates the transplants from the state of love for the most in a *law* of interest for the few.

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[29] This *consent* represents *the enemy of the categorical consent which comes from love,* its legalisation *cancels the term of donor and his role,* since this consent prevents the exercise of the free will of the man [see Νικολάου, *«Ἀλλήλων Μέλη»*, p. 214; Νικολάου, *Πνευματικὴ ἠθική*, pp. 289-290; Μακαριωτάτου Ἀρχιεπισκόπου Ἀθηνῶν καὶ πάσης Ἑλλάδος κ. κ. Χριστοδούλου, *op. cit.*, p. 11; Λουκᾶ Τσιουτσίκα, Στεφάνου Στεφοπούλου, Δαμασκηνοῦ Ἁγιορείτη, «Μεταμοσχεύσεις καὶ ἐγκεφαλικὸς θάνατος. Θεολογικὴ καὶ ἰατρικὴ παρέμβαση», *Θεοδρομία* ΣΤ΄/4 (2004), p. 530 (= Τσιουτσίκα-Στεφοπούλου-Δαμασκηνοῦ, *Μεταμοσχεύσεις*)]. *Presumptive denial is possible, presumed consent does not exist* (Νικολάου, *Μεταμοσχεύσεις*, p. 621; Νικολάου, *Πνευματικὴ ἠθική*, p. 290). *Nothing confirms the „presumed consent" for the donation of tissues and organs of the body, or, much more, the anticipation of the consent of the human, when his contrary desire is not expressed* [Μαντζαρίδη, *Χριστιανικὴ Ἠθική,* II, p. 612; Γεωργίου Ἰ. Μαντζαρίδη, «Μεταμοσχεύσεις καὶ ἐγκεφαλικὸς θάνατος», *Πεμπτουσία* 10/Δεκ. 2002 - Μάρ. 2003, p. 109 (= Μαντζαρίδη, *Ἐγκεφαλικὸς θάνατος*)].

[30] *It is more blessed to give than to receive* (*Acts* 20: 35); Νικολάου, *«Ἀλλήλων Μέλη»*, p. 216.

[31] Νικολάου, *Πνευματικὴ ἠθική*, pp. 292-293.

[32] Νικολάου, *«Ἀλλήλων Μέλη»*, pp. 216-217; Νικολάου, *Πνευματικὴ ἠθική*, pp. 293-294.

[33] See Νικολάου, *Πνευματικὴ ἠθική*, pp. 290-292.

[34] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 276; Νικολάου, *Πνευματικὴ ἠθική*, pp. 289-290; Στεφάνου Στεφοπούλου, «Ἀπὸ τὴν ὀρθόδοξη στὴ «μηχανιστικὴ» ἀνθρωπολογία», *Θεοδρομία* Ζ΄/2 (Ἀπρίλιος-Ἰούνιος 2005), p. 204 (= Στεφοπούλου, *«Μηχανιστικὴ» ἀνθρωπολογία,* II); Γεωργίου Ἰ. Μαντζαρίδη, «Θεολογικὴ προβληματικὴ τῶν μεταμοσχεύσεων», *Ἐκκλησία καὶ Μεταμοσχεύσεις*, p. 275 (= Μαντζαρίδη, *Μεταμοσχεύσεις*).

5. The Brain Death

Among the issues brought into discussion by the transplant practice are those brought up by what is called *brain death*. Generally, the medical world accepts and identifies the *brain death* with the *physical death* of the man[35]. Of another opinion, however, are the philosophers, the theologians, the moralists and even some physicians, who express objections regarding this identification and their argument has a philosophical-theological character[36].

The definition of death as a separation of the soul from the body has no relevance for the science[37], who suggests a different definition of death that caused the reaction of the ones mentioned above[38]. *The loss of the capacity regarding the*

[35] In 2005, the countries which have recognised this definition by legislative formulation were: Argentina, Australia, Belgium, Venezuela, Brazil, France, Denmark, Greece, USA (almost all the states), Ireland, Spain, Italy, Canada, Columbia, Cuba, Norway, Netherlands, Hungary, Uruguay, Peru, Poland, Portugal, Puerto-Rico, Saudi Arabia, Slovenia, Sweden, Czech Republic, Finland, Chile and Japan. Beside these, other countries (Austria, Germany, Switzerland, England, India, New Zeeland, South Africa, South Korea and Thailand) were accepting, at that time, the *brain death* with the physician's advice, but without an express recognition in their legislation (Νικολάου, *«Ἀλλήλων Μέλη»*, pp. 103-104). As for Greece, the law 2737/1999 accepts the organ removal *after the death coming, even if the functions of the certain organs are maintained with artificial means* (art. 12, see Νικολάου, *«Ἀλλήλων Μέλη»*, p. 325). A study from a collection of articles for medical students in Greece, collection which has as subject the transplants of tissues and organs, treats about the sources of grafts and transplants, which are divided into three categories: 1) *heart beating donors*, into this category fall: *living related donors*, *living unrelated donors*, *brain-dead donors* or *cadaveric donors* and *anencephalic infants*; 2) *non-heart-beating donors* and 3) *animal donors – xenotransplantation*, see Γ. Γερολουκᾶ-Κωστοπαναγιώτου, Ἀ. Κωστάκη, «Πηγὲς μοσχευμάτων», *Μεταμοσχεύσεις Ἱστῶν καὶ Ὀργάνων. Δῶρο ζωῆς,* Ἀθήνα 2004, pp. 49-64. In this article is also included the legal paper work required in case of a *brain death,* conform to the law 2737/1999, see *ibidem,* pp. 55-56. Referring to Romania, by the law 2/1998 are established the legal conditions regarding the removal and the transplant of the human organs. For the cases of those who died without having left any consent, the removal of organs and their donation could be done by the consent of the family members or of the relatives provided by law, and, in the absence of all these, the consent will be taken from the person authorized to represent the deceased. The removal of tissues and organs from the persons with *brain death* is done according to the law, that means only if the *brain death* was medically confirmed and the consent is given in the above conditions (http://www.roportal. ro/articole/92.htm, 2.09.2008).

