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THEORETICAL AND PRACTICAL CONSIDERATIONS REGARDING COMPETENT AUTHORITIES TO APPLY DISCIPLINARY SANCTIONS IN THE CURRENT REGULATION

Barbu VLAD[*]
Ştefania DUMITRACHE [**]

Abstract: *In our paper we submitted to a sensitive issue in disciplinary labor law practice, namely the jurisdiction of disciplinary application and jurisdiction of prior disciplinary investigation. Between these two aspects there is a strong interdependence relationship, given the fact that, according to Article 251 Paragraph 1 of Labour Code, under penalty of nullity, no measure, except written warning, may be issued before conducting a prior disciplinary investigation. In order to achieve an overall image of the analyzed issues, we approached the special regulations for certain categories of staff (civil servants, magistrates, teachers).*
Keywords: *disciplinary action, prior research, employer, employee, person empowered, disciplinary research committee.*

1. General concepts of general disciplinary sanctions[1]

Disciplinary sanctioning is being made according to some procedural rules, which have two purposes: *educational* - in fighting against deviating behaviour from the rules of labour discipline and harmful to work process and *preventive* in terms of avoiding unfair application of certain disciplinary sanctions by ensuring an accurate establishment of the facts and by ensuring the right to defence of the persons concerned. It is important to establish that the disciplinary rules provided by law don't have the same concern of the legislator, as criminal and contravention rules do[2].

In the literature[3] it was considered that disciplinary action is completed by the sanctioning decision and it is the employers prerogative to ensure the normal functioning of the labour process, without having a judicial nature.

2. Competent authorities to apply disciplinary sanctions

According to article 247 paragraph 1 Labour Code, the employer has the disciplinary prerogative, having the right to apply disciplinary sanctions whenever his employees have committed a disciplinary offence.

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[1] Special procedural rules for different categories of staff personnel are found in statutes. See Law no 188/1999 on the status of civil servants.
[2] See Plenum of the Supreme Court, guidance decision no. 5/1973, item 2 in The collection of decisions since 1973, pp. 14-16.
[3] See Sanda Ghimpu, Alexandru Ţiclea, *Labour law*, revised and enlarged edition, Publishing and press house „Şansa" SRL, Bucharest, 1995, p.353.

The legislator does not distinguish between employer as a individual, when things are fairly clear, and employer as a legal person, when it is necessary to make some remarks. The legal entity was defined as an entity, all human and material elements which, fulfilling the law conditions, has rights and obligations[4]. Over time, civil law rule stated that legal person is involved in legal life through its management body[5]. Consequently, the doctrine considered that this legal process mandatory contains the legal person representation by its management bodies[6]. Specific of exercise juridical capacity of legal person shows a strong and current legal regulation, which refers to governing bodies as being those through whom the legal entity exercises its rights and fulfil its obligations[7]. Governing bodies are defined by article 209 paragraph 2 Civil Code as natural or legal persons who, by law, articles of incorporation or status, are entitled to act in relations with third parties, individually or collectively, in the name and on account of the legal person. On the other hand, paragraph 3 of the same legal text, without novelty[8], presents that relations between the legal person and those who make up its management bodies are object, by analogy, of the rules of mandate, if not set otherwise by law, articles of incorporation or statute. That said, we reiterate that in the labour market, employer - legal person must conclude labour contracts[9], legal discerning documents, but, unlike the employer - natural person, the employer - legal person does not have, obviously, a free will. This is why legislator adopted the solution to considering one or more individuals responsible for management as the will itself of a collective subject.

By specializing in our field of interest, we conclude that the employer exercises the right to find disciplinary offences and impose sanctions through its management, which can be single-member (administrator, manager, leader) or college (board of Directors, directorate)[10]. Basically, prominent position is occupied by single-member bodies[11], these having overall responsibility in field, therefore, applying, any disciplinary sanction, this competence resulting, first, from the laws, statutory or contractual provisions regarding their prerogative to organize the selection, hiring and firing staff[12]. Of the Law no 31/1990 on trading companies we acquire the following conclusions: the company that operates within a single administrator, of course disciplinary sanction shall be determined and applied to the company employees by this person, while when given more managers, disciplinary rule are being applied by those competent to conclude individual labour

[4] Gabriel Boroi, *Civil Law. General theory. Persons*, Second edition, All Beck Publishing House, Bucharest, 2002, p.386.
[5] It's about article 35 of Decree nr.31/1954 concerning natural and legal persons, repealed upon the entry into force of the Civil Code - Law nr.287/2009.
[6] For details, see Gheorghe Beleiu, *Romanian Civil Law. Introduction to civil law. Civil rights issues*, Eleventh Edition, revised and enlarged by Marian Nicolae, Petrică Truşcă, Universul Juridic Publishing House, Bucharest, 2007, p.486; Ion Dogaru, Sevastian Cercel, *Civil Law. Persons*, C.H.Beck Publishing House, Bucharest, 2007, p.291.
[7] See article 209 paragraph 1 Civil Code.
[8] See article 36 of Decree no 31/1954 concerning natural and legal persons, repealed by the actual Civil Code – Law no 287/2009.
[9] For example, we mention article 284 of the Law no.31/1990 on trading companies (republished in the Official Gazette of Romania, Part I, no 1066 of November 17, 2004, with the latest changes and additions brought by the Government Emergency Ordinance no 2/2012, published in the Official Gazette of Romania, Part I, no 143 of March 2, 2012), that the employment of employees in companies is based on individual labour contract, in compliance with labour legislation and social security rules.
[10] Do not relate to the administration by another legal entity, since it would start a vicious circle, given that their legal representation applies the same rule stated above.
[11] Usually, the founder of one legal entity is also its administrator, representing the governing body of the generic unit.
[12] Alexandru Ţclea, *Labour law treaty*, Fourth Edition, C.H.Beck Publishing House, Bucharest, 2010, p.862.

contracts[13]; in small companies with not appointed administrators in the narrow sense of the term, the functions of business management in general and disciplinary prerogative, particularly, is assigned to one or more members, who deal directly with the company's business[14]; where companies in partnership and limited liability companies, disciplinary prerogative belongs to each director unless the memorandum provides that administrators must work together, the measure being taken unanimously, in case of divergence task returning the absolute majority of members representing the share capital[15]; to employees of any company taken on the dual system[16], disciplinary action will be decided by the director, who, according to article 153 paragraph 1 and 2^1 above-mentioned normative act, meets the necessary documents and necessary to achieve the object of the company, thus exerting corporate governance, under the control of the supervisory board.

It is now necessary to answer the question if the director, manager, leader or administrator can themselves become subjects of legal disciplinary relation. For this reason, it is necessary to establish the legal relation between these individuals in their capacity as directors, in the broad sense of the term, and the legal entity that they manage. We recall the provisions of the article 209 paragraph 3 Civil Code, according to which that persons who make up the governing bodies of a legal person are agents of the latter, unless otherwise provided by law, articles of incorporation or statute. This means that their legal liability is governed by the provisions concerning the mandate, in which case disciplinary action is excluded, as noted above. As regards the legal relation between manager and the company, article 72 of Law no 31/1990 on trading companies provides that they are governed by the provisions regarding the mandate and those specially provided for by the legislation mentioned. The doctrine[17] said that these contributions have, however, a double nature - legal and contractual - whereas in all cases the administrator is to conclude a contract with the company itself will follow, in general, coordinates commercial mandate contract. Since this is an administration / management contract, neither in this case we can discuss about disciplinary liability of administrators. In this context, we bring into question the provisions of paragraph 3 article 137 Law no 31/1990 on trade companies, according to which, if limited liability companies, in the performance of the job, administrators may not conclude an employment contract with society. Basically it is inadmissible overlapping administrator employing job with an employment contract for the same job, hence the specific disciplinary subordination and liability are absent. The second sentence of the same legal text prohibits overlapping administrator function with other functions or assignments, such that, if the administrators were appointed from the company's employees, their individual employment contract is suspended during the administration mandate. If managers of state companies, the entry into force of Government Emergency Ordinance no 79/2008 on economic and financial

[13] We note that in the case of public limited companies, uniform system organizes plurality of administrators in a single collective entity, which, however, may delegate some powers, including the disciplinary one, to directors. We mention article 88 and article 188 of Law no.31/1990 on trading companies which provide that the administration of society will be entrusted to one or more associated command, when companies and partnerships limited by shares.

[14] For the same opinion, see Stanciu D. Cărpenaru, David Sorin, Cătălin Predoiu, Gheorghe Piperea, *Trade Company Law. Comment on articles*, 4th Edition, C.H.Beck Publishing House, Bucharest, 2009, p.529.

[15] Article 75, 76, 197 of Law no 31/1990 on trading companies.

[16] For details on this method of administration, see article 153 and following. form Law no 31/1990 on trading companies.

[17] See Stanciu D. Cărpenaru, David Sorin, Cătălin Predoiu, Gheorghe Piperea*, op.cit.,* pp.531-532 and pp.537-538.

measures to the economic operators[18], the employment contract - basis for disciplinary liability and the „performance contract" attached, were removed with all the necessary implications. Currently, they operate under a mandate which has delegated executive management. Regarding leaders of companies in the banking and capital market (banks, financial institutions and banking companies, securities broker - SSIF), they are managers who accumulate the position of manager with an employee one in the same company, which implies that one of the forms of their legal responsibility is even disciplinary liability[19].

In the case of the civil servants, Law no 188/1999 on the status of civil servants[20] provides that the competent authorities to apply disciplinary sanctions, directly or proposal from the Board, are the same as those which have the legal power of appointment to public office[21], making the distinction, in this last point, between senior civil servants and civil service management or execution ones. According to article 19 paragraph 1, the disciplinary liability of senior civil servants is, by law, the object of Government competence, for people who are called in one public office of General Secretary or Deputy General Secretary of Government, the prefect and deputy prefect, and of prime minister for people called in public office of general secretary or deputy general secretary of ministries and other bodies of central government, the government inspector. The provisions of article 78 paragraph 1 and 2 in conjunction with article 62 paragraph 2 and 3 of the same law state that civil servants disciplinary is for the leaders of public authorities or institutions in which they operate those concerned. We notice that the contradiction between the paragraph 1 of article 78 Law no 188/1999 on the status of civil servants who provides written reprimand sanction can be applied directly to the person by those who have the legal power of appointment in the public and paragraph 3 of the same legal text, according to which no disciplinary action can be legally applied without a preliminary investigation of the offence. *Per a contrario*, prior disciplinary research is required even if for the application of lightest disciplinary sanctions, from which we conclude that the application of any disciplinary sanctions, without exception, is at the notice of disciplinary commission empowered to conduct disciplinary action..

For some staff, there are established special bodies – collegial ones, competent to apply disciplinary sanctions[22]. For example, in magistrates' cases, disciplinary penalties shall be applied by sections of Superior Council of Magistracy, in accordance to the seriousness of the breach committed by the judge or prosecutor and his personal circumstances[23]. For

[18] Published in the Official Gazette of Romania, Part I, no 465 of 23 June 2008, the latest changes and additions broth by the Government Emergency Ordinance no 44/2001, published in the Official Gazette of Romania, Part I, no 333 of May 13, 2011.

[19] See Stanciu D. Cărpenaru, David Sorin, Cătălin Predoiu, Gheorghe Piperea, *op.cit.*, p.532.

[20] Republished in the Official Gazette of Romania, Part I, no 365 of 29 May 2007 with the latest changes and additions brought by Law no 140/2010 (published in Official Gazette of Romania, Part I, no 471 of July 8, 2010) and the framework Law on salaries no 284/2010 regarding unit paid of staff from public funds (published in Official Gazette of Romania, Part I, no 877 of 28 December 2010).

[21] See the text of article 78 paragraphs 1 and 2 of Law no 31/1990 on trading companies.

[22] Vlad Barbu, Cătălin Vasile, Ştefania Ivan, Mihai Vlad, Labour Law, Cermaprint Publishing House, Bucharest, 2008, pp.359-360.

[23] See article 101 of Law no 303/2004 provisions on the status of judges and prosecutors (republished in the Official Gazette of Romania, Part I, no 826 of 13 September 2005 with the latest changes and additions to brought by the Law no 24/2012, published in the Official Gazette of Romania, Part I, no 51 of 23 January 2012), in full accordance with the provisions of article 47 paragraph 6 of the Law on the Superior Council of Magistracy no 317/2004 (republished in the Official Gazette of Romania, Part I, no 827 of 13 September 2005, the latest changes and additions to brought by the Law no 24/2012). The doctrine has been argued that the Plenary Council, its departments should not have legal jurisdiction in disciplinary matters - for details and arguments, see Ion Popa, *Treaty on the judiciary profession in Romania*, Universul Juridic Publishing House, Bucharest, 2007, pp.384 ff.

teachers, auxiliary staff, the guidance and control in the pre-established disciplinary sanctions, as appropriate to the boards of the schools or the Minister of Education, Youth and Sports under article 280 paragraph 5 in conjunction with article 282 of the National education law no 1/2011[24]. For teaching and research staff, auxiliary staff and research and the management, direction and control of higher education, disciplinary councils are established by faculty, senates that, depending on their severity, according to article 313 paragraph 2 and 3 of the National education law no 1/2011.

In all cases, the competent body to apply the disciplinary sanction will have to worry, with all the attention, about its individualization, based on criteria provided by law, because only a fair correlation of the sanction with the gravity of the offence is likely to provide achievement of educational and preventive role of disciplinary liability.

In legal literature[25] was considered that, since there is no express statutory provision, general or particular, the employer is free to empower an employee to exercise any of its functions, including disciplinary; person / body delegated can apply any disciplinary sanctions under article 248 paragraph 1 Labour Code, including disciplinary dismissal, and not only certain less serious disciplinary sanctions. To produce legal effects, the delegation must fulfil the following conditions[26]: to express free will of the employer; to regard duties that were not conferred exclusively to the employer, otherwise the act would be null and void; to be explicit and unambiguous; to be precise, in that in the absence of the delegation that employee does not have disciplinary prerogative; to be effective in the sense that the employee actually exercises the powers delegated to him; to be dated; to be accepted by the delegated employee, because involves the acquisition of additional tasks, and thus change the individual employment contract, which, under article 41 of the Labour Code, may operate as a rule, only by consent.

Regarding sub delegation, the rule is that the delegate may not, in turn, delegate the powers received. Of course, if the employer itself expressly agrees with sub delegation, this becomes possible[27].

Delegation of responsibilities, including disciplinary cease as it expires or as fulfilling individual employment delegated, at employer's proposal, by dismissal or by agreement between the two parties. The employee may not, according to his will, give the disciplinary powers delegated and any refusal to exercise its specific powers would be misconduct.

Delegation of disciplinary powers appears to be possible for public authorities and institutions too, given that, pursuant to article 45 paragraph 1 of Law no 188/1999 on the status of civil servants, public officials are responsible by law, to fulfilling their duties of public office held and the ones delegated to them. So there lies the possibility that a public official to be punished by another public officer delegated / empowered with such disciplinary powers[28].

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[24] Published in the Official Gazette of Romania, Part I, no 18 of 10 January 2011, the latest changes and additions to brought by the Law no 283/2011, published in the Official Gazette of Romania, Part I, no 887 of 14 December 2011.
[25] Ion Traian Ştefănescu, *Delegation of disciplinary tasks in labor law* in Dreptul no 12/2004, pp.103-111.
[26] Alexandru Ţiclea, *Treaty ...,* Fourth Edition, *op.cit*., p.863.
[27] *Idem*. See also Dan Ţop, *Labour Law Treaty*, Wolters Kluwer Publishing House, Bucharest., 2008, p.472.
[28] *Ibidem*, p.471.

3. Competence in conducting prior disciplinary research

According to article 251 paragraph 2 and 4 of the Labour Code, prior disciplinary research is carried out by a person authorized by the employer. In this legal context, often in practice, collective labour agreements provide that, for research offences and propose disciplinary sanctions, the employer forms a research committee which would include a non-voting observer, representative of the trade union whose employee membership is investigated[29]. Clearly, such provisions would be making favourable conditions to employees as a prior disciplinary research comprehensive, fair and balanced, are better secured this way than if the research in question is the result of one person work appointed by the employer[30]. We concur with the view[31] that the commission should consist of at least 3 members (given that its decisions shall be adopted by vote) to be added to an observer from representative organization of trade unions party, whose role would be to reduce the risk of a superficial or biased research and to increase confidence in the conclusions and the proposals. Of course, we consider the following two situations which may arise in practice:

- the unit has representative organization, but employee is not a member of this formed union, in which case that observer will miss the commission;
- the unit has not a union, in which case we believe that the observer status within the research discipline will be owned by an employees representative[32].

In practice, if there is such a prerequisite, committees for disciplinary research of the offence are formed, usually from persons employed in human resources departments, legal services (departments, bureaus) and the line managers of those surveyed[33].

The special regulations for certain categories of employees (professional status, disciplinary status, internal regulations) establish special rules in prior disciplinary research jurisdiction. For example: - If teachers, disciplinary research is done in different ways as follows:

1) to investigate alleged offences committed by teaching staff, management staff of school education, guidance and control staff in the county school and guidance and control staff of the Ministry of Education, Youth and Sports, disciplinary research commissions are called by the board of the school, or by the Minister of Education, Youth and Sports and constituted as follows: a) for teaching staff, committee consisting of 3-5 members, of which one is representing the trade union of which the person under discussion is member or a representative of employees and others occupying teaching position at least professional equal to the one who committed the offence; b) for management of school education, committee consisting of 3-5 members including a representative of employees and others occupying teaching position at least equal to the one who committed the violation. Part of the committee is also an inspector from the County/ of Bucharest School Inspectorate; c) for guidance and control personnel of the Ministry of Education, Youth and Sports, commission consisting of 3-5 members, of which one

[29] For example we recall provisions of Article 20 paragraph 2 of the Collective labour contract in the building materials industry, 2010-2012.

[30] Ion Traian Ștefănescu, *Theoretical and practical labour law treaty*, Universul Juridic Publishing House, Bucharest, 2010, p.722.

[31] *Idem*.

[32] For a contrary view, see Alexandru Țiclea (coordinator), Daniela Diko, Leontina Duțescu, Laura Georgescu, Ioan Mara, Aurelia Popa, *Commented and annotated with the law, doctrine and jurisprudence Labor Code*, Volume I, Universul Juridic Publishing House, Bucharest, 2008, p.453.

[33] *Ibidem*, p.454.

is representing trade union of which the person under discussion is member or a representative of employees and others occupying teaching position at least equal to the one who committed the offence; d) for management of county / Bucharest school inspectorates, committee consisting of 3-5 members including a representative of employees and others occupying teaching position at least equal to the one who committed the violation.

2) To investigate disciplinary violations committed by teaching staff, research staff and administrative staff, are formed analysis commissions, which are called by the rector, with the approval of the university senate or the Ministry of Education, Youth and Sports, for management of higher education institutions and consist of 3-5 members, teachers with teaching position at least equal to the one who committed the offence and also the trade union representative. - Article 79 of Law no 188/1999 on the status of civil servants provides that, for analyzing the reported incidents as disciplinary offences committed by public officials and to propose disciplinary sanctions applicable thereto, shall constitute the boards, defined as deliberative bodies without legal personality, independent exercise of their duties, competent to analyze the civil servants' facts brought before the disciplinary proceedings and to propose how to address, with the identification of applicable disciplinary sanction or dismissal notification, as appropriate (Article 2 of Government Decision nr.1344/2007 on rules providing disciplinary commissions[34]). These discipline committees are made up of three members[35] - permanent officials, appointed indefinitely public office - one of which is designated by the organization / trade unions, that the majority of civil servants of the public authority or institution which is organized every commission basis. With regard to their establishment, enshrined in Article 3 of Decision Government no 1344/2007 on rules of organization and functioning of disciplinary commissions is that they are in each public authorities and institutions. However, the Board may be established for several authorities or public institutions, where in one of them operates fewer than 10 officers. According to Article 6, paragraph 1 and Article 7 paragraph 1 of Government Resolution no 1344/2007 regarding organization and operation of the disciplinary committee, in order to analyze and propose how to address complaints regarding disciplinary violations of the administrative secretaries territorial, county / Bucharest secretaries, constitute a disciplinary committee at county / Bucharest and at nationally level. Disciplinary Commission for senior civil servants is formed at national level and is composed of 5 members - senior civil servants appointed by the Prime Minister, at the Minister of Administration and Internal proposal[36].

- In the judiciary, the Law on the Superior Council of Magistracy no 317/2004 determines that disciplinary actions are held by disciplinary committees of the Superior Council of Magistracy. Article 45 paragraph 2 of the text emerge two possible referral commissions in connection with disciplinary offences of judges and prosecutors: by (self) default or by any interested person, including the Superior Council of Magistracy. In accordance with article 44 paragraph 6 of Law on the Superior Council of Magistracy no

[34] Published in the Official Gazette, Part I, nr.768 of 13 November 2007, with subsequent amendments made including nr.1268/2008 Government Decision (published in Official Gazette, Part I, nr.700 of 15 October 2008), Government Emergency Ordinance nr.35/2009 regulating certain financial measures in personnel costs in the public sector (published in Official Gazette, Part I, No. 249 of April 14, 2009).

[35] Article 4, paragraph 2 of the GD nr.1344/2007 on rules of organization and functioning of the disciplinary committee provides that each member of the disciplinary committee is appointed (...) as an alternate operating in absence of the member accordingly, that if the mandate has ended prematurely.

[36] See Article 79 paragraph 4 of Law no.188/1999 on the status of civil servants and nr.1344/2007 8 of Government Decision on rules of organization and functioning of the disciplinary committee.

317/2004 disciplinary research is required, and only people who have competence in this field are judiciary inspectors in one of the two services consist of the Judicial Inspection Superior Council of Magistracy.

4. Proposal for further legislation

Finally, we believe it is required, for further legislation[37], that according to Labour Code, we shall face with a specialization in the prior disciplinary research jurisdiction, as the employer is a natural or legal person. Thus, we propose the insertion at Article 251 of Labour Code a new paragraph as follows: „Research disciplinary offences and disciplinary sanction proposals will be made by a person authorized by the individual employer or by a committee established by the employer – legal person. In case of research committee, it will be composed of at least three members, plus observer without voting rights form as a representative of the trade union whose member is investigated or as a representative of employees, as appropriate". To ensure consistency of these legal rules, due to the additions required, it is necessary the adaptation of paragraph 2 and 4 of Article 251, with the purpose of sending to the person empowered, but also to research commission.

References:

- Civil Code - Law no 287/2009;
- Law no.303/2004 on the status of judges and prosecutors;
- Law no 317/2004 on the Superior Council of Magistracy;
- Law no 188/1999 on the status of civil servants;
- Law no 31/1990 on trading companies;
- Government Decision no 1344/2007 on rules of organization and functioning of the discipline committee;
- Gheorghe Beleiu, *Romanian Civil Law. Introduction to civil law. Civil rights issues*, Eleventh Edition revised and enlarged by Marian Nicolae, Petrică Truşcă, Universul Juridic Publishing House, Bucharest, 2007;
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- Vlad Barbu, Cătălin Vasile, Ştefania Ivan, Mihai Vlad, *Labour Law*, Cermaprint Publishing House, Bucharest, 2008.

[37] For a less elaborated proposal in the same way see Ştefania Dumitrache, *Disciplinary liability in national and comparative labour law*, Sitech Publishing House, Craiova, 2011, pp.216-217.

INFLUENCES OF THE NEW CIVIL CODE UPON THE CREATION AND LEGAL CAPACITY OF CREDIT INSTITUTIONS

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Abstract: *Constantly upholding the idea regarding the unity of private law, the new Civil Code has brought commercial law institutions, including bank law, in its regulation area, providing them with a common and unitary regime. As legal persons, credit institutions involve the latter's constitutive elements, which are subject to new regulations; as commercial companies, of a special type, credit institutions continue to remain subject to special law – Government Ordinance No. 99/2006 and the regulations approved by the National Bank of Romania, harmonized with the European Union legislation and upheld by a rich banking practice and jurisprudence. The present work aims to establish the interferences of the Civil Code upon credit institutions, from an institutional perspective (constitutive elements, creation, registration, legal capacity), by means of a comparative and interdisciplinary approach of incident norms, by pointing out at the same time the novelty elements brought by the new regulations, but also the specificity of such entities.*

Keywords: *legal person, commercial company, credit institution, bank practices, special Bank law.*

1. Introduction

The unification of private law generated the expansion of the civil law field upon the commercial one, under all its various aspects, including the banking one. As legal „persons", credit institutions enter in the incidence area of common law provisions – Civil Code[1], art. 187-251. As legal subjects, commercial companies, *of a special type*, credit institutions are subject to the Government Ordinance No. 99/2006 regarding credit institutions and capital adequacy[2] and Law No. 31/1990 on commercial companies[3]. From a contractual point of view, credit institutions enter in the incidence area of the Civil Code, articles 2184-2189 - „Current bank account and other bank contracts" - respecting nonetheless the „operational requests" instituted by special law.

In order to respect to the theme of the present work, we shall analyze credit institutions only as legal persons - focusing on: their constitutive elements, creation and legal capacity, by means of an interdisciplinary approach of the regulations already mentioned, therefore establishing:

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[1] Law No. 287/2009 on the Civil Code, republished in Romanian Official Gazette, Part I, No. 505 from July 15th 2011, modified by Law No. 71/2011, published in Romanian Official Gazette, Part I, No. 409 from June 10th 2011; in what Civil Code is concerned, we shall use in the present work, with the same meaning, also the terms: Civ. Code, new regulations, common law.

[2] Published in Romanian Official Gazette, Part I, No. 1027 from December 27th 2006; regarding this normative act, we shall use in the present work, with the same meaning, also the terms: G.E.O. No. 99/2006; bank law – as typically bank normative act, in order to distinguish it from the Law of commercial companies, but also special regulations, nonetheless with a broader application scope..

[3] Republished in Romanian Official Gazette, Part I, No. 1066 from November 17th 2004, called by us Law No. 31/1990 or the Law of commercial companies.

provisions of common law applicable to the institutional bank system and their coverage degree; interferences areas between Civil Code and Bank law; parallelisms or areas not covered by the two regulations. Finally, we would like to underline the integration of credit institutions in the new legal background and the homogenization degree of the institutional bank system with common law, by establishing the common elements and specific differences.

Specialized literature often approaches credit institutions from the perspective of prudential requests instituted by special law and the regulations of National Bank of Romania, dealing with the way bank activity takes place; nonetheless, it is missing a study focusing on the interferences of Civil Code in the institutional bank system.

In the absence of some reference elements inside legal doctrine, regarding the theme under analysis, we shall carry out a comparative analysis of the former and new regulations, of common and bank law, taking, of course, as reference points the important studies which exist and regard „persons". In this context, we aim for our study to constitute a reference element regarding credit institutions in the context of private law unification.

2. Constitutive elements of credit institutions

According to the new Civil Code, a legal person represents „any *organization form* which, by meeting the *conditions* provided for by law, possesses civil rights and duties" [article 25 paragraph (3)]. Are considered legal persons the entities provided for by law, but also any other organization legally constituted that, although are not declared legal persons by law, meet all the *constitutive elements* of legal persons (art. 188 of the Civ. Code).

Just like the former regulations in the field, namely article 26 letter e) of Decree No. 31/1954 regarding natural and legal persons[4], Civil Code, at its article 187, institutes as constitutive elements of a legal person the following: freestanding organization; personal patrimony; licit and moral target, in accordance with general interest[5]. The aspects mentioned above condition the legal existence itself of an entity as legal person and, implicitly, its quality of legal subject, and must be met altogether, there not being any hierarchy for that matter; sometimes the elements mentioned above are completed by some „formal-legal" requests, for instance that of registration or subscription, conditioning, this time, even the acquirement of the capacity of use which a legal person can enjoy.

a) Freestanding organization

Freestanding organization regards on the one hand the distinct organisation of a legal person, as unitary legal subject, separately from other entities; on the other hand, it involves a well defined organization of the legal person, with internal structures and leading bodies, constituted according to law and its normative acts, so that the entity created to be able to take part on its own to legal relations. The recent legal literature actually defines this as „the organization of a legal person as a whole entity or as the structuring of the activity which is to be performed, mentioning the person or the persons who will represent the legal person in relation to third parties"[6].

[4] Official Bulletin, No. 8, from January 30th 1954, currently abrogated.

[5] For more details, see Carmen Tamara Ungureanu, *Drept civil. Partea generală. Persoanele,* Hamangiu Publ. House, Bucharest, 2012, pp. 411-413.

[6] Carmen Tamara Ungureanu, *quoted works*, p. 411.

Common law regulates the condition of organization only from an *abstract* perspective, the particularization being performed in the field of special regulations, on activity fields, but also in relation to each legal person.

According to bank law, credit institutions are joint stock commercial companies, which can be constituted as: banks; credit cooperative organizations; saving banks and housing credits banks; mortgage banks (article 3 of the G.E.O. No. 99/2006). In what the internal organization is concerned, Bank law points out the following relevant elements: provisions demanding the existence of an „*activity plan"*, which must include, at least, the types of activities proposed to be performed and the *organizational structure* of the credit institution …" (art. 17); legal norms which transfer inside constitutive acts and *internal regulations* the establishment of the *administration framework* of a credit institution, processes of identification, administration, monitoring, risks report and internal control of the credit institution…" (art 104); provisions from which emerges the *mandatory existence* of some *internal* structures, which must cover, at least, the issues regarding risks administration and control, internal audit, conformity, treasury, crediting and any other activity which can expose a credit institution to some significant risks. Although it does not engage the legal person, the activity of such structures is relevant, at least from the perspective of the regularity of the legal acts which involve it.

b) Personal patrimony

The patrimony represents the premise for the accomplishment of target and the participation of a legal person to legal relations, by committing to responsibilities. According to common law, any legal person *must have* a patrimony (article 187), distinct from the personal patrimony of the members from administration. Law No. 31/1990 institutes a minimum value of the patrimony when a commercial company is set up, which is different, in accordance to the forms of the commercial company involved[7].

Bank law stresses the financial factor, credit institutions being capital companies; by derogation from the provisions of Law No. 31/1990, it institutes a minimum value of the initial social capital, of 5 million euro, not agreeing with public subscription and with the contributions in kind for the constitution of the company. At the constitution of a credit institution, its patrimony is equal with the subscribed and paid up capital. Moreover, the patrimony of the credit institution (social capital, own funds) constitutes the object of some multiple prudential regulations instituted particularly by the National Bank of Romania.

c) Licit and moral target, in accordance with general interest.

Taking over the proposals *by lege ferenda* made by specialized literature, the new regulations add to the description of the target the request for it to be licit, moral and in accordance with general interest. By constituting the reason itself of a legal person's existence, target is intrinsic to its activity field, delimiting, finally, the expansion of its legal capacity and making so that such capacity is not general, as it happens with natural persons.

3. Creation of credit institutions

a) Principles regarding creation

The provisions of articles 190 and 192 of the Civil Code stress freedom and legality as principles for the constitution of a legal person.

[7] See the provisions of art 10 paragraph (1) and article 16 of Law No. 31/1990.

Freedom of creation. According to the provisions of article 190 of the Civil Code „private law legal persons can constitute themselves freely, in one of the forms provided for by law". In the bank field, the principle of „single passport" or „single authorization" in the European space is the obvious expression of the freedom with which credit institutions can be constituted, in the spirit of the European Union legislation. Concretely speaking, credit institutions are constituted and function in the conditions provided for by the legislation applicable to commercial companies, with the observance of the G.E.O. No. 99/2006 [article 102 paragraph (1) of the G.E.O No. 99/2006].

Legality of creation. The provisions of article 192 of the Civil Code point out that: „Legal persons constituted according to law are subject to the provisions applicable to the category to which they belong, but also to the provisions included in the present code, if law contains no contrary provisions"

b) Creation forms

When it comes to credit institutions, the expression „in one of the *forms* provided for by law" points to Law of commercial companies and, together with this law, to the G.E.O. No. 99/2006, which approves only the constitution of legal persons as joint stock commercial companies (article 287). The form imposed is generated by the need to provide capital to such entities, respecting nonetheless the freedom of set up; the non observance of the imposed form constitutes a reason to reject the request for the authorization of a credit institution, according to article 38 paragraph (1) letter c) of G.E.O. No. 99/2006[8].

A strictly particularized situation is the one which characterizes cooperative credit organizations. In relation to them, law instituted a hybrid legal regime: assimilates cooperative credit institutions to joint stock commercial companies (capital companies), although divides their social capital in equal parts, as it happens with companies of persons.

c) Creation ways

Rule. The creation of a legal person – credit institution – has as legal ground of maximum generality the provisions of article 194 paragraph (1) letter b) of the Civil Code, according to which „a legal person is created by means of the creation act made by those that constitute it, *authorized* (author's note) according to law". According to article 194 paragraph (2) of the Civil Code, the creation act is the act by which a legal person is constituted and, as the case may be, also its status. In what credit institutions are concerned, the creation act resides in the company contract and in their status, having the legal regime instituted by Law No. 31/1990. Moreover, Bank law provides that, besides the constitutive act, it is necessary for internal regulations of a credit institution to exist, which have to be communicated to the National Bank of Romania.

The authorization of the creation act cannot be mistaken either with the special condition of registering this act or with other requests imposed by special law. According to Law No. 31/1990, the authorization of creation is made by the delegated judge, by authentication [art. 40 paragraph (1)]. The authorization means that a legal person is created in fact or that a legal person – commercial company – is regularly constituted.

Special conditions. Besides the authorization according to common law, Bank law has also instituted the condition for the credit institution to be authorized by the National Bank of Romania, providing specific legal effects to it and presenting it as a component of prudential surveillance. Law provides that the authorization mentioned above must be

[8] According to which „The legal form is different from the one provided for the category of the credit institution which is intended to be constituted".

performed in two distinct stages: the creation of the credit institution is authorized; the functioning of the credit institution is authorized. According to article 32 paragraph (1) of the Government Emergency Ordinance No. 99/2006: „Credit institutions – Romanian legal persons – can constitute themselves and function only on the basis of the authorization issued by the National Bank of Romania"; the same meaning is also contained by the provisions of article 10 paragraph (1) of the normative act under discussion[9]. Moreover, the absence of the administrative authorization (necessary here for the creation of the credit institution) is pointed out by article 196 paragraph (1) letter d) of the Civil Code as a reason for declaring null a legal person.

The *creation authorization* represents only a premise for the access to bank activity to take place, not having a constitutive effect and being followed by the legal or in fact creation of the credit institution, according to Law 31/1990. The authorization takes the form of an authorization decision ("The National Bank of Romania decides to give the permit for creation"), which is subject to the legal regime instituted by bank law.

The functioning authorization is performed after the legal or in fact creation of the credit institution, on the basis of the documents which prove it and of the project presented. Unlike the creation authorization, the functioning authorization influences the performance of the banking activity.

d) Registration of the credit institution.

According to article 200 paragraph (1) of the Civil Code, „legal persons are subject to registration, if the laws which are applicable to them provide such registration". For the purposes of the new regulations, registration means „subscription, registration or, as the case may be, any other publicity formality provided for by law, made for the purposes of acquiring legal personality or for keeping the records of the persons legally created, as the case may be" [paragraph (2)].

The registration request does not have a general character, operating only if the law imposes it, usually for private entities. Where such request exists, it equally concerns also the changes brought to the creation act of a legal person, which were performed with the observance of the conditions provided for by law or by the creation act, as the case may be (art. 204 of the Civil Code), according to *accesorium sequitur principalem*.

In what commercial companies are concerned, „the delegated judge orders, by authentication (...), the registration of the legal person at the Register Office, under the conditions provided for by the law concerning such register.

The provisions of article 200 paragraph (2), corroborated with article 202 of the Civil Code, attribute to legal persons' registration, generically called „publicity formality", a constitutive effect and/or an opposable character in respect to third parties or keeping the records of persons legally constituted, as the case may be.

Constitutive effect. From the moment of its registration in the public register (Register Office) of the authorized creation act, the credit institution legally constituted acquires legal personality, in accordance with the provisions of article 202 paragraph (1) of the Civil Code. In order to acquire legal personality, „A legal person contributes on its own to the civil circuit and is liable for the duties taken upon itself in relation to personal assets, except for the case in which law contains contrary provisions" [art. 193 paragraph (1) of the Civil

[9] According to which: „In order to perform its activity in Romania, each credit institution must have an authorization according to the present Government Ordinance".

Code]; the text quoted above points out the quality of legal subject of a legal person and the commitment to the liability emerging from exerting such quality.

Opposable character in relation to third parties or keeping the records of legal persons created according to law. In this case, if the publicity formality was not carried out, the legal acts or deeds performed on behalf or on the account of a legal person cannot be opposed to third parties, except for the case in which it is proven that third parties were aware that publicity formality had not been met [art. 202 paragraph (2) of the Civil Code; art. 50 paragraph (1) of Law No. 31/1990].

Particular situations. In relation to common law, Bank law ascribes credit institutions to a double registration, with different legal effects; the credit institution registered at the Commerce Register, with a constitutive effect, and also authorized to function, must be inscribed as well in a register kept by the National Bank of Romania (Register of credit institutions), available for the persons interested. Moreover, in all its official documents, the credit institution must also mention the number and registration date in the Register of credit institutions (article 103 of the G.E.O. No. 99/2006).

This time, registration signifies „marking out" in the registry the credit institutions which perform their activity in Romania, including the subsidiaries of the credit institutions from other member states and third states. Nonetheless, from a legal point of view, a credit institution can exert its rights and take upon itself commitments from the moment is authorized.

4. Legal capacity of credit institutions

4.1. Civil capacity – common law capacity

In principle, civil capacity is regulated by article 28 paragraph (1) of the Civil Code – „civil capacity is acknowledged to all persons". „Any person has a capacity of use and, excepting the cases provided for by law, a capacity of exercise [art. 28 paragraph (2) of the Civil Code]. The provisions mentioned above point out a general synthetic notion, a *general capacity* of common law, and not a branch capacity of civil law stricto sensu; this happens also because the Civil Code accomplishes the unity of private law – which concerns, expresis verbis, also the capacity of public law persons [article 206 paragraph (2) articles 221-224 of the Civil Code]. The general character of civil capacity is not in contradiction with the restrictions or limits which special law institutes and which can vary from one legal field to another, respecting their particular features.

4.2. Capacity of use

a) Acquirement date. The capacity of a *legal person* is regulated by the provisions of articles 205-224 of the Civil Code, mainly preserving the provisions of former regulations (articles 4-6 of Decree No. 31/1954).

The date when the capacity of use is acquired differs in accordance to the way a legal person is instituted, regulated by article 194 of the Civil Code; for the theme subject here to analysis is relevant only the legal person subject to registration. According to article 205 paragraph (1) of the Civil Code, the legal person subject to registration can have rights and duties from the moment of its registration.

Until this date, (only) entities subject to registration can acquire rights and commit to duties, but only as much as it is necessary for a legal person to be validly constituted

[article 205 paragraph (3) of the Civil Code]; vocation is also known as „small legal personality", anticipated, limited or restricted capacity. When it comes to legal acts concluded by transgressing the provisions mentioned above, the persons who are jointly and unlimitedly responsible in front of third parties are represented by founders, representatives and any other persons who operated on behalf and on the account of the legal person on the way of being created, except for the case when the legal person recently created took upon itself such acts after acquiring legal personality [article 205 paragraph (4) of the Civil Code]; this aspect is also enforced by the provisions of article 53 paragraph (1) of Law No. 31/1990.