[36] It is often affirmed about the *brain death* that *there is not in the history of the Medicine another term like this one which provokes so much misleading and fraud of the common opinion* (Χριστοδούλου Κ. Παρασκευαΐδη, μητροπολίτου Δημητριάδος, *Ἐγκεφαλικὸς ἢ καρδιακὸς θάνατος; Συμβολὴ στὴν ἐξελικτικὴ πορεία τῶν Μεταμοσχεύσεων,* Ἀθῆναι 1992, p. 6).

[37] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 76.

[38] Χριστοδούλου Κ. Παρασευαΐδη, μητροπολίτου Δημητριάδος (he later became the archbishop of the Orthodox Church in Greece, † 2008), *Διαθρησκειακὴ θεώρηση τῶν μεταμοσχεύσεων (Ὁμιλία πρὸς Ἰατρούς)*, Ἀθῆναι 1991, pp. 16-18; Ἱεροθέου, *Μεταμοσχεύσεις*, p. 341. In 1993, *it was proven that the brain death has not any connection with that which is death in reality*. As a direct consequence of this fact in the *Ethical Code* from Nürnberg (1997) it was mentioned that the *brain*

consciousness as it happens in cases of coma or „brain death" are not identified with the loss of the capacity concerning the inner vigilance state[39]. Otherwise, there are no medical criteria to diagnose the loss of the content of the consciousness[40], because *this represents a subjective state and the content of this state comprises, beside the perception of the inner and outer medium, the superior mental functions, most of those (thinking, feeling, judgement, etc) cannot be evaluated or measured*[41]. Some theologians ascertain that the content of consciousness is still present in brain dead people, even if it is impossible to be expressed. Similarly, even though we can no longer perceive the thoughts and feelings of those with *brain death*, this does not exclude their *presence in the immediate space of their soul*[42], so even though they cannot express themselves orally, that does not mean the inner unspoken expression or the undistinguishable reasons disappear, but rather these *continue to build the noetic energy* of that human being[43].

The sources are diversified and the criteria seem to be more strict regarding the transplants from humans. There have been established regulations and special units for the removal of organs and tissues from live donors and from the ones *considered* dead, and also some criteria that are to be taken into consideration, such as age, health, donor's

death is used as a criterion to be decided the procedure of the removal of the human organs used for transplants, but in no way it can define the death of one person, see Marc Andronikof, «Μεταμοσχεύσεις καὶ ἐγκεφαλικὸς θάνατος», *Σύναξη* 68 (1998), p. 26.

[39] Χριστοδούλου Κ. Παρασκευαΐδη, μητροπολίτου Δημητριάδος, *op. cit*., p. 13.

[40] From the point of view of the classical neurology, the consciousness divides in *arousal* (*wakefulness* or *alertness, ἐγρήγοση*) and *content of consciousness* (*awareness, περιεχόμενο τῆς συνειδήσεως*). Due to the loss of the arousal at the persons with the diagnosis of *brain death,* it is not possible to verify the content of the consciousness, about which it is abusively believed that it was lost. The consciousness, which represents an ontological element of the human being and exists potentially even in the first stages of development of the embryo, is not lost by the destruction of the organ of expression which is the brain, because the destruction of the respective organ does not cancel the possibility of exercise of the respective function, but only encumbers its manifestation or expression [Κ. Γ. Καρακατσάνη, Ἰ. Ν. Τσανάκα, «Κριτικὴ στὴν ἔννοια τοῦ ἐγκεφαλικοῦ θανάτου», *Θεοδρομία* ΣΤ΄/1 (Ἰανούαριος-Μάρτιος 2004), p. 68; Κ. Καρακατσάνη, *«Ἐγκεφαλικὸς θάνατος». Ταυτίζεται μὲ τὸ θάνατο τοῦ ἀνθρώπου; (Ἰατρικὴ καὶ φιλοσοφικὴ θεώρηση),* Θεσσαλονίκη 2001[2], pp. 73-79, 87, 102 (= Καρακατσάνη, *«Ἐγκεφαλικὸς θάνατος»*)].

[41] Καρακατσάνη, *«Ἐγκεφαλικὸς θάνατος»*, pp. 74, 101; Κ. Γ. Καρακατσάνη, Ἰ. Ν. Τσανάκα, *op. cit.*, pp. 69-70, 72; Στεφάνου Στεφοπούλου, «Ἀπὸ τὴν ὀρθόδοξη στὴ «μηχανιστικὴ» ἀνθρωπολογία», *Θεοδρομία Ζ΄*/1 (Ἰανουάριος-Μάρτιος 2005), p. 103 (= Στεφοπούλου, *«Μηχανιστικὴ» ἀνθρωπολογία,* Ι).

[42] Τσιουτσίκα-Στεφοπούλου-Δαμασκηνοῦ, *Μεταμοσχεύσεις*, p. 528.

[43] Τσιουτσίκα-Στεφοπούλου-Δαμασκηνοῦ, *Μεταμοσχεύσεις*, pp. 528-529. Although it is known that the *brain death* cancels the manifestation of the consciousness outside the body, it still does not exist any scientific evidence by which to be shown that *the inner consciousness of the man* is also canceled. *The lack of argument does not mean absolutely an argument for the abscence of the inner consciousness*. *Therefore, it is not at all excluded the fact that in the state of the brain death the human being can have a mystical communion with God, with all its benefactors consequences* [Δαμασκηνοῦ Μοναχοῦ Ἁγιορείτου, *Ὀρθόδοξη ἀνθρωπολογία καὶ μεταμοσχεύσεις ζωτικῶν ὀργάνων*, Ἀθήνα 2007, pp. 56-57 (= Δαμασκηνοῦ, *Μεταμοσχεύσεις*)].

agreement or consent or the consent of donor' relatives, etc., are identified. The donors considered dead include even the ones diagnosed with *brain death*[44], by appealing to the argument that at these persons the *brainstem*[45] is no longer functional[46], at least from a medical point of view, and their breathing is maintained artificially[47].