When it comes instead to *activities* which must be *authorized* by competent authorities, the right to perform such activities appears only from the moment the authorization in question is obtained, if law contains no contrary provisions [article 207 paragraph (1) of the Civil Code]. In direct connection to the provisions mentioned above are the provisions of article 10 paragraph (1) and article 32 paragraph (1) of the G.E.O. No. 99/2006, which condition the performance of bank activity on obtaining the functioning authorization from the National Bank of Romania, the text pointing out at the same time only the functionality of the legal person only from this moment.

b) Cessation of the capacity of use. The capacity of use ceases together with the legal person[10]. When the cessation process lasts for long, the legal person can keep during the whole process a certain capacity of use, which is limited to the legal acts necessary to be performed for ceasing its activity and liquidating its patrimony[11].

c) Contents of the capacity of use. According to Civil Code, „a legal person can have *any* civil right and duty, except for those, which through their nature or according to law, can only belong to a natural person" [article 206 paragraph (1)]. The provisions mentioned above refer to rights and duties in general, the only particularization being connected to rights which, „through their nature or according to law", can only belong to a natural person; by not pointing out, expresis verbis, the civil rights and duties which a person can have, law confers in principle a *general character* to the capacity of use. Moreover, the general character of the capacity of use is upheld including by the capacity of the legal person to receive liberalities[12], even when such liberalities are not necessary for a legal person to be legally created (article 208 of the Civil Code); such liberalities constitute at the same time a novelty element brought by the Civil Code.

By clearly instituting the principle of *special character of capacity of use* only in case of *non-profit* legal persons [article 206 paragraph (2) of the Civil Code], the expression „any civil right and duty" can generate some confusions in what the legal persons of private law are concerned. In order to understand the contents and the spirit of law, the provisions of article 206 paragraph (1) of the Civil Code must be integrated in the context of article 29 paragraph (1) of the Civil Code: „The limits of capacity" – „no one can be limited when it comes to his use of capacity or deprived, totally or partially, from the capacity of exercise, except for the cases and conditions provided for by law". Consequently, besides the general character ("any civil right and obligation") and *intangibility* ("no one can be limited or

[10] The legal personality of credit institutions ceases from the moment they are erased from the registers in which they are inscribed, according to article 251 paragraph (1) of the Civil Code.

[11] See I. Reghini and Ş. Diaconescu and P. Vasilescu, *Introducere în drept civil*, ediția a 2-a, Sfera Juridică Publ. House, Cluj-Napoca, 2008, pp. 277-278.

[12] See for that purpose Ilioara Genoiu, *Dreptul la moştenire în noul Cod civil,* C.H. Beck Publ. House, Bucharest, 2012, p. 150.

deprived") of civil capacity, law also admits for *limits* of civil capacity to exist, on condition that they are legal ("in the cases and conditions provided for by law").

The rule of general character signifies only the vocation to have any right and duty, but without having a general capacity, as it happens with natural persons. When it comes to legal persons, we can speak nonetheless of a particularization of the rights and duties, within the various legal fields, private or public, the capacity being delimited by the approved object of activity and ascribed to a well defined target, licit, moral and in accordance with the general interest.

The capacity of use of credit institutions. Speaking about credit institutions, the expressions „any civil right and duty" contained by article 206 paragraph (1) must be integrated in the context of special provisions; a credit institution can be authorized only in relation to the activities limitedly provided for by the Bank law, articles 18-22 ("Activities allowed for credit institutions"), by its special provisions (concerning saving and housing credit banks, mortgage banks, credit cooperative organisations) or by any other special normative act[13] and can only perform the activities for which it was *authorized* by the National Bank of Romania[14].

Preserving the general character of the capacity of use, the provisions of Bank law contain nonetheless certain particularizations, but also some extensions regarding bank activity, which we structure as it follows:

- *activities, bank monopoly*; special law institutes a genuine monopoly upon typically bank activities on behalf of credit institutions, which consists in attracting deposits and other reimbursable funds from the public [article 18 letter a)];

- *activities exceeding the field of traditional bank activities* (deposits, credits, payment instruments), clearly mentioned by Bank law, including financial investment services, on condition that special regulations are observed, principally Law No. 297/2004 on capital market and stock exchanges[15] [article 18 letters b)-r)];

- *limited activities*[16], *restricted* or even clearly *excluded* from the object of bank activity, in order to insure a fair competition and, finally, to protect people (article 20).

The underlined elements uphold the particularization of the capacity of use enjoyed by credit institutions, essentially delimited by the purpose of their constitution and characterized, in essence, by generality and intangibility.

4.3. Capacity of exercise

a) Acquirement date

For the purposes of Civil Code, the capacity of exercise signifies to exercise the rights and to comply with the duties of a legal person, through its administration bodies, from the moment they are constituted [article 209 paragraph (1)]. Until they are constituted, the exercise of rights and the compliance with the duties concerning a legal person are performed by its founders or by the natural and legal persons appointed for that matter, law establishing at the same time the legal regime and the liability principles for the acts issued

[13] According to article 18 paragraph (4) of the G.E.O. No. 99/2006, „The activities which, according to some special laws, are subject to authorizations, approvals or special permits, can be performed by the credit institution involved only after obtaining such authorizations".

[14] For more details, see Rada Postolache, *Drept bancar,* Cartea Universitară Publ. House, Bucharest, 2006, pp. 72-77.

[15] Published in Romanian Official Gazette, Part I, No. 571 from June 29th 2004.

[16] Published in Romanian Official Gazette, Part I, No. 571 from June 29th 2004.

by such entities and, as a distinct hypothesis, the liability in case a legal person is contracted [article 210 paragraphs (2) and (3)].

b) Cessation. „The end of the capacity of exercise corresponds to the cessation of the capacity of use" enjoyed by a legal person[17].

c) Structures exerting the capacity of exercise

The capacity of exercise is exerted by the *administration bodies* – law generically including in their category *natural* or *legal* persons who, by law, creation act or status, are appointed *to act* in the relation with *third parties*, in an individual or collective manner, on behalf and the account of the legal person involved.

By generically calling them „administration bodies" [article 209 paragraph (1) of the Civil Code], or „bodies of a legal person" (article 219 of the Civil Code), law refers nonetheless their *diversity*, when in various texts of the same section (art. 211, 212, 216, 218, 220) clearly refers *also* to control and leading bodies, to auditors.

In this context, the bodies of a legal person can be identified on fields of activity, having the legal status instituted by special law, creation act or status, according to the case. Thus, in the spirit of common law and observing the provisions of Law No. 31/1990, Bank law uses the notion of administration system, which can be: a) *unitary*, having the administration board as administration structure, which can delegate leadership at least to 2 managers; b) *dualist,* with two structures: management board, comprising at least three members; surveillance board – entity only with control prerogatives.

Preserving their legal status instituted by law No. 31/1990, Bank law deals with the *access* (selection) to the quality of administrator, manager, member of the management board, auditor, leader of internal structures, instituting restrictive conditions and particularizing them from the perspective of the following criteria: activity, reputation, moral integrity, experience, the National Bank of Romania deciding if, both at an individual and collective level, the requests provided for by law are met.

The *exercise* of such quality is also subject to some typically bank requests, concerning: the professional secret in the bank field and the relation with customers, the general obligations of credit institutions, bank prudence.

The entities by means of which a legal person exerts his rights and meets his obligations enjoy *prerogatives* of management and/or leadership, according to special law, creation act or the status regulating the management and/or leadership responsibility.

5. Conclusions

The Civil Code institutes, just like the former regulations, only the main framework for the constitutive elements of legal persons. The constitutive elements of credit institutions acquire particular features according to special regulations - mainly the Government Ordinance No. 99/2006 on credit institutions and social capital adequacy and the regulations of the National Bank of Romania issued for the enforcement of this Ordinance.

The unity of private law generated the regulation of a legal capacity with vocation of generality, without overlapping it with civil capacity sctricto sensu, undergoing

[17] Gabriel Boroi, Carla Alexandra Anghelescu, *Curs de drept civil. Partea generală,* Hamangiu Publ. House, Bucharest, 2011, p. 104.

nonetheless, when it comes to credit institutions, the particular features instituted by Bank law – creating monopolies, limiting or expanding the field of bank activities.

The capacity of exercise of credit institutions is accomplished by means of structures common to commercial companies, which can choose between the dualist or unitary system. By leaving totally the „functioning of legal persons" to Civil Code, particularly the legal regime of the acts issued by the structures of legal persons, including nullity, Bank law institutes a special restrictive regime, regarding the access to and the exercise of the prerogatives held by the leading structures of credit institutions, which is quite exaggerated.

Above all, far from having an exhaustive character, the issue analyzed in the present work is actual enough, being pointed out by us as a stage in determining the institutional legal bank regime and as essence of the incidence and interference of the three relevant regulations involved: the new Civil Code, Law No. 31/1990 on commercial companies, Government Ordinance No. 99/2006 on credit institutions and capital adequacy.

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THE MATRIMONIAL AGREEMENT CHANGE

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Abstract: *In terms of the matrimonial agreement change we will have to distinguish between changing the agreement concluded prior to marriage and the change of the agreement concluded during marriage*1.

According to art.336 of the new Civil Code the matrimonial agreement may be amended before the contracting of marriage, under the conditions of art.330 of the new Civil Code (document authenticated by notary public, with the consent of the parties, expressed in person or by mandatory by authentic special mandate having predetermined content) and art.332 of the new Civil Code (by matrimonial agreement one cannot derogate under the sanction of absolute nullity from the legal provisions regarding the matrimonial regime chosen except as expressly provided by law. The marital agreement is without prejudice to the equality of spouses, to the parental authority or to the inheritance law). However, for opposability against third parties, the publicity conditions stipulated in art.345 and 335 of the new Civil Code should be observed.

The change of the matrimonial agreement before marriage may be intended to replace the original matrimonial regime chosen by the spouses, as it may refer to certain modifications within the same matrimonial regime (eg within the conventional community regime future spouses add or remove the preciput clause).

The change of the matrimonial agreement before marriage is performed with the consent of all persons who participated in its conclusion.

Instead, the matrimonial regime change is made during marriage, after the matrimonial regime chosen at the contracting of marriage enters into force. And this requires the completion of an agreement, which must meet all the conditions of the matrimonial agreement.

It is noted that the difference between the two hypotheses rests in the following:

- *before the contracting of marriage we talk about change (because there isn't an applicable matrimonial regime), while during marriage, the matrimonial regime itself changes;*
- *the change of the matrimonial agreement before the contracting of marriage requires the presence of all those who participated in its conclusion (the intending spouses, and as appropriate, third parties who have made donations, according to the principle of legal symmetry), while the matrimonial regime change during marriage is achieved only with the consent of the spouses;*
- *the new Civil Code distinguishes between the conventional modification (art.369) and the legal modification of the matrimonial regime (art.370-372).*

The conventional modification of the matrimonial regime may take place after at least one year from the contracting of marriage, under the conditions provided by law for marriage agreements.

The legal modification of the matrimonial regime will be performed in court through the transition from the community of property regime to the separation of property regime, at the request of either spouse, if by the acts concluded, the other spouse threatens the patrimonial interests of the family.

Keywords: *matrimonial agreement; matrimonial regime; The change of the matrimonial agreement; the conventional modification of the matrimonial regime.*

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[1] M., Avram. C., Nicolescu. *Regimuri matrimoniale (Matrimonial Regimes),* Hamangiu Publishing House, Bucharest, 2010, pp.349-362.

1.Introduction

The freedom of choice of the matrimonial regime ensures the institution of a matrimonial regime adapted specifically to the spouses' mentalities and possibilities, and therefore the matrimonial regimes based on this principle are preferred to legal, unique and compelling matrimonial regimes. And the choice has always a conventional nature, being achieved through the conclusion of a matrimonial agreement. One's freedom to choose the specific matrimonial regime can be very broad, in that it allows one to choose a matrimonial regime alternatively regulated by law or to combine them and create an „unnamed" matrimonial regime, or it may be more limited in that it allows one to choose only a matrimonial regime provided by law. On the other hand, this freedom is not absolute, but limited by the establishment of a body of mandatory rules (the hard core of matrimonial regimes) from which no derogation by matrimonial agreement can be made and which forms the primary system. For situations where, by matrimonial agreement, no specific matrimonial regime has been chosen, the law indicates the matrimonial regime applicable to spouses, thus constituting the legal matrimonial regime[2].

According to art.312 with the name of Matrimonial regimes. „Future spouses may choose as matrimonial regime: the legal community, the separation of property or the conventional community." From the provisions of paragraph 1 of art.312 of the new Civil Code we see that the future spouses have the possibility to choose as their matrimonial regime: the legal community, the separation of property or the conventional community.

According to art.329 of the new Civil Code with the marginal name Matrimonial convention „Choosing a matrimonial regime other than the legal community is achieved by signing a matrimonial agreement". As it is apparent from art.329 of the new Civil Code, the spouses have the possibility to choose by matrimonial agreement either the separation of property regime or the conventional community regime. The exception to this rule is represented by the legal community regime. So, if spouses have not chosen until the day o marriage by matrimonial agreement one of the two matrimonial regimes the legal community regime applies.

2.The notion of matrimonial agreement

The names used in the past to designate marital agreement are varied. Thus, the term matrimonial agreement was used in art.1224 Civil Code of 1864 along with „maritagiu" agreement (art. 932 Civil Code). Over time, the doctrine[3] has used names by naming the

[2] P., Vasilescu. *Regimuri matrimoniale. Parte generală.(Matrimonial Regimes. General Part)* Rosetti Publishing House, Bucharest, 2003, pp. 56-106; C., M., Crăciunescu. *Regimuri matrimoniale (Matrimonial Regimes),* All Beck Publishing House, Bucharest, 2000, pp. 51-58; M., Avram. C., Nicolescu. *Regimuri matrimoniale, (Matrimonial Regimes)* Hamangiu Publishing House, Bucharest, 2010, pp.18-28.

[3] D., Alexandresco. *Explicaţiunea teoretică şi practică a dreptului civil roman (Theoretical and Practical Explanation of Romanian Civil Law),* vol. III, Part I, Socec Publishing House, Bucharest, 1916,p.5; C., Hamangiu, I., Rosetti – Bălănescu, A., Băicoianu. *Tratat de drept civil (Civil Law Treaty),* vol. III, All Beck Publishing House, Bucharest, 1998, p. 4; M., B., Cantacuzino. E*lementele dreptului civil roman (Elements of Roman Civil Law),* All Beck Publishing House, Bucharest, 1998, p. 697; C., M., Crăciunescu. *Regimuri matrimoniale (Matrimonial Regimes),* All Beck Publishing House, Bucharest, 2000 p.11; P., Vasilescu. *Regimuri matrimoniale. Parte generală.(Matrimonial Regimes. General Part)*, Rosetti Publishing House, 2003, p. 182-183.

matrimonial agreement „marriage agreement", „matrimonial contract", „agreement or marriage contract," „contract" or „prenuptial agreement".

The Civil Code of 1864 regulated, as single conventional regime, the dowry regime (Civil Code Article 1233 -1293), and the dowry being according to the provisions of art.1233 'the fortune brought by men, from or on behalf of women, to help man support the tasks of marriage Spouses could adopt it with or without modification, by matrimonial agreement. The dowry was managed and used by man, who alone, exercised the actions affecting them. The woman could alienate the movable dowry, but only with the authorization of the man, the estate dowry being inalienable, intangible and imprescriptible. The married woman retained the right of administration, use and disposal of the paraphernal property. The Civil Code also regulated, as an annex to the dowry regime, the spouses' procurement society formed of a small community of goods, which was in joint ownership of both spouses[4].

The *Constitution of 1948,* although it failed to remove the family legal relations legal from under the regulation of the Civil Code and to expressly repeal certain texts of this code, basically, by the consecration of new principles (eg gender equality) made important changes in family relationships. Thus, the dowry regime was considered tacitly repealed.

The Family Code by art.20 paragraph 2 prohibited any agreement that would provide a different legal status than that of common property for anything acquired during marriage and which could not be included in the provisions of the art.31 of the Family Code (which listed the goods that remained in the property of each spouse). Also art.30 paragraph 2 of the Family Code prohibited the marriage agreement under penalty of absolute nullity, prohibiting, thus, any agreement derogating from the provisions of the Family Code provisions.

The term of matrimonial agreement has been defined differently by authors. Thus, the matrimonial agreement is defined as „the agreement by which future spouses govern their matrimonial regime, the condition of their present and future property in the pecuniary relationships arising from marriage[5]" or a „conditional contract, solemnly and irrevocably, in which future spouses organize their civil capacity and shall determine, in respect of goods, the consequences of marital association"[6] or „as the legal document by which parties regulate the essential property relations, which will take place between them during marriage" [7].

According to a last opinion[8], to which we agree[9], the matrimonial agreement is the conventional act by means of which future spouses, making use of the freedom conferred by the legislature, establish their own matrimonial regime or change, during marriage, the matrimonial regime under which they were married. In comparative law, matrimonial convention is defined as that contract, by which spouses adopt a particular matrimonial regime, different from the legal regime, but which is provided by the national applicable to monetary relations[10].

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[4] Al., Bacaci. Viorica- Claudia, Dumitrache. Codruța, Hageanu. *Dreptul familiei (Family Law)*,4th edition, All Beck Publishing House, Bucharest, 2005, p. 44-45.

[5] C., Hamangiu, I., Rosetti – Bălănescu, A., Băicoianu. *Tratat de drept civil (Civil Law Treaty),* vol. III, All Beck Publishing House, Bucharest, 1998, p.4.

[6] D., Alexandresco. op. cit., p.5 -6.

[7] P., Vasilescu. op. cit., p. 184.

[8] C., M., Crăciunescu. op. cit., p. 11.

[9] N., C., Dariescu. *Convenția matrimonială în dreptul internațional privat roman (Matrimonial Agreement in Romanian Private Law,* Lumen Publishing House, 2007, Iași.

[10] Georges, A., L., Droz. *Les régimes* matrimoniaux en *Droit international privé comparé* în *Receil des cours de L'Académie de droit international de la Haye,* Tome 143, 1974/III, p.13.

The general characteristics of the matrimonial agreement is that of being concluded between future spouses to enter into force from the date of marriage and, in principle, for the entire duration of marriage, without excluding the possibility of change of the initial matrimonial regime, whether legal or conventional.

3. The conventional modification of the matrimonial regime

3.1. The substantive, formal and publicity condition for the change of the matrimonial regime by matrimonial agreement

From the content of art.369 paragraph 1 of the new Civil Code it results that the direct modification of the matrimonial regime requires the conclusion of a new matrimonial agreement that replaces the matrimonial regime under which spouses have married, or, where appropriate, the spouses bring certain changes to the same matrimonial regime.

From the provisions of art.336 of the new Civil Code regarding the change of the matrimonial agreement we see:

- the matrimonial agreement may be changed before the contracting of marriage, under the same conditions required for its conclusion
- the provisions on the publicity and opposability of the matrimonial agreement shall apply.

The matrimonial agreement by which the matrimonial regime changes must meet certain general conditions of validity of contracts, as well as some special conditions.

3.2. The substantive conditions necessary for the change of the matrimonial regime by matrimonial agreement

The change of the matrimonial regime by matrimonial agreement requires the free and uncorrupted consent of the spouses.

Even though at the conclusion of the original matrimonial agreement persons other than the future spouses were parties, the consent of these people is not necessary for the change of the matrimonial agreement during marriage, unlike in case of the situation in which the matrimonial agreement changes before the marriage celebration[11].

Article 369 paragraph 1 of the new Civil Code specifically refers to spouses who can modify the matrimonial regime during marriage, hence, although in the conclusion of the matrimonial agreement other persons participated, the reason why according to art.330 paragraph 1 of the new Civil Code the matrimonial agreement is concluded with „the consent of all parties" for the matrimonial regime change their consent is not required.

In terms of the capacity of exercise, the minor who got married acquires full legal capacity and may conclude in these circumstances a matrimonial agreement in order to change the matrimonial regime.

As a special condition, the new Civil Code establishes the condition that at least one year must pass from the date of marriage. After fulfilling this term, the spouses are allowed to change their matrimonial regime whenever they want.

For the matrimonial regime change one must take account the limits imposed upon the matrimonial agreement. Thus, in terms of the subject of the modifying matrimonial

[11] A., Colomer. *Separation de biens*, în *Encyclopedie juridique, Repertoire de drot civil*, 2 ed, tome VII, *Privileges generaux a sequestre, Jurisprudence Generale*, Dalloz, Paris, 1990, p.161.

agreement, the provisions of art.332 paragraph 1 of the new Civil Code should be considered; they state that: „By matrimonial agreement no derogation can take place under the penalty of absolute nullity, from the laws of the matrimonial regime chosen except as expressly provided by law" and also the provisions of art.312 paragraph 2 of the new Civil Code according to which: „Regardless of matrimonial regime chosen, one cannot derogate from the provisions of this section, unless the law provides otherwise."

3.3. The formal and publicity conditions for the matrimonial regime change by matrimonial agreement

For the conclusion of the matrimonial agreement the notary authentic form is required *ad validitatem*, as for the conclusion of the matrimonial agreement.

For opposability against third parties, the change of the matrimonial regime is subject to publicity measures.

The act of marriage also makes mention of the matrimonial agreement change, and if one spouse is a merchant, in the trade register.

Under the new Civil Code, the provisions on the publicity of the matrimonial agreement are applicable, so that the conventional modification of the matrimonial regime registered in the National Register for matrimonial property regimes regarding third parties' opposability.

In addition, to be opposed against third parties the matrimonial regime modification should not pursue to fraud the interests of third parties. Therefore, even if the publicity formalities are met the matrimonial regime change is not opposable to third parties, if the change was made in fraud of their interests. In this sense, the creditors prejudiced by the change or liquidation of the matrimonial regime may formulate a restitutory action within one year from the date of the publication or where appropriate, from the date they became aware of these circumstances. They can invoke at any time by way of exception, the inopposability of a matrimonial regime change or the liquidation performed in fraud of their interests[12].

Conclusion

From our point of view, an *effective legislative technique, of introduction of new matrimonial regimes in the Romanian law is represented by the regulation of matrimonial agreements*, by which the spouses who are discontent with the characteristics of the legal community regime, can choose the conventional community regime or the separation of property regime as their matrimonial regime, better adapted to the needs of the respective family.

The introduction of marriage agreements in the Romanian family law represents a step forward, whereas the Romanian legislation is far more flexible and more liberal, passing over the responsibility in respect to the regulation of economic relations within the family from the central legislature, to the spouses, who know best their needs and the ways to meet them. The same liberalization of the Romanian law requires the mutability of matrimonial agreements, thus adapting them to the unexpected occurrences of life.

Given the complexity of matrimonial agreement issues and the implications of these contracts, the legislature stated that these marriage agreements should be concluded before a notary public, so that the spouses can benefit from his assistance in drafting these agreements.

[12] See reference 1 from M., Avram. C., Nicolescu. *Regimuri matrimoniale (Matrimonial Regimes),* Hamangiu Publishing House, Bucharest, 2010, p. 357.

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BRIEF CONSIDERATIONS REGARDING THE JUDICIAL INDIVIDUALIZATION OF CRIMINAL RESPONSABILITY

Olivian MASTACAN*

Abstract: *Sentence individualization, as a part of the criminal law enforcement activity, can be achieved only under the conditions and limits established by the law. The legislator, who can not adapt on his own the sentence to each particular case, fixes some coordinates in which it follows to be achieved by the judges the establishment and application operation of the concrete punishment. These coordinates represent the legal framework of the judicial individualization. We will present the most important ones.*

Keywords: *legal individualization, judicial individualization, court, sentence*

General notions regarding the judicial individualization of the sentence

Judicial individualization of the penal sentence is basically represented by the interpretation and appreciation activity of the criminal offense's tangible threat, in determining the causality report between the criminal act and its legal consequences, and also the establishing operation of a punishment for the concrete criminal action by the court.

This completion phase of acknowledging an individualized criminal responsibility is the court's attribute, without neglecting the other judicial bodies' contributions, the lawyers contributions and of all those involved in the criminal trial.

Judicial individualization is primarily necessary because an act is always committed in certain situations or circumstances and these circumstances are so different that, in terms of moral and social mathematics two offenses of same species both absolute similar as gravity can not even be conceived. As noted, only if it is proportional to the crime's or fact's seriousness under the criminal law, the criminal sanction becomes fair.

The formal and logical proceeding of the penalty's judicial individualization, consisting in determining a sentence for the offense committed by the offender, involves the verification of the causality report concept existent between the criminal action-inaction and its direct result (antisocial), the offense influence against the social environment and also the punishment influence on individual behavior.

Individualized judicial activity is realized[1] by the court for concrete facts (committed by a certain person under certain conditions) aiming at the application of the punishment legal principles, and the prevention of some criminal acts committed, by comparing the limits of punishment, generally regulated in the Penal Code and the severity of criminal offense, in the particular case. If the penal sentence foreseen in the Penal Code has a general character (not being differentiated), the penal sentence is established through the judicial individualization activity.

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[1] V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, *Explicaţii teoretice ale Codului penal român. Partea generală,* Academiei R.S.R. Publishing House, Bucharest, 1969, pp. 122-123

Concerning the abstract sentence given both in the general part and also in the particular part of the Penal Code, in case of the judicial individualization a sentence is circumscribed according to the evaluation of the concrete social danger's degree[2] of the fact and to the offender. In respect with the typical criminal liability[3] the punishment appliance for committing an offense for which that penalty is provided[4] the concrete criminal penalty shall be determined, the sentence applied to the offender restoring the violated order, the accomplishment of the constraint and his re-education[5].

In order to acquire the character of concrete punishment, enforceable, the court deliberates with the purpose of assessing the general evaluation criteria for the general social threat and the concrete social threat specifically produced by the criminal act, by a criminal who has a specific attitude, unmistakable, being distinguished from other criminals because of his criminal history, by executing the criminal act under aggravating circumstances, by his hostile attitude regarding the law or the legal principles.

Thus, to achieve an objective individualization of the punishment, we compare the general legal framework concerning the criminalization of the offense as a crime, its specific identity in order to distinguish between crimes or to diversify the crime under the form of some aggravating variants of the offender's legal situation (to accomplish qualified crimes), in accordance with the whole system of social relations protection and, eventually, of the whole system of law.

The first moment in the judicial individualized legal sentence refers to identifying the legal dispositions in which stand concrete measures regardless of any implementation (objective or subjective), reporting the criminal fact to the concrete social threat, the judicial court „having the power to judge impartially and to distinguish truth from falsehood"- (*potius vim incorupte judicandi verum ad falso distinguendi*).

If the individualization nature of the sentence appears to be a form of appreciation and a form of assessment and reporting the crime to the criteria, to the concepts, abstract legal institutions, in fact, by judicial individualizing, the punishment must fit all the requirements established in law by reporting to the main ways of producing the offense (the real object, determined, the action-inaction through it was produced, subjective and objective conditions that have made possible the antisocial consequences, how the criminal act was perceived by the offender, the context in which it was committed the criminal action - inaction, the frequency and the dynamic chain of the crime in the dynamic of the social dangerousness, the particular determining *modus operandi* concept, the „crime experience and also the criminal history, the psycho-physical state", the motivation in criminal experience).

For objective circumstances, the law accepts another phase of the judicial re-individualization (even after a final judgment of convicting)[6], if it finds the concurrence of offenses (article 33 from the Penal Code), the convicted offender being later judged for a concurrent offense or it appears that the final sentenced person had suffered yet another permanent conviction for a concurrent crime; in case of relapse (article 37 from the Penal Code), when the two sentences (the sentence later committed and the sentence imposed for the previous offense merge) whether the person judged definitively for a continued or

[2] I. Tănăsescu, *Licit şi ilicit,* INS Publishing House, 1994, p. 158
[3] I. Oancea, *Tratat de drept penal, partea generală,* ALL Publishing House, Bucharest 1994, p. 269
[4] C. Bulai, *Manual de drept penal. Partea generală*, AII Beck Publishing House, Bucharest 1997, p. 48
[5] C. Mitrache, *Drept penal român, partea generală,* Şansa Press and Publishing House, Bucharest, 1994, p. 265
[6] V. Dongoroz ş.a., *op. cit.,* p. 126

complex crime is later judged also for other actions-inaction that are within the same crime (article 41 from the Penal Code).

The resolving procedure for these situations is represented by „the judicial re-individualization sentence" (evaluating again the evidences and the social threat) and by the appliance of a sentence relative to the concrete social danger, characteristic to that crime. In this form of evaluating the facts showing the same degree of social danger, or a different degree of danger (although for a certain period the first fact has acquired attribute of final judgment fact), is removed (by the power of law) the effects, *the authority principle of the judged thing,* as the new offenses is considered to be within the old crime, requiring the sentence modification[7].

The new sentence, coming from two distinct criminal offenses (first is the crime for which the offender was already convicted, the second one being an action that continues or completes the old crime) will be determined by the same general individualization criteria, but only under limited circumstances provided by law. In this way, it is both respected the sentences principle that applies (they are set by the law) and also the principle of judged case authority (limited to the need to respect and to the enforcement of final judgments, to the execution of these sentences by the force of law).

The sentence individualization, being a part of the criminal law enforcement activity, can be achieved only under the conditions and limits established by the law. The legislator, who can not adapt himself to each particular case, establishes some coordinates in which the judges will realize the establishment and enforcement operation of the concrete punishment. These coordinates form the legal framework of the judicial individualization. We will present the main ones.

The first element of the legal framework in which the judicial individualization is rendered is the sentences' **general framework**, which includes, listed in a specific order, all the applicable penalties in our criminal law and also their general limitations. This is the so-called **sentence's system** - article 53 from the Penal Code, supplemented by Decree-Law no. 6/1990.

Another component element of the judicial individualization legal framework is represented by the **sentences' nature** provided by law for each crime and their **special limits**. Guided by the degree of generic social danger of each particular type of crime, by the echo and the disapproval that such facts awaken in the social consciousness, by the dynamics of the crime phenomenon, by the needs of defense against each category of offenses, the legislature selects among sentences that form the general system of criminal those sanctions, the principals and complementary ones, that he considers to be appropriate against the requirements of each particular type of crime and also sets, for each of the chosen sentences, a special minimum and maximum. Selected sentences and special limits represent the legal framework within which - in the absence of aggravating or mitigating circumstances - must register all sentences that will be applied for the same type of crimes, whatever the seriousness of the concrete social danger of each and whatever dangerousness of each offender.

In the composition of the judicial individualization legal framework come in, thirdly, **the effects recognized by the law of different causes of aggravation or mitigation**. To achieve full compliance between repressive reaction, on the one hand, and the changes that are imprinted to the social danger degree of crime and criminals' dangerousness certain conditions, situations or circumstances, on the other hand, the legislature has identified

[7] Ibidem

from their huge multiplicity, those situations or circumstances to which always correspond a plus or a minus of social danger and assigned them by law aggravating or mitigating effects regarding the criminal treatment.

In addition, the legislature has given to the judges the right to recognize themselves the mitigating or aggravating character of certain circumstances and to adapt, on this basis, within the limits set by law, the criminal treatment. Our penal code includes such a set of general causes of aggravating (the relapse post-enforceable state, the continue committing of the crime, aggravating circumstances: legal and judicial) or of mitigation (mitigating circumstances: legal and judicial).

The legal framework of judicial individualization also includes **the effects assigned by law to general causes of changing the sentence**, represented by some forms of multiple criminalities: post-sentence relapse (article 37 letter a. from the Penal Code.), concurrent crimes (article 33 from the Penal Code.) and intermediate plurality (article 40 from the Penal Code).

- To the above are added the effects of **the concurrent aggravation and mitigation causes of the penal treatment** on the sentence, according to the law (for example, the coexistence of some aggravating or mitigating circumstances with the relapse status etc). Criminal law regulates both the order in which there must be taken into consideration these causes and consequences that such concurrence has on the sentence, causing also the limits to which this can be increased or reduced.

The individualization general criteria of sentences. Concept and characterization

A possible definition of the individuation general criteria could indicate these as being elements recognized as such by law, which the judge must take into account in the applying process of a concrete sanction to a person that is considered to be guilty of a crime or facts foreseen by the criminal law[8]. Although they are provided in the regulations context that structures the sentences institution, they have a generality character in the impact area, meaning that, these criteria must be taken into account not only in all establishment sentence application cases, but also in all cases of taking and concrete determining of the educational and safety measures [9]

Individualization is the formal condition of all sentences in general. Legal individualization as an establishment form of the sentences generally is limited only to determining the shape and duration of the sentence (the minimum and maximum limits), and judicial individualization is, instead, specifically determined and related to the committed sentence.

From the phrasing given in the law to these individualization general criteria it results that they are compulsory, the court being compelled to guide itself after these criteria in the individualization operation, and establishing and sentence appliance with disregard of any of those criteria makes the conviction sentence to be not solid and unlawful.

Another feature of the general individualization criteria is their plurality, meaning that they can be used only together, that every time they should all be taken into account, individualization of the punishment not being able to be done by using only one or some of these criteria[10]

[8] V. Dobrinoiu ş.a., *op. cit*., p. 426
[9] C. Bulai, *op. cit*., p. 199
[10] Idem, p. 361

The name of individualization general criteria implies that there are special criteria of individualization, which are also stipulated by law for special circumstances establishing and implementing the sentence.

Law provides, indeed, such criteria in relation to establishing the sentence in case of participation (article 27 from the Penal Code), in connection with the imposed **fine** (article 63, paragraph 4 from the Penal Code.), in connection with applying the conditional suspension of the sentence execution, in case the loss of the convicted work capacity at the imprisonment work place (article 869 paragraph 4 from the Penal Code) and others. In all cases when such specific criteria are met, they are applied with priority and, in addition to their completion, general criteria are applied.

In the considerations guiding decision number 12 from 10th of November 1966, Plenum of the Supreme Court[11] stated that in addition to the legal aggravation or mitigation circumstances for criminal liability, in the establishment of the concrete sentence is for the court to also consider the following:

1. the affected social value, the extent of the caused damage or the measure in which it has been endangered this social value;
2. the motive and the purpose of the criminal when committing the crime;
3. ensuring support of some co-authors or accomplices;
4. how the offense was prepared, selection of favorable time and place or of the most proper tools leading to consumption of the criminal fact, preparing the place for hiding the physical object of the crime;
5. perseverance, of the defendant, in the inhuman conduct against the victim after the crime or, instead, work to avoid harmful consequences or to cover the caused damage;
6. the offender's attempt, after the discovery of the fact, to confuse the searches, no regret attitude towards the offense, use of false witnesses or false alibis, trying to turn suspicion toward others or, conversely, auto-denunciation, sincerity in the criminal investigation and trial and regret of the committed crime;
7. the offender's behavior at work, in family and society in general, the existence of some previous convictions even when they don't fail to the existence of a relapse state, or, on the contrary, a correct behavior or meritorious work[12].

Dispositions of the Penal Code's general part

When establishing and applying sentences the dispositions of the Penal Code's general part are taken into account (article 72 from the penal Code), this rule being self established the in legal practice, first by limiting the minimum and maximum of the penal sentence and second by defining the legal concepts that form the content legal penalties (the crime's type, the offender's quality, the type of criminal liability). Through the perception way of the criminal law institutions, namely, by the specific regulation of the offense, of the criminal

[11] Published in *Culegere de decizii ale Tribunalului Suprem pe anul 1966,* Scientific Publishing House, Bucharest 1967, p. 52

[12] George Antoniu, Vasile Papadopol, Mihai Popovici, Bogdan Ştefănescu, *Îndrumările date de Plenul Tribunalului Suprem şi noua legislaţie penală. Decizii de îndrumare din anii 1952-1968,* Scientific Publishing House, Bucharest 1971, p. 74

liability and of the punishment it is ensured the enunciation of all general-fundamental principles of the criminal law and therefore the practical application of those principles[13].

The first thing which produces the individuality concept is first the dispositions' compliance of the Penal Code's general part so that the generic determined sentences in special provisions of the Penal Code or in special laws to be compulsory reported to these dispositions. Therefore, the concrete sentence represents a summary of rules through which it is determined the evaluation of the crime, based on these general dispositions.

Within the unity of the Penal Code's general dispositions there are two forms of evaluation: dispositions that represent the legal frame work of the legal individualization sentence and also provisions that determine the concrete sentence[14].

The possibility and the necessity to approach the criteria of the general part under these aspects are based on practical differentiation of the individualization phases, as follows:

- *establishing the crime component elements:* characterization of the criminal act as the content of a particular type of crime; the offender's involvement degree (attempt/consumed crime); establishing the causes concerning the guilt; the crime's social danger; aggravating or mitigate elements' identification of the liability – in this way is realized the general phase of the legal individualization followed by the concrete phase judicial punishment establishment.[15]

- *after identifying the concrete fact of the general elements from* the first phase of the judicial individualized follows the establishment and the application of the penal punishment to the action-inaction author - that represents a particular type of crime. But on the base of both individualization phases are identification operation of the rules and of the general principles set out in all possible representations in order to properly qualify the offense, to apply the proper sentence in respect with the crime's seriousness and circumstances held by the criminal, to justify a specific criminal sentence.

Any penalty may have influence on the offender, but only the concrete sentence adapted to the individualization criteria can determine his social rehabilitation. In the conviction decision it is necessary to motivate all phenomena, to relate to each action - inaction all existing evidence, these having a direct connection with the individualization or exemption from criminal liability. The criminal action - inaction committing, under specific conditions of each case, will be object of knowledge in the legal individualization process, in a correctional way of the individual behavior and assurance social re-education to ensure conditions of the offender[16]. Only in this way, the sentence may have an influence on the offender, who will be forced to bear the established consequences in accordance with the legal criteria, the punishment and the rehabilitation being included in the sentence imposed by the judicial court.

The sentence's limits established in the Penal Code's special part

Dispositions of the Penal Code's special part establish the minimum and maximum limits for each crime, these limits being found, however, in special laws (which include some criminal provisions), the judicial court being able to apply the penal sentence within

[13] V. Dongoroz ş.a., *op. cit*., p. 130
[14] Ibidem
[15] I. Tănăsescu ş.a., *op. cit*., p. 508
[16] I. Tănăsescu, B. Florescu, *Victima şi agresorul*, INS Publishing House, 1994, p. 23

these limits, but by direct reporting to the degree of social danger coming from the offense and from the offender. Typically, in the special part of the Criminal Code, any crime contains two sentences and the judicial court must choose one of these two sentences (imprisonment or amercement) and in the sentence's adoption, after orientating, will proceed to fix its actual duration (which will be contained between the minimum and maximum specific limit) provided by the special part of the Penal Code.

The relationship between the sentence contented within the special limits and the concrete sentence settled down by the judicial court is realized a special report devoted by the sentence's justice regulation[17]. If there were not such a way of reporting the concrete sentence to the abstract limits of the punishment for each crime separately, it would mean to abandon the assessment prior principle of the criminal acts' consequences and therefore to reduce the general-preventive role of the legal sentence. The actual fact is that the concrete sentence settled by the court must be between the minimum and maximum limit established in the special part of the Criminal Code to include in this way as many particular cases, with such a similar yet distinct content.

The actual sentence becomes the result of deliberation, the legal method of checking the component and the extrinsic elements of the crime. The consecration of the concrete sentence adopting process, applied by the judicial court, to the frame fixed by the legislature in the special part of the Penal Code is defined as representing *the institution of jurisprudence*.

The criminal law authority regulates this concrete sentence enforcement system (which differs fundamentally from the abstract sentence provided in the content of any specific crime), because the action - inaction was committed by an concrete offender against which will have to materialize the reforming and social rehabilitation work (by assessing the social danger degree of the fact, his personality) and finally the punishing (the sentence being of some sort and of a specific period of time).