Regarding the *brain death*, in order to define it, a split was made between the cerebral and cardiac function[48] and were established the criteria concerning the procedure of diagnosis for the brain death (Harvard – 1968[49]; Stanford and Minnesota – 1971; The Medical Royal Colleges and their Faculties in the United

[44] It must be mentioned that some voices suggest to use as transplant sources not only the ones in *brain death*, but even the anencephalic infants (their span of life is from few hours up to few days on earth or the ones in chronic vegetative state, although the last ones are in a state which is totally different from what is called *brain death*. Another category is the one of the death penalty convicts, who can choose to become donors of organs and they will be given a different execution method. Hence, there are opinions trying to justify the euthanasia, especially when it is done for organs donation [Νικολάου, *«Ἀλλήλων Μέλη»,* pp. 46, 47, 83-84, 89-92; Ἀρχιμ. Νικολάου Χατζηνικολάου, «Τὸ μέλλον τῶν μεταμοσχεύσεων», *Ἐκκλησία καὶ Μεταμοσχεύσεις*, page 322-325 (= Νικολάου, Τὸ μέλλον)].

[45] The *brainstem,* which includes three parts [*medulla oblongata* (*myelencephalon*), *pons* (*part of metencephalon, Varolii's pons*) and *midbrain* (*mesencephalon*)], is on top of the spinal cord, linking the brain to it, and deals with vital functions, such as heart rate, blood pressure, swallowing, coughing, breathing, etc. (Δαμασκηνοῦ, *Μεταμοσχεύσεις*, p. 78; for much more information see http://old.ournet. mdl~anatomia/centru.html, 26.01.2009).

[46] Within the laws of the United States of America (USA), in order to confirm *brain death* it is also necessary the detection of the loss of the functions of the cortex, in addition to the praxis in Europe where the *brain death* is identified only with the *inactivity* of the brainstem (Γ. Γερολουκά-Κωστοπαναγιώτου, «Ἐγκεφαλικὸς θάνατος», *Μεταμοσχεύσεις Ἱστῶν καὶ Ὀργάνων. Δῶρο ζωῆς,* Ἀθήνα 2004, p. 68; Μαντζαρίδη, *Μεταμοσχεύσεις*, p. 273).

[47] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 33.

[48] The first clinical description of *beyond coma,* that will be later called *brain death*, was made in France in 1959, but it was still not considered identical with the fact of the death. For a man to be considered dead, he had to be in coma with apnoea and to present no reflexes in the extremities or no automatic movement, that is to have the brain and the spinal cord dead [Ἱεροθέου Μητροπολίτου Ναυπάκτου καὶ Ἁγίου Βλασίου, *Βιοηθικὴ καὶ βιοθεολογία,* Ἱερὰ Μονὴ Γενεθλίου τῆς Θεοτόκου (Πελαγίας), Λεβαδεία 2005, p. 157 (= Ἱεροθέου, *Βιοηθική*, p. 157)].

[49] Παναγιώτου Ἰ. Μπούμη, *Μεταμοσχεύσεις: Προβληματισμοί-Θεολογικὴ Θεώρηση,* Ἀθῆναι 1999, p. 39 (= Μπούμη, *Μεταμοσχεύσεις*); Ἱεροθέου, *Βιοηθική*, p. 157. At the same time with the *Harvard Declaration* was launched and the *Sydney Declaration* (August 5, 1968). Both had in common a new definition of death, invoking two reasons: 1) technological and medical progress concerning the artificial maintenance of blood circulation, and 2) support of organ transplant development. The difference was that in Harvard it was highlighted the clinical explanation of *brain death*, while in Sydney, where this term was not used, have been highlighted the conceptual and philosophical arguments about human death [C. Machado, J. Korein et al., «The Declaration of Sydney on human death», *Journal of Medical Ethics,* 33/12 (dec. 2007), pp. 699-703; for critics of the Declaration of Harvard see Στεφάνου Στεφοπούλου, «Ἐκκλησία καὶ μεταμοσχεύσεις», *Θεοδρομία* Ε΄/2 (Ἀπρίλιος-Ἰούνιος 2003), pp. 205-206 (= Στεφοπούλου, *Ἐκκλησία καὶ μεταμοσχεύσεις*, II].

Kingdom – 1976[50]), criteria which are still open to debates and generating dilemmas. Therefore, in order to solve those, the Bioethics relies on the principle of Theology.

Although the idea of *brain death* was accepted by the medical world and recorded in the legislation of many countries[51], there is still no common agreement on the definition of the *brain death*[52]. The first opinion is that *brain death* is identical to the irreversible ceasing of the entire brain's function (*whole-brain death*)[53]. Another view, introduced in 1975 by Robert Veatch, takes in consideration the definitive loss of all the functions that are fundamental to humans. This refers to the *ceasing of the upper brain functions* (*higher-brain death*), that means the identification of the death with the cessation of the cortex functions[54]. A third opinion, somehow dominant in Europe, identifies the death with the *inactivity* of the brainstem, since some parts of the brain (frontal and lateral lobe, thalamus and hypothalamus, etc.) cannot be examined in comatose state[55]. Exception from this definition is made by the patients who have all the elements of *brain death* (locked-in syndrome), but they retain their consciousness, fact for which the electroencephalogram and the brain cortex metabolic rate control are required[56].

If the international medical society seems to accept and identify *brain death* with man's *physical death*[57], in spite of different views about its definition, the Bioethics journals, and not only, have published articles that reveal some hesitation

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[50] Νικολάου, *«Ἀλλήλων Μέλη»*, pp. 22, 36-41; Χριστοδούλου Κ. Παρασκευαΐδη, μητροπολίτου Δημητριάδος, *op. cit*., p. 18; Δρακόπουλου, *Μεταμόσχευση νεφροῦ*, p. 96; Ἱεροθέου, *Βιοηθική*, p. 157. In 1981, it was printed in the USA the law *The United States Uniform Determination of Death Act*, by which the *brain death* was declared equal to the physical death (Μπούμη, *Μεταμοσχεύσεις*, p. 39).

[51] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 40.

[52] Bibliographical data show that *brain death* was contested since the inception of this term (Ἐμμανουὴλ Παναγοπούλου, «Αἱ μεταμοσχεύσεις ἀνθρωπίνων ὀργάνων», *Ὀρθόδοξος Τύπος* 7/Ἰαν. 2000, apud Δαμασκηνοῦ, *Μεταμοσχεύσεις*, p. 53).