Although the law establishes in the special part of the Penal Code the maximum and the minimum limits for each crime separately, also by the power of law are established situations when the special limits will be overcome either for the attenuation or for the mitigation of the sentence – in respect with the concrete social danger of the crime or with the personal circumstances held by the offender[18] Based on these pre-existing relationships there is made specific appliance of the concrete sentence, realizing this way the scope and purpose of the criminal law.

The social danger degree of the committed crime

The social danger degree of the action - inaction committed by the offender is one of the rules for determining the antisocial results produced by the criminal[19]. Generic social danger of all crimes is measured by the legislature who establishes the minimum and maximum limits, by the judicial court, in sentencing, directly assessing the concrete social danger of the crime.

[17] I. Tănăsescu ş.a., *op. cit*., p. 510
[18] V. Dongoroz ş.a., *op. cit*., p. 132
[19] I. Tănăsescu, *Omuciderea,* INS Publishing House 1995, p. 12

In article 18, paragraph 2, of the Penal Code, in order to avoid the arbitrary and the subjectivity in evaluating the social danger degree, are listed the criteria that must be considered when there are made such assessments by the judicial organs.

First of these criteria is represented by the observation of *the mode and means of committing the offense*. Under this criterion should be considered, among others: how the deed was prepared, the action was committed in secret or openly, commit a single ilicit act or more criminal acts. An increased social danger may be revealed by the offender's use of some tools (weapons, poisons) or means (fires, explosions), capable through their nature to produce serious consequences[20].

Sometimes, by committing the act, the offender can pursue hostile, selfish, vile purposes (for example committing or hiding the commitment of another offense). Other times, the perpetrator may commit acts to meet an urgent need (for example the purchasing of a drug which is absolutely necessary). It is obvious that the social danger will be greater in the former case than in the second one.

Circumstances in which the offense was committed refers to a set of data, conditions or circumstances which together have created the environment (for a certain specific meaning in terms of the social danger degree) in which the crime was committed. Under this criteria can be considered: where and when the crime was committed, the precautions taken by the offender to thwart the discovery of the crime and of his identity, the organs' failure to take measures (security, verification) which could have prevent crime.

The produced result or which could have been produced - are taken into consideration the actual consequences regardless of their nature, which the committed act actually produced or could have occurred if certain circumstances beyond the offender's will would not have prevented their implementation. Within the crimes against patrimony, the small injury may be an indication of the low level of social danger, if it is not associated with aggressive character circumstances[21].

Thus, it was shown in the case law that in the case of a stolen wallet – in the congestion conditions in a store – when from the injured person's pocket was found a small amount of money is not likely to diminish the seriousness of the committed crime or to demonstrate that the offender is less dangerous, when he sought to steal as much as it may be found, so that any lighter sentence can not be justified[22].

Regarding *the person and conduct of the offender* it was shown that the committed offense's nature and the offender's criminal history are not an obstacle in applying the dispositions of the article 181 from the Penal Code, their share in characterizing the degree of the offense's social danger being assessed only in the complex all data, states, situations and circumstances likely to effectively contribute to his evaluation.

The offender's person

The offender's person is a criterion for sentence individualization based on the psycho – physical status, on the social – professional attributes, on the criminal history and on the behavior considered after the crime was committed. The characterizing possibility of the

[20] V. Dobrinoiu ş.a., *op. cit.*, p. 109

[21] Court of Appeal Bucharest, December Pen. No. 516/1994, *Revista de drept penal* no. 4/1995, p. 154

[22] Vasile Papadopol, Ştefan Daneş, *Repertoriu de practică judiciară în materie penală pe anii 1981-1985,* Scientific and Encyclopedic Publishing House, Bucharest 1989, p. 145

offender reveals internalized evolution of the crime conception and manner of realizing the actual fact, these symmetrical attitudes representing manifestation sides of a social danger degree of the offense or of the offender[23].

The individual behavior is determined by the age, by the ability to understand documents and societal demands, by the attitude, culture, by the relationship between will and inhibition, favoring conditions for the concrete case. „Law enforcement is essentially coercible, meaning that in case of disobedience it can be imposed by force. The coercible character differentiates the legal rules from any other species of rules"[24].

It is necessary to check the individual capacity of a legal responsibility for the criminal offense, capacity depending on which it will be decided if the offender is criminally liable (if has the perception of his actions) or not (whether while committing the offense was injudicious). The psycho – physical state of the offender will determine the adoption of the safety measures required in the case when, following the criminal act, he/she has lost his/hers capacity to be legally responsible (for acts committed before), following to be relieved of criminal responsibility.

Human appreciation can not however limit to using a single tool, to use a certain empirical or scientific knowledge method. At the basis of human appreciation must stand the idea that man is the most complex being who, because of its inner nature and social living conditions, is in a constant process of training, of development, of self-recognition[25].

People who had an affected discernment by a mental illness ("due to physical or psychological abnormality or due to the young age")[26] when the action was produced, will not be subjected to condemnation, being considered irresponsible.

Assessment of whether the discernment when committing the criminal action - inaction existed or not, constitutes a complex activity that is done after the offender's person was identified and before carrying out the individualization activity of the sentence, in order to avoid in this way that an unidentified person is subjected to a conviction as being the offender, or a person who has not discernment of his deeds.

The offender's behavior after the crime occurrence is reflected in the crime confessing attitude, in the attempt to reduce the real effects, to adopt some appropriate measures to repair the damage, in the attempt to avoid prosecution, in hiding the criminal motive, in the passive attitude towards the crime consequences[27].

Connecting the circumstances with the offender's person and with the deed's social danger

Circumstances that mitigate or aggravate the criminal liability are a general criterion for establishing and applying the criminal sentences and consist of the verification, by the judicial court, of the circumstances, states and conditions in which the crime was committed or that determined the offender to accomplish it.

According to the dispositions of the article 72 from the Penal Code, circumstances that mitigate or aggravate the criminal liability are represented by states, conditions, provisions, individual qualities (regarding the person of the offender) or real qualities (relative to the

[23] V. Dongoroz ş.a., *op. cit.,* p. 135
[24] G. Del Vechio, *Lecţii de filozofie juridică,* Europa Nova Publishing House, p. 87
[25] Titus Şuteu, Victor Fărcaş, *Aprecierea persoanei,* Albatros Publishing House, Bucharest 1982, p. 29
[26] V. Dongoroz ş.a., *op. cit.,* p. 136
[27] Ibidem

produced offense). It results that the mitigating or aggravating circumstances of the criminal liability include, along the mitigating circumstances (article 73 from the Penal Code) and circumstances that may represent mitigating circumstances (article 74 from the Penal Code), and besides aggravating circumstances (article 75 from the Penal Code) also other aggravation causes of the punishment: causes, situations, states, conditions regarding the implementation of the relapse status, of the crime concurrence, the apprehension of the intermediate plurality, the continued offense. These states have different contents, being reported to the offender's person or to the criminal action - inaction, constituting the area of some institutions of the criminal law, the general part: the state of relapse, the continued offense, the concurrence of offenses (having aggravating effects); the attempt, the minority (having mitigating effects)[28].

The concept of circumstance includes the qualities, characteristics, situations and determinations concerning the criminal act or the person of the offender, the circumstances that mitigate or aggravate the criminal liability complete the sphere of social danger degree of a typical crime or a qualified crime. Representing these circumstances may be specific to a criminal, to a class of criminals or may be general, finding itself within the dynamics of crime making.

Circumstances that mitigate or aggravate criminal liability are not the same with mitigating or aggravating circumstances, because some circumstances, states, situations, personal attributes were included in the incorporativ content of some concrete crimes in order to shade the social danger of aggravating or mitigating sentences. This way it can be established mobile and the purpose of the crime, following that the sentences be separately individualized.

Real circumstances (relative to the criminal offense) are dependent on the criminal action - inaction produced, so that they have legal effects for all participants, but only if and insofar they were known, predicted or their effects have been accepted by the participants. So there is the possibility that for similar criminal acts to undertake an individualization specific to the attitude and behavior customized of each offender, establishing different sentences for each of them. Real circumstances have an impact on participants only if it is proven that they have known them, that they have foreseen them and have accepted them, because participation is committed only intentionally.

Personal circumstances approach both the offender's involvement in the criminal action-inaction (how to participate, the individual contribution for participation, the post-criminal attitude) and also circumstances concerning the person of the offender. Referring to the qualities, attitudes, skills, habits of the offender, the personal circumstances (subjective) are not reflected on other participants[29]

[28] C. Mitrache, *op. cit*., p. 262
[29] Idem, p. 267

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THE INCRIMINATION OF SEXUAL INTERCOURSE WITH A MINOR ALONG TIME

Mariana-Narcisa RADU*

Abstract: *Sexual intercourse with minors have been considered dangerous since the earliest of times, so that, under a name or another, we can also find them in the Romanian criminal law.*

Even if the analysis of this offence involves a consented sexual intercourse with a minor, this consent is not valid because it is considered that the child can not appreciate the full implications of his act of will, or, according to the current regulation, his freedom of will is more restricted by the influence, the authority, the trust etc., which the offender benefits from and makes use of, in order to commit the offence.

In the present study the criminal provisions relating to the offence of sexual intercourse with a minor are presented and analyzed in a comparative manner starting with the feudal law, through the Criminal Code of 1864, the Hungarian Criminal Code (Act V of 1879, about the crimes and offences), applicable also in Transylvania, the Criminal Code of 1936, the one of 1969 with subsequent amendments, in force today, completing this approach with the new Romanian Criminal Code.

Keywords: *minor, sexual intercourse, active subject, offence, criminal code.*

Due to specific psycho-behavioral and age peculiarities, minors are one of the most vulnerable categories of persons with increased victimization[1].

By criminalizing sexual intercourse with a minor, it is envisaged that the minor does not have enough life experience and not enough strength to defend himself against those who want to engage into sexual intercourse with him.

Over time, protection of freedom and sexual inviolability of the minor by requiring everyone to refrain from engaging into „sexual acts" with him came to the attention of legislators, as such acts are expected to have serious repercussions on the later development of the minor[2].

In feudal law, the old regulations (called pravila) stipulated that anyone who had sexual intercourse with a girl less than 12 years, even if she consented, would be punished, but the punishment was left to the judge's choice[3]. In fact, „damaging little girls", was punished even by the canon law[4].

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1 Mitrofan N., Zdrenghea V., Butoi T., *Psihologie Judiciară*, Casa de Editură şi Presă „ŞANSA" S.R.L., Bucureşti, 1992, p. 84.

2 Vasiliu T., Antoniu G., Daneş S., Dărângă G., Lucinescu D., Papadopol V., Pavel D., Popescu D., Rămureanu V., *Codul penal al RSR comentat şi adnotat*, Edit. Ştiinţifică, Bucureşti, 1972, p. 216-217.

3 Îndreptarea Legii, Glava 252, zac. 7: „Anyone who would defile a little girl, not yet 12 years, will be scolded...", zac. 10: „...and if there were caresses and plays and gifts and nice promises and without a need, then the person guilty will be scolded as the judge would see fit." See *Îndreptarea Legii 1652*, Edit. „Academiei R.P.R.", Bucureşti, 1962, p. 253 şi. Cronţ G, Floca I., Georgescu V. Al.,. Grigoraş N, Hanga V., Herlea Al., Marcu P., Matei I., Mioc D., Sachelarie O., Stoicescu N., Strihan P., Şotroapa V., Vulcănescu R., *Istoria Dreptului Românesc*, vol. I, Edit. „Academiei R.S.R.", Bucureşti, 1980, p. 442.

4 Îndreptarea Legii, Glava 255: „When the women is no more than 12 years but less, then whoever had defiled her would suffer 12 years of canons ...", *op. cit*., p. 256.

The Criminal Code of 1864 stipulated the intercourse with a minor under article 263, as „offence against decency, without violence"[5]. This offense also had aggravated forms, if the offender had a certain quality or authority over the victim (parent, teacher, servant, priest etc.) or if the victim had died (articles 265, 266).

The Hungarian Criminal Code (Act V of 1879, about the crimes and offenses), applied also in Transylvania, stipulated the crime of „indecent offence", under article 236 which consisted of cohabitation with an honest girl, younger than 14 years.

The Criminal Code of 1936[6] regulated the offence against decency without violence, the doctrine of the time alleged that such acts are „against morality, against the social order"[7]. We point out however that this regulation (from 1936) stipulated that the subject of such an offence could only be a female person, less than 14 years, as the legislators gave up the broader expression of the previous Criminal Code of the Old Kingdom of Wallachia and they took over the wording of the Hungarian Criminal Code. Thus, the protection of the female victim was justified at the time with the fact that „the girl at this age (less than 14 years) has reduced ability to consent, has no sexual experience and she can not realize well enough the consequences of her sexual condition, her moral strength is too low, while her age renders her greatly impulsive. The consequences are often disastrous, namely: disgrace, ruin of the future, or complete depravity."[8]

Regarding the active subject of the offence against decency without violence, we note that only a male person, „the man", could have this capacity. The material element of the offense consists in an act of „sexual intercourse".

The offence against decency without violence had the following aggravating circumstances: the victim's pregnancy, contamination of the victim with a venereal disease, the fact that the perpetrator is a relative, legal guardian, curator, teacher, educator, supervisor, caregiver, physician, a master or a confessor; committing the offense by several people against the same victim or with the help of one or several persons (article 421 paragraph 2, article 422).

The Criminal Code of 1969, stipulated for the offense of sexual intercourse with a minor under article 198; the original text had the following wording:

"Sexual intercourse with a female person who is less than 14 years of age shall be punished with imprisonment from one to five years.

This punishment shall also apply for the intercourse with a female person between 14-18 years of age, if the offence is committed by a legal guardian or curator, or by a supervisor, caregiver, physician, teacher or educator, if the latter made use of this quality.

When the offence stipulated under paragraph 1 above was committed under the circumstances set out in article 197 paragraph 2 letter c, or if the offences set out in paragraphs 1 and 2 above had the consequences set out in article 197 paragraph 2 letter d, the punishment is imprisonment from 3 to 10 years.

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[5] Art. 263: „*Any offence against decency, done or attempted, without violence, against a male or female child, of less than 14 years of age, shall be punished with imprisonment from 2 to 3 years*". A se vedea Bădulescu G. S., Ionescu G. T., *Codul penal adnotat. Jurisprudenţă şi doctrină română şi franceză*, Bucureşti, 1911, p. 348.

[6] Art. 421: „The man who has sexual intercourse with a girl younger than 14 years, commits the offense against decency without violence and shall be punished with correctional imprisonment of 1 to 3 years. If the victim became pregnant or if the offender has contaminated her with a venereal disease, the punishment is the correctional imprisonment of 3 to 5 years and correctional banishment of 1 to 5 years."

[7] Iliescu T., rapporteur, in Parliamentary Discusions, in *Codul Penal Carol al II-lea*, vol II, partea specială I, adnotat de Rătescu C. G. ş. a., Editura „Librăriei Socec & Co." S. A., Bucureşti, 1937, p. 647.

[8] Pop T., Comentare, în *Codul penal Carol al II-lea*, op. cit., p. 649.

If the offence resulted in the death of the victim the punishment is imprisonment from 7 to 15 years

The provisions of article 197, the final paragraph shall also apply to the offences set out in paragraphs 1-3 above."

Firstly, we notice that, unlike the Code of 1936, the Criminal Code of 1969, in its original version, criminalizes under paragraph 2 the act of having sexual intercourse with a minor girl aged between 14 and 18, when the offender acts as legal guardian or curator or as supervisor, caregiver, physician, teacher or educator and he makes use of this quality to obtain the consent of the minor. We also note that the initial wording of article 198 did not stipulate as aggravating circumstances the pregnancy of the victim or the contamination of the victim with a venereal disease, but it stipulated that all the aggravating circumstances mentioned for the offence of rape shall be applicable for the offence of sexual intercourse with a minor girl.

Unlike the Code of 1936, the text of article 198 no longer provides that the criminal proceedings shall be initiated at the complaint of the victim, but its original version, did stipulate that the marriage between the victim and any of the participants was grounds for non-punishment. [9]

The text of article 198 of the Criminal Code has undergone successive changes and additions. Thus, Law no. 140/1996[10] changed the limits of the punishment if the offence was perpetrated under the circumstances described in paragraph 3.

The Law no. 197/2000[11] for the amendment and modification of the Criminal Code brought about the first significant changes as the offense is now defined as „sexual intercourse of any kind, with a person under the age of 15 years. Therefore, the age limit of the passive subject was increased to the age of 15 years (paragraph 1). Paragraph 2 of the same article was also modified in the same manner, establishing the age range between 15-18 years, and paragraph 5 regarding the grounds for non-punishment was abrogated.

Government Emergency Ordinance no. 89/2001, approved by Law no. 61/2002[12], modified the wording of article 198 by stating that the passive subject of the offence „can be a person of the opposite sex or the same sex," and it introduced the complementary punishment of prohibiting certain rights.

Emergency Ordinance no. 143/2002, approved by Law no. 45/2003[13], amended and modified the provisions of article 198 by introducing the second sentence of the paragraph 2, introducing paragraph 3 and 4 and reference to the victim's suicide in paragraph 6.

With the changes and additions to the text, the above mentioned norms also modified the limits of the punishment prescribed by law, so that at present, article 198 reads:

"*(1) Sexual intercourse, of any kind, with a person of the opposite sex or the same sex who is less than 15 years of age, is punishable with imprisonment from 3 to 10 years and prohibition of certain rights.*

(2) The same punishment shall apply to sexual intercourse, of any kind, with a person of the opposite sex or the same sex aged between 15-18 years, if the offence is committed by the legal guardian or curator or by a supervisor, caregiver, physician, teacher or educator,

[9] Dongoroz V., Darângă G., Kahane S., Lucinescu D., Nemeş A., Popovici M., Sârbulescu P., Stoican V., *Noul Cod penal şi Codul penal anterior. Prezentare comparativă*, Edit. Politică, Bucureşti, 1968, p. 126.
[10] Published in „The Official Journal of Romania" nr. 289/1996.
[11] Published in „The Official Journal of Romania" nr. 568/2000.
[12] Published in „The Official Journal of Romania" nr. 65/2002
[13] Published in „The Official Journal of Romania" nr. 51/2003.

if the latter made use of this quality, or if the perpetrator has abused the trust of the victim or his authority or influence over it.

(3) If the sexual intercourse, of any kind, with a person of the opposite sex or the same sex who is less than 18 years of age, was determined by the offender by offering or giving money or other benefits to the victim, directly or indirectly, the punishment is imprisonment from 3 to 12 years and prohibition of certain rights.

(4) If the acts referred to in paragraphs 1-3 above were committed in order to produce pornography, the punishment is imprisonment from 5 to 15 years and the prohibition of certain rights, and if for that purpose the perpetrator made use of coercion, the punishment is imprisonment from 5 to 18 years and the prohibition of certain rights .

(5) When the offence provided under paragraph 1 was committed under the circumstances set out in article 197 paragraph 2 letter b or if the facts set out in paragraphs 1-4 above had the consequences provided for in article 197 paragraph 2 letter c, the punishment is imprisonment from 5 to 18 years and the prohibition of certain rights.

(6) If the offence resulted in the death or the suicide of the victim, the punishment is imprisonment from 15 to 25 years and the prohibition of certain rights „.

Law no. 286/2009[14] introduced a new Criminal Code in Romania and its Chapter VIII, named Crimes against sexual freedom and integrity was widely revised; the offense of sexual intercourse with a minor underwent significant changes.

According to article 220 of the new Criminal Code, the offense of sexual intercourse with a minor has the following content:

"(1) Sexual intercourse, oral or anal intercourse and any other acts of vaginal or anal penetration committed with a minor aged between 13 and 15 shall be punished with imprisonment from 1 to 5 years.

(2) The act referred to in paragraph 1 above committed against a minor, who is less than 13 years of age, is punishable with imprisonment from 2 to 7 years and the prohibition of the exercise of certain rights.

(3) The act referred to in paragraph 1 above committed by an adult with a minor aged between 13 and 18, where the adult abused their authority or influence over the victim, is punishable with imprisonment from 2 to 7 years and the prohibition of the exercise of certain rights.

(4) The act referred to in paragraphs 1 – 3 above is punishable with imprisonment from 3 to 10 years and the prohibition of the exercise of certain rights when:

a) the minor is a direct line relative, a brother or a sister;

b) the minor is under the care, protection, education, watch or treatment of the perpetrator;

c) was committed in order to produce pornographic material.

- The facts referred to in paragraphs 1 and 2 shall not be punished if the age difference does not exceed three years „.

Under a comparative analysis of the current and future regulations of the offence of sexual intercourse with a minor we can see that in article 220 the legislator stipulates for several modes[15] for committing this offence according to the age of the minor and also giving them new contents.

[14] Published in „The Official Journal of Romania" nr. 510 din 24 iulie 2009.
[15] Boroi Al., *Drept penal. Parte specială*, Edit. C.H. Beck, Bucureşti, 2011, p. 132.

Thus, the wording of article 220 criminalizes the „sexual intercourse, oral or anal intercourse and any other acts of vaginal or anal penetration committed with a minor aged between 13 and 15" as opposed to paragraph 1 of article 198 which incriminates the „sexual intercourse, of any kind, with a person of the opposite sex or the same sex who is less than 15 years of age". Paragraph 2 of article 220 of the Romanian Criminal Code reads as follows: „ The act referred to in paragraph 1 above committed against a minor, who is less than 13 years of age, is punishable … „ replaces the contents of paragraph 2 of article 198 of the current code that reads: „the same punishment shall apply to sexual intercourse, of any kind, with a person of the opposite sex or the same sex aged between 15-18 years, if the offence is committed by the legal guardian or curator or by a supervisor, caregiver, physician, teacher or educator, if the latter made use of this quality, or if the perpetrator has abused the trust of the victim or his authority or influence over it".

Paragraph 3 of article 220 covers the situation where the act referred to in paragraph 1 is committed by an adult with a minor aged between 13 and 18 years, when the adult abused their authority or influence over the victim, a situation that we find now included in paragraph 2 of article 198 Criminal Code.

The legal scope of the offence of sexual intercourse with a minor is the sexual freedom and inviolability of the minor, who has not yet attained the age of 13, regardless of its sex in the situation provided for under paragraph 2 of article 220 of the New Criminal Code, or aged between 13 and 15 years in the situation provided for under paragraph 1 of article 220 of the New Criminal Code or of the minor aged between 13 and 18 years who is also in some relationship with the offender in the situation provided for under paragraph 3 of article 220 of the New Criminal Code.

The criminal doctrine has expressed the opinion that in the case of aggravated forms, the offence has a complex legal scope, having as a „secondary component the social relations arising from guardianship or working relationships or contractual duty of care, treatment, education or guard[16]".

The material object of the offense of sexual intercourse with a minor consists of a person's body[17], regardless of sex, aged between 13 and 15 years (paragraph 1) or under the age of 13 years (paragraph 2) or is aged between 13 and 18 years (paragraph 3) against whom the sexual intercourse is realized. The material object can only be the body of the minor person who is alive, the same as for the rape.

However, there is also the opinion that the minor's body can not be „an adjacent or secondary material object"[18] because in the case of this offence the coercion, including the physical one, is excluded. According to another opinion[19], the fact that this offense is committed by violence does not mean that it has no material object as long as the sexual intercourse is practiced on the victim's body.

From the wording used by the legislator, we conclude that active or passive subject of the offence of sexual intercourse with a minor can be any person, regardless of gender.

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[16] Dungan P., Medeanu T., Paşca V., *Manual de drept penal. Partea specială, vol. I, Infracţiuni contra persoanei. Infracţiuni contra patrimoniului*, Edit. Universul Juridic, Bucureşti, 2010, p. 215.
[17] Boroi Al., *op. cit*., p. 130.
[18] Cioclei V., *Drept penal. Partea specială. Infracţiuni contra persoanei*, Edit. Universul Juridic, Bucureşti, 2007, p. 208.
[19] Dungan P., Medeanu T., Paşca V., *op. cit.*, p. 215.

The active subject can be any person, regardless of sex, who has the capacity to be criminally liable and meets the requirements stated under article 220 of the New Penal Code[20].

Thus, according to the modes prescribed by paragraph 1 and 2, both a man and a woman can be the direct active subject of this offence if they are older than 14 years and they are criminally liable. Unlike the current Criminal Code, paragraph 5 of article 220 states that the facts stipulated in the cited provisions are not criminalized if the „age difference does not exceed three years". Therefore, the legislator imposes the condition for the punishment of the active subject that between the latter and the minor, the passive subject, there should be an age difference of minimum three years.

In the mode provided for by paragraph 3 of article 220 of the New Criminal Code, the direct active subject is qualified, as it must be an adult who abuses his authority or influence over the victim, unfairly exploiting the moral ascendancy which it has against the victim[21].

The active subject is also qualified in the version provided in paragraph 4 of article 220 letter a) of the New Criminal Code. In this case, it is necessary for the perpetrator to be, in his turn, a relative in direct line, the brother or the sister of the minor who is a victim.

Paragraph 5 of article 220 of the New Criminal Code brings about a new regulation of the offence of sexual intercourse with a minor as it stipulation a cause for non-punishment[22] as it mentions that the facts set out in paragraphs 1 and 2 are not punishable if the age difference between the author and the victim does not exceed 3 years.

As the marginal title of article 220 of the New Criminal Code suggests, the passive subject of the offence is qualified as it can be only a person who is a minor – quality required by law. Thus, the passive subject can be any minor, regardless of sex, aged between 13 and 15 years (in the version provided for by paragraph 1) while the version provided for by paragraph 2, the passive subject is a minor who is less than 13 years.

According to paragraph 4 letter a) of article 220 of the New Criminal Code, the passive subject must have certain qualities and the offense is more serious if the minor is a relative in direct line, a brother or a sister of the offender. Also, in the mode provided under paragraph 4 letter b), the passive subject must be a minor who is under the care, protection, education, security or treatment of the perpetrator.

The provisions of paragraph 1 of article 220 replace the definition of „sexual intercourse of any kind" from article 198 of the current Criminal Code with „sexual intercourse, oral or anal intercourse and any other acts of vaginal or anal penetration,". The same as in the case of rape, the offence is addressed, through the acts of penetration.

Thus, the material element of the offence is represented by the following actions: sexual intercourse, anal intercourse, oral intercourse and any other act of vaginal or anal penetration.

Sexual intercourse is defined in criminal law doctrine as the conjunction between male and female sexual organs, „a biological act of procreation." [23] Thus, it implies the conjunction

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[20] Radu M.N., *„Subiecţii infracţiunii de act sexual cu un minor în reglementarea noului Cod penal"*, în volumul *„Calitate şi performanţă în serviciile educaţionale"*, Edit. Dacia, Cluj-Napoca, 2010, pp. 360-365.

[21] Bogdan S., *Drept penal. Partea specială*, Vol. I, Edit. Sfera SRL. Cluj-Napoca, 2007, p. 153; Diaconescu G., *Infracţiunile în Codul penal român*, Bucureşti, Edit. Oscar Print, 1997, p. 294; Dongoroz V. ş. a., *Explicaţii teoretice ale Codului penal român,* Bucureşti, Edit. Academiei Române, Edit. All Beck, 2003*,* p. 346.

[22] Hotca M. A, *Noul Cod penal şi Codul penal anterior. Aspecte diferenţiale şi situaţii tranzitorii*, Edit. Hamangiu, Bucureşti, 2009, p. 216.

[23] Antoniu G., Bulai C., Chivulescu Gh., *Dicţionar juridic pena*l, Edit. Ştiinţifică şi enciclopedică, Bucureşti, 1976, p. 235.

of the sexes; the male sexual organ penetrates the female sexual organ[24]. The term „sexual intercourse" is therefore limited to „normal" sex between people of different sexes.

Anal intercourse (anal coitus), involves making an anal intercourse[25]. Oral intercourse (coitus oral) is the introduction of the penis in the partner's mouth[26]. Both oral sex and anal can be performed on or between persons of the same sex or different sex.

The term „any other act of vaginal or anal penetration" includes other acts of penetration than the sexual intercourse, anal and oral intercourse. Such acts may include penetration with certain objects or with other parts of the body than the sexual organ.

Under the new regulation, the legislator requires as a condition for the existence of the offence, that the above mentioned acts are committed against a minor aged between 13 to 15 years (paragraph 1) or with a minor who is less than 13 years (paragraph 2).

The offense can fall under the provisions of paragraph 3 of article 220 of the New Criminal Code if all of the following conditions are met: there is a sexual intercourse, oral or anal intercourse or any other acts of vaginal or anal penetration; the above mentioned acts must be committed by an adult with a minor aged between 13 to 18 years; the adult abused of his authority or influence over the victim.

Comparing the provisions of article 218 regarding the rape with those regarding the offence of sexual intercourse with a minor, we observe that the two offenses can be committed by identical actions. What distinguishes them is that in the case of rape, the sexual intercourse, oral or anal intercourse as well as any other acts of vaginal or anal penetration, must take place by coercion, against a victim who is unable to defend herself or unable to express their will or by taking advantage of this situation of the victim. In the case of sexual intercourse with a minor, the sexual intercourse, the oral or anal intercourse and any other acts of vaginal or anal penetration are achieved with the consent of the minor[27], regardless whether it was implicit or express[28].

The offense of sexual intercourse with a minor can only be committed with direct intention, as the author conceives the occurrence of the consequences provided for by the law. However, the criminal doctrine also expressed he opinion[29] according to which this offence can also be committed with indirect intention. We can not agree to this opinion because, in this case, the offender conceptualizes the result of its action and seeks the realization of the sexual intercourse with a minor.

The offender must be aware of the fact that sexual intercourse, oral or anal intercourse and any other acts of vaginal or anal penetration is achieved with a minor who is aged between 13 and 15 years (in the case of article 220, paragraph 1 of the New Criminal Code), or with a minor who is less than 13 years (paragraph 2 of article 220), or with a minor aged between 13 and 18 in the case covered by paragraph 3.

The action is not the offence of sexual intercourse with a minor if the offender was in error with regards to the actual age of the minor (a more robust appearance, a more developed body, claiming an older age etc.) [30].

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[24] A se vedea Vasiliu T.,ş.a., *op. cit*., p.208.
[25] Perju- Dumbravă D., *Medicină Legală. Teorie şi practică*, Edit. Argonaut, Cluj-Napoca, 2006, p. 164-165.
[26] Idem
[27] Dungan P., Medeanu T., Paşca V., *op. cit.* p. 219.
[28] Boroi Al., *op. cit.*, p. 131.
[29] Stoica O. A., *Drept penal. Partea specială*, Edit. „Didactică şi pedagogică", Bucureşti, 1976, p. 128; Bogdan S., *op. cit.,* p. 154.
[30] Streteanu F., *Drept penal. Partea generală*, Edit. „Rosetti", Bucureşti, 2003; p. 475.

As for the attempted sexual intercourse with a minor, we note that, although it is possible, it is no longer sanctioned under the new regulation. According to article 204 of the current Criminal Code the attempt to this offense is punishable.

Unlike the current Criminal Code, the offense of sexual intercourse with a minor is considered to be more severe under the new regulation if the sexual intercourse, the anal or oral intercourse or other acts of vaginal or oral penetration with a minor happen with a minor who is less than 13 years. In this case the age of the minor constitutes „an aggravating circumstance" [31] - the punishment provided by the law is imprisonment from 2 to 7 years and the prohibition of certain rights.

The same punishment applies if the offense is committed by an adult who abused their authority or influence over the victim. In this case, the fact that the adult makes use of his moral ascendant on the victim determines a higher degree of social danger (paragraph 3 of article 220). We note that in this case, the legislator separated the provisions of article 198, paragraph 2 of the current Code, which can be found in the New Code under two different paragraphs (paragraph 3 and paragraph 4 letter b) of article 220 of the New Romanian Criminal Code).

According to the provisions of paragraphs 4 of article 220, the acts that take place under the conditions stipulated by the previous paragraphs are more serious, if the minor is a relative in direct line, a brother or a sister (letter a). This aggravating circumstance does not have a correspondence into the current regulation of the sexual intercourse with a minor.

Committing the offense against a minor who is under the care, protection, education, security or the treatment of the offender constitutes an aggravating circumstance regulated by paragraph 4 letter b) of the New Criminal Code. This provision is also found in the current regulations, under paragraph 5 of article 198.

The offense of sexual intercourse with a minor is more serious when it was committed in order to produce pornographic material (paragraph 4, letter c) article 220). This provision can also be found in article 198, paragraph 4 of the current Criminal Code[32].

We notice that under the new regulation, the legislator no longer provides for the aggravating circumstances set out in article 198, paragraph 3: „sexual intercourse, of any kind, with a person of the opposite sex or the same sex who is less than 18 years of age, was determined by the offender by offering or giving money or other benefits to the victim, directly or indirectly „; the final part of paragraph 4 article 198 provides for the situation where coercion was used to produce pornography; the final part of paragraph 5 of article 198: „offences stipulated under paragraphs 1-4 of article 198 resulting in serious bodily injury or de deterioration of the victim's health"; paragraph 6 of article 198 „the offense resulted in the death or suicide of the victim."

The New Criminal Code brings about substantial changes in respect of the penalties for the offence in any of the above mentioned modes, and the reduction of their limits stands out. If under the current regulation the basic forms of the offense was punishable with imprisonment from 3 to 10 years the prohibition of certain rights, under article 220, paragraph 1 of the New Romanian Criminal Code the punishment is imprisonment from 1 to 5 years and the prohibition of certain rights is no longer mandatory, and it is not stipulated at all in the case of a minor aged between 13 and 15 years.

The punishment is imprisonment from 2 to 7 years and the prohibition of certain rights in the cases provided under paragraphs 2 and 3 of article 220, while for the aggravated

[31] Dungan P., Medeanu T., Paşca V., *op. cit.* p. 219.
[32] Ivan Ghe., *Drept penal. Partea specială*, ediția 2, Edit. CH Beck, Bucureşti, 2010, p. 202.

forms provided under paragraph 4 of article 220 the punishment is imprisonment from 3 to 10 years and the prohibition of certain rights.

The aggravated forms are punishable under the current Criminal Code with imprisonment from 3 to 12 years (see paragraph 3 of article 198), from 5 to 15 years (see paragraph 4, first part, article 198), from 5 to 18 years (see paragraph 4, the final part, paragraph 5 of article 198), from 15 to 25 (paragraph 6 article 198).

As far as the procedural aspects are concerned, the New Criminal Code makes no changes, as the criminal proceedings are exercised ex officio.

Conclusions

In recent years great strides were made in improving the regulation of the offense of sexual intercourse with a minor, by renouncing to the specifications of the subjects, by abrogation of the provisions relating to the cause of non-punishment, by adding the hypothesis regarding the abuse of the trust, authority or influence over the victim, by introducing as aggravating circumstances the purpose of the perpetrator consisting in the production of pornography etc.

We can not help but notice the attitude of the legislator, over time, in what regards the punishment for analyzed offence. After having increased the penalties to the current limits, the provisions of the new Code returns to the initial limits the penalty that we could find in article 198 in its original version.

Comparing the legal provisions mentioned above we see that the Romanian legislator, in article 220 of the New Criminal Code continues the tradition in the criminalization of the offence but adapting its provisions to the laws of other states, to the situations stemming from the evolution of the society and to the diversity of the methods of committing it.

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ASPECTS CONCERNING THE GUARDIANSHIP IN THE REGULATION OF THE NEW CIVIL CODE

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Abstract: *This approach aims at analyzing certain aspects concerning the guardianship, in the light of the new Civil Code. Considering the fact that this means of protection is handled by the legislator in the present regulation, in a detailed manner, and that it has multiple implications, I approached in this study, only a fee aspects concerning the guardianship, that drew my special attention, i.e. those concerning the tutor, family council and exercising the guardianship.*

Even if the entire present regulation of the guardianship is substantially different from the old one, I consider that the aspects I chose to analyze in this study, illustrate convincingly enough the new optic of the legislator in this field.

Keywords: *Guardianship, means of protection, family council, supervision, court of protection*

1. Introduction

The guardianship is defined in the specialty literature as those means of protection that intervene when the minor child is lacking parental protection.[1] Other authors [2] qualify the guardianship „as a task taken over by a person capable de facto and de jure and whose object is to insure the personal protection of a minor child, managing its patrimony and exercising its civil rights."

The guardianship is not an institution of specific protection of the minor child, because, by its means, the protection of persons under court interdict is performed as well, with certain specific features and differences, as compared to the guardianship exercised for the minor child. [3]

The guardianship of the minor child is regulated in the new Civil Code, in content of Chapter I, Chapter II „Guardianship of the Minor Child", articles 110-163. As related to the fact that the new regulation in the field of the guardianship is handled by the legislator in a detailed and very elaborate manner, I will analyze in this study, only the following aspects concerning the guardianship, i.e.: the tutor, family council and performing the guardianship.

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[1] G. Boroi, „Drept civil. Partea generală. Persoanele" („Civil Law. General Part. Persons."), Hamangiu Publishing House, Bucharest, 2010, page 421.

[2] O. Ungureanu, C. Munteanu, „Drept civil. Persoanele în reglementarea noului Cod civil" („Civil Law. Persons in the Regulation of the New Civil Code"), Hamangiu Publishing House, Bucharest, 2011, page 244

[3] For details concerning the specific features of the guardianship of the interdiction by the court of law, see articles 164-177, new Civil Code. At the same time, see C.T. Ungureanu, „Drept civil. Partea generală. Persoanele în reglementarea noului Cod civil" („Civil Law. General Part. Persons in the Regulation of the New Civil Code"), Hamangiu Publishing House, Bucharest, 2012, page 398-407 and O. Ungureanu, C. Munteanu, *op. cit*., pages 263-270

2. The tutor

As per art. 112, paragraph 1, new Civil Code, the tutor can be a natural person or the husband and wife, together, if none of the incompatibility cases provided by the actual code applies.

If more minor children, who are siblings, find themselves without parental protection, then, as per paragraph 2 of the same article, a single tutor is appointed.

Art. 113, new Civil Code enumerates expressly and limitatively the categories of persons that cannot be tutors: the minor child, the person interdicted by the court or the one under trusteeship; the person whose parental rights have been withdrawn or the person declared incapable to be a tutor; the person whose exercise of civil rights was restricted according to the law or to a court decision, as well as the person with ill conduct considered by a court of law; the person who, exercising a guardianship, was removed from it, under the conditions of art. 158, new Civil Code (if it commits an abuse, severe negligence or other facts that make it unworthy to be tutor, as well as if it does not fulfill the task properly); the person in insolvency condition; the person, who, because of interests contrary to the ones of the minor child, could not fulfill the task of the guardianship; the person denied by notarized document or by will, by the parent who exercised alone, upon death, the parental authority.

As concerns the persons who can be tutors, I notice that in the new regulation, the hypothesis of art. 117, letter „d" of the former Family Code is no longer found, i.e. that of the person that lacked, according to the special law, the right to choose and be chosen deputy. At the same time, the legislator determined two new hypotheses, in which a person cannot be a tutor, i.e. the insolvable person and the person who was denied, by the parent holding the parental authority, by notarized instrument, or by will, from the possibility of exercising the guardianship.

We can notice that the new Civil Code, i.e. art. 114 brings a total novelty element, as compared to the old Family Code (art. 118, paragraph 1), in the sense that it offers the child's parents the possibility to appoint themselves, the person who will hold the guardianship of their minor children; the principle of precedence of the family towards the minor child is asserted again.[4]

Thus, the parents can appoint, by one-sided instrument or by agent contract concluded in authentic form, or by will, the person who will be the tutor of their children, with the indication that the appointment made by the parent who, upon death, had lost its parental rights or was under interdict of the court of law, is invalid.[5]

If, more persons were appointed tutors, without any preference order, or when there are more relatives, in-laws or friends of the minor child's family, that can fulfill the tasks of the guardianship and wish to do it, the court of protection will decide considering their material conditions, as well as the moral guarantees necessary for a harmonious development of the minor child.[6]

The persons appointed tutors by the minor child's parents, by mandate contract concluded in notarized form, can refuse the guardianship only in the following cases: if they turned 60; if it is a pregnant woman or a mother of a child under 8; or the persons have

[4] O. Ungureanu, C. Munteanu, *op. cit*., page 249
[5] Article 114 Republished Civil Code
[6] Article 115 Republished Civil Code

two or more children in care; if these persons, because of an illness, infirmity, type of the activities performed, remote location of the residence from the location where the minor child's assets are or because of other grounded reasons, could not accomplish this task.[7]

As opposed to the old Family Code, that did not determine any preference order for appointing the tutor[8], in the present regulation, when there exists no appointed tutor, the court of law appoints priority, as tutor, a relative, in-law or friend of the minor child's family.

Regardless of the fact that the tutor was appointed or not by the minor child's parents, it can be appointed only by the court of protection at the minor child's residence. The court of protection is, in its turn, an institution introduced by the new Civil Code and that took over, in this field, the tasks granted in the old regulation, to the guardianship authority.

Appointing the tutor takes place in the council chamber, by final decision, and hearing the minor child who turned 10, is compulsory.

If the parents did not appoint a tutor, it will be appointed with the advice of the family council, if it was set. The rights and obligations of the tutor begin upon sending the appointment decision, and until naming the tutor, the court of protection can take provisory means required by the minor child's interests, also having the possibility to appoint a special curator.[9]

Another novelty of the present regulation is the fact that, upon naming or during the guardianship, the court of protection may decide, ex officio or upon request of the family council, that the tutor give real estate or personal guarantees, should the interests of the minor child require such guarantees.[10]

3. The Family Council

If the tutor is „the main character of the guardianship", the family council is that mechanism which, as asserted in the doctrine, controls and supervises the functionality of the guardianship[11].

The notion of „family council" is another fundamental institution in the field of guardianship, reintroduced by the legislator in the new Civil Code and it is regulated by articles 124-132.

The family council is formed by the court of protection, of three persons, that can be relatives or in-laws of the minor child, considering the degree of kindred and the relations with the family of the minor child, and, in lack of these persons, from other persons who had friendship relations with the parents of the minor child and show interest for its situation. The spouses cannot be together members of the same family council. Under the same conditions, the court of protection appoints two deputy members. It is important to mention the fact that the tutor cannot be a member of the council [12].

The court of protection can appoint the family council only with their agreement [13] and the componence of the family council can be amended during the guardianship, only in

[7] Article 120, paragraph 2, Republished Civil Code
[8] Article 118 Republished Civil Code
[9] Article 119 Republished Civil Code
[10] Article 117 Republished Civil Code
[11] O. Ungureanu, C. Munteanu, *op.cit*., page 252
[12] Article 128 Republished Civil Code
[13] Article 128, paragraph 2 Republished Civil Code

three cases provided by the law: if the interests of the minor child impose it, if one of the members is dead or disappeared or upon request of the tutor, if, in the complaints against the tutor, the court of protection gave at least two times final decisions against the decisions of the family council.[14]

The position of member in the family council is a personal task, such as the task of the tutor, as it cannot be taken over, in case of death, by the heirs, and free; the court of protection cannot authorize any form of remuneration for this position.[15]

The functioning of the family council is regulated in detail by art. 129, new Civil Code.

Thus, summoning the family council is the task of the tutor, either of its own initiative, or upon request of any of its members, of the minor child who turned 14 or of the court of protection. Summoning the family council has to be made with min. 10 days before the date when it is gathered. Still, there exists the possibility that the summon be made before passing the term of 10 days, if all members of the family council agree. In all cases, the presence of all council members covers the summon irregularities.[16]

The council members are obliged to show up personally at the meetings of the council, and, if unavailable to attend, they can be represented by persons, relatives or in-laws with the parents of the minor child, if these persons are not appointed or summoned on their own name, to be members of the family council. At the same, a spouse that cannot attend, can be represented by the other spouse. [17]

The meetings of the family council are held at the residence of the minor child or at the registered office of the court of protection, if the court was the one initiating the summon of the family council.

The family council has three main tasks: to *supervise* the way in which the tutor exercises its obligations towards the person and assets of the minor child, to *give advisory approvals* and to *take* grounded *decisions* when the law imposes it.

As concerns the task of supervising the activity of the tutor, the family council has to make sure that the inventory of the minor child's assets is well drafted, that the tutor fulfills effectively the obligations concerning the person of the minor child and its assets, it has to preserve the archive of the guardianship, etc., and this supervision role is exercised during the entire duration of the guardianship and the cooperation with the tutor.[18]

The family council issues advisory approvals, upon request of the tutor or of the court of protection, when, for instance, the tutor takes measures concerning the person of the minor child or when, for example, the court of protection recognizes the full capacity of the minor child for anticipated exercise of rights, for instance at the age of 16.[19]

The family council takes decisions in the situations determined by the law, as per art. 130, new Civil Code. For example, the council determines by decision, the amount of money necessary annually for the maintenance of the minor child and for managing its assets, being able to notify, at the same time, according to the circumstance, this amount. [20]

The advisory approvals and decisions are taken with the majority of the council members, as it is presided by the elderly person. Upon taking the decisions of the council,

[14] Articles 127 and 131 Republished Civil Code
[15] O. Ungureanu, C. Munteanu, *op.cit*., page 253
[16] Article 129, paragraph 1 Republished Civil Code
[17] Article 129, paragraph 2 Republished Civil Code
[18] O.Ungureanu, C. Munteanu, *op.cit*., page 252
[19] C.T. Ungureanu, *op.cit*., page 381
[20] Article 148, paragraph 2 Republished Civil Code

hearing the minor child who turned 10 is compulsory. The decisions of the council have to be grounded and will be recorded in a special register, held by one of the council members, appointed by the court of law.[21]

The instruments concluded by the tutor, in the absence of the family council can be cancelled, while concluding instruments with not observing the approval bring along the tutor's responsibility, as per art. 130, new Civil Code.

4. Exercising the guardianship

Exercising the guardianship is regulated by art. 133-155 Civil Code and aims at two aspects: the person of the minor child and its assets.

The court of protection has to exercise an effective and continuous control over the way in which the tutor and the family council fulfill their obligations concerning the person and the assets of the minor child.[22]

Tasks of the tutor related to the minor child

De facto, the tutor exercises for the minor child, the rights and obligations that belonged to the parents, as it is obliged to insure the care of the minor child, its physical and mental health, its education, learning and professional training, according to its skills.[23] If the tutors are spouses, they exercise the guardianship together and, in case of a divorce, the court of law will inform the court of protection, to make a decision about exercising the guardianship.

The measures concerning the person of the minor child are taken by the tutor, but with the approval of the family council, except for the current measures.[24]

The residence of the minor child under guardianship is determined by its tutor, and it can approve that the minor child has a residence determined by its professional education and training, but the tutor has the obligation to inform in this case the court of protection.[25]

As concerns the type of education or professional training it received upon setting the guardianship for the minor who did not turn 14, the new Civil Code brings the following clarifications: they can be changed only with the approval of the court of protection. Nevertheless, the court of protection had no right to chance, against the will of the minor who turned 14, the type of learning decided by its parents or that it used to receive upon setting the guardianship. At the same time, the court of protection cannot decide without hearing the minor child who turned 10. [26]

Tasks of the tutor concerning the assets of the minor child

Art. 142, new Civil Code stipulates that the tutor has the obligation to manage the assets of the minor child in good faith. Under the patrimony aspect of the guardianship, the tutor has the quality of manager, instructed to simply manage the assets of the person under

[21] Article 130 Republished Civil Code
[22] Article 151 Republished Civil Code
[23] Article 134, paragraph 2 Republished Civil Code
[24] Article 13 Republished Civil Code
[25] Article 137 Republished Civil Code
[26] Article 138 Republished Civil Code

guardianship; the provisions of title V, book III of the new Civil Code „Managing the assets of another person" apply in this case.

Despite these legal provisions that grant the tutor the obligation to manage the assets of the minor child, the legislator regulated in the new Civil Code, in this field, an alternative to managing the assets of the minor child by the tutor, in the sense that the court of protection, with the approval of the family council, may decide that a part of the matrimony of the minor child, or even the whole patrimony be managed by a specialized natural person or corporate body.[27]

The patrimony side of the guardianship aims at the following aspects: *managing the assets of the minor child, representing the minor child lacking the capacity to exercise its rights and approving the legal instruments concluded by the minor child with a limited exercise capacity.*

Within max. 10 days from appointing the tutor, an inventory of the minor child's assets will be performed by an agent of the court of protection, that will verify all assets of the minor child, in their location. The inventory has to be approved by the court of protection and is drafted in the presence of the tutor and the members of the family council.

Before drafting the inventory, the tutor has the right to conclude, on behalf of the minor child, only urgent preservation and management instruments, as per art. 141, new Civil Code.

On the occasion of drafting this inventory, the tutor, as well as the members of the family council are obliged to declare in writing, the possible debentures, debts or claims they have from the minor child. These declarations are included in the inventory report.[28]

The tutor and members of the family council who, knowing that they have debentures or own claims from the minor child, did not declare them, despite their being summoned in this sense, presumably gave them up, and if these persons do not declare their debts towards the minor child, although they had been informed of this, can be relieved from their positions.

It is important to mention the fact that the possible debentures the tutor, any of the members of the family council or spouse, direct relative or siblings have towards the minor child, can be paid voluntarily only with the approval of the court of protection.[29]

As indicated above, the tutor is obliged to manage, during the guardianship, the assets of the minor child. The tutor has to fulfill this task with the diligence of a good owner, with honesty and loyalty and to avoid the conflict of interests between its obligations and interests.[30]

As per art. 142, paragraph 2, new Civil Code, the assets acquired by the minor child free are managed only if the testate or the donor stipulated it expressly. Otherwise, these assets are managed by the curator or the person named by disposition or appointed, as applicable, by the court of protection.

A task that belongs to the family council during the guardianship is to determine the annual amount that it necessary for maintaining the minor child and managing its assets; the council may change this amount, according to the circumstances. The decision of the council has to be communicated to the court of protection.

Considering the fact that the tutor cannot be obliged to bear the costs determined by the maintenance of the minor child, the expenses for its maintenance and managing its assets are covered by its incomes. If the incomes of the minor child are sufficient, the court of

[27] Article 122, paragraph 2 Republished Civil Code
[28] Article 140, paragraphs 1 and 2 Republished Civil Code
[29] Article 140, paragraph 4 Republished Civil Code
[30] O. Ungureanu, C. Munteanu, *op.cit*., page 255

protection will order selling the assets of the minor child, by consent of the parties or by public auction. Nevertheless, the objects with sentimental value for the family of the minor child or for the minor child will not be sold, except for exceptional cases. If the minor child does not have assets and parents or other relatives that have the maintenance obligation, according to the law, or the maintenance granted is not enough, the minor child is entitled to social care.[31]

The amounts of money that surpass the maintenance needs of the minor child and for managing its assets, as well as the financial instruments, will be deposited by the tutor, on behalf of the minor child, into a credit institution indicated by the family council, within 5 days from the day of cashing these amounts.

The tutor has the right to dispose of these amounts and of the financial instruments, only with the approval of the court of protection. The tutor cannot use, in any case, the amounts of money and the financial instruments for concluding, on behalf of the minor child, transactions on the capital market, even if it obtained the approval of the court of protection.[32]

While exercising the guardianship, the tutor has to take the following measures regulated by articles 152 and 153 of the new Civil Code: it has to present every year, to the court of protection, a report about the ways the assets of the minor child were managed and the way in which the minor child was cared for, within 30 days from the end of the calendar year; at the same time, the tutor is obliged any time, apart from the annual report, to present to the court of protection, reports concerning the way of managing the assets of the minor child and the way the minor child was cared for. The court of protection verifies the calculations about the incomes of the minor child and the expenses made for maintaining it and managing its assets and if they were correctly drafted and correspond to the reality, it will release the tutor.

Upon cease of the guardianship, the tutor or, as applicable, its heirs are obliged to present to the court of protection, a general report in guardianship, to deliver the managed assets to the former minor child, to its heirs or to the new tutor.[33] The release from administration of the tutor can take place only after the assets being handed over, the calculations being checked and approved by the court of protection, but the release from administration does not exonerate the tutor from the prejudice caused by its fault, as per art. 162, paragraph 2, new Civil Code. At the same time, the tutor that replaces another tutor has the obligation to request it to compensate the damages brought this way to the minor child.

The other component of the patrimony aspect of the guardianship refers to representing the minor child under 14 and approving the legal instruments that the minor child with limited exercise capacity concludes.

As per article 143 new Civil Code, the tutor represents the minor child until it becomes 14.

The minor child with limited exercise capacity concludes personally legal instruments, but with the approval of its tutor. If this minor child concludes an instrument that, according to the law, the tutor cannot conclude without the approval of the court of protection and the approval of the family council, then the minor child has to obtain these approvals.[34]

The tutor may conclude, according to the provisions of art. 144, new Civil Code, two categories of legal instruments: instruments that it may conclude alone, without the

[31] Article 148 Republished Civil Code
[32] Article 149 Republished Civil Code
[33] Articles 160 and 161 Republished Civil Code
[34] Article 146, paragraph 2, Republished Civil Code

approval of the family council; instruments that it may conclude only with the approval of the family council and the approval of the court of protection.

Some of the legal instruments that the tutor may conclude alone are, for example, the preservation and management instruments, taking delivery of the amounts of money from CEC (Savings Bank), deposited for maintaining the minor child, documents for alienating the assets subject to damage, degradation, depreciation, demise or that are not useful for the minor child.[35]

For concluding the disposition instruments and those that surpass the area of the managing right, the tutor needs the approval of the family council, as well as the approval of the court of protection. As per art. 144, paragraph 2, new Civil Code, the legal alienation instruments, the instruments for setting real rights, divisions, setting mortgages, the instruments for waiving the patrimonial rights of the minor child belong to this category.

There are legal instruments that the tutor may not conclude, even if it obtained the approval of the court of protection. Therefore, the tutor cannot make donations on behalf of the minor child, it cannot guarantee on behalf of the minor child, for the obligations of other persons and, at the same time, it, its husband or wife, a direct relative, its siblings, on one hand cannot conclude legal instruments with the minor child under guardianship, on the other hand.[36]

The sanction that intervenes if the tutor concludes legal instruments by infringing the legal provisions or without obtaining the approval of the family council and the authorization of the court of protection is the relative nullity. The action for annulment can be exercised by the tutor, by the family council and the prosecutor, ex officio or upon notice of the court of protection.

Finally, I should mention that the tutor is responsible for not fulfilling the tasks of the guardianship; the responsibility set for it is of many kinds: civil, infractional or criminal, as applicable.[37] At the same time, if the tutor refuses unjustifiably to continue the task of exercising the guardianship, as well as when it fulfills defectively the task of the guardianship, by its fault, it can be obliged to pay a civil fine for the state, as per art. 163, new Civil Code.

At the end of the analysis, I can formulate the following more important conclusions:

First of all, one can notice that the legislator proved in the field of guardianship, as in other fields regulated by the new civil code, an innovative vision, according to which the guardianship is approached at present in a fundamentally different way, as compared to the old regulation, the old Family Code.

Thus, the legislator reintroduced the institution of the family council, that plays an important role in the field of guardianship, it abandoned the notion of court of protection, whose tasks, indicated more precisely and more detailed than in the old regulation, were taken over by the court of protection.

We can also notice the preoccupation of the legislator for exercising the guardianship in a more rigorous frame than the old regulation, because the tutor is supervised, when exercising its tasks by the family council and is under the direct control of the court of protection. The fact that the family council is made up by relatives or in-laws of the minor

[35] O. Ungureanu, c. Munteanu, *op.cit.*, page 256

[36] Articles 144, paragraph 1 and 147 Republished Civil Code

[37] For details in this sense, see C.T. Ungureanu, *op.cit.*, pages 388-389; O. Ungureanu, C. Munteanu, *op.cit.*, pages 258-260

child or persons close to the minor child's family insure an effective protection and increased care of the minor child, including for his psycho-emotional development.

Least, but not last, I consider that the possibility the legislator offers to parents, to appoint themselves, if they want, the future tutor of their child is welcome, as the child's interests can be very well and carefully promoted and protected.

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SOME OBSERVATIONS ON MAIN REGULATORY DOCUMENTS ADOPTED IN ROMANIA IN 2011

Andrei CONSTANTIN*

Abstract: *From the content of the Law nr. 202/2010 regarding some accelerating measures of the trials, we conclude that in the most part, the law targets the changes, completion or repealing added to a number of laws (penal law, civil , administrative, commercial, copyright laws etc). According to the title of the mentioned Law (202/2010) in the matter of „accelerating the trials", we see only a few regulations in this matter, the real situation remaining the same as it was before enforcing this Law (202/2010).*

Keywords: *little reform, accelerating measures of the trials, changes, completions, repealing.*

Measures to reform the legal system - proposed by the Romanian Government, according to the National Reform Programme during 2007 - 2010, had as main objective, the provision of a more efficient legal system.

Following the recommendations made by the European Commission, the Romanian Government has made a public commitment to adopt new codes - civil, criminal, civil procedure and criminal procedure, including implementing laws[1].

Some of them, according to the performed anticipations, came into force in autumn 2011.

In addition, by Law no. 40/2011, from May 1st also came into force the new Labour Code.

Prior to the adoption of codes mentioned above, was also adopted the *Law no. 202/25.10.2010 on measures to accelerate solving trials*[2].

By this law, also known as the „Small reform" there have been made some *changes, completions* or *repeals* of many regulations[3] in civil, criminal, administrative, commercial,

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* translation was provided by CONTRAD GROUPE AD

[1] Law no. 286/2009 on the Criminal Code and Law No. 287/2010 on the Civil Code.

[2] Published in the Official Gazette, Part I, no. 714/26.10.2010, entered into force 30 days after publication, except the provisions on divorce by administrative and notary procedure - for which the term was set at 60 days.

[3] - Code of Civil Procedure, republished in the Official Gazette, Part I, no. 45/24.02.1948, with subsequent amendments and completions;
- Law no. 304/2004 on legal organization, republished, with subsequent amendments and completions;
- Regulation on organization and administrative operation of the High Court of Cassation and Justice, republished;
- Law no. 4/1953 - Family Code, published in BO no. 13/18.04.1956, with subsequent amendments and completions;
- Law no. 188/2000 on bailiffs, published in the Official Gazette, Part I, nr.559/10.11.2000, with subsequent amendments and completions;
- O.G. no. 66/1999 for Romania's accession to the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, adopted at The Hague on October 5, 1961, published in the Official Gazette, Part I, no. 408/26.08.1999, approved by Law no. 52/2000, with subsequent amendments and completions;
- Law of notaries and notary activities No. 36/1995, published in the Official Gazette, Part I, nr.92/16.05.1995, with subsequent amendments;
- Law on Administrative Legal Department no.554/2004, published in the Official Gazette, Part I, nr.1154/07.12.2004, with subsequent amendments and completions;
- Law No. 105/1992 on Private International Law Relations, published in the Official Gazette, Part I, nr.245/01.10.1992, with subsequent amendments and completions;

administrative litigation, copyright and related rights and procedural provisions, legal organization, jurisdiction competencies.

We will express below some views on the provisions of this law, starting in the first place, from the title that was given to it.

According to the large number of modified, supplemented or repealed legal provisions (codes, laws, ordinances, regulations), we consider the given title of „Small reform" (according to the magnitude of these „changes") fully justified, even if it is not found in the Official Gazette.

It cannot be said the same about the official title - „*Law no. 202/2010 - on measures to accelerate solving trials."* We consider this name to be totally inadequate in relation to the substance of the provisions.

In support of this view, we argue that the law covers only a few regulations that directly relate to, or have impact on „accelerating solving trials „. For the most part, as we said, makes only changes, amendments and repeals of many laws and other regulations.

Appearance of the specific effects expected in the direction of the „acceleration of solving trials „ is less visible in practice.

We appreciate that the new regulations impose a number of procedural issues in the organization of courts, the composition of the panel of judges, their correlation, including logistics and personnel resources - leading to achieving this goal.

According to Art. 132^1 of the law: „For the trial, according to circumstances, the court sets short terms, even from one day to another ..."

This new regulation, that was introduced by L-202/2010, has in fact no coverage.

There are granted the same long terms, including in trade, labor relations, etc. - where „emergency" and „timeliness" were mere phrases, contradicted by reality.

- O.G. no.2/2001 on the legal regime of contraventions, published in the Official Gazette, Part I, nr.410/25.07.2002, with amendments by Law no. 180/2002, with subsequent amendments and completions;
- O.U.G. no. 195/2002 on traffic on public roads, republished in the Official Gazette, Part I, nr.670/03.08.2006, with subsequent amendments and completions;
- Law no. 61/1991 on the punishment of violations of rules of social life and public order, published in the Official Gazette, Part I, no. 387/18.08.2000, with subsequent amendments and completions;
- Law no. 10/2001 on the legal status of property unlawfully taken over from 6 March 1945 - December 22, 1989, republished in the Official Gazette, Part I, no. 798/02.09.2005, with subsequent amendments;
- Law no. 221/2009 on political and administrative convictions and assimilated measures, rendered from 6 March 1945 – 22 December 1989, published in the Official Gazette, Part I, no. 1066/17.11.2004, with subsequent amendments and completions;
- Law no. 192/2006 on mediation and organization of mediator profession, published in the Official Gazette, Part I, no. 441/22.05.2006, with subsequent amendments and completions;
- Law no. 146/1997 on legal stamp duties, published in the Official Gazette, Part I, no. 173/29.07.1997, with subsequent amendments and completions;
- O.U.G. nr.212/2008 no.146/1997 for amending the law on legal stamp duties, published in the Official Gazette, Part I, nr.837/12.12.2008, approved by Law no. 276 / 2009;
- Criminal Procedure Code, republished in the Official Gazette, Part I, no. 78/30.04.1997, with subsequent amendments and completions;
- Law No. 508/2004 on the establishment, organization and operation of the Public Ministry of the Department for the Investigation of Organized Crime and Terrorism, published in the Official Gazette, Part I, no. 1089/23.11.2004, with subsequent amendments and completions;
- Criminal Code of Romania, republished in the Official Gazette, Part I, no. 65/16.04.1997, with subsequent amendments and completions
- Law no. 8/1996 on copyright and related rights, published in the Official Gazette, Part I, no.60/26.03.1996, with subsequent amendments and completions;

Factual situation reveals that many times, in cases where emergency is required, there are given terms even larger than for the other, having another nature and in total contradiction with the ones regulated as imperative.

Regarding the above mentioned provisions, on the possibility of granting short terms - „even from one day to another", in order to materialize this provision, it is required a day allocation of the panel of judges (which is not happening).

It is also required a sufficient number of courtrooms and judges - and not at least, the optimization of a unitary organization of the entire legal apparatus, to mitigate the disturbances on the workload of magistrates.

♣ In the same context, we also emphasize the need to enhance the transparency of the legal by the electronic publication of all judgments, of the free access of citizens to these decisions in their entirety and by publishing the names of judges who have ruled.

♣ On the other hand, the obligation of the magistrates to professional insurance and, as applicable, hold them responsible for legal errors, are essential - both in terms of liability and also - their protection in case of lack of fault.

Up to present all these things were just „raised" or „faked" without gaining a concrete manifestation.

It is to be noted that many of these measures are also found in the European Commission's recommendations[4]- in line with the objectives of the Cooperation and Verification Mechanism (CVM), created in order to establish an impartial, independent and effective legal and administrative system, endowed with sufficient means, inter alia, to combat corruption.

We believe that by implementing such measures (including in law), major objectives will be achieved in the reform measures, and only then we can talk about:

- Transparency;
- Predictability;
- Liability;
- Efficiency of the activity of the judiciary as a whole;
- Improvement of the quality of justice administration;
- Unitary practice.

Only under these conditions we can achieve such objectives and we can use another phrase - that of the „Great Reform".

Returning to the subject matter of „acceleration of solving trials „ – we consider that under the law in question, sharing skills in order to relieve the courts, simplifying the summoning procedure or decreasing the legal review procedures, are indirect measures of „shortening" the trial solving terms and, outside of a coherent strategy and action programs (legal, organizational and procedural), proposed objectives cannot be effectively achieved.

On *simplifying the summoning procedure* - regulation that is found in the contents of Article I, section 4 of L.202/2010, amending Art.82 Civil Procedure Code and of the new introduced article - Art. 132^1 Civil Procedure Code, we express some reservations about their content.

Specifically: the telephonic notifications of the parties, or the notifications by telegraph, facsimile, electronic mail or other means for presentation at term, or sending / receiving confirmation of an act, respectively the indication of these identification / contact data in

[4] See the 4th Annual Report of the Commission to the European Parliament and Council on progress in Romania under the Cooperation and Verification Mechanism (Brussels, 20.7.2010) and Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to achieve specific benchmarks in the judiciary and the fight against corruption (JOL354/14.12.2006, p.56)

the requests / actions intended to the courts - are at least „border" issues, if not an infringement of constitutional rights.

Regarding *timeliness, emergency* and *necessity* of this law, our point of view is that in practice (as opposed to the explanatory memorandum), was not likely to lead to an acceleration[5] in dealing with cases, or to a relief of the courts under the procedural aspect. Nor can be seen that the law has led to some simplification in this respect.

In the explanatory memorandum it was further submitted that Law 2002/201 would be aimed, on one hand - to simplify and accelerate the trial solving proceedings and on the other hand - it was meant to „prepare" the implementation of new codes??? ...

We consider the motivation to be totally unjustified and that this law is inappropriate, because in terms of real effects, has actually generated no fact situation according to the explanatory memorandum. Moreover, we consider the emergency in its adoption, neither justified nor realistic, given the fact that the entry into force of the new Civil Code was expected.

Often, under the pretext of the „reforming" need of a system or another - reform is made in a radically way, in great haste, without thorough analysis - and worse, even of certain institutions and legal texts, which in time have proven their viability and stability.

In fact the same haste and precipitation can be seen within the adoption of other new codes.

With respect to this issue, on which we expressed our views in other occasions, we point out that the law to which we referred and new codes were not expressly imposed by the European community and even less, no deadlines have been established.

It is true that in many country reports, the European Commission made reference to the new codes to be adopted, recommendations, but they were taken by the Government on its own initiative, through the public commitment - and not imposed by the European institutions.

European Commission has not highlighted the need for further codes, but highlighted other requirements, including:

- need for legal reform to streamline the administration of justice;
- independence and impartiality;
- improvement of the legislative framework;
- simplification and acceleration of legal proceedings;
- acceleration in solving cases;
- transparency;
- consistent practice / consistency of jurisprudence;
- improvement of training and recruitment standards for magistrates;
- full disclosure of law cases and general access to them;
- increase of effectiveness of the disciplinary system and performance of judiciary inspection for legal liability;
- corruption diminishing;
- prevention of conflicts of interest[6] in procurement / management of public funds and money laundering;
- forfeit of goods whose origin can not be justified, etc.

Therefore, the Commission only assessed / analyzed facts, to which it made such recommendations to achieve certain goals at the level of the entire legal apparatus.

[5] One illustrative example in this respect: At The Civil Section VIII - Labour disputes and social insurances of Bucharest Court, are registered several actions in late 2011 which received the first term within the half of 2013?!

[6] See the Emergency Ordinance no. 76/2010, adopted by the Romanian Government on 20th June 2010.

In other words, following the performed assessments, the Commission highlighted irregularities, made recommendations to achieve objectives - to improve the legal and institutional framework, or to set terms, or to impose specific ways and tools to achieve them.

Returning to this „rush" to adopt codes that Romanian Government has undertaken, there is something else, which we consider particularly important for legal practice. We refer to the fact that adoption and enforcement of the new civil code and of the new criminal code was not performed - and unfortunately, the circumstances show that neither the latter (new criminal code) will be performed in future, with the new code of criminal procedure, as in vase of the civil code. We mean, it was natural that the adoption and entry into force of the new civil code to be done together with the new Civil Procedure Code and the new criminal code which will enter into force, to be done with the Criminal Procedure (package) for a better correlation of the provisions they contain.

We are now in a position where, in substance, the former provisions on civil procedure are applicable to the new civil code already entered into force on 1 October 2010?! ...

In the same idea we hope that will not happen the same with the new Criminal Code which will enter into force.

Under the new Criminal Code, we consider it appropriate to draw attention to another aspect that we consider worth to be analyzed by decision makers.

We mean that, before the entry into force, thorough analysis and impact studies are required (otherwise required by all laws of this scale), but primarily motivated by the fact that this involves an economic, financial, logistics and personnel analysis caused by the actual provisions of this code.

Otherwise, it is likely to have a nasty surprise (as with other legislation adopted and entered into force), but which, on a practical aspect - could not produce the expected results.

It is also emphasized the special importance of these codes including practical work, which will influence the performance of the judiciary and of the entire apparatus and will have both a powerful impact on social, economic level, with implications and multiple effects in society as a whole.

In comparison with the „Small reform" - by which changes, amendments or repeal of many provisions of various laws were made (which we mentioned earlier and on which we expressed our opinion), we shortly highlight the ones on the new Civil Code entered into force (yet generally), without going into a concrete content analysis of new adopted texts.

- Firstly, we consider that the statements of reasons that led to the many laws that were adopted, supplemented, modified or abrogated, find no counterparts in many respects to the real practical situation, in terms of expected effects (some already outlined);
- Also, there were many critical opinions - that the monistic conception for the unitary regulation of private law relations in a single code - adopted in the new civil code, does not justify the incorporation of regulations on people, trade and family relations without any distinction.
- In addition, multiple relationships and regulation of commercial legal relationships are not to be found in this new code, while remaining distinctly regulated by special laws[7].

[7] Apud Gheorghe Buta – „New civil code and the unity of privat right" in „New Civil Code. Comments", Ed. Universul juridic, Bucharest, 2010, pp.15-39.

To mention above all:
- Trade Companies;
- Insurance companies;
- Credit institutions;
- National firms and companies;
- Autonomous companies;
- Cooperatives.

➢ From the Code there also missing a series of contracts such as:
- Lease contract (GO no. 51/1997);
- Franchise contract (GO no. 52/1997);
- Factoring contract (Law no. 246/2009).

♣ a series of actions and limitation periods specific to commercial materials in:
- Law no.31/1990 on trading companies - Article 34, Article 48 paragraph (3) and Art.82 paragraph (4);
- Law no. 11/1991 regarding unfair competition (Article 12);
- Law no. 58/1934 on the bill and promissory notes (Article 94);
- Law no. 59/1934 on checks (Article 73);
- O.U.G. no. 51/1991 for exploitation of state assets (Article 49);
- Law no.137/2002 on the acceleration of privatization (Article 34);

♣ many other regulations are not to be found in the code, cocerning:
- Trade register;
- Insolvency;
- Banking;
- Air, land, river and sea;
- Securities and capital markets;
- The bills right, etc.

- All these examples demonstrate that the new Civil Code (as opposed to the explanatory memorandum), has not incorporated all regulations and not fully unified private law - which supports the view expressed earlier, that the „uniqueness if regulation" issued as objective in the explanatory memorandum, is contradicted not only by the practice, but also by the very content of the code.

- ➢ On the other hand, there was expressed the opinion that - in developing these regulations, which was intended to be consistent and with a general application, it was not taken into account the specificity of legal topics of law, the peculiarities of various branches of law , their legal means - which will give rise to conflicting interpretations, to a hindering of the completion of legal documents, especially in commercial matters.
- ➢ In the legal terminology that is found in its new Civil Code, reasoned opinions have been expressed in that some terms are incompletely defined, others imprecise, likely to create ambiguity, confusion and inconsistent interpretation[8].
- ➢ Undue precipitation in the adoption and entry into force of new code, is also supported by the fact that, through the implementing laws (very substantial in volume), there are made several additions to the text itself, which would have been

[8] See in this idea, Marilena Uliescu in „New Civil Code. Comments", Ed. Universul juridic, Bucharest, 2010, pp.9-14 (eg.: the term „professional", „enterprise").

avoided if there was no such hurry and the required impact studies, including appropriate debate, were carried out.

- In fact, in this respect, for us it became unfortunately a rule, that after the adoption of legislation, law, etc., enters into force with amendments, additions or repeal - and frequently there were situations when, by laws, rules, instructions, methods of implementation, the text itself has been altered, or in any other cases, in which the decision of Parliament was circumvented, down at ministerial level, by issuing orders and instructions for application.
- Compared with the intent (partially materialized without proper distinctions – s.n.), to integrate unitary the private law relations, we can ask why the new Labour Code was not incorporated into the new Civil Code?!

CONCLUSIONS

♣ We state that changes, additions and repeals of regulations of L-202/2010, although they hinted at relevant texts of very important organic laws (and the adoption of „new codes") –were all taken under „emergency", with little much debate (ie liability) - and that they were not based on appropriate studies on the effects of impact. In France for example, this is mandatory, and otherwise, such laws are considered to be unconstitutional.

♣ On the „acceleration of solving trials „ except those presented, we wonder how would this be possible, when, today, in Bucharest on the lists of authorized technical experts (specialty „facilities"), are only two people and one sworn translator / interpreter for Albanian??? ...

We also formulate two rhetorical questions:

1. In the current legislative context and the one emerging in the future, which will be the case and how to solve the issue of composition of the panel of judges, of the „specialization of courts"???...
2. If the unifying of private law relations in a single code was intended, why not call it „Private Code"??? ...

LEGAL PROTECTION OF YOUNG PEOPLE AT WORK - COMMUNITY AND NATIONAL LAW WITH OFFICIAL REGULATIONS

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Abstract: *Freedom of work, the specific principle of legal work, permits the employment of youth who aged 16 years-rule or 15 years-except. In this case, this category of employees enjoy special protection. The present article aims to enlarge on some aspects regarding protection of special young people at work.*

Keywords: *Work, Legal relationship of employment, youth, rights, obligations, special protection.*

The notion of work

Safety and health issues was an important concern in the European Union[1], provisions in this regard can be found in even the treaties establishing the European Communities, but also a large number of directives adopted on their basis[2].

The term „work" comes from the Slavonic - Monk and has several meanings, such as productive activity, but the result of this activity. In another sense, this term can be regarded as employment and all employees. Perceived as a free action, creative, but also as an obligation, work can mean pain and suffering and even torture[3].

Present on any society, work is an activity governed by rules that are commonly accepted in society. Employment law is a branch of law characterized by a set of legal rules governing a distinct object, namely the social relations of work that arise between employer and employees during the conduct of business activities[4].

On the basis of legal work is the employment contract[5]. „Individual employment contract is a contract under which an individual, called employee, undertakes to perform work for and under the authority of an employer, person or entity, in exchange for remuneration called wage". (Article 10 of Labour Code). Youth is a special subject of the individual employment contract.

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[1] Cosmin Cernat, *Armonizarea dreptului intern cu dreptul comunitar al muncii*, Cermaprint Publ. House, Bucharest, 2007, p.278.

[2] Nicolae Voiculescu, *Dreptul comunitar al muncii*, Rosetti Publ. House, Bucharest, 2005, p.135

[3] Alexandru Ţiclea, *Tratat de dreptul muncii, ediţia a V-a revizuită*, Universul Juridic Publ. House, Bucharest, 2010, p. 7.

[4] Cosmin Cernat, *Dreptul muncii – curs universitar, ediţia a III a*, Universul Juridic Publ. House, Bucharest, 2011, p. 96.

[5] Ion Traian Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, Universul Juridic Publ. House, Bucharest, 2010, p. 37.

European Standards and Labour Code

In Community law distinguishes between „children and adolescents". The child is one who has not attained the age of 15 years, while the teenager is person aged 15 to 18 years „young" is the generic term given to any person aged at least 15 years to 18 years[6].

At the community level, protection of young people at work is governed by the Directive. 94/33/EC[7]. The contents are determined aspects of working time and rest periods, prohibition of child labor, possible exemptions from the ban, and general obligations of employers about hiring people. It is also regulated working hours, night work, rest legal and activities involving youth exposure to harmful factors.

Internally, the Labour Code regulates individual labor contract forms and conditions for concluding such a contract.

Ability to use and exercise the person is a prerequisite for concluding an individual labor contract[8]. Article 13, Labor Code provides:

(1) An individual becomes able to work at the age of 16 years.

(2) An individual may sign an employment contract as an employee at the age of 15 years, with the consent of parents or legal guardians for appropriate activities to develop physical skills and knowledge, that this does not jeopardize their health , development and training.

(3) Employment of persons under the age of 15 is prohibited.

(4) Employment of persons under judicial prohibition is prohibited.

(5) Employment in heavy jobs, harmful or dangerous to do after the age of 18 years, these jobs are determined by the Government.

For certain functions (jobs), full capacity to enter into an employment contract is acquired, by exception, only the age of 18 years (eg, managers, drivers for international transport of goods or passengers) or 20 years (in forestry)[9].

Article 49, para. 4 of the memorandum states that the Romanian minimum age of employment, age 15.

Usually employment of children is not allowed. But notwithstanding, children can be employed in the following situations:

- Children aged 16 years subject to compulsory schooling on a full, carrying only light work (article 5 par. 2 of Government Decree no. 600/2007)[10] on young people at work.
- Children aged 15-16 years are able to be employed only with the parents or legal guardians, provided the activities are appropriate physical development and skills, avoiding endangering health or training professional.

Requirement of parental consent or legal guardians is required, whether children are in compulsory schooling period or not.

Agreement for individual contract of employment must be prior to or concurrent with the individual labor contract, the agreement must also be given by both parents. If parental

[6] Cosmin Cernat, *Dreptul muncii – curs universitar, ediția a III a*, Universul Juridic Publ. House, Bucharest, 2011, p. 96.
[7] Cosmin Cernat, *Armonizarea dreptului intern cu dreptul comunitar al muncii*, Cermaprint Publ. House, Bucharest, 2007, p. 302.
[8] Alexandru Țiclea, *Tratat de dreptul muncii, ediția a V-a revizuită*, Universul Juridic Publ. House, Bucharest, 2010, p. 385.
[9] Ion Traian Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, Universul Juridic Publ. House, Bucharest, 2010, p.231.
[10] Published in the Romanian Official Gazette No. 473 din 13 iulie 2007.

consent is missing, the contract will be null and void, invalidity can be remedied. Withdrawal of parental consent lead to termination of contract.

Labor Code criminalizes failure to comply with laws relating to minimum age of employment. Thus, violation of these statutory provisions is an offense that is punishable by imprisonment between 1-3 years.

Thus, both international norms and the European labor that have established minimum age for admission to employment age of 15 years.

According to Directive 94/33/CEE[11], children and adolescents are considered specific risk groups requiring safeguards regarding their safety and health. There are, however, where the ban on minimum age of employment has no applicability. These areas are areas of cultural, sports, advertising, areas where employment of young people under age 15 is considered possible.

Cultural, artistic, sporting or advertising can be performed by the children, only if they obtain prior authorization issued by competent authority[12]. This work should not be likely to prejudice the security, health or child development and also not likely to affect school activities, participation in guidance programs or vocational training or ability of children to benefit from the instruction received. Notwithstanding the authorization procedure, Member States may, by legislation or regulations, can supply the children reached the age of 13 years the nature of cultural and artistic activities, sports or advertising[13].

The exercise of individual employment contract shall be determined and limited in both rights and obligations of contracting parties under the law.

With regard to working time and rest time, it is different from adults to youth. Thus, Article 134 of the Labor Code provides that:

(1) In cases where daily working time is more than 6 hours, employees are entitled to a lunch break and other breaks, as determined by the applicable collective agreement or internal regulations.