[53] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 40.

[54] R. Veatch, «The whole-brain oriented concept of death: an outmoded philosophical formulation», *Journal of Thanatology* 3 (1975), pp. 13-30, apud Νικολάου, *«Ἀλλήλων Μέλη»*, p. 41.

[55] C. Pallis, «ABC of brainstem death. The declaration of death», *British Medical Journal* (= *BMJ*) 286 (6358), January 1, 1983, p. 39; idem, «ABC of brainstem death. Prognostic significance of a dead brain stem», *BMJ* 286 (6359), January 8, 1983, pp. 123-124; idem, «ABC of brainstem death. The position in the USA and elsewhere», *BMJ* 286 (6360), January 15, 1983, pp. 209-220; idem, «ABC of brainstem death. The arguments about the EEG», *BMJ* 286 (6361), January 22, 1983, pp. 284-287, apud Νικολάου, *«Ἀλλήλων Μέλη»*, p. 317.

[56] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 41.

[57] The medical studies show that people in the *brain death* state are kept alive through artificial respiration support for a few days or, very seldom, for a few weeks. Without this support, their heart would lose its function, and, in a few days long cases of *brain death*, the organs can no longer be used for transplants (Νικολάου, *«Ἀλλήλων Μέλη»*, p. 47).

about *brain death*; meanwhile, in the consciousness of the world we see the desire that *death* should remain, however, a mystery, and not be transformed into a mere technical and descriptive fact[58].

The Orthodox theologians' reaction to *brain death* rests in the reality of the man, which is dichotomous, body and soul. Thus, man is not just soul, nor only body[59], is identified *neither with their mixture or the sum of those*, according to Saint Maximus the Confessor[60], *but he is something beyond all these, and he owns them without being owned by them in any way or being determined with something by them*[61]. On the other hand, man's death is linked, in the Christian tradition, to the cessation of his respiration, fact that is embraced by other traditions as well. The first to move the center of the life from the heart and breathing to the brain was rabbi Moses Maimonidis (12th century)[62], but this fact did not influence the traditional perception of death, mentioned above. Hence, death was still regarded as a personal and spiritual fact, remaining different to the definition given by the medical science. Therefore, it has been stated that *brain death represents a phenomenon of medical origins, and the result of the artificial maintenance of the respiration*[63].

To further avoid conflicts in the religious beliefs, especially in the case of *brain death*, that also raised opposing views in all the denominational and religious circles, in spite of the official texts elaborated, two statements were published (New Jersey - 1991 and New York - 1992), by which it is allowed the extension of the artificial life maintenance in brain dead patients and it is made room to diagnose death not on the neurological criteria, but on these regarding the religious convictions of the patient and his family, so that *the religious personal beliefs or the moral convictions of that individual would not be violated*[64].

6. Decisions and synodical texts in the Orthodox world

In the Orthodox world, the Church in Greece[65] is the first to approache bioethical problems and subjects, from the standing point of the Orthodox

[58] Νικολάου, *«Ἀλλήλων Μέλη»*, pp. 46-47.

[59] See I. Croitoru, «Conceptul de chip şi de asemănare la Sfinţii Părinţi», *Almanah bisericesc,* Târgovişte 2005, pp. 83-90; *ibidem, Glasul Bisericii* 63/9-12 (2004), pp. 98-108.

[60] See Saint Maximus the Confessor, *Ambigua, PG* 91, 1225D-1228A.

[61] Μαντζαρίδη, *Χριστιανικὴ Ἠθική,* II, p. 610; Μαντζαρίδη, *Ἐγκεφαλικὸς θάνατος*, p. 108.

[62] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 36.

[63] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 79.

[64] See *New Jersey Declaration of Death Act*, in Νικολάου, *«Ἀλλήλων Μέλη»*, p. 117.

[65] By the governmental decision 8284/ 6.11.1990, it has been decided that the Greek government should celebrate with the Church *the day of transplant* every year, in the *Sunday of the Good Samaritan* (K. Χριστοδουλίδη, *Μεταμοσχεύσεις: λύση ἢ πρόβλημα;*, Ἀθῆναι 1995, p. 72).

Theology and Tradition[66], founding also a special Synodical Commission for the Bioethics (December 1998)[67]. The first subject that received the attention of the Bioethics Commission of the Holy Synod of the Church of Greece was the one about the transplants. Based on the Commission's works, the Holy Synod of the Orthodox Church in Greece approved an official text (October 7, 1999), that comprises in 55 articles and 12 thematic units the main positions of the Orthodox Church in Greece towards the transplants[68]. In this text, **that is not promulgated as a synodical encyclics,** but only *as a starting text for discussion and dialogue*[69], the Orthodox Church in Greece accepts the medical practice of transplants on the

[66] Ever since 1971 the practice of transplants was in the attention of the *Synodal Commission of the Church of Greece for the dogmatic and nomocanonic issues*, following a question addressed by a faithful, whether it is allowed to leave his eyes, after his death and by testament, to be used for transplant. The answer of this Commission, dated May 3, 1971 (approved by the Holy Synod of the Church of Greece, with the protocol number 397/17-6-1971), was that *this practice of transplants is pleasant to God,* and it was invoked as a primary argument, entirely miss-interpreted unfortunately, that God the Creator was the first applying the transplants by taking a rib from Adam and creating Eve from it (?!) (Μπούμη, *Μεταμοσχεύσεις*, 16; see also Εὐαγγ. Μαντζουνέα, *Αἱ μεταμοσχεύσεις εἰς τὴν Ἑλλαδικὴν Ὀρθόδοξον Ἐκκλησίαν ἐξ ἐπόψεως κοινοῦ καὶ ἐκκλησιαστικοῦ Δικαίου*, Ἀθῆναι 1985, p. 50). In Greece, the legislation referring to transplants begins with the year of 1955. About the evolution of this legislation during the period 1955-1999, in comparison to the legislation from Germania, see Χαραλάμπου Κονιδάρη, Χαραλάμπου Παμπούκη, «Νομικὴ θεώρηση τῶν μεταμοσχεύσεων», *Ἐκκλησία καὶ Μεταμοσχεύσεις*, pp. 149-231.

[67] Ἀρχιμ. Νικολάου Χατζηνικολάου, «Σύντομη εἰσαγωγή», *Ἐκκλησία καὶ Μεταμοσχεύσεις*, p. 17; Ἱεροθέου, *Μεταμοσχεύσεις*, p. 343.

[68] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 222. The scientific writings, upon the official text of the Holy Synod of the Orthodox Church in Greece was drafted, were presented to the Holy Synod in September of 1999 and published later in the volume *Ἐκκλησία καὶ Μεταμοσχεύσεις,* Ἱερὰ Σύνοδος τῆς Ἐκκλησίας τῆς Ἑλλάδος. Εἰδικὴ Συνοδικὴ Ἐπιτροπὴ ἐπὶ τῆς Βιοηθικῆς, Ἔκδοσις τοῦ Κλάδου Ἐκδόσεων τῆς Ἐπικοινωνιακῆς καὶ Μορφωτικῆς Ὑπηρεσίας τῆς Ἐκκλησίας τῆς Ἑλλάδος, Ἀθῆναι 2002 (= *Ἐκκλησία καὶ Μεταμοσχεύσεις*). The text approved by Holy Synod of the Church of Greece was published in several reviews and books. For bibliographical references see *Βασικαὶ θέσεις ἐπὶ τῆς ἠθικῆς τῶν μεταμοσχεύσεων*, in *Ἐκκλησία καὶ Μεταμοσχεύσεις,* pp. 21-38; Νικολάου, *«Ἀλλήλων Μέλη»*, pp. 327-339; *Ἐκκλησία* 4 (Ἀπρίλιος 2000), pp. 280-286; Νικολάου Γ. Κοΐου, *Βιοηθική. Συνοδικὰ κείμενα Ὀρθόδοξων Ἐκκλησιῶν*, Ἀθήνα 2007, pp. 59-72; *Basic positions on the ethics of Transplantations,* Athens 2007 (in English, Greek, French and Russian); www.bioethics.org.gr. The publication of this text has caused reactions and critics concerning its drawbacks and incompleteness in the Greek world, particularly on the part of theologians [see Λουκᾶ Τσιούτσικα, «Προβλιματισμοὶ περὶ τὸ θέμα τῶν μεταμοσχεύσεων», *Παρακαταθήκη* 14 (Σεπτέμβριος-Ὀκτώβριος 2000), pp. 20-25; Νικολάου Χατζηνικολάου, «Ἐπιστολή», *Παρακαταθήκη* 15 (Νοέμβριος-Δεκέμβριος 2000), pp. 15-17; Στεφοπούλου, *Ἐκκλησία καὶ μεταμοσχεύσεις*, II, pp. 193-201; Τσιουτσίκα-Στεφοπούλου-Δαμασκηνοῦ, *Μεταμοσχεύσεις*, pp. 526-533], as well as from laics [see Ἀθ. Β. Ἀβραμίδη, «Μεταμοσχεύσεις καὶ βιο-ιατρικὴ ἠθική», *Ἀκτίνες* 66/638 (Φεβρ. 2003), pp. 36-37; idem, «Προβληματισμοὶ ἀπὸ τὶς βασικὲς ἐπὶ τῆς ἠθικῆς τῶν Μεταμοσχεύσεων τῆς Ἱερᾶς Συνόδου», *Θεοδρομία* Θ΄/3 (Ἰούλιος-Σεπτέμβριος 2007), pp. 385-397].

[69] *Basic positions*, p. 34.

grounds of love and help and also of the cultivation of self-sacrifice; it underlines the maintaining of the notion of a free donor, it welcomes both the donor and the recipient of organs, it rejects the obtaining of organs from the anencephalic newborns (art. 28), as well as the *presumed consent* (art. 18), but it accepts, *with some exceptions and according to the economy* (*oikonomia*), the relatives' consent or agreement (art. 22). Also, it is emphasized the physicians' attitude, *who must work with humbleness and very deep sensitivity of the fact that they are organs of God in the service of the man* (art. 7)[70].

In regards to the issue of the *brain death*, he synodical text has not been dogmatized on the phenomenon of the *brain death*, but it has not been either rejected the medical opinion to which the Church maintains an attitude of respect and open mind[71]. Even if it is not of its competence, the Church ***could accept*** *the unanimous opinion internationally that the brain death is identified with the irrevocable biological end of the man* (art. 12)[72]. As for the artificial maintenance of the breathing, it is affirmed that this procedure *does not stop... the departing of the soul,* but temporarily it delays the *process of the body disintegration* (art. 13)[73]. A distinction is made between the *brain death* and the *vegetative state*, *which is usually called clinical death*, as long as in the last one the brainstem is functioning,

[70] *Basic positions*, p. 38.

[71] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 222. In the Greek legislation, the concept of *brain death*, the diagnostic criteria and the methods of removing the organs were accepted since March 20, 1985, based on the protocol established and promulgated by Royal Medical Colleges in England, on 11 October 1976 (Δρακόπουλου, *Μεταμόσχευση νεφροῦ*, p. 96). Among the scientific papers, submitted to the Holy Synod of the Church of Greece in September 1999, there is a study that identifies *brain death* with the death of the man, although it is made the distinction between the *cardiac* and the *brain death*, see Σταύρου Μπαλογιάννη, «Ὁ ἐγκεφαλικὸς θάνατος», *Ἐκκλησία καὶ Μεταμοσχεύσεις*, pp. 121-147.