(2) Young people aged under 18 years receive a lunch break of at least 30 minutes when their daily working time is more than 4:30.

Working time is the period in which the employee performs work lucrative, fulfilling duties and powers under the individual employment contract and employment laws.

Depending on the workload, the normal work of an employee is 8 hours / day and 40 hours / week. Work can be the day (06.00 to 22.00) and night (22.00 to 06.00).

Young people are a special subject in the individual employment contract, if their normal working hours will be 6 hours / day and 30 hours / săpămână. The employer has a duty to ensure young people working conditions appropriate to their age and to take measures to ensure security and protect health.

Young people under the age of 18 years will not be able to perform night work or overtime and benefits from the annual leave of at least 24 working days.

According H.G. no. 600/2007, the young people at work, *young people can not work in activities that:*

[11] Cosmin Cernat, *Armonizarea dreptului intern cu dreptul comunitar al muncii*, Cermaprint Publ. House, Bucharest, 2007, p. 302**.**

[12] Nicolae Voiculescu, *Dreptul comunitar al muncii*, Rosetti Publ. House, Bucharest, 2005, p.137.

[13] Dan Ţop, *Tratat de dreptul muncii,* Wolters Kluwer Publ. House, Bucharest, 2008, p. 432.

- Clearly beyond their physical or psychological;

- Work involving harmful exposure to toxic agents, carcinogens causing genetic, hereditary, with harm to the fetus during pregnancy or having any harmful effect on human chronic;

- Work involving harmful exposure to radiation;

- The risk of accidents that are supposed youth can not identify or prevent, due to lack their sense of security or their lack of experience or training

Decision establishes that the employer is obliged to take measures to ensure security and protect the health of young people, taking particular account of specific risks arising from their inexperience, lack of awareness of existing or potential risks or that young people are still in development.

Decision Directive 95/33/CEE implement fully the provisions on the protection of young people at work, which aims to ensure protection of young people from economic exploitation and against any work that may harm the health, safety or physical development, mental, moral or social. Assess risks to young people about their work must be done before actual work or whenever the work of major changes have occurred work.

According conditions of Government Decision no. 600/2007[14], aimed at assessing:

- Work equipment and workplace organization and workstation;
- The nature, extent and duration of exposure to physical, biological, chemical
- Organization, category and use of work equipment;
- Establish procedures work and as work progresses, work organization;
- The training and education to young people.

Employers must inform, in writing, not only young people about the possible risks and of all measures taken in regard to their safety and health, and parents or legal guardians of children engaged in the law.

In our country there is need and requirement regulations in respect of young people at work is a priority, given the conditions of their work processes by the public sector. In terms of protecting young people at work, protective measures relate to safety and health at the physical, mental, moral and social development of young people and their education.

In Romanian law, regulations concerning protection of youth work are summarized in the Labor Code, nr.600/2007 Government Decision[15] on the protection of young people at work, and Government Decision no. 867/2009 on the prohibition of hazardous work for children[16].

While the Government Decision no. 600/2007 on the protection of young people at work apply to youth employed with individual labor contracts in the formal sector, Government Decision no. 867/2009 on the prohibition of hazardous work for children, apply the formal sector and the informal. The formal sector means activities or work performed by individuals or legal entities with respect to a contractual forms, while the informal sector of a child understand the work done for individuals without a completed contract form (eg domestic activities their households).

According to Government Decision no. 867/2009 on the prohibition of hazardous work for children, are considered hazardous work, the following activities: (*art. 2, letter b*), all activities of the child or child's direct involvement, which, by their nature or the circumstances

[14] Cosmin Cernat, *Dreptul muncii – curs universitar, ediția a III-a*, Universul Juridic Publ. House, Bucharest, 2011, p. 99;

[15] Published in the Romanian Official Gazette No. 473 din 13 iulie 2007;

[16] Published in the Romanian Official Gazette No. 473 din 13 iulie 2007.

in which carries harmful to health, safety, or morals of children's development (activities that prevent the presence of children to compulsory education, vocational guidance programs), activities involving forms of slavery or similar practices - sale or trade of children, forced labor , forced or compulsory recruitment of children for use in armed conflict, use in prostitution or illicit activities such as drug production and trafficking.

Children are and must remain a priority, and childhood is a time of life to be dedicated to development and education. In this respect, Romania has adopted a series of relevant labor laws that are intended to protect young people against exploitation at work.

In support of this objective, were adopted domestically Government Decision no. 600/2007[17] and Government. 867/2009[18], which is transposed Directive. 94/33/CEE.

Vision international labor organisations

International Labour Organisation estimates that some 115 million children are engaged in hazardous work. This negative effects on health, safety and child development, has become a problem. Therefore eliminating child labor exploitation is one of the most urgent goals of the moment. In addition, the International Labour Organisation statistics show that each year approximately 22,000 children die from accidents.

Child labor continues to exist despite existing criminal offenses, both national and European level.

In our country the „Save the Children" undertake activities to reduce vulnerability and to provide support for social and educational reintegration of child victims of trafficking or other serious forms of exploitation at work. Through this program, children not enrolled in education, are encouraged to regularly attend school by providing psycho-social counseling, legal advice, providing school supplies and food, drugs, and by providing tutoring and leisure opportunities.

Since its establishment, the International Labour Organization has focused on legislative regulation of issues concerns the worst forms of exploitation of youth labor, adopting this convention that established the minimum age for employment of young people at work. Hazardous work are among the worst forms of work involving children, the need for action to eliminate this form of exploitation has been the World Conference on Child Labour, The Hague in 2010.

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PARTICULAR ASPECTS REGARDING THE MEETING OF THE OBLIGATIONS IN THE LIGHT OF THE NEW REGULATIONS OF THE CIVIL CODE

Manuela TĂBĂRAŞ[*]

Abstract: *Our civil law has been enriched as of last autumn with new institutions in the field of execution by equivalent of the obligations, being obvious the concern of the lawmaker to protect the contractor that in good faith has exerted its contractual obligations, by ensuring a full coverage of the entire prejudice, which is but natural in a modern state.*

When reading the provisions of the new legal instrument we can but notice the doctrinal culture of this lawmaker, which has taken into account the imperatives previously claimed by the legal practice in the field and also by the studies and proposals of lege ferenda of those who have dedicated themselves in a doctrinal manner to the study of this field and has recognized in full in the new provisions the right of the citizen harmed by the failure to comply with the contractual obligations to receive damages to cover the prejudice created with guilt, even in the lightest form, by the debtor, and also all the losses and benefits collateral to the main failure to perform.

Keywords: *moratoria damages, penalizing interest, penal clause, confirming earnest, penalizing earnest*

Far from us the thought of trying to even tackle all the topics proposed by the current lawmaker in the field of fulfilling obligations. We try to limit this work to the liability the bears with the guilty party in their failure to perform the obligations assumed, as it is apparent in the new Civil Code.

Damages remain regulated in the new Civil Code (NCC) as *civil sanctions* triggered by the failure to perform for instance the promise to contract (art. 1279 NCC). The lawmaker, as different from the previous legislation, points out that the harmed party is entitled to both the return of the provision and, as the case may be, to reparations of the prejudice caused, w3hich represents a direct and necessary consequence of the unjustified failure to perform the obligation. As a result, both the guilty failure to fulfil the obligation and the failure to perform without a legitimate justification triggers the payment of damages.

The right to damages does not violate the creditor's right to request in court *execution in kind,* if possible, of the debtor's obligation and neither does it limit the creditor's right to claims both the damages contractually negotiated with the debtor for the failure to perform on time and under the contractual conditions the obligations and the execution in kind of the debtor's obligation in a perfectly legal cumulation allowed by the lawmaker.

The description of the method of quantifying the value of the prejudice provides for a reflection of the previous doctrine in the current text of the law, as the prejudice includes both the *loss incurred* by the creditor and the *benefit* of which the latter has been deprived, together with the reasonable expenses incurred by them with avoiding or limiting the prejudice. Furthermore, the creditor is entitled to repair the non-patrimonial prejudice and

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also the future certain prejudice, resulted, for instance, from losing a contract, a possibility of contracting, of getting any kind of advantage.

The limit set to this type of liability which may lead to significant difficulties, both in fact, to the debtor, and in law, to the judge vested with the settlement of the creditor's request of evaluating the prejudice, is stated in the provisions of art. 1533 and art. 1534 NCC. Thus, in the first article mentioned, the lawmaker limits the debtor's liability only to the *prejudices that the debtor has predicted or could have predicted* as a result of *the failure to perform as at the time of concluding the contract*, whereas in the second article mentioned above, the lawmaker points out that if the creditor has contributed to the occurrence of the prejudice, either by an action, or by an omission, guilty, however, or if the prejudicial event is a *risk assumed by the creditor,* the claims owed by the debtor are to be diminished prorated to the guilt of the creditor.

The third limit provided for by the lawmaker is the hypothesis according to which *the creditor, with minimum diligence could have avoided the occurrence of the prejudices,* which, however, in the absence of a natural actions have occurred, a case where para 2 of art. 1534 states that the debtor does not owe damages.

The fourth apparent limit set to the payment of damages is *the evidence of prejudice* as in the absence of a legal provision or convention for establishing in advance the value of the prejudice as at the time of occurrence of the action of failing to perform anticipated by the contractual parties, the creditor will have to produce the evidence showing that the failure to perform the obligation has effected a prejudice that needs to be covered by the damages requested – the responsibility of proving the prejudice bearing in full with the creditor.

Going further on, to the completions, additions to the damages, we note that *moratoria damages* are regulated the way they were in the past, or the so-called interest owed by the debtor from the due date to the time of payment, independently of the proof of the prejudice incurred by the creditor, which makes this institution similar to a certain extent to the institution of the penal clause. As a completion to the provisions of art. 1535 of the Civil Code, we need to take into account the provisions of the special law regarding the legal interest in the field of professionals and of the other category provided for by Government Ordinance no. 13/2011 regarding the remunerating and penalizing legal interest regarding the money obligations.

According to this normative act, the parties are free to set the rate of the interest due in case of delay in the payment of a money obligation, interest also called *penalizing interest* and which can also consist in an amount of money, as well as in another provision under any title or name, undertaken by the debtor in law as an equivalent of using the capital.

The interest must be set in writing and in the absence of such quantification, the legal interest shall be applied.

If no moratoria interests are owed higher than the legal interest, the creditor can cumulate apart from the legal interest also damages as full reparations for the prejudice. Interests can be capitalized (only the remunerating ones) and can generate in their turn other interests.

Therefore, we should note that *it is compatible to set moratoria damages involving the execution in kind of the obligation, but is incompatible to set damages to compensate for failure to perform the obligations, involving execution in kind*.

A second group of norms regarding the execution by equivalent has been designed by the lawmaker by regulating the penal clause and the earnest.

Penal clause represents, the same as in the old law, the convention under which the parties establish in advance the provision owed by the debtor in case of failure to perform the main obligation. In such a case the creditor does not have to prove the prejudice, as they do have to in case of damages.

Therefore, the nature of the penal clause remains that of civil sanction established in advance by the parties, based on the hypothesis of the guilty failure to perform the main contractual obligation. It is, however, worth mentioning that *the enforced execution in kind of the main obligation with the approval of the court cannot be cumulated in any way with the execution of the penal clause*, as the creditor is obligated to choose between the two types of executions and the debtor cannot be cleared by paying the provision due as penal clause, - this specific nature distinguishing the penal clause, again, from the institution of damages. However, being closer to damages, the penal clause is admissible in the event of contracts that establish that in case of termination/end of contract further to the debtor's guilt, therefore to contractual failure to perform, the partial payment made by the debtor should be kept together with the payment of damages.

In conclusion, *penalties cannot cumulate with enforced execution in kind, but can cumulate with damages, less the earnest.*

Starting from this rule, the lawmaker experienced considering the previous doctrine has established that *penalties can be cumulated with the execution in kind of the main obligation if the penalty has been agreed upon for the failure to perform on time or at the established place.* This enumeration is limitedly established by the lawmaker so that we cannot include in this hypothesis a different way of execution, proposed by the debtor, who in the light of these provisions must qualify as a failure to perform incompatible with any cumulation of the execution of the penal clause.

Another exception from the execution of the penal clause is *the lack of any guilt* of the debtor. We mention that even in the lest serious form, failure to execute an obligation which has become impossible to execute, the responsibility for proving such a case bears , of course, with the debtor.

The lawmaker of the new Civil Code also regulates the possibility of a court *to reduce the amount of penalties agreed by the parties*, this being a legal interference with the consensus principle, as per the provisions of Art. 1541 the judge being entitled to reduce the excessive penalties pertaining to a prejudice subsequently established and also in the case where the creditor has benefited from a partial performance of the contractual obligation.

As a novelty introduced by the Romanian lawmaker in the field of executing by equivalent a contractual obligation, we note the institution of *earnest* defined as being an amount of money or of fungible goods given by a party to the other party upon the conclusion of a contract, amount which upon the due date of the provision owed it is either withheld, or returned as the case may be.

The circumstance that in case of failure to perform the contractual obligations, the creditor terminating the contract can withhold the amount of money or of fungible goods or may demand even double the amount of the earnest,, as the case may be, can raise confusion regarding the different nature of the *confirming earnest* as against the damages, the mistake being to take one for another. They are, however, different in nature, if damages represent an advance of the provision, the confirming earnest represents a guarantee for the execution of the provision, *the creditor being in a position to choose for execution, or for termination of contract and reparation of prejudice. The withholding of earnest in such a case is similar in nature with legally quantified damages.*

Penalizing earnest represents, as different from the first case, a conventional clause applicable in the case of discontinuing the performance of the contract, a case where the party that has discontinued the performance loses as sanction the penalizing earnest agreed upon or returns, as the case may be, double the amount of the earnest received. The same as in the case of the penal clause, *penalizing earnest is returned when the prejudice conventionally estimated by the parties is not effected by the liability for the failure to perform by any of the contracting parties.*

If the lawmaker has instated in the first part of the section regarding the execution by equivalent, as a general title, the creditor's right to damages, regulating in the second part of the section the methods of conventionally evaluating the prejudice, in the last sub-section, also in principle, the lawmaker points out that the guilt of the debtor is essential to triggering their liability for repairing in full the prejudice, a coverage that also includes the expenses incurred by the creditor with avoiding or limiting the prejudice, including here also the repairing of the non-patrimonial prejudice, - instating in the provisions of art. 1548 Civil Code, the relative assumption of debtor's guilt derived from the mere fact of the failure to perform.

Thus, as per art. 1545 Civil Code, if the contract expressly states the right of any of the parties to terminate the contract, the one that terminates the contract loses the earnest given or, as the case may be, if the one that terminates the contract is the one that has received the earnest, they must return double the amount of the earnest, therefore losing from their asset an amount equivalent to the earnest received.

It worth noting the lawmaker's care to regulate expresis verbis the fact that the earnest is returned when the contract is terminated for reasons that do not trigger the liability of any of the parties.

Significantly enough, the conclusion is that in case of including this type of earnest, the creditor of the obligation not performed cannot choose between demanding the execution in kind of the obligation by a court decision that is ruled in lieu of a contract and demanding the termination of the contract with the payment of damages, as it is exactly this type of anticipative sanction chosen by the parties that is equivalent to recognizing a right to deny without reason by any of the parties the performance of the contractual obligation, under the condition, which is in fact unchallenged, of paying an amount equivalent to the earnest and placing the parties in the positions they held before entering the agreement (return of the earnest received, writing off the promise from the land registry, etc.).

It remains, however, unclear the method to settle cases where the prejudice derive3s from the devaluation of the exchange currency, for FX risks. In commercial matter, these things have been rigorously and consistently resolved by the judicial practice of the courts of law, but in civil matter, this issue has been faced in its most serious and intrinsic need with the opacity of the legal practice. To be more explicit and also up-to-date, we refer to the conclusion of pre-contracts where the advance payment/currently the earnest is equal to the price of the building, followed by the refusal of the promising seller to go through with the sale without any reason, or with reason, under the circumstances of an increase in the price of the buildings (frequent case in the time span 2006-2007)– a case where damages should be equal to at least double or triple the amount of the prices of land in order to ensure a minimum satisfaction of the interest pursued by the promising buyer upon the time of entering the contractual commitment of obtaining a building of certain parameters contractually predetermined.

Last but not least, we should consider the predictability of the prejudice and the instated role of unpredictability in the matter of contractual performance and the related risks.

Thus, the law states that the parties are obligated to perform their obligations, even if such performance has become more costly, by the example given by the lawmaker, it is answered even the matter anticipated above of the increase in value of one of the provisions (the sold land) in exchange for the modest counter-provision of the other contractual partner.

Whatever defines this obligation is the size of the cost, as the lawmaker makes it clear that if the performance of the contract has become excessively costly due to an exceptional change, subsequent to the conclusion of the contract, a change in circumstance not assumed by the parties and unpredictable, such as the real estate market in respect of the exponential increase in the time span 2006-2007, which would obviously render unfair to obligate the debtor to perform their obligation, the court can choose taking into account the grounded arguments of the contractors between adapting the contract in order to equitably distribute between the parties the losses and benefits resulting from the change in circumstances and termination of the contract at the time and under the conditions established by the court.

The principle of full reparation of the prejudice caused by the failure to perform an obligation contractually assumed is therefore based on the recognition by the lawmaker of some of the direct, natural and unmediated prejudices which are caused by the failure to perform without doubts a contractual obligation, thus exonerating the parties from the obligation to prove the occurrence of such prejudices.

Therefore, although apparently old, the methods chosen by the lawmaker for the performance of the obligations have a new basis which illustrates the lawmaker's concern on the one hand for safeguarding the contract and executing it in kind, and on the other hand for finding the most effective means of covering an unpredictable, real, complete and not assumed prejudice incurred by the creditor of the obligation not executed.

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THE INFORMATIZATION OF THE JUDICIAL TECHNICAL EXPERTISE ACTIVITY FROM THE POINT OF VIEW OF CONTEMPORARY VALUES AND NORMS

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Abstract: *The present paper underlines the necessity and the impact of tangible technical expertise activity. The reform of justice in Romania is a complex, long-term process, which, on the one hand, aims at consolidating the independence of judicial system and, on the other hand, at shaping a modern public service meant to answer the present day requirements of society.*
Keywords: *judicial technical expertise, informatization, Microsoft Excel functions.*

Introduction

Judicial Development and Evolution. Promoting the new Legal Codes. The Probation System. At the beginning of 2009, the Ministry of Justice and Citizenship Freedoms approved a pack of strategic documents in the probation field:

- ✓ The 2009-2011 Strategy of Developing the Probation System and the 2009 Action Plan;
- ✓ The Educational and Probation Staff Professional Development Strategy as well as the 2009 Action Plan;
- ✓ The Action Plan regarding the Internal and External Communication for the 2009 Probation System.

1. Collateral Legal Services

The Ministry of Justice and Citizenship Freedoms has taken an active part in the legal process of enacting Law no. 178/2009 for modifying and completing the Government Ordinance no. 2/2000 regarding the organization of judicial and extra-judicial technical expertise activity. Thus, the Ministry of Justice and Citizenship Freedoms made amendments to the legislative proposal regarding amending and supplementing the Government Ordinance no. 2/2000 referring to organizing the activity of judicial and extra-judicial technical expertise. It was a common attempt of both Ministry of Justice and Citizenship Freedoms and Superior Council of Magistrates. Mention should be made of the fact that, in drawing up the amendment proposals, the two institutions have taken into account the observations and proposals made by courts and experts. Basically, the provisions contained in Law no. 178/2009 aimed at solving the problem of the lack of

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judicial experts and at taking some measures meant to make more efficient the technical expertise activity. [1]

2. Informatization

By enforcing the provisions of the GD 736/2003 and of the Order of the Ministry of Justice no. 1424/C/2003, the Department of Information Technology Operations coordinates the process of informatization in the case of courts and of the institutions subordinated to the Ministry of Justice. In 2004, the activity of the Department of Information Technology Operations consisted in achieving the following goals[2]: exploiting the existing system, providing web services for the Ministry of Justice, providing computers and programs, providing communication services (Internet, virtual private network), providing specialised assistance for courts and subordinated institutions. The expertise is considered to be the „queen of the evidences in court". The judicial technical expertise is regulated by the Ordinance no. 2/21 of January 2000 regarding the organization the activity of judicial and extra-judicial expertise[3] . This refers to: the quality of judicial technical expert, the procedural rules regarding the judicial technical expertise, the organization of the judicial technical expertise activity in addition to the Decree no. 79/1971 regarding both the accounting and the technical expertise, published in Official Gazette, Part I, no. 32/16 of March 1971, with the subsequent changes. In accordance with article 21, the expertise report has the following parts[4]:

a) the introductory part in which the following elements are mentioned: the institution which had the expertise, the date on which the decision of making the expertise was taken, the name and surname of the expert/ specialist, his/her speciality, the date when the expertise document is completed, its object and the questions to which the expert/specialist is to answer, the material on which the expertise was made and if the participant parties gave explanations during the expertise;
b) the description of the operations when making the expertise, the objections or explanations of the parts, as well as the analysis of these objections or explanations based on the expert's/specialist's conclusions;
c) the conclusions containing the answers to the posed questions as well as the expert's/ specialist's opinion over the object of the expertise.

In the case of the judicial technical expertise which evaluates goods, a series of calculations must be made in order to evaluate these goods at the date of their purchase. The evaluation, at the date when the expertise took place, takes into account the physical and moral ware of goods, the updating in accordance with the annual indices of consumer prices and with the annual inflation rate in the period 1971-2011*) [5] drawn up by the Romanian Institute of Statistics. Further on, we will provide some examples of functions more frequently used when calculating the value of the goods which are in expertise.

[1] The politics in the field of justice in 2009 - www.just.ro/LinkClick.aspx?fileticket=zKh7gArp%2FZQ%3D...
[2] *www.just.ro/.../0/.../Raportul%20de%20activitate%20MJ%202004.do...*
[3] Ordinance no.2/ 21 ianuarie 2000 regarding the organization of the judicial and extra-judicial technical expertise -www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=21979
[4] Ibidem
[5] Annual indices of consumer prices and annual inflation rate during 1971-2011*) - www.insse.ro/cms/rw/pages/ipc.ro.do

3. The use of Microsoft Excel functions in making an expertise and evaluating the goods in the judicial field

The use of relative and absolute reference . [6] When it is created a formula that refers to another cell or range, the cell or range reference can be relative or absolute. A relative cell reference (cell reference: The set of coordinates that a cell occupies on a worksheet. For example, the reference of the cell that appears at the intersection of column B and row 3 is B3.) adjusts to its new location when the formula is copied and pasted. An absolute cell reference does not change, even when the formula is copied and pasted elsewhere.[7]

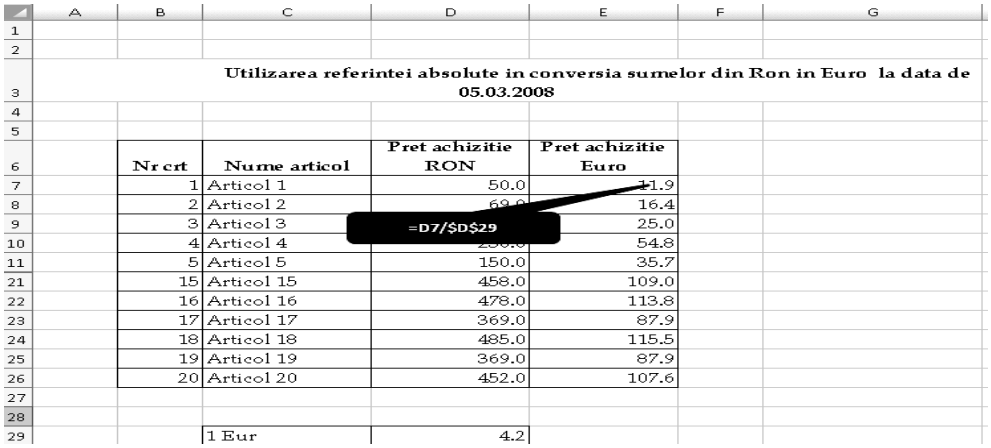


Figure 1 The use of absolute reference in converting amounts from Ron to EURO on 05.03.2008

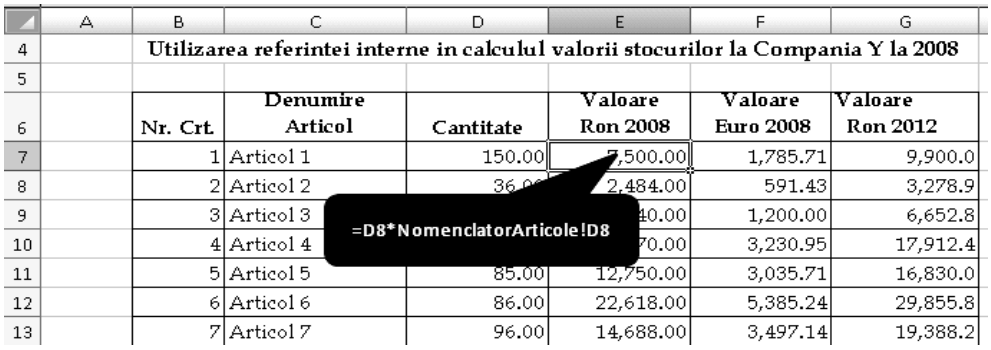
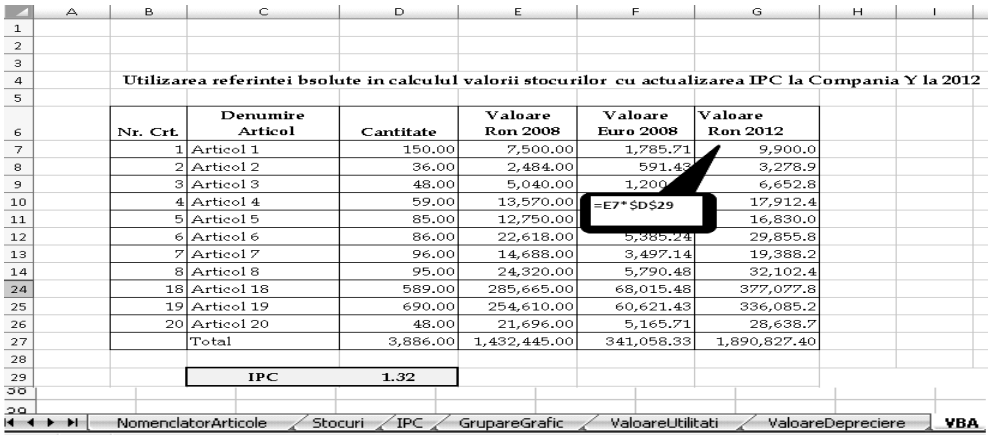


Figure 2 The use of internal reference in calculating the stocks value in Y Campaign in 2008

[6] Argentina Gramada-"Microsoft Excel- Basic Concepts"- http://sitebirotica.go.ro/excel.htm
[7] http://office.microsoft.com/en-us/excel-help/knowing-when-to-use-absolute-references-HA010287468.aspx



Utilizarea referintei bsolute in calculul valorii stocurilor cu actualizarea IPC la Compania Y la 2012

Nr. Crt.	Denumire Articol	Cantitate	Valoare Ron 2008	Valoare Euro 2008	Valoare Ron 2012
1	Articol 1	150.00	7,500.00	1,785.71	9,900.0
2	Articol 2	36.00	2,484.00	591.43	3,278.9
3	Articol 3	48.00	5,040.00	1,200	6,652.8
4	Articol 4	59.00	13,570.00	=E7*D29	17,912.4
5	Articol 5	85.00	12,750.00		16,830.0
6	Articol 6	86.00	22,618.00	5,385.24	29,855.8
7	Articol 7	96.00	14,688.00	3,497.14	19,388.2
8	Articol 8	95.00	24,320.00	5,790.48	32,102.4
18	Articol 18	589.00	285,665.00	68,015.48	377,077.8
19	Articol 19	690.00	254,610.00	60,621.43	336,085.2
20	Articol 20	48.00	21,696.00	5,165.71	28,638.7
	Total	3,886.00	1,432,445.00	341,058.33	1,890,827.40

IPC	1.32

NomenclatorArticole | Stocuri | IPC | GrupareGrafic | ValoareUtilitati | ValoareDepreciere | VBA

Figure 3. The use of absolute reference in calculating the stocks value with IPC updating in Y Campaign in 2012.

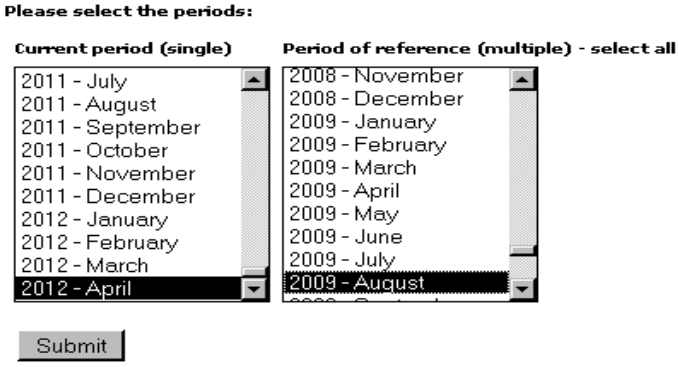


Figure 4. Choosing the index of the consumer price depending on the type of the good which is part of the expertise. (Statistics Institute)[8]

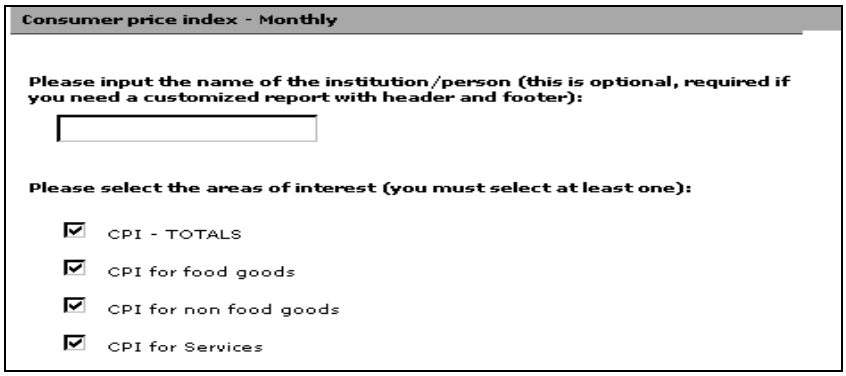


***Figure 5 Figure that** selects the areas of interest*

[8] https://statistici.insse.ro/shop/?page=ipc1&lang=en

CALCULATION FORMULAS to update the values using the Consumer Price Index (CPI)

$$A = \frac{\text{Initial sum to be updated} * \text{CPI}}{100}$$

or

$$B = \frac{\text{Initial sum to be updated} * \text{Inflation Rate}}{100} + \text{Initial sum to be updated}$$

We mention that the results of updated sums are the same, either using the consumer price index or the inflation rate because **Inflation Rate = CPI - 100**

Figure 6 CALCULATION FORMULAS to update the values using the Consumer Price Index (CPI)[9]

Indicele lunar al preturilor de consum – Rezultatele cautarii					
Perioada curenta	**Perioada de referinta**	**TOTAL IPC (%)**	**IPC Marfuri alimentare (%)**	**IPC Marfuri nealimentare (%)**	**IPC Servicii (%)**
2012 - Aprilie	**2009 - August**	115,06	110,50	119,53	113,41

Figure 7 Choosing the index of the consumer price depending on the type of the good which is part of the expertise. (Statistics Institute)

4				
5	**Situatia marfii depreciate la data 13.08.2009**		**Situatia marfii depreciate la data 17.05.2012**	
6			**IPC**	**Valoare ajustata cu IPC**
7	**Marfa retrasa**	211,921.60	119,53	253,309.89
8	**Marfa expirata**	149,523.30	119,54	178,725.20
9	**Marfa depreciata**	256,838.80	119,55	306,999.42
10	**Marfa depreciata partial**	505,564.80	119,56	604,301.61
11	**Total**	**1,123,848.50**		**1,343,336.11**

Figure 8. Calculating the value of the goods impaired using the index of the consumer price in X file.

Conclusions

1. The informatization of the judicial activity is a must.
2. The use of the Processor Excel tables which includes a large number of fpredefined unctions (232), which allows the judicial technic expert to define his/hers own functions effieicently and effective, according with the requirements of the courts.

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CONSIDERATIONS REGARDING CONTRAVENTIONAL LIABILITY OF LABOR LAW IN FRANCE

Ana-Maria MĂCĂRESCU*

Abstract: *The French Labor Code contains many provisions which incriminate and sanction several offenses committed, most of the time, by employers and their representatives, or other persons within or outside them. In the same time we also have incrimination regarding labor activities in Criminal Code, where the penalties varies from fine to imprisonment. Infrigements concern concluding, execution and termination of individual employment contract, obstructing certain activities, workplace discrimination, employee's salary.*

Keywords: *employer, employee, liability, offense, representative, union, individual employment contract, collective employment agreement, infringement.*

In France there is the notion of sanctionig labor law[1], and it is composed of all the legal rules that provide and sanction all the infringements (crimes or misdemeanors) related to labor relations. This notion has full coverage as the French Labor Code[2] contains many provisions which incriminate and sanction several offenses committed, most of the time, by employers and their representatives, or other persons within or outside them.

Contraventional liability is provided by the Crimal Code. Thus there are set five levels for fines, depending on the seriousness of the offense. So, the offense can be sanctioned with a fine or, depending on its gravity, with an alternative sanction – fine or imprisonment, and when they are crimes with imprisonment.

According to Article 131-12 of the Criminal Code, the sanctions for individuals who committed a misdeanor are:

1. fine;
2. deprivation or restriction of right unde Article 131-14;
3. repair penalty under Article 131-15-1.

These penalties arent exclusively, the can be coroborates with one or more additional sanctions under Articel 131-16 and 131-17[3].

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[1] Catherine Veron – Claviere, Philippe Lafarge, Jaques Claviere Schiele, *Droit penal du travail*, Dalloz, Paris, 1997; Elisabeth Fartis, Alain Coevret, *Droit penal de travail*, Edition Litèc, Paris, 2003; *Droit penal du travail*, Edition législations, Paris, 2008.

[2] The new Labor Code was enforced on May 1, 2008 and is the second coding after 1973. This was necessary in order to addapt legislation to current national and European conditions. It contains texts that weren't uncoded till then or texts were removed and took place in other codes.The legislator intended to facitate the access and understanding the new provisions by it's users. (Bernadette Lardy – Pélissier, Jean Pélissier, Agnes Roset, Lysiane Thaly. *Le Nouveau Cod du Travail Annote*, 28e édition, Groupe Revue Fiduciare, Paris, 2008, p. V).

[3] Additional penalties provided for these articles are: suspension drive license for a period not exceeding 1 year and it can be limitted to driving outside professional activities; prohibition of having or transport a weapon which requires a license, for a period of 3 years; seizing one or more weapons belonging to the punished person; withdrawal of the hunting license, with the prohibition to apply in order to obtain a new license for a period of 3 years; seizing goods used or intended to use to commit an illegal act; prohibition on driving land vehicles for a period of 3 years; taking a course of safty road awareness payd by the person in question, also a course of citizenship and one of parental responsibility, according to L.131-35-1; seizing the animal which was used in committing the offense or against which the offense was committed; prohibition of keeping animals for a period exceeding 3 years.

Misdemeanors can be punished with fine which may be:

1. 38 euros for illegal acts – class I;
2. 150 euros or more for illegal acts – II class;
3. 450 euros or more for illegal acts – III class;
4. 750 euros or more for illegal acts – IV class;
5. 1500 euros or more for illegal acts – V class, but it can't be bigger than 3000 euros for each illecgal act, except for the situation when it's stipulate dthat a repeat violation es a criminal offense (Article 131-13).

All misdemeanor in the Vth class can be imposed next to one ore more additional sanctions regarding deprivation or restriction of right, as it follows:

- driver license suspension for one year, and it can be limitted to driving outside professional activities; this limitation isn't possible when the driver license suspension may be limitted due to its gravity;
- suspension to one ore more vehicles belonging to the punished person foe 6 months;
- seizing one or more weapons belonging to the punished person;
- withdrawal of the hunting license, with the prohibition to apply in order to obtain a new license for a period of one year;
- prohibition to issue checks for a period of one year, other than those which allows the withdrawal of funds or those which are certified for using payment cards;
- seizing goods used or intended to use to commit an illegal act; seizing can be imposed for press offenses too;

The fine can be cumulatively imposed with deprivation or restriction of the right listed above. Deprivation or restriction of right listed above can be imposed cumulatively (Article 131-14). Maximum fine for legal entities is five times bigger than for individuals. The offenses concerning labour are gruped on content, usually in a final chapter of each title in Labor Code.

Offenses of the Labor Code regarding prevention or obstruction

Article L.483-1

Any hindrance or obstruction brought to the establishment of the entreprise committee, to the central committee, to the established entreprise committee, or to the free vote of the members or their regular operation, particularly by noncompliance with L. 433-13, L. 436-1 la L. 436-3 and data standards for their application is punishe by up to one year imprisonment and a fine of 3750 euros or only one of these. In case of recidivism, the punishemnt is imprisonment up to 2 years and a fine of 3750 euros.

Article 482-1

Anyone who will try or will affect either free designation or election of employee representatives or the regular exercise of their function, especially the failure of Article L.425-1 to L.425-3 and data standards for their application is punished up to 1 year imprisonment and a fine of 3750 euros or only one of these. In case of recidivism, the punishment is imprisonment up to 2 years and a fine of 3750 euros.

L.263-2-2

Anyone who will try to affect either free designation or election of the members, or the committee of health and safety work activity, particularly by noncompliance of the Article L.236-11 and data standards for their application is punished up to 1 year imprisonment and a fine of 3750 euros or only one of these. In case of recidivism, the punishment is imprisonment up to 2 years and a fine of 3750 euros.

Article 483-1-1

Anyone who will violate the provision of the Article L.395-5 and prevent the nomination of a committee group or regular operation of the committee shall be punished as the Article L.483-1 provides.

L.483-1-2

Any hindarnce or obstruction brought to the establisment of a special negociating body, to an European work or to a procedure of information or social dialogue, or to free election of their members or to their regular activity, particularly the failure of the Article L.439-7, L.439-8 and 429-12 will be punished as the Article L.483-1 provides.

Article 791-2

Any hindrance or obstruction of the free designation of representatives of smaller organizations, or to their regular activity, particularly by noncompliance with Article L. 712-1, L. 712-7 and 712-26 will be punished as the Article L.483-1 provides.

Article 481-2

Any hindrance or obtruction brought to the exercise of a union right as Article L. 412-1, L. 412-4 to L. 412-20 provides, will be punished as the Article L.483-1 provides.

Banning unions activities

Labor Code prohibits and sanctions banning in any way the establishment, organization and functioning of various institutions of employee unions. This offense is characterizes by following elements:

- damage caused due to failure of employees institutions and organizations and its sanctionig by Labor Code;
- the element of the obstruction consists in omission to accomplish certain legar or regulatory obligations;
- it is an intentional act.

Employee representatives powers are established by numerous pieces of legislation and it can happend that a single act of the employer to contravene to several criminal provisions. The court will consider in the classification of the offense if the author is guilty of committing crimes as much as they are specified in legal texts. Then, the court must take into account that the author's work was unique in order to impute a single act and if so, which one is chosen. The unique sanctions is based on rule *non bis in idem*. So, it's impossible for a person to be punished two times for the same offense. The case law established that „the same act placed in another legal text couldn't lead to a double indictment". When the judge holds a single classification:

- when there are two ore more offenses,for example obstruction and violation of the collective dismissal procedure as Article R.321-11 of the Labor Code provides, the penalty is the most severe one;
- the most appropriate solution when we deal a general sanction and a special one, is that it will be applied the latter even is less severe.

So, the employer will be punished if he didn't consulted the union regarding the period for paid holiday or the order of holiday, if these aspects aren't mentioned in the collective employment contract. This act is contrary to Article L.482-1 and L.483-1 of the Lbor Code (obstruction of consulting the representatives of the employees) and also to Article L.223-7

of the Labor Code[4] (in the absence of an agreement or a collective agreement, the period of leave is determined by the employer, as customary and after consultations with employee representatives) and is sanctioned by Article R.262-6 of the Labor Code. Therefore, are two possibilities for classification this offense: as a contravention or as a crime. When it's established a single classification, the author is considered as having committed a single offense. In case of obstruction and union discrimination, the court retains the crime of obstruction the union rights (Article L.481-2 of the Labor Code) and the crime of union discrimination (Article L. 481-3 of the Labor Code or 225-1 of the Criminal Code).

Obstruction in the exercise of trade union rights prohibits employers to consider the union membership or the exercise of a union right when it comes for employment, training or promotion. This provision aims therefore to protect freedom od association.

The offense of union discrimination protects the union itself or one of its representatives by any obstruction and provides that trade unions may organize freely themselves in all enterprises (Article L.412-1 of the Labor Code[5]). The employer can misinterpret sometimes both ways of classification of an act. For example the union member who was the subject of dicriminatory measure by the employer.[6] Article L.431-12 of Labor Law provides that law isn't an obstacle for those rules relating to the operation or management duty specified in collective employment agreements. Article L.426-1 of Labor Code also provides that law doesn't oppose to more favorable terms regarding nomination and functions of the representatives resulting from collective contracts.if the employer ignores a conventional rule and that is an onstruction offense, Court of Cassation rulled over Article L.153-1 of the labor Code on 4 of April 1991: „when under a legal provision a an agreement or a collective contract derogates from the legal or regulation text, violation of these stipulations are liable to penalties". So this article defines conditions under which violation of a rule established by convention may be sanctioned:

- breach of derogatory conventional rules;
- derogation should result in a contract or agreement , so the derogatpry agreement must have been part of an order or a decree of extension the criminal sanction;
- the least known conventional provision to be specifiecd by a legal text in a specific area.

In one case, it was created, thru a collective contract, a committee of health and safety which also consisted in union representatives. An employer fired an employee appointed as union representative in this committee, without taking into account the protection procedure provided by the Labor Code. The employer was sought by hinder committee's activity and he was acquitted because „unknowing a conventional provision isn't liable to criminal sanction, as the union is established in a collective convention that derogates from law as an express provision in a given area states, determined by Article L.153-1 of the Labor Code"[7].

Union activity can be improved by custom, and its violation isn't an obstruction. Thus, if the president of an association who unilateraly established a custom, allowing to alternant members from its executive committee to assist to preparatory meetings, the court didn't consider an obstruction because „breach of customs aren't penal sanctioned by Article L.153-1".[8]

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[4] Bernadette Lardy-Pélissier, Céline Lavanchy, Jean Pélissier, Agnès Roset, Lysiane Tholy, *Le code du travail annote*, 27eme édition, Grupe Revue Fiduciaire, Paris, 2007, p. 586-588.
[5] Bernadette Lardy-Pélissier, Céline Lavanchy, Jean Pélissier, Agnès Roset, Lysiane Tholy, *op. cit*., p. 1277.
[6] Cass crim 29 oct 1975 no 73-95.253: Bull crim no 231; Cass. Crim, 31 martie 1998, no 97-82.830.
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[8] Cass crim 4 apr. 1991, nr. 89-83.204: Bull. crim. nr. 164.

It is considered that obstruction can be committed by any means which includes commission od illegal facts or refrain from certain actions. Omission is the most often incriminated: the management don't gather, members aren't convocated, the committe isn't consulted, etc.

Obstruction of the Steering Committee function or union right aren't continued illegal acts.[9] In one case, after finding several violation of the Labor Code, the court acquitted a company director who remedy the situation after he was called to justify his acts. As it was a spontaneous act and he didn't know the legal provisions, all the director could do, in order to escape punishment, was to regret.[10] As an example for an illegal continuous act is failure the protective status granted to representatives: the employer refuses to reintegrate an employee who was illegally fired.[11]

Obstruction is committed by intention. Awareness of its committing means knowing the illegalcharacter of the act, the presumption beeing that „nobody is entitled to ignore the law" (*nemo censetur ignorare legem*). In our case we talk about the author's will to realize the offense as it is provided in legal texts. The will isn't presumed, it has to be proven.in order to exclude fault, the author's reason is irrelevant. An obstruction related to union activity is sanctioned when it was faud, no matter if it is a result of a personal misunderstanding that affects not by desire the exercise of the right to organise.[12] If it's not established the guilt, the court will not be able to establish criminal liability of the author.[13] The courts concludes from the facts found, the intentional willingness to committ the offense.[14] So, intention is presumed, which is a very severe solution for offenders. The lack of a registry for representatives problems is ostruction, even if, the omission is the result of unknowing a legat text and doesn't indicate any obstruction intention.[15]

The authors of obstruction

Law doesn't specify what people can committ an obstruction. Most of the times the offender is a unit director, but it also can be a representative of staff, an employee or a trade union. Labor Code incriminates obstruction but it doesn't indicate the offender.[16] For example, the president is the legal representative of an association and he must ensure Labor Code compliance. He can be sanctioned for obstruction, even if the association's statute doesn't confer him any power of its own and the board is the one who decided in that problem which proved to be an offense.[17] If two of the board members were fired without administration authorization, the president or the director who chair the board will be punished for obstruction on its activity; the author couldn't possibly be the general manager who signed the dismissal decision, for he was just an employee who had a technical mission and who acted as a subordinate of the board's president or director.[18] The obstruction of the board activity can be imputed to the general director of a liquidating company when he took part next to the president in board consultation, fact that was

[9] Cass crim. 26 aprilie 1988, nr. 86-93.566: Bull. crim. nr. 179
[10] Cass.. crim. 6 ianuarie 2004, nr. 02-88.240, nr.8 F-P +F: Bull. crim. nr. 4.
[11] Cass. crim. 26 iunie 1979 nr. 78-92.757: Bull. crim. nr. 231.
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[15] Cass crim., 22 oct 1975, no 93-478.74 Bull crim. 223.
[16] Cass crim. 9 dec. 1986, nr. 86-90.552: Bull. crim. nr. 368.
[17] Cass crim. 5 dec. 1989, nr. 89-82.031: Bull crim. nr. 467.
[18] Cass crim. 19 mai 1992, nr. 91-84.167.

considered a personal error relating to the offense. Such an error is the refusal, without legal justification, in violation of Article L.431-5 of the Labor Code, to notify the board that they are in possession of a document that was necessarily to inform the institution.[19] The obstruction can be committed by employees, the ones who opposed to reinstate an union delegate and representative with the company board, who was illegally fired. Such opposition from the employees couldn't be classified as force majeure to justify for the director not to execute his legal obligations which are incriminated and thus to be realiesed from liability[20].

Discrimination offenses

French Labor Code provides two sets of offenses. The first one refers to professional equality between men and women. The second relates to moral and sexual herassment at work. Regarding the fisrt category, the following acts are punishable:

- indicating in a job offer the sex or family status of the candidate;
- refusal to employ a person, to move him/her from his/her's job on account of sex, family status or pregnancy;
- taking any measure concearning wages, training and professional qualification, promotion, etc., on account of sex or pregnancy (Article L. 1146-1).

Those provisions aren't applicable when for a certain job there is a condition regarding the sex (L.1142-2).

In the second group, French Labor Code incriminates acts of moral and sexual harassment, as they are defined in L. 1152-1 şi L. 1153-1 (art. L. 1155-2). Article L.1152-1 states that nobody should be a victim to repeated acts of moral harassment that are likely to affect persons work, rights, dignity, to alter his physical or mental health or compromising his professional future. Sexual harassment is defined as those actions against a person in order to obtain sexual favors in his own benefit or for another person. It is also illegal to stop mediator's activity who was designated to reconcile parties to end moral harassment (Article L.115-1, Article 1152-6). All this offenses are punished with inprisonment of one year and fine of 3750 euros. However, there is as complementary punishment – displaying the court decision as the Criminal code states in Article 131-35 and its publication, in whole or extracted, in a newspaper (Article L.1146-1, Article L.1155-2). In this case there is a posibility to delay penalty (Article 132-58 to 132-62 of the Criminal Code) for the employer to restore professional equality between men and women (Article 1146-2 of the Labor Code) or to eliminate moral and sexual harassment (Article L.1155-3).

Infringements on individual labor contract

The first category concerns infringements regard fixed-term individual labor contract:

- concluding a fixed-term individual labor contract which has as object or effect the exercise of professions related to normal and permanent activity of the company (Article L.1248-1, Article L.1242-1);
- concluding a contract having another object than Article L.1241-2 and Asrticle 1242-3[21] provide;

[19] Cass. crim. 18 nov. 1997, nr. 96-80.002.
[20] Cass crim. 9 dec. 1986 nr. 86-90.552: Bull crim. nr 368.
[21] According to this article, a fixer-term contract can be concluded:
- based on the legal provisions ment to favor certain categories of unemployed people;
- when the employer is obliged to ensure training of employees for a period of time provided by law.

- failure to comply Article L.1242-5 which prohibits concluding fixed-term contracts as a result of temporary increase of the company activity, including exercise an occasional task, within 6 months from dismissalfor economic reasons and breach of Article 1242-6 which prohibits replacing an employee whose contract is suspended for a collective labor conflict or who refuses to carry out dangerous tasks (Article L.1248-2);
- concluding a fixed-term contractwithout specifying the period and the date of ending[22] (Article 1248-4);
- failure to conclude a contract in written form and failure to mention the reason for fixed term (L.1248-6);
- omission of giving a copy of the contract to the employee in two days from employment as Article L.1242-13 provides (Artcile L.1248-7);
- pay lower wages than a normal one paid by the company to a permanent hired employee having same position and qualifications (Article L.1248-8);
- not extending or renewing the fixed-term contract (Article L. 1243-12; Article L. 1248-9; Article L. 1248-10);
- violation of the prohibition regarding the sequence of contracts for the same job (Article L. 1248-11).

All these offenses are punished with fine of 3750 euros and in case of relapse, the punishement is fine of 7500 euros and 6 months imprisonment.

Another category of offenses refers to temporary contracts and availability ones. There are incriminated the offenses commited by temporary work agent and also by users, as it follows:

- failure to comply conditions for temporary work by others employers than entrepreneurs (users) of this kind of activity (Article L.1254-1);
- recruiting an employee and conlcuding a contract which doesn't mention those terms regarding availibility or they are inaccurate or the document isn't forwarded as Article L.1251-16 Article L. 1251-17 require;
- breach minimum wage;
- employer's failure to offer to a temporary employee more contracts which don't pose this risk (Article L.1251-34);
- using a temporary employee for another company and not concluding an availability contract in two days since that date (L.1251-42);
- the entrepreneur function without declare it at the administrative authority (L.1251-45) or without obtaining the financial warranty required by law (L. 1251-49).

Concerning individual contract execution, is illegal that a director or an employee to disclose or attempt to disclose a manufacturing secret and it's punished with 2 years of inprisonment and a 30000 euros fine. The court may also rule as an additional penalti for maximum 5 years, prohibiting civil and family rights under Article L.1227-1 of the Criminal Code.

The fourth category is related to undetermined labor contract termination:

- dismissal of employees without consulting the delegate personnel or committee when law provides such consultation (L.1238-2, L.1233-34, L.1233-35);

[22] Article L.1242-8 states that the total duration of a fixed-term contract is of 18 months and in some cases 24 months.

- dissmissal without notifying it for economical reasons for at least 10 employees (L.1238-4, L.1233-46), etc.

Offenses on wedges and other labor rights

The first category reffers to breach the rule which says that for equal work, or of equal value, equal pay for men and women. (L.3221-2, L.3221-6). Any contrary provisions are null. In this case the penalty can be delayed for the employee to fix the problems (L.3222-1, L.3222-2).

Other offenses punished with fine are:

- setting wages below minimum wage;
- payment of lower wages than monthly minimum;

In case of relapse will be applied Article R.3233-1 of the Criminal Code.

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THE EFFECTIVENESS OF THE RIGHT TO PENSION FOR RETIREMENT AGE IN THE ROMANIAN LAW SYSTEM

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Abstract: *The effectiveness of the right to pension, social and economic right constitutionally guaranteed in the Romanian system, depends on the efficiency of its legislative regulation and on the position the Constitutional Court adopts concerning it. Among the legislation many problematic issues we will treat the effectiveness of women's right to public pension for reaching the retirement age, through the prism of how equality between women and men is designed in this area concerning the retirement age. The legislator's solution in this field was constant until 2010, when a change of optics occurred. The differentiated treatment, consisting in different retirement ages was replaced by an undifferentiated treatment, consisting in the establishment of the same retirement age for men and women, the equalization of which was to be realized gradually.*

The change, although considered constitutional, didn't came into force, and the classical solution was maintained, as a result of a re-examination of the law, due to the review requested by the president of the State. The effectiveness of women's right to a retirement pension for reaching the statutory age is affected in relation with the men's same right, by maintaining the difference between retirement ages correlated with the undifferentiated duration of the period of contribution to the public pensions' fund. Regrettably, the Constitutional Court considered that such legislative regulation of both aspects of the right to pension for reaching the retirement age was constitutional.

Keywords: *right to receive a pension for retirement under the State pension scheme, retirement age, period of contribution, men, women, equality, discrimination, differentiated treatment, undifferentiated treatment, constitutionality control, revival of judicial opinion, review of legislative provisions.*

In the Romanian system, the Constitution guarantees, in its Title II, number of social and economic rights, rights *to*, in opposition to the liberties *of*. One of these social rights is the right to pension, guaranteed in the second paragraph of the article 47 of the Constitution, regarding the right to a level of decent living. The effectiveness of the right to pension depends on the efficiency of its protection mechanisms. The political guarantee of this right in the supreme law is only the first step towards its effectiveness. The second step is its legislative regulation, without which the right to receive a pension for retirement under the State pension scheme would remain just a goal, due to the fact that its specificity as social right requires an active involvement of the State, the latter's positive obligation to intervene in order to create, through the legislative activity, the public services or mechanisms necessary to the effective exercise of any social right.

Without the legislative regulation, the beneficiaries of the right to pension wouldn't be able to address the Constitutional Court, because in the Romanian system the legislator's omissions can't be object of the constitutionality control. Likewise, without the legislative regulation, the right to pension couldn't be protected by the ordinary judge against administration. Thus, once the legislation exists, the judicial protection of the right to pension is double: on the one hand, it is protected, as fundamental right, by the

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constitutional judge against the legislator and on the other hand it is protected, as subjective right, by the ordinary judge against the administrative measures that enforce the law.

In this contribution we will approach only a small part of the aspects concerning the effectiveness of the right to public pension for retirement age, due to its complexity, that involves many problematic issues and multiple actors, not only the Romanian legislator and the Constitutional Court, but also the ordinary Romanian courts of justice, the Romanian supreme court of justice and the European Court of Human Rights, considering the fact that the right to public pension for retirement age falls under the protection of the first article of the First Protocol to the European Convention on Human Rights, regarding the free enjoyment of possessions and of the article 14 of the Convention, regarding the principle of nondiscrimination.

The Romanian legislator's behavior in the field of social rights in general and of the right to public pension for retirement age in particular is subject to critic not only because its incoherence and the inflation of legal norms in the past years, but also because the unconstitutionality of legal provisions concerning many aspects of the right to pension. Considering the constraints of space, that make it objectively impossible for us to analyze and even to summarize all the problematic issues of the legislation, we will approach only the effectiveness of women's right to public pension for reaching the retirement age, through the prism of how equality between women and men is designed in this area concerning the condition of the retirement age.

Our choice is also justified by the need to emphasize the specificity of the legislator's view on equality between men and women in the matter of the right to pension, view that the Constitutional Court validated constantly, regardless of the modifications or the inconsistencies and despite the fact that on a single occasion (the Decision no. 872 din 2010[1] regarding the objection of unconstitutionality concerning the provisions of the Law on some measures needed to re-establish a balanced State budget, Law no. 118 of 2010[2]), the Constitutional Court considered that the right to the public pensions implied the right to a pension of a particular amount. On that occasion, contrary to what was to be done under the constitutional provisions, the Court refused to apply the exigencies of the article 53 of the Constitution (cocerning the restrictions of the rights and liberties' exercice) to the right to a particular amount of the public contributive pensions that were already in payment. Beyond this positioning of the Court[3], it is important to retain the fact that the Court recognized, in principle, the fundamental character of the right to a public pension.

The classical Romanian legal system's solution regarding the retirement age is the differentiation between men and women. Before 2010, the Constitutional Court considered that this solution complied with the Constitution. This means that the Court validated the legislator's conception according to which equality requires a differentiated treatment justified by the difference between the socio-professional situations of women and men. We emphasize that the basis of the differentiated legal treatment is not sex - a discriminatory ground prohibited under article 4 paragraph (2) of the supreme law -, but the consideration of the socio-professional situation in which the people of one sex or the other are in. Such understanding of equality as a right to difference that requires positive legislative measures

[1] Published in the Official Journal of Romania no. 433 of June 28, 2010.
[2] Published in the Official Journal of Romania no. 441of June 20, 2010.
[3] For the critical approach of this Decision, see E. M. Nica, „Notă la Decizia nr. 872 din 2010", *Pandectele Române*, nr. 9, Bucureşti, 2010, pp. 99-111.

in order to compensate for factual inequalities that represent disadvantages contrary to equality was affirmed by the Court on several occasions.

A. The position of the constitutional Court in 1995, 2006 and 2008

In response to an exception of unconstitutionality regarding the first paragraph of article 8 of Law no. 3 of 1977 on State pension insurance and social assistance, the Constitutional Court considered, in the Decision no. 107 of 1995[4], that the criticized legal provisions complied with equality guaranteed by the article 16 of the Constitution. The legal provisions instituted different retirement ages for men and women, namely 62 and respectively 57 years.

The Court began arguing the constitutionality of the legal provisions by recalling its case law concerning equality, which the Court deemed to be consistent with the practice of the European Court of Human Rights and the practice of comparative law at the constitutional level. According to the precedent of the Constitutional Court, „the principle of equality does not mean uniformity therefore if to equal situations must be applied an equal legal treatment the legal treatment of different situations can only be different".

The Court held that „violation of the principle of equality and discrimination exists when applying differentiated treatment to equal cases, without any objective and reasonable motivation, or if there is a disparity between the aims and means used by the unequal treatment. In other words, the principle of equality shall not prevent specific rules, if a difference of circumstances exists. Formal equality would lead to the same rule, despite the difference in circumstances. So the real inequality that results from this difference justifies different rules depending on the purpose of the law containing them. Therefore the principle of equality leads to emphasize the existence of a fundamental right, the right to difference and if equality is not natural, imposing it would be the establishment of discrimination".

Customizing these general rules to the provisions challenged in the case, the Court found that different retirement ages aren't discrimination because the differentiation of legal treatment is based on a real inequality between women and men concerning their general socio-professional conditions. This inequality makes women to be a disadvantaged group in relation to men. The Court held that „establishing a single pension age for both men and women would mean the establishment of equal treatment for different situations", which constitutes a violation of equality. In other words, differentiated treatment is constitutional, providing a positive discrimination measure aimed at ensuring equality between women and men, as motivated by social inequality of situation that were disadvantageous to women.

In the Decision no. 888 of 2006[5], the Constitutional Court ruled on different retirement ages for women and men as a result of the invocation of an exception of unconstitutionality arguing that the age difference was a discrimination against men in relation to women.

According to the contested legal provisions, the standard age for retirement (and therefore for entitlement to a public pension) was 57 years for women and 62 years for men. The age was to rise gradually, so that, from 2013, the standard age would be 60 years for women and 65 for men. In this regard, the Court reiterated that negative discrimination,

[4] Published in the Official Journal of Romania no. 85 of April 26, 1996.
[5] Published in the Official Journal of Romania no. 54 of January 4, 2007.

prohibited by article 4 paragraph (2) of the Constitution, should not be confused with positive discrimination, which doesn't violates equality. The Court held that positive discrimination is permissible because „it takes into account the specific situations or the pursuit to realize distributive justice, to cancel or reduce objective inequalities". In other words, the Court recognized, as it did in 1995, that certain factual inequalities justified different treatments, so that equality by law compensated the real inequality. The difference in treatment was, according to the Constitutional Court, a special protection measure based not on sex, but on the social situation arising from the sex difference.

This specification is important as it draws attention to the matter which could ensure the passage form certain legal measures to another, completely opposite, under the conditions of a change of social status in an evolutionary context. It is what the Court said, even if it did so by using other words and other method than citing foreign constitutional precedent, as it did in 1995. This time, the Court generically mentioned the example set by the laws of other states, and referred to EU recommendations.

It is therefore apparent the prudence of the Court's assessment on the pertinence of the equalization of the retirement age, since the Court recognized that the appreciation of the suitability of regulation in this area was at the free and exclusive discretion of the legislator. The use by the Court of the expression „legislative desideratum" may be however interpreted as equivalent to a recommendation (a subtle one, that's true) addressed to the legislator, in the direction of establishing if not a single retirement age, at least the progressive equalization of the retirement ages.

Two years later, when delivering Decision no. 191 of 2008[6], the Constitutional Court strongly affirmed that in its opinion the social conditions supporting the establishment of a single pension age for women and men didn't yet exist in Romania. However, in terms of the scale of the Court's considerations and of the diversity of its references to extra-national practices and the fact that the constitutional judge mentioned the incident case law of the European Court of Human Rights are a step further, compared to Decision no. 888 of 2006.

In fact, the Constitution's 20th article establishes the obligation to interpret constitutional provisions on fundamental rights and freedoms in accordance to the international treaties in this field to which Romania is part. Or, the European Convention on Human Rights being such a treaty therefore it is, indirectly, a standard of reference for the constitutionality control. More precisely, the Constitution is the reference standard for the constitutionality control, but the meaning of the Constitution itself, in the case of the provisions guaranteeing the rights and freedoms, must be circumscribed to the meaning given to those rights and freedoms under the European Convention, such as specified in the case law of the European Court of Human Rights.

Differently put, in 2008, the Romanian Constitutional Court refuses to do a revival of its opinion concerning the retirement age, under the pressure of the European or comparative law's solutions. The revival will be conducted in 2010, in the context of a new legal provision on retirement age, justified, as the Court itself stated, by the change occurred in the social realities.

[6] Published in the Official Journal of Romania no. 260 of April 2, 2008.

B. The revival of the Constitutional Court's judicial opinion regarding the equalization of the retirement age for men and women

In 2010, when controlling the constitutionality of the law on the unitary system of public pensions (Law no. 263 of 2010[7]), before its promulgation, the Constitutional Court changed its optics on retirement age, considering, in the Decision no 1237 of 2010[8], that the legal provisions introducing a gradual equalization of the retirement age for men and women complied with equality.

The revival of judicial opinion is defined as „the abandonment, wanted by the Constitutional Court, of a prior jurisprudential solution in favor of a new and incompatible one (…) the extraction from the same reference text (...) of an opposite interpretation to the one given until then"[9]. In the argumentation which supported the revival of its opinion, the Court, through citing its previous case law, continued to refer to the European Court of Human Rights' case law, but also referred to the precedent of the European Court of Justice and, in a generic manner, to the international context. The Constitutional Court's assessment on the change of social reality in Romania regarding the professional situation of women and men were based on declaratory specifications unsupported by sufficiently strong demonstrative mentions.

The controlled law provided that the standard retirement age for men and women - 65 years – was to be reached by a gradual increasing in accordance to a rescheduling provided by the law. For some categories of subjects, the standard retirement age was 60 years; its meeting was to be realized in the same manner as the one prescribed for the age of 65 years.

To support its consideration that equalizing the retirement age was in accordance to equality, the Court began by citing its previous case law and stated that in 1995, „by weighing the social conditions existing at that time, the Court considered that the legal provision of that moment reflected these social conditions" and thus were constitutional. The constitutional judge added that in 1995 he also „noted the tendency to change social condition at the European level and that he didn't exclude a possible reconsideration of his optics".

In its essence, the revival of jurisprudence consisted, with regards to the conception of equality concerning retirement, in the necessary gradual replacement of the differentiated measures of positive discrimination of women with the undifferentiated treatment of men and women. The Court said that „by adopting the Law on the unitary system of public pensions, the legislator has deemed it time to initiate a legislation that would lead gradually to the establishment of equal treatment between men and women in terms of retirement age". It is interesting to observe the prudence with which the Court referred to the legislative equalization of the retirement age, the Court considering that it couldn't categorically rule on this legislative provision's appropriateness, but also emphasizing that

[7] Published in the Official Journal of Romania no. 852 of December 20, 2010.

[8] Published in the Official Journal of Romania no. 785 of November 24, 2010. For a critical approach of this Decision, concerning not only the intrinsic constitutionality objections made, but also the extrinsic unconstitutionality of the Law no. 263 of 2010, see E. M. Nica, „Comentariul la Decizia nr. 1237 din 6 octombrie 2010", *Pandectele Române*, nr. 5, Bucureşti, 2011, pp. 153-178.

[9] Th. Di Manno, „Les reviriments de jurisprudence du Conseil Constitutionnel français", *Cahiers du Conseil constitutionnel* no. 20, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-20/les-revirements-de-jurisprudence-du-conseil-constitutionnel-francais.50637.html, juin 2006.

„opposition to this solution would mean now the very opposition to a social current social with international magnitude, at whose standards Romania is called to rise".

The prudence was that the Constitutional Court firstly recognized that social realities in Romania didn't support an absolute equality between men and women, but on the other hand considered that the gradual equalization of the retirement age was the only legislative solution - and the best one - able to ensure „adequacy to the social reality" and „to give a constitutional character to the legal norm".

From a tactical perspective, namely the need to substantiate its revival of judicial opinion, this excess of caution of the Court is understandable but it also proves nuancing an issue to say at least delicate. The Court accepted that there were no significant social changes that would have justified a revised conception of equality in relation to the retirement age, namely as equal treatment, undifferentiated treatment.

The Court thus seemed to admit that compared to the European level, the Romanian social realities didn't yet support an equal start, equality of conditions between women and men, objective and relevant differences of situation continuing to exist. However, such differences require different treatment. The legislator's option for undifferentiated treatment seemed justified to the Court only due to the perspective of the fact that these differences would blur. What the constitutional judge seemed to not want to specify was that in order to blur the differences and to support their eventual elimination (the only reason able to justify an undifferentiated treatment) the legislator had to adopt measures to encourage this effect, measures that therefore would have contributed to equality as equal start. Or, the Court referred to legislative measures of equalizing the treatment, and not of supporting equality as equal start.

Moreover, the Court referred solely to one of the three requirements of equality: the undifferentiated treatment had to be based on an objective and reasonable motive. Considering that the latter existed, the Court didn't pass, as it had to do, to the analysis of the other conditions required by equality: the means used to introduce an undifferentiated treatment had to be relevant and sufficient to support the legitimate aim pursued and correlatively the means used had to be proportionate to the situation that imposed the measure. The latter condition involves multiple appropriateness and proportionality relations between the reasons of the law, the object of the law and its aim[10]. On the adequacy and sufficiency of the means used by the legislator, the Court simply stated that „the legal solution adopted (…) defined in terms of a gradual increase in retirement age of women over 15 years is the only way to ensure adequacy of this measure to the social reality".

Consequently, the Court held that „the provisions of the law on the unitary system of public pensions which stipulate equal treatment concerning the retirement age between men and women are not contrary to the Constitution".

C. The return to the solution of different retirement ages for men and women

The legislator's solution consisting in a single standard retirement age for men and women didn't enter into force, despite the constitutional endorsement given by the Constitutional Court. This was because, due to the review of the provisions concerning the

[10] For further details, see D. C. Dănişor, *Drept constituţional şi instituţii politice,* Editura Sitech, Craiova, 2006, pp. 654-663.

unique retirement age, requested by the President under article 77 paragraph (2) of the Constitution, the legal provision got a new content, according to which „the retirement age is 65 for men and 63 for women. The meeting of this age is achieved by increasing the standard retirement age according to the rescheduling provided in the annex no. 5 of the law". This is the form currently in force of the article 53 paragraph (1) of Law no. 263 of 2010.

The reality of the Parliament's exclusive competence to decide what measure is appropriate regarding the retirement age for men and women, reality to which the Constitutional Court referred to, repeatedly, imposed the maintenance of the „classic" solution in our system, namely different ages of retirement for men and women.

It is curious, however, that the Parliament reconsidered its position rapidly, between the moment of the Constitutional Court's declaration of the constitutionality of the provision concerning a single retirement age and the moment the Parliament received the law back for review with regard to this provision. This goes to show that not only the Constitutional Court wasn't convinced about the direction the Romanian social realities imposed to the regulation, but also that even the legislator itself didn't have a detailed and realistic knowledge of the Romanian society's specificity, more precisely of the conditions of men and women. This kind of knowledge would have sustained a firm regulation in one way or the other.

The legislator's hesitations and change of heart are unfortunate in this respect. They make us wonder whether the initial change in the Law no. 263 of 2010, in the direction of equalizing the retirement age, wasn't dictated by the recommendations issued from the European Union and also by the need for alignment both with the solutions in comparative law and the case law of the Court in Strasbourg, both in the sense of an undifferentiated treatment of men and women with regards to the retirement age. This alignment would have been justified, in our opinion, only if it was sustained, internally, by the specificity of the real and objective social and professional situations of men and women and not by alleged or wanted ones.

When pronouncing on an objection of unconstitutionality regarding the Law no. 263 of 2010 as adopted after review, the Constitutional Court considered, in the Decision no. 1612 of 2010[11], that the law was constitutional. This time the article 53 paragraph (3) of the law was attacked, among others. Its provisions concerned the second condition of the right to pension for retirement, namely the period of contribution to the public pensions fund and stated that the complete contribution period was to be equalized for both men and women, to the standard of 35 years; the reaching of this standard was to be achieved by increasing the full contribution as set out in an annex of the law.

In essence, the MP objectors considered that these provisions, establishing an equal contribution period for women and men, were contrary to equality, while the legal retirement age of women was lower than that of men: „in the conditions of the criticized law, persons placed in similar legal situations are subjected to a different treatment, without this being justified by an objective and reasonable motive".

Since this was an objection of unconstitutionality regarding a law that had been reviewed under the article 77 paragraph (2) of the Constitution, the Court found that the criticized provisions, concerning the same contribution period „don't refer to the legal provisions reviewed or to those indissolubly connected with them". Consequently, the Court held that „at this stage after the review (...) it has no jurisdiction to verify the constitutionality of legal solutions that were not object to the review". Correlatively, the

[11] Published in the Official Journal of Romania no. 888 of December 30, 2010.

Court considered that in accordance with its case law, during the review procedure, the Parliament could change not only the legal provisions on which the review was requested, but also other legal provisions only if they were in inseparable connection with the ones regarding to which the review was requested by the President.

Given these limits of jurisdiction to exercise the constitutionality control, the Court stated that „the only new grounds of unconstitutionality objections in relation to the ones that have been settled by Decision nr. 1237 of October 6, 2010 (...) concern the article 53 paragraph (3) of the law". Or, the equalization of the contribution period required by these provisions didn't violate, in the Court's view, women's equality with men, because they didn't constitute discrimination, as the extent of the contribution period of 35 years for women to be achieved gradually by 2030 was reasonable.

The Court gave extensive explanations on the component of the right to pension for retirement, as shown in the law, at the end of which considered „it can't be held that to the lower retirement age would automatically correspond a lower complete contribution period". The Court chose to justify the reasonableness of the equalized complete contribution period summarizing: „Whereas the active life of the individual is not the same as the period between the time of the acquisition of labor capacity and the age of retirement, any person may achieve contribution periods after meeting the standard retirement age".

With regard to the equal minimal contribution period for women and men, the Court stated that „it is therefore obvious that it is the legislator's choice to establish the actual duration of both the minimal and complete periods of contribution, of course with respect to the reasonableness condition as described above. Thus, to different retirement age do not automatically correspond different periods of contribution, minimal or complete".

Or, in its previous indications, the Court didn't make a proper analysis of the reasonableness of equalization, for men and women, of the complete contribution period. Nor did the Court make such an analysis concerning the minimal period of contribution. A proper analysis would have meant firstly the verification of the objectivity of the reason for which the legislator introduced a measure of undifferentiated treatment for subjects in different legal situations, women and men being in different legal situation in terms of the statutory age of retirement.

In such a situation, since there was a relevant difference of situation (because it affected the access to the benefits of the public space, namely the contributive pension for retirement at the legal age limit), the legal measure introducing an undifferentiated treatment concerning the contribution period should have been based on an objective reason, independent of the Parliament's will. Or, by mentioning that it is the legislator's choice to establish the actual duration of both the minimal and complete periods of contribution with respect to a reasonableness condition, condition that the Court limited to the possibility of „any person" to achieve contribution periods even after meeting the retirement age, the Court concluded that the reasonableness standard was fulfilled.

What the Court forgot (or avoided addressing) was that while anyone could work even after reaching the period of contribution, the legal retirement age for men being higher than the one for women, men were (and still are) in the position to fulfill both the minimal and the complete contribution periods faster and easier than women, without having to work beyond the statutory retirement age. From the perspective of the period of contribution, women were (and still are) forced to cover a gap of two years regarding the statutory retirement age with a possible work beyond the prescribed age limit for retirement.

Such a difference between men and women concerning the possibility of performing the contribution favors men, without being based on objective and reasonable grounds consisting in a lack of relevant difference between men and women regarding their ability to meet the minimal contribution period. On the contrary, the relevant difference in situations consists in the two more years that men have on their disposition to fulfill the statutory retirement age, years during which they can contribute and meet such minimal contribution period. The two cumulative conditions required in order to trigger the right to pension for meeting the legal retirement age – the reaching of the statutory age and the fulfillment of the minimal contribution period - are interrelated.

Even if admitting that the contribution period and the standard retirement age conditioned one another, the Constitutional Court proved once again its distorted understanding of equality as equal treatment. Like in other cases, the Court turned an issue of constitutionality with reference to equality into an issue of legislative policy regarding to which the Court argued, at that time, that it met the criterion of reasonableness, a criterion that the Court outlined in an insufficient manner, as shown above.

Furthermore, in order to decide on the non-violation of equality between women and men in the matter of the contribution periods in the conditions of different retirement ages it was not enough to establish the reasonableness of the identity of treatment regarding the contribution period. It was imperative moreover for the Court to verify the compliance of the legislative measures in question to the others exigencies of equality, as shown above.

We also consider that article 53 paragraph (3) of the law, unchanged after the review, was designed with the purpose of sustaining the equalization of the retirement age for men and women originally introduced in the Law no. 263 of 2010. In the logic of the first form of the law, minimal and complete contribution periods, identical for men and women, were justified precisely by the same statutory retirement age. In the logic of the current form of the Law no. 263 of 2010, the disparity between the different retirement ages and the same contribution period is illogical (if the pun is allowed), by reference to the legitimate aim pursued, namely equality between men and women in the field of entitlement to public pension age (a right that is cumulatively conditioned by age and period of contribution), equality conceived as right to difference but only half observed by the legislator, namely only concerning the different retirement ages for women and men.

Moreover, according to the Court's own case law, the legislator could also change, following the review of the law, „other legal provisions, only if they are in inseparable connection with the ones regarding to which the review was requested by the President". And the Parliament should have done it. This because from the perspective of the right to public pension for reaching the retirement age, social and economic right with constitutional ground, the legal provisions concerning the contribution periods were (and still are) in an inseparable connection with the provisions regarding the statutory retirement age for which the review was requested. This connection was implicitly noticed by the Court itself, when considering that „even if a person has reached the retirement age but has no minimal contribution period, the person may not receive a retirement pension and vice versa – complete contribution period in absence of the standard retirement age", even if, on the explicit level, the Court affirmed that there were no such connection.

To conclude, the retirement age remains a delicate and unresolved issue in the Romanian system, due to the lack of firmness of the legislator's policy and correlatively to the lack of nuanced and coherent reasoning of the Constitutional Court. The price is for

equality between men and women and correlatively for some aspects of the equal effectiveness of men and women's right to public pension for retirement to pay.

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CHANGING EUROPEAN UNION. BRIEF CONSIDERATIONS ON THE DYNAMICS AND PROSPECTS OF THE EUROPEAN UNION AS A LEGAL REALITY[1]

Constanța MĂTUȘESCU[*]

Abstract: *The European Union can be analyzed under certain aspects. Geographic, economic or cultural location, it is also a legal entity*2 *compelled to find its place within traditional classifications.*

*The legal nature of the European Union is one of the most discussed and controversial themes in the professional literature. The dificulty of defining the Union derives, on the one hand, from its evolutionary nature, „a constant evolutionism"*3,*which does not facilitate reflection*4*, and on the other hand, from the complexity of the integration process, which involves a mix of supranational and intergovernmental elements of different nature(economical, social, political).*

Although through the Treaty of Lisbon the Union acquires legal personality, becoming a matter of law, defining the legal nature of the European Union does not become easier,and the qualification given to this construction more than 15 years ago by Jacques Delors, that of „unidentified political object" is as true now.

However, the current crisis Europe faces in recent years, an economic crisis that transformed into a sovereign debt crisis, represents, according to many analysts, the moment for a more courageous, trenchant attitude of the European leaders in defining a clearer future for the European Union, starting from Jean Monnet reflections, according to which: «Les hommes n'acceptent le changement que dans la nécessité et ne voient la nécessité que dans la crise.»

Keywords: *European Union, crisis, intergovernmental cooperation, federalization*

1. The evolution character of the European integration

The European integration was conceived from the start as an evolutionary process, continually adapted to the needs that will arise along the way and to desires expressed by the member states to move in one direction or another. „The European integration is not a „to be" but „to become", it is not a given situation but a process, it is not a result, but the action that leads to this result"[5]. The European structure is a *„site",* and the integration is the main „process" .

In its history, influenced by two main components: *thoroughness* and *broadening,* the European construction has encountered moments of extraordinary boom, but also moments of regression, where the European idea was subordinated to national interests, where the

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[2] C. Blumann, *L. Dubouis, Droit institutionnel de l' Union Européenne*, 3-e édition, Paris, Litec, 2007, p. 29

[3] Ibidem, p. 57.

[4] J. P. Jacques, *Droit institutionnel de l' Union Européenne*, third edition, Dalloz, Paris, 2004, p. 44.

[5] L.-J. Constantinesco, *La nature juridique des Communautée européennes,* Conférence, P. H. Spaak, Liege (1980), citation by J. P. Jaque, *cited works,* p.21.

intergovernamental elements were strengthened to the detriment of deepening European integration process[6].

The European Union as a legal reality is the result of that complex historical process, its birth not being a determined object, but rather a movement towards a community that behaves more united in its efforts to overcome the obstacles inherent to the pursuit of European construction[7].

Although it followed an evolution of almost 60 years, the European project did not concentrate on a pre-existing model, having no equivalent in the past or present[8], and did not even have in view a preset purpose. In „its act of birth",the Schuman Declaration in 1950, is expected the creation of an international „organisation" „opened" to other European states, that, through a voluntarist, progressive process should lead to a „European federation indispensable to the preservation of peace". During its evolution, the objectives and the means of the European integration have encountered major changes. Between national and supranational, between functional and federal there were discussions through time regarding the organisation of the European project, without any of the solutions to overcome. The diverse phases the European construction followed have allowed the strengthening of one or other of these approaches without others to dissapear[9].