[72] *Basic Positions,* p. 39. In fact, inside the text the *cerebral death* is not rejected, but this is appreciated as self-sacrifice, in the case of organ donation, although the Commission's opinion is expressed only as a possibility: *Thus, if anyone would like to offer his organs even if, as some could claim, brain death could not identify with the irrevocable separation of soul and body, with his organs he would also offer his life. His deed would not content only the element of dedication, but also the one of self-sacrifice (*art. 10, see *Basic Positions, p. 39*). Elsewhere it is stated that *organ donation from brain dead donors* is consistent with the teaching and morals of the Orthodox Church (art. 17, see *Basic Positions*, p. 41). Confronted by this position of the Orthodox Church of Greece, position which was taken based on the fact that *this Bioethics Commission of our Church,* as the former archbishop Hristodulos was stating in a conference organized by the Synodal Council of Bioethics (15 February 2003), *accepted, I would said, brain death as the definitive biological end of human life,* the hierarch was affirming on the same occasion, taking into account the reaction of many clergy and faithful that, if the 55 theses approved by the Holy Synod *are not correct, we will change them. They are not Gospel, therefore they can be changed... The Church does not say that "it accepts", neither that „it is possible to accept", but "it could accept" the international homophonous view that the brain death is identified with the irreversible biological end of the man* (Δαμασκηνοῦ, *Μεταμοσχεύσεις*, pp. 283, 285 , 287, 289).

[73] *Basic positions*, p. 40.

and in the most cases the artificial breathing is not necessary (art. 14)[74]. There are also some references made to the use of the artificial organs or the heterotransplants (xenotransplants), as well as to those obtained by cloning, but because *the research does not have to present precise results up to now and its process is not clear, the Bioethics Commission has restraints to present for the moment its positions and opinions about this topic* (art. 29)[75]. The text contains warnings against the possible legalization of the use of organs that come from those who choose euthanasia as end of their life (art. 30)[76], practice that is not accepted by the Church and, consequently, does not consider these ones as donors.

In August of 2000, the Holy Synod of the Russian Patriarchy adopted a text regarding the issues important to the contemporary societies[77]. Among other issues, the respective encyclical refers to the problem of transplants and *brain death.* The Orthodox Church in Russia accepts the medical practice of transplants but, it condemns the trade of organs and emphasizes that the donation of the organs has to be made only upon donor's free will. Therefore, the *presumed consent* is convicted as a *violation of human freedom*, but it is accepted, for the cases when the physicians do not know the will of the potential donor, to ask his relatives in order to know the donor's possible intent[78].

As to the *brain death,* it is ascertained that *the death has become a death procedure, which depends on the physician's decision*[79]. From the point of view of the Russian Church, one could speak about *a continuous life only when a body functions as a whole. The prolonging of life by artificial means, while only few organs continue to function, is not to be considered a necessity and nonetheless a recommended medical task*[80]. In this way, the *brain death* is indirectly accepted[81]. In regards to the artificial support of a sick person's life, *it is forbidden to end someone's life by denying the artificial support, in order to prolong someone else's life*[82].

In this encyclical, the Russian Church also talks about the personality of the one who receives an organ. *The recipient assimilates the organs and tissues of the*

[74] *Basic positions*, p. 40. In these cases, only the cortex has ceased activity (Γ. Γερολουκά-Κωστοπαναγιώτου, *op. cit.*, p. 74).
[75] *Basic positions*, p. 45.
[76] *Basic positions*, p. 45.
[77] See http://www.russian-orthodox-church.org.ru/sd00e.htm. For the Greek translation of the parts of the text relating to transplants and *brain death* see Νικολάου, *«Ἀλλήλων Μέλη»*, pp. 224-226. For a general overview of the whole encyclical in terms of positions of the Orthodox Church in Russia, see the issues raised by Bioethics see M. Βάντσο, «Ἡ θέση τῆς Ρωσικῆς Ἐκκλησίας σὲ θέματα βιοηθικῆς», *Θεοδρομία* Ε΄/2 (Ἀπρίλιος-Ἰούνιος 2003), pp. 232-244; for the text of the encyclical concerning Bioethics issues, translated into Greek, see also Νικολάου Γ. Κοΐου, *op. cit.,* pp. 113-130.
[78] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 225.
[79] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 226.
[80] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 226.
[81] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 226.
[82] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 225.

donor and these become part of his personal, spiritual and physical hypostasis. Thus, it is not possible in any case to morally justify the transplant that threatens the recipient's identity and influences its uniqueness as a personality and representative of the human kind[83].

The subject of the transplants of organs and tissues has been a priority for the Holy Synod of the Romanian Patriarchy, too. By the decision no. 3001/2002, the Romanian Patriarchy entrusted the *National Bioethics Committee* to draw up the final version of the text expressing the official position of the Orthodox Church in Romania on the issues brought up by this medical practices. The final document on organ transplantation, accompanied by two texts on euthanasia and abortion, has been submitted to the Holy Synod and approved by it on 4 May 2004. Although the publishing of the document about the transplant of organs in the central and diocesan reviews was also decided, we could only find the electronic format on the Patriarchy's website[84].

The document is divided into eight parts and deals with almost the entire issue of transplants. The Orthodox Church in Romania blesses the medical practice of the transplants, which must be made *with respect to the recipient and the donor, living or dead,* pointing out that this medical practice is intended to eliminate the suffering of its members and not to promote *the idea of the autonomy of the physical life and of the immortality of this life in the detriment of the faith in the eternal life* (*real life*), *by neglecting the preparation for the last one.*

This text presents the *general* and the *special principles* of this medical practice, and emphasizes that the *act of donation* has to be founded on Christian love for the neighbour and on the spirit of self-sacrifice. References are then made about the *responsibility of the physicians* who must have the conscience of being God's tools and collaborators. The text defines also the notions of donor (living or deceased) and recipient, whom the Church blesses, showing understanding for those who can't donate organs, but it disapproves the *unjustified negativity* (*negativity that would consist in the refusal of organ donation or in the denial of the acceptance of any form of transplant, such as it would even be the blood transfusion*). The organ donation, *fact that does not at all create the moral obligation to donate*, is based on the *free* and *explicit consent* of the donor, as *expression of love* and *spirit of sacrifice* and *generosity*. In the absence of this consent it is accepted the *consent of the relatives*, but with compliance to the legal disposals and with the aim of avoiding any suspicion of relatives' interest in trading of the organs. Thus, the *presumed consent* is indirectly rejected. Both *consents* are considered to be *in accordance with the Christian morals*.

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[83] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 225.

[84] See http://www.patriarhia.ro/ro/opera_social_filantropica/bioetica_3.html, 31.07.2008. For many of the principles and the positions outlined in the document see also Vasile Răducă, «Despre transplantul de organe din punct de vedere ortodox», *Ortodoxia* 3-4/55 (2004), pp. 116-130.

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A special chapter is dedicated to the issues *about death*. It is done the distinction between the *Christian point of view* (*spiritual death* and *physical death*) and *the medical and legal perspective* on death. The latter is defined in many ways: *systemic death, clinical death, biological death* and *brain death.* Concerning the *brain death,* it is specified that it should not be confused with the *biological death,* and that *due to the rehabilitation techniques it has arrived at the conviction that the death is a process and it is not necessarily related to the stop of the heart beat*. In this chapter it is defined the concept of *brain death* and there are presented the *criteria according to which the brain death can be legally declared.* In regards to the identification of the *real death* (*the leaving of the body by the soul*) with the *brain death legally declared, the Church requires accuracy in respecting the criteria of diagnosing of the brain death and legal death, respectively,* by a medical-legal team of physicians, who is not involved in the transplant. However, *the death, as the separation of the soul from the body, still remains a mystery*. *Nobody could ever say precisely that this separation coincides with the brain death*; *it can coincide with, it can go before or it can come after the brain death*[85].

From the document clearly results that *the removal of tissues from embryos* is not allowed, especially because, on the one hand, they are *in the impossibility to give their consent*, and on the other, *it carries the risk of affecting the foetus' health*; it is disapproving *the use of organs for the transplant from the anencephalic or hydrocephalic new-borns* and *the tendency of those who want to become donors of organs only under the condition to be subjected to the euthanasia*. Also, the transplant transactions, the exploitation of *the crisis statuses and of the vulnerability of the potential donors* (*the lack of the spiritual or physical freedom, the social penury*), *the deliberate provocation of the mutilation or death just for the removal of organs*, are all banned.

7. Challenges and attitudes

The Church blesses the achievements of Medicine as long as through them life is promoted and they do not become obstacle in the carrying out the spiritual perfection and the achievement of man's redemption. This attitude is based on the living experience of the Holy Fathers, who expressed their view on the achievements or the challenges of Medicine, too. A point of reference is considered

[85] The same conclusion was also drawn by the Greek theologian Gheorghe Mantsaridis, see Μαντζαρίδη, *Χριστιανικὴ Ἠθική,* II, p. 609; Μαντζαρίδη, *Ἐγκεφαλικὸς θάνατος*, p. 107. For the critique of the document of the Romanian Patriarchy concerning the transplant of organs, the identification of the *real death* (*the leaving of the body by the soul*) with the *brain death* and formulations which mislead and lead to the confusions and misinterpretations of some points from the Orthodox teaching see Oana Iftime, «Bioetica şi argumentele ei în favoarea dialogului ştiinţă – religie», *Science and religion – conflict or convergence,* Constanța 2005, pp. 152-169, punctul 1. *Problema transplantului de organe.*

Saint Basil the Great, who studied also the Medicine of his time. He mentioned how the use of the medication and medical methods came in agreement with the Christian faith[86]. If Saint Basil brought some clarifications about the medical practice, which entered then in the consciousness of the believers, he also gave us what we call nowadays *hospital*, institution that developed in Byzantium, and it was further adopted in the Latin West and the Islamic East[87].

In the spirit of the Christian consciousness, *when somebody offers certain organs or tissues of his body after death*, *on one side, he is postponing their deterioration, but on the other side he offers life and love to his brothers*. *The organ offered maintains life and gives life*. *The offering of the body, besides the act of brotherly communion, also represents an expression of the respect for the same body*, writes the metropolitan Nicholas of Mesogheia and Lavreotiki, a supporter of transplant practices that are in agreement with the Orthodox teaching and morals[88]. Moreover, this act has an eschatological dimension. According to the Holy Fathers[89], and also the last book of the *New Testament*, the *Apocalypse*[90], the resurrected bodies, which will regain the characters of the first Adam, will be adorned as how they lived their own life. The bodies of the people who lived a life full of sins, will show the signs of their sins, while the holy bodies will bear the signs of living in grace, the proofs of the martyrdom or the seals of love for their neighbour[91]. In the light of these truths, the bodies of those who offered organs for transplants, if this act is made out of love for the neighbour, will bear the signs of this act as proof of their *return to the state of the first Adam*[92].

The prolonging of the life by the practice of the transplants must not become a purpose in itself**.** Jesus Christ does not sacrifice Himself to extend the earthly life of man, but to renew it and to make it part of the incorruptibility. Even if He granted the extension of the earthly life by the miracles He made and through the resurrections from death, as signs of *His Kingdom*, all these show, on one part, that

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[86] See Saint Basil the Great, *The Great Rules II*, *PG* 31, 1044B-1052C.

[87] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 127; see also Timothy S. Miller, *The Birth of the Hospital in the Byzantine Empire,* Baltimore 1985; Demetrios J. Constantelos, *Poverty, Soceity and Philanthropy in the Late Medieval Greek World,* New York 1989; Stanley S. Harakas, *Health and Medicine in the Eastern Orthodox Tradition*, New York 1990.

[88] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 140.

[89] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 166.

[90] *Apoc.* 6: 9-10.

[91] Νικολάου, *«Ἀλλήλων Μέλη»*, pp. 166-157.

[92] Νικολάου, *«Ἀλλήλων Μέλη»*, p. 167. If the donor has the holy wish of self-giving, *then the transplant represents much more the expropriation of the organ by himself rather than the placement of this organ into the body of the recipient,* and in this case *the transplant means movement and energy that enlivens the society and not an act that blasphemizes the person* (Νικολάου, *«Ἀλλήλων Μέλη»*, p. 179; Νικολάου, *Πνευματικὴ ἠθική*, p. 301). On the other hand, according to some theologians, the virtues of self-sacrifice and love of the neighbour are entirely followed only by the living donors (Τσιουτσίκα-Στεφοπούλου-Δαμασκηνοῦ, *Μεταμοσχεύσεις*, pp. 529-530), without having this position generally accepted.

man must lead himself toward *His Kingdom*, and on the other, that He is merciful towards the human weakness. However, His purpose is not the work of miracles, but the liberation of man from the chains of sins[93]: *But to prove to you that the Son of Man has authority to forgive sins on earth, He said to the paralytic: I order you: get up, take your bed and go home*[94].