The three communities underlying the European Union were born from multilateral treaties, expression of the sovereign will of the member states, negotiated within international conferences, signed by the plenipotentiaries of the founding states, ratified and entered into force in accordance with the classical principles of the treaty law[10]. Although signed under the auspices of international law, constitutive treaties detach from the international classic treaties of founding international organisations through institutional frame, decision-making procedures which gave them birth and the created specific law order. However, the Constitutions of the member states do not contain specific provisions regarding the participation of states in European Communities, the general dispositions regarding the participation in international organisations were considered applicable.

An essential role in defining the legal nature of the European Communities was detained by the Court of Justice that, given the objective of the finality valorification, innitially appreciated that these constitute "[...]*a new legal order of international law*,in the benefit of which member states limited their sovereign rights, although just for a limited number of areas and its law subjects are not only the member states but also their nationals"[11], because, afterwards, to deploy community law from international law and to qualify community law order as *own legal order, legally integrated to the law system of the member states*[12], and, finally, to make it *constitutional*, „holding that the treaty (treaty CEE-n.n),

[6] For a detailed overview of the European integration, see C. Mătuşescu, *European construction.The evolution of the idea of European unity*, Bibliotheca Publishing, 2007.

[7] I. Jinga, *The European Union – realities and perspectives*, Lumina Lex Publisher, Bucharest, 1999, p. 42. The changing nature of the European integration is confirmed also through the last treaty, that of Lisbon, the preamble to the speaks about establishing an European Union „in the light of the next steps that will be taken in order for the European integration to advance".

[8] Ph. Manin, *L'Union Européenne. Institutions, ordre juridique, contentieux*, Paris, Pedone, 2005, p. 14.

[9] C. Mătuşescu, *cited works*, p. 264.

[10] I. M. Anghel, *International treaty and intern law*, Lumina Lex Publisher, 1999, p.26.

[11] Decision of 05.02.1963, N.V. Algemeine Transporten Expeditie Ordeneming van Gend & Lost against Dutch Tax Administration, C-26/62, Rec. 1963, p. 3.

[12] Decision of 15.07.1969, the cause of Costa against Enel, C-6/64, Rec. 1964, p. I-0114.

„although concluded in the guise of an international treaty, is nevertheless *the constitutional charter of a law community"* [13].

European Communities were thus qualified as *regional, supernational and integrationist international organisations,* that substitute to states by taking some of their skills and that give rise, due to this process, to a personal right, Community law, applicable also to their nationals[14].

European communities appear as institutions that, by their structures and functions, repeat, to some extent, those of state entities, as well as those of international organisations, but representing a new category of international law subjects, different from those known until now: they are entities *sui generis*[15] *or* „a kind of the third model, which is interposed between the structure of the state and that of international organisations"[16].

Established by the Maastricht Treaty[17] and designating a structure based on three pillars-a community pillar represented by the three European Communities and two pillars of intergovernmental cooperation of member states- Foreign Policy and Common Security and Cooperation in the domain of Justice and Home Affairs, the European Union originally represented rather a political concept than a legal one. Heterogenous structure, functioning both after the community method, the integration of state and after intergovernmental method, but whose cohesion is ensured by providing the same values and objectives, same procedures of accession by States and revising treaties, the European Union founded on the Maastricht Treaty is not equipped with legal personality, this is detained only by European Communities.

Maastricht Treaty Negotiators were able to give precise shape to the future of Europe but, by refusing to accept the proposals of the registration of a federal vocation of the community construction and to offer this legal personality, they only increased confusion, creating a hybrid construction or, as Jacques Delors describes it "an unidentified political object".

The European Union is the result a successive review process of the Communities, process in which it was intended to preserve organisations initially instituted, taking as starting point the first constitutive treaties to which changes have been made in order to adapt to the new demands, functions and finalities, towards European integration[18]. Subsequent reviews of the Maastricht Treaty retained this logic, including the most recent of these, made by the Treaty of Lisbon[19]. By Lisbon Treaty, the European Union established in 1992 is not replaced by another organisation, but reorganised and endowed with legal personality[20].

As the European Communities, the European Union (which incorporated, through Maastricht Treaty, for through the Treaty of Lisbon to be substituted), although it is an organisation created by sovereign states, whose founding act does not take the shape of a Constitution(intern law act), but that of an interstate treaty, has a large autonomy in relation to

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[13] The notice CJCE of 14 december 1991, 1/91, EEE, Rec. p. I-6079, point 21.

[14] I. M. Anghel, *cited works*, pages 24-82; F. Cotea, *European Community Law*, Wolters Kluwer Publisher, 2009, pp. 196-200.

[15] I.M. Anghel, *cited works*, p. 27.

[16] C. Blumann, *L'apport du droit de retrait* à *la qualification juridique de L'Union Européenne*, in L'Union européenne – Union de droit, Union des droits, Mélanges en l'honneur du Professeur Philippe Manin, Editions A. Pedone, Paris, 2010, p. 66.

[17] Called the Treaty of the European Union exactly for highlighting the changing nature, the unfinished form of this Union.

[18] I. M. Anghel, *Treaty of Lisbon. Its defining landmarks,* in RRDC nr.1/2010, p. 132.

[19] B. M. C. Predescu, *Treaty of Lisbon – continuity and innovation in the institutional thinking of the European Union* , in RRDC nr. 2/2010, p. 101.

[20] The treaty takes the form of an amendments catalogue to anterior treaties.

member states and holds own institutions meant to express their will in relation to them, it may, within legal limitations reglemented by EU Treaty to impose the will on national governments. However these rather suggest the idea of *a rather constitutional structure of the constitutive act* or, more accurately, „the memorandum has the form of a treaty, but the substance of a constitution"[21], representing, by extrapolation of the qualification given to the Treaty CE by the Court of justice, „the constitutional charter"[22] of this association of states.

2. The legal nature of the European Union – between confederal and federal

The Union is an original and complexe legal structure that refuses to fit into traditional categories of international law[23]. Its originality and power depend on finding a balance, of realising a compromise between unification and the respect for the diversity of its components.

Consisting of elements of different nature (supranational integration and intergovernmental cooperation), the Union brings together elements specific to intergovernmental international organisations (mainly the way of constitution), federal states (the way powers are divided, the coexistence of Union and of member states, the direct election of members of European Parliament, single currency, citizenship, law system, common politics, etc) and of confederations(maintaining the quality of law subject of member states, cooperation in a number of areas, including in foreign and security politics), without to be considered as belonging exclusively to one of these categories. It is also a *conventional union of states*[24] (without being a classical regional organisation and representing more than a simple real union[25]) and *constitutional union*[26] (dimension strengthened following the entry into force of Lisbon Treaty[27]), borrowing many elements specific to the federal state.

The conventional nature (confederate) of the European Union is given, except that is founded on international treaties, by maintaining, in spite of advances enregistered through Lisbon Treaty, the foreign policy and defence in the sphere of competence of the member states, by unanimous vote used in areas such as reception of new members,revision of the treaties or financing from own resources and, especially, the central place in political and institutional plan granted to the European Council, institution that brings together heads of states and governments of member states.

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[21] I. Jinga, *cited works*, p.45.

[22] Decision of 23 of April 1986, the Ecologist Party „the greens"/European Parliament, C-294/83.

[23] A.Groza, *The European Union. Institutional Law*, C. H. Beck Publisher, 2008, p. 86.

[24] Or, as qualified by the German Constitutional Court in the decision of 30 June 2009, point 229 and 231, "an association of sovereign national states"

[25] A Berramdane, J. Rossetto, *Droit de l' Union Européenne. Institutions et ordre juridique*, Montchrrstien, Paris, 2010, p. 7 ; Ph. Manin considers it « an union of states with the object and effect of creating a sense of belonging to a collectivity" (*cited works*, p.14). At the same time, it concerns "a continually closer union between the peoples of Europe" – Preamble to the Treaty regarding the European Union.

[26] a « federal European constitutional pact »– O. Beaud, *La puissance de l'Etat*, PUF, Paris, 1994, p. 490. Regarding the existence of a progressive *constitutionalization* of the European Union (meaning by this the process that involves the evolution from treaty to constitution) see also A Berramdane, J. Rossetto, *cited works* ; M. Dony, *Droit de l' Union Européenne,* Ed. de l'Université de Bruxelles, 2010 ; F. Chaltiel, *La constitutionnalisation de l' Union Européenne. Visions croisées des Etats Membres*, in *L'Union européenne – Union de droit, Union des droits, Mélanges en l'honneur du Professeur Philippe Manin*, Editions A. Pedone, Paris, 2010, pp. 69-77 ; J. P. Jacque, *cited works*, pp. 85-92.

[27] Despite abandoning the term « Constitution », treaties contain a number of elements that draws them near to a constitution, even if « imperfect and incomplete (M. Dony, *cited works*, p.35). The very terminology used-notions such as „legislator", „ordinary legislative procedure", are appropriate to national constitutions.

It is noted, in the meantime, the existence of a process of progressive *federalization* of the Union, for the prominence of which a series of elements are raised, such as:

- establishment of a set of common values and objectives;
- the affirmation of the citizen dimension of the Union;
- recognition of fundamental rights;
- the existence of a vertical system of competences division, with the precise description of competences attributed to the Union[28];
- the consecration and strengthening of the subsidiarity principle;
-creating an European single currency;
- the possibility of establishing a closer cooperation between member states in areas that do not relate to the exclusive competence of the Union;
- the ability of international representation;
- the principles of the Union law (the existence of a hierarchical system of law norms);
- the existence of constitutional functions specific to states, exist, exercised through an institutional system on a level with which one can identify the legislative function (exercised by the Council, Parliament and Comission) executive(exercised by the Commission, Council and member states) and judicial (the prerogative of the Court of justice,Court, Public Court and national courts);
- rules relating to membership to the Union, etc.

Lacking the constitutive elements of a state(territory and own population and the completeness of skills[29]), and the member states are sovereign, distinct law issues[30], the Union cannot be a federal state *stricto sensu.* Another argument is the fact that, in case of the federal states, their constitutions list the areas of activity that are left to the jurisdiction of the federal state, at the level of the European level the member states are the ones that authorize the Union to decide in certain areas, the powers conferred to the Union are limited and reversible[31].In addition, the recent, formal recognition through the Treaty of Lisbon of the existence of a right of withdrawal, little known in case of the federal states, seems to reinforce this conclusion[32].

But the doctrine makes an interesting distinction between federation and federal state[33], considering that the state is not the only form of federal organisation[34]. Moreover, starting from the idea that a federal type of organisation requires the joint exercise of competences

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[28] Any competence that is not attributed to the Union through treaties that belong to the member states(article 5 TUE, consolidated version) – statement that reminds, as noted in the dogma (E. Moroianu, *Le Traite de Lisbonne (2007) modifiant le Traite sur L'union Europeenne et le Traite instituant la Communaute Europeenne: son integration dans les orders juridiques nationaux*, in Curentul Juridic nr. 4/2010, p. 25), of United States of America Constitution provisions regarding the report, in terms of competences, between the federal state and the federated states.

[29] J. P. Jacque, *cited works*, pages 93-96.

[30] According to article 4, paragraph (2) of TUE, consolidated version, „The Union respects the equality of member states in relation to treaties, as well as their national identity, inherent to their political, constitutional fundamental structures, including the local and regional autonomy. It shall respect the essential state functions and, especially, those that aim to ensure its territorial integrity, maintaining public order and national security defence. In particular, national security remains the sole responsability of every member state".

[31] A. Groza, *cited works*, pp. 88-89.

[32] For a contrary opinion, in the sense that the right of withdrawal „fits in the federation theory" see Blumann, *L'aport du droit de retrait..., cited works*, p. 68.

[33] For a thorough analysis of federalist theories, see O. Beaud, *Théorie de la Fédération*, PUF, Paris, 2007, p. 159-173.

[34] J. P. Jacque, *cited works*, p. 99; C. Blumann, *L'aport du droit de retrait* …., cited works, p. 66; C. Smittt, *Theorie de la Constitution*, PUF, Paris, 1993, p. 507 and the following.

respecting the diversity of member states, it is considered that the Union is built on a federal model, in the treaties one can notice the constitution of a federal entirety[35]. The federation, based on the idea of separation of competences between different levels of powers, discerns from the classical model of federalism in that it tries to overcome the notion of sovereignty[36]. At its basis there is an *European federal pact*(a treaty-constitution) that should be approved by the peoples of member states (for the benefit of double legitimacy-state legitimacy and democratic legitimacy). One of the essential characteristics of these federations would be that there is not a single global owner of foreign attributions, international relations and defence are the object of shared competences, competences that are to be exercised conjointly[37]. The European Union would appear as a *modern form of federation,* that is not to be confused neither with the federal state nor with the confederation, resulting from a free and sovereign choice of the states that created it. This does not replace the member states that retain their independence and may regain full freedom if benefits derived from the will to live together do not appear as appropriate[38].

In terms of evolution, of next step towards improving European integration, Union European vocation seem to be that of a federal assembly[39], the federalist option is seen as a necessary step[40]. Currently, however, it is impossible to fit the Union in one of the ordinary categories. Although in recent years efforts have been made to print a more integrative character to the European construction, the existing political difficulties lead to the conservation of ambiguity, Lisbon Treaty keeps unaltered the legal nature of the European Union. Through this treaty the Union appears like a hybrid between federation and confederation[41], an original structure that has not yet reached full development.

3. The crisis and future of the European Union– the need for „a more Europe" or an Europe "a minima" ?

The current crisis faced by Europe, an economic crisis transformed into a debt crisis, within which Greece, that represents only 2% of the European PIB, and its debt only 4% of the euro zone debt, managed to shake the unique European currency, putting in question its very existence, reveals the interdependence that exists between the European states, particularly between those sharing the same currency.

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[35] J. P. Jacque, *cited works*, p. 99.

[36] C. Blumann, *L'apport du droit de retrait* …., cited works, p. 66.

[37] It can be easily seen that this type of federation overlaps closely on what should be the European Union in the Constitutional Treaty regime.

[38] C. Blumann, *L'apport du droit de retrait* …., cited works, p. 68.

[39] J. P. Jacque, *cited works*, pp. 98-99.

[40] Ph. Manin, *cited works*, p. 71; N. Păun, A. C. Păun, G. Ciceo, *Europe's finality*, European Studies Foundation Publisher, Cluj Napoca, 2005, p.347; I. Muraru, *European citizenship*, All Beck Publisher, 2003, p. 4; A. Groza, *cited works*, p. 89.

[41] E. Moroianu, *cited works*, p. 24. According to the author, we are in the presence of a bidirectional model of organizing the Union: an European Union with a confederative character, having legal personality and encompassing the entirety of member states and „a federation of European states inside the Union", encompassing member states of the *euro* group which displays the will to realize „strengthened cooperation" which can accelerate their political, social and economic integration, Lisbon treaty retakes the argument of an Europe with„two or more speeds".

Nobody expected the crisis to shake the foundations of the unique currency, considered by old member states the main pillar of the integration, the current situation shows that there are no longer domains directly related to intern politics, economic and budgetary policies of some states engaging the future of others.

The fragility of the euro area, proved by the fact that it had been affected by the crisis more than other more endebted states, derives from its incapacity to decide and apply common rules, in other words, from the absence of „governance". Thus, although through the Treaty of Lisbon it is recognised the competence of the Union Council to orient the action of member states in coordinating economic policies[42], and the actual modalities are detailed in a manner sufficiently clear[43], the possibilities established in the treaties have not been fully exploited by the Council[44].

The recent economic developments have clearly proved that coordinating economic policies within the Union, especially in the euro zone, did not work well enough and that despite obligations under the Treaty concerning the European Union Functioning (TFUE), member states did not consider that their economic policies represent an issue of common interest and did not coordinate these policies inside the Council according to relevant dispositions of the treaty and to respecting the fundamental role of the European Commission in the surveillance procedure.

Mechanisms of adopting decisions established in the treaties have been replaced by „on-the-spot mechanisms" such as „Frankfurt Group"[45], and "community method"[46] (now Union method) has been replaced by the „intergovernmental" management of Europe by Berlin and Paris. Between European summits and French-German reunions, most solutions considered so far to respond to challenges raised by the crisis orient towards an Europe with „two speeds"[47], within which member states stay together, but the Union recalibrates around the eurozone. *Inside there will be more integration, but on an intergovernmental level.* Regarding states apart those also will have to readjust to the new context.

A reflection of this option is the signing, on February 2 nd 2012, of the *Treaty establishing the European mechanism of stability*[48]. In this document it is shown the necessity of stengthening the economic and monetary Union through a new „architecture" (in other words other than existing treaties) that will allow to go further in applying

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[42] In particular article 3 TUE, article 2 paragraph (3) TFUE, according to which " Member states coordinate their economic policies and filling work force in conformity with conditions provided in this Treaty, for the definition of which the Union shall have competence" article 5 TFUE , that establishes that„Member states coordinate economic policies inside the Union. To this end, the Council adopts measures and, especially, broad guidelines of these policies...", as well as

[43] See the provisions of the Title VIII "Economic and monetary politics", especially articles 121, 126, 136, 138 and 352 of the Treaty regarding the functioning of the European Union and protocols(nr. 12) regarding the procedure applicable to excessive deficits and (nr. 14) regarding the Eurogroup,annexed to the Treaty regarding the European Union and the Treaty regarding the functioning of the European Union

[44] Also, to this respect, see the European Parliament Resolution of 23 of March regarding the decision project of modification of article 136 of the Treaty regarding the functioning of the European Union concerning a stability mechanism for the member states whose currency is the euro (00033/2010 – C7-0014/2011 – 2010/0821(NLE))

[45] The so called „Frankfurt Group" is composed by German and France leaders, European Commission president, BCE and FMI governors, the leader o f finance ministers within the euro zone and the commissionner responsible for economic and monetary business.

[46] C. Mătuşescu, *cited works*., pp. 260-262.

[47] For a detailed analysis, see J. C. Piris, *The Future of Europe. Towards a Two - Speed EU?,* Cambridge University Press, 2012.

[48] Its text can be found at the address http://european-council.europa.eu/media/639164/18_-_tscg.ro.12.pdf

principles and rules already contained in treaties(coordinating economic policies, supervision and sanctioning of excessive deficits, the coordination and surveillance of budgetary policies). The new treaty however has the vocation to join, at a certain moment, the community law, it is provided that its dispositions will be incorporated, as soon as possible, in the treaties the European Union is founded on.

The fate of this treaty is however rather uncertain given that François Hollande, the new president of France, speaks for its renegotiation. Even if the opposition of France could not hinder the entry into force of the treaty that according to final provisions enters into force on the first of January 2013, on condition that twelve of the Contracting Parties whose currency is the euro to have deposited the ratification instrument, or on the first day of the month to follow to the deposit of the twelfth ratification instrument of a contracting party whose currency is euro, applying the earlier date, utility issue is however raised, all the more so as one of the initiator states may take a step back.

As a matter of fact the European Parliament,in a resolution voted on February 2012[49], considers the treaty inadequate for overcoming the crisis faced by the euro area, because it very much focuses on auterity and budgetary rigor to the detriment of economic revival. In addition, given the effect of the institutional rearrangement treaty of the Union, the European Parliament considers that the establishing and functioning of a stability mechanism must fully respect the main principles of the democratic decision making process, such as transparency, parliamentary control and democratic responsability, it highlights that the European mechanism of stability must actively involve Union institutions and organisms responsibles of monetary issues: European Commission, European Central Bank (BCE) and European Investments Bank; it highlights that the mechanism should not engender a new model of economic governance that doesn't respect the democratic standards of the Union[50].

Regardless of the Treaty fate establishing the European mechanism of stability, the general appreciation is that the *European Union is not an option, but a neccessity,* and solutions for rebuilding the European Union do not end here. A classical but substantial review of the treaties or, if this approach will prove impossible[51], the resort to the entire panoply of tools provided by the Lisbon Treaty to allow some member states to establish enhanced cooperation between themselves[52].

[49] The Resolution of the European Parliament towards the European Council of 30 of January 2012, adopted on February 2 nd 2012 (P7_TA(2012)0023)

[50] The European Parliament Resolution of 23 March 2011 towards the decision project of the European Council to modify article 136 of the Treaty regarding the functioning of the European Union regarding a stability mechanism for the member states whose currency is euro (00033/2010 – C7-0014/2011 – 2010/0821(NLE))

[51] At least for now two countries do not want to participate-Great Britain and Czech Republic.

[52] The implications of both options are largely presented in the work J. C. Piris, *The Future of Europe. Towards a Two - Speed EU?,* Cambridge University Press, 2012.

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THE EVOLUTION OF CODIFICATION REGARDING THE RESPONSIBILITY OF THE STATES FOR INTERNATIONALLY WRONGFUL ACTS

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Abstract: *Experts in international law have been concerned for decades with the codification of the subject matter of responsibility of the states, in this respect various drafts have been prepared both by private institutions and international organizations, part of the sessions organized by their bodies. The particularities specific to the drafts prepared prior to the works of ILC consist in reducing the issue of liability only to the damage caused to the persons or foreign citizens on the territory of the state. Subsequently, further to the agreement reached between the General Assembly and the International Law Commission, the focus was placed on the codification of the responsibility of the states, in the sense of preparing a draft convention with a general character and the responsibility for the damage caused to foreign citizens was recorded separately as a point to be discussed. The International Law Commission (I.L.C.) presented the draft articles regarding the responsibility of the states for internationally wrongful acts to the UNO General Assembly, which adopted it under resolution 56/83 dated 12 December 2001.*

Keywords: *state, responsibility, internationally wrongful act, codification, United Nations Organization.*

1. Introductory considerations

International responsibility of the states has been a topic that has drawn the attention of many entities existent at international and regional level, but also of education institutions engaged in the codification of international law. When discussing the issue of codification at international or regional level, responsibility of the states was especially considered a topic of major importance being introduced on the established working agendas. However, the exceptional difficulties triggered by the complexity of the topic have led to delays in obtaining the result pursued.

Various drafts aiming at the codification of the rules regarding the responsibility of the states have been prepared by private persons or institutions of education. Certain drafts have had a significant influence on the topic debated.[1]

Although the role of the United Nations Society in the codification of responsibility is beyond any doubt, and the works conducted during the Conference in the Hague in 1930 represented an important step in the codification of the topic mentioned, the result has been considered a failure due to the differences between the supporters of an international standard of justice and the ones of the national treatment.[2]

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[1] First report by F.V.Garcia Amador on State responsibility, Yearbook of the International Law Commission (YILC), vol II,1956, doc A/CN.4/96, p.173; Report of the 1926 Conference of the International Law Association, p.382-383; Annuaire de l'Institut de droit international,1927,vol.33, p.330-335.

[2] I.Diaconu, *Tratat de drept internațional public (Treatise of Public International Law)*, 3 vol., I-2002, II-2003, III-2005, Edit. Lumina Lex, Buc,vol.III-p.331.

2.Codification of responsibility in the light of the works of the UNO bodies

After World War II, the responsibility for the codification of international law and especially for the codification of the principles regarding the responsibility of the states were taken over by the UNO through its especially designed bodies, the most significant part in this activity being played by the International Law Commission.

In the first working program prepared by H. Lauterpacht for ILC, international responsibility was regarded as a sort of criminal law, suggesting that the activity in this field should take into account the new developments, especially that of „the criminal responsibility of the states the same as of the persons".[3] In the first session held in 1949, the UNO International Law Commission prepared a list of fourteen topics that were considered as recommended for codification, the mentioned topics including also the responsibility of the states.[4]

In 1953, based on various proposals initiated by the Cuban delegation, the UNO General Assembly adopted a resolution under which the issue of responsibility was included on working agenda of the International Law Commission.[5]

2.1. Contribution of the special rapporteurs to the preparation of the draft

Codification in the field of responsibility of the states, especially of the responsibility for internationally wrongful acts was conducted during a long time span from 1949 and to 2001 when it was completed by the adoption of the Draft prepared by the Commission.[6] In the preparation of the draft, a key role was played by the special rapporteurs, who assisted by the experts in the field managed to analyse all the theoretical and practical aspects involved by this subject matter and to identify the inconveniences and ways of going around them. The thorough, complete and complex analysis was aimed at preparation of the draft regarding the responsibility of the states for internationally wrongful acts. That is why the International Law Commission expressed its appreciation for the contribution of the four special rapporteurs: R. Ago, Willem Riphagen, Arangio-Ruiz and James Crawford, who made use of their entire theoretical and practical experience to prepare the draft mentioned above.

2.1.1. The beginning, from the point of view of Garcia-Amador's thinking

Resolution 799(VIII) dated 7 December 1953 was the main document that triggered the beginning of an activity of codification that was to last over 50 years. During the sixth session, the International Law Commission acknowledged the provisions of the resolution and the memorandum presented by Francisco V. Garcia Amador.

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[3] I.Diaconu, op.cit., vol.III, pag.330.
[4] Yearbook of the International Law Commission, 1949,Summary Records of the First Session, 2nd-7th meeting, pag.14.
[5] Resolution 799 (VIII) dated 7 December 1953.
[6] Although the Draft Articles regarding the responsibility of the states for internationally wrongful acts was adopted by the UNO General Assembly in 2001, the discussions on the content of the draft and on the form that this draft should take continue to this day.

In 1955, ILC appointed the Cuban Francisco V. Garcia Amador special Rapporteur.[7]

Initially, Garcia-Amador, although he admitted that international responsibility could result „from an unlimited number of circumstances", tried to go back to the traditional focus on the responsibility for the damage caused to foreigners.[8] In the time span 1956-1961, he prepared six reports, trying to achieve an integration of the norms of substance regarding the protection of foreigners in the human rights. Garcia Amador's approach of these issues was abandoned by the Commission in 1961 when his mandate ended.

2.1.2. The outstanding significance of the reports prepared by R. Ago

In the session held in 1963, the Commission decided to set up a subcommittee comprising 10 members chaired by R. Ago, who was appointed special rapporteur and prepared the 1st part of the draft articles approaching the origin of responsibility, so that most of the 35 articles can be found in the final draft. At the beginning, the subcommittee decided unanimously that the priority in codification will be given to defining, establishing the general rules that govern the responsibility of the states, but there were not to be disregarded the aspects regarding the obligation of repairing the prejudice, ways of providing reparations and the sanctions applicable. Thus, the subcommittee, based on the report prepared by R. Ago[9], recommended that the Commission should focus firstly on the origin of responsibility. In the report, R. Ago indicated the approach that served as basis for the works of the ILC as early as at that time, supporting the „secondary" general rules on the responsibility of the state to the detriment of the „primary" rules (such as the damage effected to foreigners).

In 1964, the Secretariat, at the request of the Commission, prepared various analyses on debates that took place within the various bodies of the United Nations and the final decisions adopted by those bodies[10] and a un digest regarding decisions of the international tribunals regarding the responsibility of the states[11]. In the session held in 1969, the Commission asked the Special Rapporteur (Roberto Ago) to prepare a study that should include a first draft of articles that was supposed to establish when an act is internationally wrongful and the conditions under which such act can be brought against the state.

Thus, R. Ago presented his first report to the Commission in 1969,[12] against the background where the special Rapporteur wanted to underscore the serious difficulties encountered in relation to the problem of responsibility and to point out the reasons that had led to placing codification under the auspices of the official bodies, including Society of Nations and even the United Nations.[13] In 1970, R. Ago presented to the Commission the second report entitled „the origins of international responsibility", which focused especially on the objective and subjective conditions for the existence of a wrongful act and in 1971

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[7] In order to be able to start the preliminary study of the responsibility of the states, the secretariat of the Commission requested the drafts previously prepared by various entities. Thus, it requested the Draft regarding „The responsibility of the states for the damage caused on their territory to the person or property of foreigners", which was the starting point of the discussions initiated at the Conference in the Hague in 1930, Yearbook of the International Law Commission,1955,vol.I, pag.190.

[8] D.Bodansky, J.R. Crook, *Symposium: The ICL'Ss State Responsibility Articles*, AJIL, vol.96, 2002, p.777.

[9] Yearbook of International Law Commission,1963,vol II,p.227-259.

[10] Yearbook of International Law Commission,1964,vol II, 125-132,document A/CN.4/165.

[11] Yearbook of International Law Commission, 1964,vol II,.132-171,document A/CN.4/169.

[12] The report was based on documents resulted from studies made in respect of responsibility by experts, groups of experts, by official or non-official bodies, YILC, 1969, vol. II, p.125-156, document A/CN.4/17 and Add.1.

[13] Yearbook of International Law Commission, 1973, vol.II, p.166.

he presented a third report entitled „the internationally wrongful act of the state, source of international responsibility", which established in fact the bases of responsibility. The report that included the draft articles referred in its first chapter called „General Principles" to the principle according to which any internationally wrongful act of the state triggers the responsibility of the state; the conditions for the existence of the wrongful act; the subjects that can commit a wrongful act, as well as the act is considered wrongful by reference to the norms of international law. The second chapter of the draft established all the circumstances in which a state is responsible for the acts of its bodies; attributing to the state the acts committed by private persons, who, however, exert public offices or act on the behalf of the state and attributing to the state the acts of its bodies put at the disposal of another state or of an international organization.

The considerations regarding the chargeability of the wrongful act to the state, as subject of international law, were continued and completed by the fourth report of R. Ago, presented to the Commission in 1972.[14] The report included also other aspects, such as: chargeability to the state of the conduct of the bodies of other subjects of international law; attributing to the state the conduct of insurrectional movements whose structures would become in whole or in part structures of the state.[15]

In 1973, the Commission starts the preparatory works with a view to preparing the draft articles regarding responsibility and thus adopts after the first reading the draft of the Working Committee consisting of the two chapters. [16] Further on, it was intended the preparation of the articles that regulated aspects regarding the objective element of responsibility, that is „breached obligation", aspects that were already in the attention of the special rapporteur.

Year 1976 brought the fifth report prepared by R. Ago, which established the content of chapter II called „Breach of an International Obligation". According to the provisions presented to the Commission, aspects were analysed with regard to the origin of the breached obligation, the fact that the obligation needed to be in force, thus shaping also the content of international obligation. The discussion on the content led to the distinction between crimes and offences, which was given up by the Commission in the final form of the document of 2001. The discussions on the objective element will continue over the following years based on the sixth report[17] and seventh report[18] of R. Ago. The draft regarding the responsibility of the states for internationally wrongful acts was completed with the eighth report of the Special Rapporteur R. Ago, which included a proposal of regulating the issues regarding the indirect responsibility of the state, in case of the involvement of a state in an internationally wrongful act committed by another state and aspects regarding the circumstances that exclude the wrongful character of the act.[19]

Although the general plan adopted by the Commission in 1975 aimed at the preparation of a draft consisting of three parts, in 1980, together with ending R, Ago's activity of special rapporteur, it was only the first part, regarding the origins of the responsibility of the states for the wrongful acts that had been adopted. Ago's mark on the articles was decisive.[20]

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[14] Yearbook of the International Law Commission, vol.II, 1972, pp.77-166.
[15] These articles and comments made on them were adopted by the Commission considering that to a certain extent the basic rules regarding the responsibility of the state have been established.
[16] I.Anghel,V. Anghel, *Responsibility in international law*, Editura Lumina Lex ,Buc.,1998, p.95.
[17] Document A/CN.4/302,Add.1-3,p.3-44.
[18] Document A/CN.4/307,Add.1-2, p31-60.
[19] Document A/CN.4/318 et Add.1a 4 p.3-69;Document A/CN.4/318/Add.5 a 7.
[20] D. Bodansky and J. R.Crook , op. cit., p.778.

2.1.3. Willem Riphagen's action regarding the codification in the field of responsibility

The appointment in 1979 of R. Ago as judge with the International Court of Justice (I.C.J.) determined the Commission to appoint W. Riphagen as special rapporteur. The activity of the special rapporteur took the shape of various reports that have led to the preparation of part II and part III of the project.

In 1980, W. Riphagen presented a draft report regarding the content, forms and degrees or international responsibility, a topic that formed the basis of preparation of part II of the draft.

The subject of part two consisted in the analysis of the legal consequences determined by the violation of an international obligation. The determined consequences are different according to the breached obligation. In order to establish a concrete framework of the international relations that may occur, the rapporteur started from three parameters, namely: the content of the new obligations of the author state, the new rights of the harmed sate and the position of third party states in respect of the situation created by the wrongful act.

In the second report, the special rapporteur took into account, in the analysis made, the observations made in the preliminary examination by ILC[21] and treated especially the first parameter, that is the one referring to the content of the new obligations of the author state. The special rapporteur established three preliminary rules that constituted the guidelines of part II. As early as the introductory part, it was underscored the fundamental difference existing between international law and domestic law and that in case of breaching a norm of international law, reference was to be made to international rules, irrespective of the source of the breached obligation (conventional or customary). Chapter II established the obligations of the author state to discontinue the breaching of the obligation and to repair the prejudice caused. In order to establish the reparations, the rapporteur proposed ways specific to domestic law systems, namely: restoration of things to initial status and if this is not possible, reparation by equivalent. Being in the field of international law, satisfaction was mentioned as a reparatory measure in case of a moral prejudice.

The third report of W. Riphagen consisted of a group of comments with theoretical and practical pleas, being complete with the preparation of the first articles of the second part.

In April 1983, the special rapporteur presented the fourth report, which commenced with a short comment on the origin of international responsibility, after which there were brought back into discussion the first reports in which the focus was on the new relations occurring in case of breaching international obligations and triggering responsibility. Also, it was discussed the preparation of the final part of the draft aiming at regulating the differences and the ways of triggering the responsibility of the author state. In this respect, the special rapporteur proposed to the Commission the basic points that needed to be taken into account for the preparation of part III.

The year 1985 brought to the attention of the Commission report number six, which made a comment on articles 1-16 from the second part of the draft and an analysis of the nature and content of the third part, which is considered to be the „responsibility system engineering"[22]

In 1986, the special rapporteur W. Riphagen prepared and presented to the Commission the seventh report, which presented the texts of the articles of the third part and the content of the annexes. First of all, it was presented the setting off of the action by the claimant state, that is why it was considered the regulating of the possibility to notify the state author

[21] Annuaire de la CDI, 1980, vol.II, part II, p.60.
[22] Annuaire de la CDI,1985,vol.II, first part,document A/CN.4/389,p.20.

of the act, which is made aware that it must stop breaching the obligation. The notification procedure is started also taking into account the provisions of paragraph 1 of the Vienna Convention of 1969.[23] The purpose was also to regulate the possibility of suspending the execution of the obligation. In order to resolve the difference created, the text, art. 3 of the third part, noted the possibility of the states involved in the dispute to seek a solution of resolving as per art. 33 of the UNO charter.[24] It was noted that the litigations were to be settled by means of reconciliation, setting up in this respect a Conciliation Commission with the held of the UNO Secretary General, or, as a last resort, it was mentioned the possibility of settling the dispute in front of the ICJ.

The last report ended with a new reading of the first part of the draft regarding the responsibility of the states for internationally wrongful acts.

Riphagen's reports offered several interesting but challenging theoretical perspectives. Only five articles were temporarily adopted during his seven-year term in office as special rapporteur, the most important focusing on the definition of the harmed state, which was thoroughly reviewed by Crawford.

2.1.4. Of Gaetano Arangio-Ruiz's activity

In 1987, ILC appointed Mr. Gaetano Arangio-Ruiz special rapporteur for the issue of responsibility of the states for internationally wrongful acts, as a successor of Mr. Willem Riphagen whose mandate expired on 31 December 1986.

The draft report was prepared in 1988[25] and comprised the presentation of various suggestions regarding part II and part III of the draft. Following the basic guidelines proposed and discussed in the 1987 session of the ILC, the rapporteur proposed three aspects that needed to be taken into account: studying and improving the content of art. 6 and 7 of the second part, which regarded the cessation of the wrongful act and the ways of repairing the prejudice; considering the discussions on them, these articles were to be rephrased, and in the end, based on the rich material gathered by the previous rapporteurs, a new presentation of the first part of the draft was to be made.

The year 1989, brought in front of the Commission that second report[26], which continued the proposals regarding the ways of repairing the prejudice. Special heed was paid to the moral prejudice and the distinction between satisfaction and compensation.

If the first and the second report considered mainly the ways of repairing the prejudice, the third report[27] referred to a different type of consequences. International practice underscored various measures to which a state can resort as a reaction against a wrongful act. Such measures are: self-defence, retaliation, reprisals, countermeasures, suspension or termination of a treaty, etc. The report of 1991 was considered a thorough analysis of these measures.

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[23] The Vienna Convention, art.65, paragraph 1-"The party that based on the provisions of this Convention invokes either a flaw of its consent to be bound by a treaty, to terminate it, to withdraw from it or to suspend its application, must notify its claim to the other parties. The notice must mention the measure considered by the treaty and its reasons."

[24] UNO Charter, art. 33, pct.1-"The parties to any dispute whose extention could jeopardise the maintaining of international peace and security, needs to resolve the dispute, first of all, by negotiations, inquiries, mediation, conciliation, arbitration, judicially, resorting to regional organizations or to other peaceful means, at their choice."

[25] A/CN.4/416 and Add.1,1988,p.7.

[26] A/CN.4/425 and Add 1,1989,p.3.

[27] A/CN.4/440 and Add1,1991,p.4.

Countermeasures were subject to the research of the special rapporteur and of the ILC for a long period. Thus, in the fourth report[28],Gaetano Arangio –Ruiz analysed: the conditions and functions of countermeasures, the existence of the wrongful act – a basic condition in case of countermeasures, the cases where countermeasures were forbidden and the issue of proportionality.

The third part of the draft regarded the responsibility of the states for internationally wrongful acts and its starting point was the proposals made by Mr. Riphagen, the debates within the Commission and the sixth committee. The first part of the fifth report[29] of Mr. Gaetano proposed ways of settling the disputes, mentioning that the first step would be conciliation, then arbitration and eventually the jurisdictional resolution. The Commission supported arbitration as basis of resolving the differences in this matter and the necessity of introducing it in the draft.

Art. 19 of the draft introducing the distinction between crimes and offences led to fierce discussions in the second part of the report, in respect of the consequences of the so-called state crimes. The aspects discussed by ILC and the sixth Committee led to the conclusion that in respect of state crimes, a special regime needs to be taken into account. The consequences of these acts trigger the reaction of international society and the sanctions applied correspond to the gravity of the act committed.

The notion of international crime formed the object of study of the following reports presented by Mr. Gaetano. Report number six presented in 1994[30]placed the focus on the notion of state crime, the remedies that can be applied, and especially on the countermeasures against an act that might be considered a state crime. Also, it was brought back into discussion a general rule of international law, which asserts that in such cases the victim state will be helped to do away with the imminent danger.

Report number seven comprised two chapters. Chapter I was focused on the legal consequences of a internationally wrongful act, characterized as a state crime as per art. 19 of the first part of the draft adopted after the first reading. Also, proposals were made with regard to the editing of the texts that referred to the consequences of the acts considered state crimes.

Chapter II included recommendations regarding the editing of the texts concerning the countermeasures and the last part of the chapter described the dispute created by the countermeasures against crimes.[31]

In his last report edited in 1996[32], Mr. Gaetano expressed his hopes that the activity of those in charge of the research in the field of responsibility could result in a draft that should correspond to the international practice and the Commission will have to submit the draft to the discussions of the government representatives of the member states.

By his activity, Arangio-Ruiz helped that clarification of the consequences of breaching international obligations, by focusing in particular on the obligation to stop the continuous violations. Although many of these articles are reflected in the final text, the part that deals with the resolution of disputes – this being, maybe, the topic that has been associated with Arangio-Ruiz the most – did not survive the second reading.