The success and the enthusiasm following the transplants can also deviate the human being from the purpose of his existence[95]. Moreover, each organ transplant transforms a double medical failure into an relative success: a) *the failure of medicine facing the deseased person who cannot be healed*, and b) *the failure of medicine and society, that cannot stop the fatal evolution of the stage after the coma*, meaning the death, *in which a young person arrives, who was healthy not long ago.* To these failures we can also add the spiritual failure of the human being. This failure is encouraged by the society, because the excessive confidence in a medical practice, such is the practice of the transplants, focuses the interest of the man on a more corporal integrity, while the spiritual reality and the fact of death, as a path towards another life, are ignored.

This situation is actual due to a *mechanistic anthropology* cultivated by the technological and medical progress[96]. In other words, Professor George Mantsaridis affirms that *the anthropology on which the contemporary medicine is founded is different from the Christian anthropology*[97]. The science does not perceive the man *as a being with a soul according to his being*, in other words *with an hypostatical soul*, but it accepts him *as a being with soul according to his energy, like animals, whose souls die along with their bodies.* This perception is due to the fact that man is considered the result of a biological evolution of species[98]. As a consequence, the science does in our times *the higher injustice against the human being, in spite of its own achievements and progress, just because it views the man as a «physical living being - φυσικ□ν ζ□ον» and not as a «deified... living being - ζ□ον... θεούμενον», according to Saint Gregory the Theologian*[99].

In conformity with the Orthodox Christian teaching, the human being is not only body, created by God, nor only soul, also created by God, as the *result of God's blowing into man, a mystery according to his being, immortal according to*

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[93] Μαντζαρίδη, *Μεταμοσχεύσεις*, p. 263; Μαντζαρίδη, *Ἐγκεφαλικὸς θάνατος*, p. 106.

[94] *Marc* 2: 10-11.

[95] Thus, if we were to compare the human lives saved by transplants and also the lost ones due to abortion, we can notice the relativity of the enthuziasm to the medical progress and the protection of human life (Μαντζαρίδη, *Μεταμοσχεύσεις*, p. 252; Νικολάου, *Πνευματικὴ ἠθική*, p. 279).

[96] Μαντζαρίδη, *Μεταμοσχεύσεις*, pp. 252-253.

[97] Μαντζαρίδη, *Μεταμοσχεύσεις*, p. 254.

[98] Δαμασκηνοῦ, *Μεταμοσχεύσεις*, p. 15. The soul of the man is both *energy* and *being*. Therefore, the human body decomposes, whereas the soul remains eternal *by grace* of God (Δαμασκηνοῦ, *Μεταμοσχεύσεις*, p. 132).

[99] Δαμασκηνοῦ, *Μεταμοσχεύσεις*, p. 20.

the grace[100]. The same, the human being is not only body and soul or their mixing or their ensemble, but the man is something which exceeds all theses and possesses them, without being mastered or determined by them[101]. Being made *in God's image* to achieve the *God's likeness*, the man is always understood in an iconic way, as in the same way he is recognized[102]. Thus, *the man is not an engine that functions and stops, but a spiritual organism with saps of sentiments and blood of principles, ideas and values. His function has not gotten determinism, but self-control. His life is not a chemical equation with symbols and parameters, but mystery with grace and indetermination. His death is not cease and inexistence, but a progressive and existential continuity. Therefore, his own organs are not rechargeable pieces or accessories that can be redeemed or fraudulently taken, but focuses and hideouts of life that offer themselves*[103].

In comparison to the old Greek Medicine and the subsequent Medicine, the today's Medicine views the human being in a *mechanistic and one-dimensional way.* That is the effect of the humanistic anthropology which misses the purpose of deification, because it isolates the man within the boundaries of the created and mortal being status. *Therefore, it has been usually ascertained that God is removed from wherever this type of Medicine is dominant*[104]. The Theology does not hinder Medicine in its own manifestation and efforts, but it does not ignore its relativity either[105]. As long as the Christian faith determines people's personal and social life, there is an *ascetic* framework for Medicine, too. However, due to the spreading of laicization, there have been doubts regarding the moral and religious values, while the man's judgment and the scientific research have been idolized[106], against the authentic life in Christ.

[100] Δαμασκηνοῦ, *Μεταμοσχεύσεις*, p. 14. After the act of the creation of the ancestors Adam and Eve by the Triune God, the soul of each human being is created by God in the moment of its conceiving, in an inexpressible and unknown way (Δαμασκηνοῦ, *Μεταμοσχεύσεις*, p. 14).

[101] Μαντζαρίδη, *Χριστιανικὴ Ἠθική,* II, p. 610; Μαντζαρίδη, *Ἐγκεφαλικὸς θάνατος*, p. 108; Μαντζαρίδη, *Μεταμοσχεύσεις*, p. 266; Δαμασκηνοῦ, *Μεταμοσχεύσεις*, p. 14; see also Saint Maxim the Confessor, *Ambigua, PG* 91, 1225D-1228A.

[102] Μαντζαρίδη, *Μεταμοσχεύσεις*, p. 266; Μαντζαρίδη, *Ἐγκεφαλικὸς θάνατος*, p. 108; Νικολάου Λουδοβίκου, «Μεταφυσικὴ ἢ ἐσχατολογία τοῦ σώματος», *Ἐπιστημονικὴ Ἐπετηρίδα Θεολογικῆς Σχολῆς,* νέα σειρά, Τμῆμα Θεολογίας, τόμ. 1, Θεσσαλονίκη 1990, p. 124.

[103] Νικολάου, *Πνευματικὴ ἠθική*, p. 289.

[104] Μαντζαρίδη, *Μεταμοσχεύσεις*, p. 254; Μαντζαρίδη, *Ἐγκεφαλικὸς θάνατος*, p. 104.

[105] Μαντζαρίδη, *Μεταμοσχεύσεις*, p. 257.

[106] Μαντζαρίδη, *Μεταμοσχεύσεις*, p. 261.