In 1996, the Commission adopted the draft articles which it sent to the UNO General Assembly, which in its turn asked for the opinion of the member states.

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[28] A/CN.4/444 ana Add 1-3,1992,p.6.
[29] A/CN.4/453 and Add 1-3,1993,p.7.
[30] A/CN.4/461 and Add 1-3,1994,p.4.
[31] A/CN.4/469, 1995,p.4.
[32] A/CN.4/476.1996,p.2.

The comments and observations made by the member states determined essential changes to the draft.

2.1.5. A new approach in the concept of J.Crawford- ILC Special Rapporteur

Before the appointment of J.Crawford as special rapporteur, the working agenda of the ILC had included for over forty years the responsibility of the states and the Commission was willing to conclude on this topic. Furthermore, the General Assembly had adopted in 1995 a resolution, putting in fact pressure on the Commission to make progress on the articles regarding the responsibility of the states and on other drafts that had long been waiting.

In the 15 May 1997 session, the Commission sets-up a Working Group on the responsibility of the states, to prepare the draft for the second reading, taking into account the observations made. In this respect, the Commission appointed James Crawford special rapporteur for the field under scrutiny.

Crawford approached the task in a pragmatic manner, admitting that in order to reach a conclusion, the Commission would have to abandon a lot of what had been challenging and controversial in his previous work, including, in particular, art.19 on the crimes of the states and the section on resolution of disputes.

The first report prepared by J. Crawford was presented in 1998 and its topics were: the distinction between the „primary" and „secondary" rules, controversial aspects regarding art. 19, the rapport between the draft articles and the rules of international law, provisions regarding countermeasures and the resolution of disputes, as well as a synthetic analysis of the future form of the draft.

The distinction between the „primary" and the „secondary" rules was formulated by R. Ago as follows: „The Commission agrees with the need to focus its study on the determination of the principles that govern the responsibility of the states for internationally wrongful acts, maintaining a strict distinction between this topic and the topic regarding the defining of the rules that regulate the obligations of the states, the violation that might trigger responsibility.

Considering the different types of obligations assumed by the state at international level and especially their classification according to importance may constitute a necessary element in determining the degree of wrongfulness, and also the consequences effected by the wrongful act. The essential factor consists in defining the rules and content of the obligation imposed and another factor determines whether a breach on an international obligation has been committed and what the consequences of the obligation are. It is only the second aspect that has to do with the scope of responsibility, the occurrence of this confusion on these aspects might determine the apparition of an obstacle in the way of codifying the topic."[33]

The theory prepared by Ago was considered useless. The classification of a topic as a part of a rule of behaviour (primary rule) or as a part of determination (secondary rule) is arbitrary. What defines the purpose of the articles is not their secondary position, but their generality, the articles representing those fields where the ILC has been able to identify and reach a consensus on the general assumptions applicable at a general level within international law. The ILC articles assume that international law is a unifying body of law,

[33] Yearbook of the International Law, 1970, vol. II,p.306.

with common characteristics that operate in similar manners in various fields. As a result, it remains a problem under scrutiny whether this is a desirable approach.[34]

The distinction between crimes and offences does not correspond to the purposes pursued by the Commission, the international law experts claiming that this has more criminal connotations and needs to be analysed as part of international criminal responsibility. Instating a regulation of a general character regarding the responsibility of the states triggers the removal of the delimitation between crimes and offences, the states being considered responsible for the violation of the obligations irrespective of the nature, content and origin of such obligations.

The Commission decided to examine the possibility of systematically developing the concepts of *erga omnes* obligations, imperative norms and a possible category of the most serious violations of international obligations, in order to resolve the problems generated by the concept of international crime. Subsequently, in the final text, it has been introduced the heading „Serious violations of the obligations deriving from the imperative norms of the general international law". The text of art. 40 does not indicate the categories of imperative norms, per fields of activity, as presented in the draft prepared in 1996. By this the adopted text lost precision and specificity.

Separately from the issue of international crimes, controversies regarded the countermeasures and ways of resolving disputes. A part of the representatives of the states fiercely supported their criticism on the introduction of countermeasures, whereas another part of the representatives of the states were in favour of the introduction of countermeasures in the category of causes that remove the wrongful character, not agreeing with the development of the regime applicable to them in part II of the Draft. Those supporting the presence of countermeasures, also agreeing with the instatement of a regime applicable to such countermeasures, were on the winning side.

During the mandates of the Rapporteurs Riphagen and Arangio-Ruiz, the Commission had to deal with proposals of including in articles substantial provisions regarding the settlement of disputes. The text at first reading included an elaborate structure for settling disputes. It included provisions on negotiations, good offices, conciliation or mandatory arbitration of disputes involving resort to countermeasures. The proposed relation between countermeasures and mandatory settlement of disputes was very controversial. Eventually, it was considered that the issue of settling the disputes needs to be abandoned and left to be dealt with by the UNO General Assembly.

The aspects regarding the possible form that must be taken by the draft articles were not clarified further to the analysis made by the presentation of the first report of Crawford. A part of the members of the Commission proposed that the project should take the shape of a convention under which the consent of the party-states should be expressed by ratification, whereas another part supported the form of declaration of principles adopted by the General Assembly.

The second report was presented in 1999 and was focused on a rephrasing of the provisions of Chapter III, regarding the violation of the international obligation. It was not considered necessary to preserve the distinction between crimes and offences, as well as between obligations of result and obligations of means. On the other hand, the rephrasing of the existent provisions reduced the number of articles, eliminating what lacked efficiency. As a result, there were kept the aspects regarding the existence of the international

[34] First report on State responsibility by Mr. James Crawford, 1998, p.5.

obligation violated, the fact that the obligation must be in force and the classification in continuous obligations and composed acts.

The third report was presented in the year 2000 and brought back to the centre of attention the legal consequences of the internationally wrongful act, the focus being on the general principles, as well as on the notion of „injured state".

Crawford's activity ended with the presentation of the fourth report in the year 2001, report which re-discussed to a large extent the controversial issues that had appeared through the years. Consequently, it was only after 50 years that the ILC presented the „Draft articles regarding the responsibility of the states for internationally wrongful acts" to the UNO General Assembly, which adopted it under resolution 56/83 dated 12 December 2001. In 2004, the UNO General Assembly adopted resolution no. 59/35 which required the governments of the UNO member states to pay special heed to the Draft adopted in 2001 and to express their opinions on the methods of codification. UNO Secretary General had the mission of preparing a compilation of decisions of the international courts and tribunals, as well as of other entities, which, together with the observations of the governments of the member states should constitute the subject of discussions on the agenda of the session of the year 2007[35]. Subsequently, the discussions continued, the UNO General Assembly establishing that on the working agenda of the sixty-fifth session there should be included the topic of the responsibility of the state for internationally wrongful acts. In this respect, it is reiterated the obligation of the governments of the members states to analyse the draft prepared, as well as the compilation of decisions of the international courts and tribunals, in order to be able to discuss the legal form that might be taken by the draft adopted in 2001.[36] In 2010, the UNO General Assembly established that the topic regarding the responsibility of the states for internationally wrongful acts would be the topic of the discussions of the 68th session.[37]

Mention must be made of the key role of the comments made at each article, considering the ambiguities and sometimes the abstract character of the articles. Many comments are of high quality, being said that some of them are small jewels of law literature. Still, there are also critic opinions determined by the fact that in the preparation of the comments the rationales of the International Court of Justice have been taken into account, which leaves room for doubt. Comments seldom investigate thoroughly the practices of the state or try to extract the unclear manifestations of the „law in practice".

Conclusions

The draft articles adopted show that the ILC has approached a limited perspective, focusing on the rules of responsibility of a general character or postponing several difficult and controversial issues. For instance, the separate regime of criminal responsibility has been eventually abandoned, the rules of attribution dealing only partly with the potential responsibility of the state for the non-state behaviour, most of the responsibility for such behaviours remaining to be assessed under the primary rules of obligations, the problem of

[35] Compilation of decisions of international courts, tribunals and other bodies,United Nations, General Assembly, sixty-second session, A/62/62, 2007; Comments and information received from Governments, United Nations, General Assembly, sixty-second session, A/62/63, A/62/63/Add.1, 2007.
[36] General Assembly/Res. 62/61 - 6 December 2007.
[37] United Nations, A/C.6/65/L.8.

causality is analysed, but it is not approached in a concrete manner, etc. Generally, the articles tend to have a perspective oriented more to the past than to the future. The value of the articles lies rather with their legal innovation, that with the consolidation and classification of several secondary traditional rules on the responsibility of the state.

For various reasons, the ICL chose to submit the articles to the General Assembly without recommending the negotiation of a convention on the responsibility of the state. Although the draft articles regarding the „responsibility of the states for internationally wrongful acts" has been a topic of debates during several sessions of the UNO General Assembly, the variant presented by the UNO International Law Commission has not been subject to changes and the legal form that might be taken by the draft convention or draft declaration has not yet been agreed.

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COMMENTS ABOUT THE CONTENT OF DISCIPLINARY DECISION

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Abstract: *Disciplinary investigation is materialized in a sanctioning decision which must meet certain substance and form conditions. Those legal provisions regarding sanctioning decisions components are mandatory and of public policy. This is why the penalty for noncompliance is the most severe one – nullity, and it can't be remediated as others nullities in labor law, as it isn't an avoidable one. However, the notification of the sanctioning decision is also subject to specific rules.*

Keywords: *disciplinary investigation, offense, employer, employee, sanctioning decision, nullity, unenforceability.*

Terms of form and substance for the sanction decision

As the Article 252 Paragraph 2 of the Labor Code states, the sanctioning decision necessarily includes the following elements:

- the description of the act which constitutes the misconduct;
- the specification of the violated provisions from personal statute, in the internal rules or in the collective labor contract;
- the reasons for which the employee's defenses were removed during the disciplinary investigation, or the reasons for which the investigation hasn't been done, under art. 251 paragraph 3;
- the legal basis under which the disciplinary sanction is applied;
- the limit in which the sanction can be appealed;
- the competent court where the sanction can be appealed.

The conclusion is that the sanctioning decision shall meet all these cumulative conditions, given the fact that they are imperative and of public policy, and the penalty for noncompliance is the most drastically. Even if one of the listed items is missing, the sanction decision is absolute null, which means that, according to common law, the parties shall be restored to the state before. Certainly, this nullity isn't specific to labor law, because it isn't an avoidable one. This would mean that the lack of any of the mentioned items can be complemented later, and this fact isn't possible as the legislator has expressly established nullity in Article 252 Paragraph 2 of the Labor Code. The doctrine[1] considered as the only way to remedy the nullity of not fulfilling the background conditions, the issue of a new decision to includes all the mandatory which were previously omitted, in due time. As for us, we consider that in this situation we can't talk about a remedial of the nullity, but

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[1] See O. Musta, *New details about the lack of mention from Article 268 Pagraph 2 letter f of the Labor Code from the sanctioning decision* in Law Magazine, no. 1/2007, p.94.

a replacement of the null sanctioning decision with one that meets all legal requirements, as long as it is issued within the time provided for Article 252 Paragraph 1.

Concerning employer's defenses, in judicial practice[2], the act from the territorial labor inspectorate, under which the sanctioning decision was issued, has no legal relevance. The only important fact is that the act has to be adapted to the rigor of the law, which is the duty of the employee and not of the territorial labor inspectorate, which has no responsibilities in labor disputes. For that the only competent are the courts of justice as the Article 231 and 269 of the Labor Code states.

Under Article 252 Paragraph 2, letter a of the Labor Code, the sanctioning decision must include, as an essential element, the description of the offense, depending on which the court consider and check the veracity of the deed, if is or is not a misconduct, as Article 247 paragraph 2 of Labor Code says, and also if the employer has complied the criteria of individualization of the disciplinary sanction or if it was applied in due time[3]. Therefore, the legislator has considered a detailed description of the offense[4]. The employer must show in the sanctioning decision the charged act and the material element of the offense which involves directly the employee in committing them. In judicial practice[5], it was stated that the simple referring to a report written before or to a report of completion the disciplinary investigation[6] aren't likely to overcome the legal requirement. These papers aren't part of the sanctioning decision, but those on which the employer decides the guilt of the employee are[7]. Another point of view is that in a work conflict, the employer can't invoke to the court other reasons of fact or law, than those specified in the sanctioning decision and that the lack of mandatory mentions can't be covered by other acts, defenses or presentations in front of the court[8]. Moreover, if the legislator wanted that the description of the fact to be done in other documents than the sanctioning decision, he would have stated that.

The courts have considered that the generic formulations, the formal, elliptical or those which are too general or unverifiable, are likely to attract nullity, such as: „hiring costs without management approval", the employee omitting to indicate the nature of the expenses and the time they were incurred; „making some works by violating the law" without specifying what work was which were the violations; „public spending"; „generating a case which is before the court[9]"; „the employee has repeatedly misconduct and even an offensive

[2] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 7330/R/2009 in Labor Law Magazine no.1/2010, p.122-126.

[3] See Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 4230/R/2008 in Labor Law Magazine no.2/2009, p.154-157.

[4] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 1403/R/2006 in D. Lupascu (coordinator), p.42-45.

[5] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 295/R/2008 in Labor Law Magazine no.4/2008, p.165-169.

[6] See Court of Appeal Pitesti, Section of civil cases, labor disputes and social insurance, decision no. 12/R-CM/2006 in A. Țiclea (coordinator), D.Diko, L. Duțescu, L. Georgescu, M.Ioan, A. Popa, Comments on *Labor Code adnotted with law, doctrine and jurisprudence, Ed. Universul Juridic, Bucharest, 2008,* p.471.

[7] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 6323/R/2009.

[8] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 327/R/2010 in Labor Law Magazine no.4/2010, p.104-112. ALSO SEE Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 4886/R/2009 in Labor Law Magazine no.1/2010, p.126-130.

[9] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 4230/R/2008 in Labor Law Magazine no.2/2009, p.154-157.

attitude in the society, affecting it's effective exercise[10]"; „rude behavior besides co-workers or superiors, materialized by injury, immoral acts, slander, violence or mistreatment extortion or constraints for performing actions against society interest, misinformation and misleading the workers, the refusal to the superior of performing assigned tasks and work, advertising and publicity for competitors made by the employee[11]"; „bringing insults and threats to another employee[12]"; „irresponsible behavior of the employee" as long as the employer hasn't properly defined the rules of procedure, leading to extent that any action of the employee is likely to be disciplinary sanctioned – this would be an abuse of the employer and would also contravene to the fundamental principles of the employment relationship[13]. There are also illegal: „inappropriate attitude towards the institution[14]" or „serious deficiencies in managerial work[15]" of the employee, without being specified the facts in breach of professional ethics and those which are serious deficiencies.

It is also considered that the offense description by reproducing the full text from the internal regulations do not comply with Article 252 Paragraph 2 letter a of the Labor Code, because the court is unable to verify and to establish the actions that the employee actually committed, which were the conditions, circumstances and the consequences thereof[16].

Another essential element in order to individualize the offense is the date or the time when the disciplinary misconduct has been committed, noting that spatial and temporal limits characterize any human action or inaction and its absence isn't able to conceive. In addition, the indication of time is essential in order to ensure the legality of the sanction decision (as Article 252 Paragraph 2 letter a corroborated with Article 252 Paragraph 1 of the Labor Code[17]). In this context the lack of the date makes that the offense description to be insufficient, which means the nullity for the sanction decision[18]. In judicial practice[19] it was said that the nullity occurs only when, without any evidence, the date can't be established in any way, and hence the disciplinary sanctions time limits.

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[10] We consider that the court of appeal covered incorrectly the lack of the offense description from the sanctioning decision with the report from disciplinary investigation and witnesses statement which indicates that the investigation was made - See Court of Appeal Pitesti, Section of civil cases, labor disputes and social insurance, decision no. 9/R-CM/2006 in Labor Law Magazine no.1/2007, p.137-139.

[11] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 4114/R/2008 in Labor Law Magazine no.2/2009, p.157-161.

[12] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 2707/R/2010 in Labor Law Magazine no.1/2011, p.121-129.

[13] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 2360/R/2009 in Labor Law Magazine no.5/2009, p.103-108.

[14] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 821/LM/2004 in Labor Law Magazine no.2/2005, p.124.

[15] Court of Appeal Galati, Section labor disputes and social insurance, decision no. 974/R/2007 in The Bulletin of appeal court, no. 1/2008, p.43-46.

[16] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 6080/R/2009 in Labor Law Magazine no.8/2009, p.203-205.

[17] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 4114/R/2008.

[18] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 3110/R/2009 in Labor Law Magazine no.5/2009, p.109-114; Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 6080/R/2009 in Labor Law Magazine no.8/2009, p.203-206. Also see Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 6318/R/2009 in Labor Law Magazine no.8/2009, p.197-202.

[19] Court of Appeal Alba Iulia, Section VII of civil cases, labor disputes and social insurance, decision no. 459/2008, www.jurisprudenta.org.

It was decided that the mandatory provisions of the Article 252 Paragraph 2 letter a of the Labor Code, shelter the employee by any abusive or unjustified measures of the employer by a thorough and detailed description of the offense, in order to appreciate in an actual, factual and consistent way the legality of penalties[20].

Most notably, the wording of Article 252 Paragraph 2 of the Labor Code, makes a clear distinction between the description of the offense, or better said the motivation in fact (letter a), the motivation in law (letter d) and specifying the violated provisions (stating the article, the paragraph, the letter ignored by the employee – letter b[21]).

Article 252 Paragraph 2 letter b has been modified by Article 1, point 96 of Law no. 40/2011, adding to the list of violated rules which were considered disciplinary misconducts the provisions from the individual labor contract. So, under nullity, the decision mandatory contains (…) the specification of personal status, the internal rules, the individual employment contract or collective agreement which was violated by the employee. Although not required, this change of the legal text was justified by reasons of clarity, in order to correlate it with Article 247 Paragraph 2 which defines the disciplinary offense as the action or inaction regarding work committed with guilt, which violated legal norms, internal rules, the individual/collective employment contract, legal orders and provision from superiors. The element in discussion is relevant for the court to establish and verify if the employee's deed constitutes misconduct[22], if his behavior is contrary to the obligation he has at work. We believe that it isn't sufficient to indicate the number of the article of the Labor Code, of personal status, the internal rules, the individual employment contract or collective agreement, but is required to indicate the legal failed text. If this condition isn't respected, it can't be covered by attaching an extract from the document whose provisions have been violated to the sanctioning decision. Nor the indications of the violated provisions on appeal are not likely to overcome the law requirement[23].

The reasons for which the employee's defenses were removed or for which the investigation wasn't done, mean the factual, logical and legal grounds in order to disprove employee's defenses and the merits of missing investigation. The doctrine[24] considered that this con condition is required even if the defenses of those in charge have nothing to do with his accusations. The sanctioning decision which contains the employees reply at prior investigation, doesn't fulfill this requirement, but also it isn't indicated any argument that can justify removing these defenses[25]. Regarding the lack of the element from Article 252 Paragraph 2 letter c, the legislator established as sanction the nullity as a guarantee that the employee defenses and explanations were analyzed and considered by the employer, and the sanctioning decision wasn't taken arbitrarily. A subsequent preparation of a document which contains the mentioned reasons can't turn the decision null[26]. The employer can

[20] See A. Ticlea, *Labor law treaty*, Ed. Universul Juridic, Bucuresti, 2009, p.780.
[21] S. Beligradeanu, Highlights on the form, content and validity of the dismissal decision in Labor Code, in Law Magazine no.6/2004, p.39.
[22] G. C. Frențiu, *Consideration on nullity under Article 268 Paragraph2 letter b and c of the Labor Code* in Law Magazine, no.10/2005, p.88.
[23] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 295/R/2008.
[24] See A. Ticlea, Labor law treaty, p.880.
[25] See Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 3145/R/2010 in Labor Law Magazine no.8/2010, p.88-91.
[26] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 3285/R/2005 in Labor Law Magazine no.5/2009, p.119-124.

justify that the employee could show his defenses in the explanatory note given during the preliminary procedure, can't be considered relevant because, according to the legislator's will, the very content of the decisions has to refer to the reasons of removing those defenses. The judicial practice showed that motivations as „the defenses has been rejected as unfounded because the misconduct results from employees facts[27]" or „the defenses were removed showing and proving that all employees are expected to know the procedures and changes[28]" are nothing but simple statements of the employer and they can't be considered as complying with the law imperatives, as they are totally deficient, insufficient and therefore inappropriate. Also the list of legal items without any reference to defenses of person in question, isn't a reason for removal of defenses during the disciplinary investigation[29].

In doctrine[30] and judicial practice[31] has been established that if the sanctioning decision doesn't includes the competent court where the sanction can be appealed, it is absolutely void[32] for violation of the Article 252 Paragraph 2 letter f of the Labor Code. It is insufficient the indication of the possibility of contestation and its term, which are distinct legal requirement of indicating the competent court and they not compensate each other. In these circumstances, non-compliances can't be imputed to the punished person who should know the legal provisions as the principle *nemo censitur ignorare legem.* Article 8 of the Labor Code states the good faith principle in employment relationships and that the employer shall advise the employee about the competent court[33], by inserting this information in the decision, whether or not he received qualified legal assistance[34]. According to an isolated contrary opinion[35], if this information is missing from the contested decision, it can be remedied by introducing the contestation at the competent court or by reaching the dispute to competent court, although initially the employee notified an incompetent court. Further more, it is unreasonable to consider null the decision, since the lack of that indication hasn't produced any injury to the contestant. It seems that absolute nullity appears to be too excessive, and in fact, the remediable theory would work.

In conclusion, as the case law[36] showed, it's irrelevant either that the penalty is easier or more serious, or the employee has suffered or not a prejudice, because the absolute

[27] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 3110/R/2009 in Labor Law Magazine no.5/2009, p.109-114.

[28] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 2630/R/2009.

[29] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 1403/R/2006 in Labor Law Magazine no.2/2006, p.112-115.

[30] O. Musta, p.93-95; M. Volonciu, *Absolute and relative nullity in labor law* in Law Labor Magazine no.2/2005, p.59.

[31] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 364/R/2009 in Labor Law Magazine no.3/2009, p.125-131.

[32] See Valcea Court, sentence no. 965/2008, maintained in appeal by Court of Appeal Pitesti, decision no.66/R/2009 in L. C. Dutescu, *Commented court law* in Labor Law Magazine, no.4/2009, p.119.

[33] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 3175/R/2010 in Labor Law Magazine no.1/2011, p.101-106.

[34] Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 364/R/2009 in Labor Law Magazine no.3/2009, p.125-131.

[35] N. Gheorghiu, *An opinion on the nullity of sanctioning decision, under Article 268 Paragraph 2 of the Labor Code* in Labor Law Magazine no.3/2005.

[36] See Court of Appeal Pitesti, Section of civil cases, labor disputes and social insurance, decision no. 12/R-CM/2006 in A. Țiclea (coordinator), D. Diko, L. Duțescu, L.Georgescu, M. Ioan, A. Popa, p.469-470. Also see Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 1367/R/2006 in D. Lupascu (coordinator), p.46-50.

nullity occurs if the violation regards a general interest, as Article 252 Paragraph 2 of the Labor Code states, when the injury is presumed. Constitutional Court found that the criticized text is one of those which are ensuring the stability of employment, its development in terms of legality, respecting the rights and the obligations of both sides. In the same time they are meant to assure the defense and respect to the employee rights and interests, given the dominant position of the employer. Disciplinary actions, and particularly, employment termination as employer's unilaterally will, are permitted only by respecting some form and substance rules introduced to prevent any employer improper conduct. Those terms which necessarily must be included in the decision to apply the sanction are intended to fully inform the employee about the facts, reasons and grounds of law, including the remedies and periods in which the legality and validity of that measure can be established. As the employer has all the information regarding the measure, he must prove its legality, so the employee can disprove other relevant evidence. The legal text is required by the court in order to solve any disputes coming from the employer[37].

Under Article 252 paragraph 2 of the Labor Code, the sanctioning decision has to be written for its validity. *Ad validitatem* form is required for many reasons as: superior courts have the possibility to better control, warning the parties over the economic or moral implications that a disciplinary sanction involves.

Constitutional Court was seized with an unconstitutionality exception concerning the form and substance conditions of the sanctioning decision. In his motivation, the author sustains that the highly restrictive regime of the decision harms economic freedom and the entrepreneurship of the employer, which would include his right to establish how to organize his activity and also to establish its own procedure of application disciplinary sanctions. Also, by imposing a very laborious text, as rules of public policy, and liable to be interpreted in employees favor, the legislator creates a procedural imbalance in the litigation regarding challenging measure. The Court rejected the exception[38], finding that those rules regard minimum rights and duties for both the parties that must be respected, and rules for work litigations. The form and substance conditions of the paper thru which a disciplinary sanction is applied, are imposed in order to prevent any abuses from employers and to have sufficient information to verify the legality and validity of the ordered measure. Further more, if the employer mentions some information in the decision, under penalty of absolute nullity, it has nothing to do with every person access to a business or free enterprise. This is because any employing person is required to comply with statutory regulations. The Court also noted that compilation and communication of the sanctioning decision are previous litigation activities, and the right to a fair trial can be achieved through respecting all the rules and guarantees regarding defense and legitimate interests, which has no connection with legal requirements for employer's disposal papers.

Constitutional Court stated that the provisions concerning sanctioning papers and those related to prior disciplinary investigation, and the criteria of disciplinary sanctions

[37] See Constitutional court decision no.1675/2009 published in Monitorul Oficial al Romaniei, part I, no.112/19.02.2010. these are also presented in Decision no 319/2007 published in Monitorul Oficial al Romaniei, part I, no.292/03.05.2007 and Decision no.383/2005, published in Monitorul Oficial al Romaniei, part I, no.792/31.08.2008, when after analyzing Article 268 od the Labor Code and Article 21 Paragraph 3 and Article 45 of the Constitution, The Court rejected as groundless the criticism made.

[38] Constitutional Court decision no.383/2005.

individualization aren't likely to restrict the right of any part to a fair trial, but rather, they serve to a promptly and reasonable time decision in court[39].

Notifying the sanctioning decision

Sanctioning decision shall be communicated to the employee within 5 days from issue date, this recommendation period[40] failure being sanctioned with unenforceability not with nullity. If this period would have been a decay one, in order to disciplinary prosecution, it was absolutely necessarily to reopen the disciplinary proceedings, respecting all the mandatory law provisions – fact that is impossible to accept in the initial legal context.

Under Article 252 Paragraph 1 of the Labor Code, timeliness of disciplinary application, reflects in the decision date, not in the paper thru which the employee was informed about the sanction. However, the doctrine[41] has shown that after 6 months since the offense, the decision became obsolete. *Per a contrario*, a late decision will become effective, if the 6 months period is observed. In judicial practice, the court of appeal overturned the sentence and send it back to the first instance, indicating prior checking whether the decision was late, taking into account the application date and the date when the decision was appealed[42].

Delayed notification of the sanctioning decision or the lack of it is likely to result in disciplinary sanctions by those who should have done it.

Providing notification to the employee gives him the opportunity to find out the way the investigation ended. This is the moment when the limitation period of 30 days starts, period in which the employee can appeal the decision. In addition, this is the moment when the sanction is applied and when the employer may enforce it. If the employer enforces the sanction before he notifies it, the employee is entitled to formulate an objection to execution, rather than avoidance measure. This is because revocation reasons are preliminary (Article 251 – failure prior disciplinary investigation) or concomitant (Article 252) with the sanctioning decision, while the notifying takes place after the paper is issued and it can't affect its validity[43].

The legislator state two ways of notifying the decision: by handing it to the employee, after he signs for it in a special register, or by mail at his home or residence when the employee refuses the receipt. In this legal context isn't valid to notify another employee or to display it at work. The employer bears the burden of proof, and this is possible only through documents. The doctrine maintains the opinion that isn't relevant if the employee

[39] Constitutional Court decision no.58/2007.
[40] See A. Ticlea, *Labor law...,* p.881.
[41] Ibidem, p.881. see also I.T.Stefanescu, *Labor law treaty*, Ed. Universul Juridic, Bucharest, 2009, p.729.
[42] See Court of Appeal Bucharest, Section VII of civil cases, labor disputes and social insurance, decision no. 10/R/2009 in Labor Law Magazine no.3/2009, p.99-102. In this case, the sanctioning decisions were issued in August and September 2009. The employee was notifyed on 11.03.2008 thru a report, and the complain was introduced on 02.04.2008. The employer appealed the complaint as late, claiming that it should have been made in 30 days after emission. The first instance admitted the exception and rejected the complaint as it was too late introduced. On remand, the court should reject the first except as without cause and should found as impossible the implementation of such a sanction notifyed by violating Article 268 Paragraph 3 of the Labor Code.
[43] Court of Appeal Cluj, Section VII of civil cases, labor disputes and social insurance for minors and family, decision no. 1298/R/2008, www.jurisprudenta.org.

moved out or he isn't found at that home/residence[44], as long as he didn't informed his employer about any changes, which remain unenforceability to the employer.

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- Constitutional Court decision no.383/2005;
- www.jurisprudenta.org

[44] A. Țiclea (coordinator), D. Diko, L. Duțescu, L.Georgescu, M. Ioan, A. Popa, p.474.

REFLECTIONS UPON THE CRIME OF DISTURBING THE USE OF THE DWELLING

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Abstract: *This article deals with the norm of incrimination regarding the crime of disturbing the use of the dwelling in the criminal code in force meant to protect a person's private life.*
Keywords: *the criminal code, protect, person's private life.*

This deed is incriminated[1] in art. 320 in the criminal code in force[2]. Such a deed is committed by a person that disturbs *repeatedly* the use of the dwelling or prevents the normal use of the dwelling[3].

Such deeds can derive from a co-dweller or from a person who lives in another part. The methods and the means of committing can be various. Any form this deed could take, it represents an obvious social danger as it can disturb the person's state of intimacy, his/her private life and the peace necessary to restore the work capacity.

Moreover, such deeds can be the source of serious conflicts between neighbours, of states of tension susceptible to bring important physical and psychic damages to the victims of the disturbances.

Protecting the person's intimacy involves fighting against the above mentioned deeds, to the extent to which they reach a degree of danger that can be eliminated only through the application of the criminal law.

The special legal object of the crime of disturbing the use of the dwelling concerns the relations that are born and developed in the context of social living, of mutual respect required by the life in the same condominium[4], emerged from the necessity of ensuring peace needed by everyone in his/her dwelling, and of a quiet use of the dwelling by a person[5].

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[1] Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roşca, *Explicaţii teoretice ale Codului penal român, Partea specială,* vol. IV, Editura Academiei Române, 1972, p.663. George Antoniu, Marin Popa, Ştefan Daneş, *Codul penal pe înţelesul tuturor*, Bucureşti, Editura, Politică, 1995, p.238;

[2] Art. 320 in the criminal code, *Tulburarea folosinţei locuinţei* (The disturbing of the use of the dwelling), consists of the deed that disturbs repeatedly the use of the dwelling in a condominium or prevents the normal use of the dwelling. Costică Bulai, Avram Filipaş, Constantin Mitrache, Bogdan Nicolae Bulai, Cristian Mitrache, *Instituţii de drept penal*, Editura Trei, Bucureşti, 2008, p.465; Gheorghe Nistoreanu, Alexandru Boroi, Ioan Molnar, Vasile Dobronoiu, Ilie Pascu, Valerică Lazăr, *Drept penal. Partea specială*, Editura Europa Nova, Bucureşti, 1999, p.271; Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roşca, *Explicaţii teoretice ale Codului penal român, Partea specială,* vol. IV, Editura Academiei Române, 1972, p.560; Mihail Udroiu, *Drept penal, Partea generală. Partea specială.* Editura C.H.Beck, Bucureşti, 2010, p.304; Tudorel Toader, *Codul penal. Codul de procedură penală,* Editura Hamangiu, 2011, p. 137;

[3] Ioana Vasiu, *Drept penal roman, Partea specială*, vol.II, Cluj-Napoca, 1997, Editura Albastră, p.505; Ioana Vasiu, *Drept penal. Partea specială*, Cluj-Napoca, 2003, Editura Accent, p.430.

[4] Ferrando Mantovani, *Diritto penale, Delitti contra il patrimonio con appendice di aggiornamento*, CEDAM, Padova, 1994, p.128.

[5] George Antoniu, *Ocrotirea penală a patrimoniului*, R.D.P., no.2/2001, p.131.

The crime of disturbing the use of the dwelling has as a *material object* a real estate or a part of it, belonging to a natural person, a legal person or a public institution; the real estate has to be in a person's possession or holding (it is protected the de facto possession[6]).

Another opinion belongs to Toader Tudorel[7], who considers that the crime of disturbing the use of the dwelling does not have a material object.

The active object of the crime can be any person because law does not condition the holding of someone criminally liable on the presence of a certain capacity of the subject.

Usually, the active subject of the crime is a dweller in the condominium who acts for certain reasons (for instance, for revenge, for mocking of a co-dweller, for the reason to force him/her to leave the dwelling etc.).

The passive object of the crime can be any person of the condominium who had his/her use of dwelling disturbed repeatedly or was prevented, in any way, from using in normal conditions his/her own dwelling. The capacity of dweller can belong to the owner of the dwelling, the tenant, the sub-tenant, the person tolerated in the condominium etc.

Moreover, the criminal law does not require that the passive subject should have a certain capacity[8]. Although the norm of incrimination uses the expression „dwellers", this does not mean that the crime will subsist only if in the condominium there are more dwellers; in reality it will exist even if there is only one dweller. The same, the deed to prevent the normal use of the dwelling can refer only to a single dweller, not to more[9].

In the criminal doctrine[10] was emphasized the fact that criminal law grants protection only to the person who occupies the dwelling legally. To support this thesis were brought the following arguments: first of all, from the literal interpretation of the term used in the text „dwellers", term that involves a legal acceptation, denominating not only a simple de facto occupant of the dwelling, but also a person with a legal capacity according to which he/she occupies the dwelling. This opinion considers that the tolerated has a legal capacity as he/she occupies the dwelling on the basis of the consent of the owner or tenant.

Secondly, if the protection of the criminal law was addressed in fact to any dwelling space, it would serve also to protect certain persons who use abusively certain rooms, without title, without complying with equity and morality. Law protects the interests of all people on the condition that these interests are legal. It is hard to think about the protection of an interest based on the breaking of the law.

On the contrary[11], was emphasized the fact that the criminal law grants protection not only for the person who occupies legally the dwelling, but also for the person who lives illegally. In this view, has no interest neither the legal title of the person who lives in the

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[6] Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roşca, *Explicaţii teoretice ale Codului penal român, Partea specială,* vol. IV, Editura Academiei Române, 1972, p.561; Mihail Udroiu, *Drept penal, Partea generală. Partea specială.* Editura C.H.Beck, Bucureşti, 2010, p.304;

[7] Vasile Dobrinoiu, Ilie Pascu, *Codul penal al României*, Edit. Albastră, Bucureşti, 1997, p.187; Tudorel Toader, *Drept penal român. Partea specială*, (5th edition, revised and updated), Edit. Hamangiu, 2011, p.470.

[8] Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roşca, *Explicaţii teoretice ale Codului penal român, Partea specială,* vol. IV, Editura Academiei Române, 1972, p.562.

[9] T. Vasiliu et al., *Codul penal comentat şi adnotat*, op. cit., p. 432.

[10] Ştefan Daneş în Teodor Vasiliu, Doru Pavel, George Antoniu, Ştefan Daneş, Gheorghe Dărângă, Dumitru Lucinescu, Vasile Papadopol, Dumitru C.Popescu, Virgil Rămureanu, *Codul penal român, comentat şi adnotat. Partea specială*, vol.II, Editura ştiinţifică şi enciclopedică, Bucureşti, 1977, p.433.

[11] Vasile Dobrinoiu, Nicolae Conea, Ciprian Raul Romiţan, Camil Tănăsescu, Norel Neagu, Maxim Dobrinoiu, *Drept penal, Partea specială*, vol.II, Editura Lumina Lex, Bucureşti, 2004, p.272.

dwelling, nor the way he/she managed to live hold the dwelling; in fact, it is enough that a person lives in that condominium and is disturbed by the way of use of the dwelling by other persons[12]. In our opinion the latter view is more justified (see also our opinion expressed in paragraph 10 regarding the consent of the person who occupies in fact a dwelling).

The material element (*actus reus*), in its typical form, consists of a repeated deed that disturbs the dwelling. Applying justly art.320 of the criminal code, the regional tribunal in Hunedoara decided, through the criminal decision no.779/1955, that the use of this text involves the fact that a dweller commits a complex of personal abuses meant to create an atmosphere that makes the other dwellers' living impossible[13].

If each of the disturbing deed represent a criminal act, will be multiple offences. Thus reasoned the popular tribunal of Craiova, which through the sentence no. 698/1955 condemned the man accused C.Z. to pay the fine of 100 RON for the offence of insulting and 400 RON for the crime of disturbing the use of dwelling, and the woman accused M.S. to pay 200 RON as the fine for the offence of hitting and 300 RON as the fine for the same crime of disturbing the use of dwelling, because on 24 November 1954 the accused M.S. threw in the courtyard the gas stove of the woman claimant E.G., and the next day the accused C.Z. cut the electric wire in the apartment and insulted her, while the accused M.S. hit her repeatedly in order to make impossible her living there and to prevent her from using normally the dwelling. The sentence was canceled as illegal by the regional tribunal of Craiova, through the criminal decision no. 4305/1955, being stated that all the above mentioned deeds represent only the objective side of the crime of disturbing the use of dwelling.

We have objections as regards this solution.

Through disturbing the use of dwelling is understood any deed that produces a discomfort to a person, preventing her/him to live in peace, in harmonious relations with the neighbours, in a calm atmosphere in her/his dwelling (for instance excessive noises, teasing telephone calls, throwing garbage on the balcony of the inferior floor, violent verbal acts such as screams, shouts, whistles etc.)[14]. It is about turbulent manifestations that do not represent themselves crimes. If they were accepted as crimes, the dominant opinion[15] is that there would be applied the rules concerning multiple offences.

A contrary opinion was expressed by Berthold Braunştein[16] who considered that when the criminal's activity is concretized through hitting, insults, threats to another dweller, with the aim of making his/her living impossible or to prevent him/her from normally using the dwelling, these deeds should be classified only as crimes of disturbing the use of dwelling, not as crimes of hitting, insult or threat, because the same deed cannot, under different denominations, attract more punishments for the author.

According to Vintilă Dongoroz[17], the disturbing brought to the public or private property means breaking the peaceful and complete use of a good, against the will of the owner or of the person entitled to use it.

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[12] Tr. Pop, op.cit., p. 611.

[13] The regional tribunal in Hunedoara, criminal decision no.779/1955, in Legalitatea populară, no.9/1956, p. 1097.

[14] C.Jornescu, *Îndrumar pentru asociaţiile de locatari în contextul legislaţiei actuale*, Editura Lumina Lex, 1990, p.28; Stefan Daneş, *Combaterea prin mijloace de drept penal a faptelor de tulburare a folosinţei locuinţei*, R.R.D., no.5/1973.

[15] Tudorel Toader, *Drept penal român. Partea specială*, (5th edition, revised and updated), Edit. Hamangiu, 2011, p.471.

[16] Berthold Braunştein, *Drept penal, partea specială*, Edit. de stat didactică şi pedagogică, Bucureşti, 1962, p. 147.

[17] V.Dongoroz, S.Kahane, I.Oancea, I.Fodor, S.Petrovici, *Infracţiuni contra avutului obştesc,* Bucureşti, Editura Academiei Române, 1963, p.325.

Are susceptible to produce such a disturbing those deeds through which are created inconvenient conditions for using the dwelling or the annexes, implicitly a state of tension, of discomfort of the person living in the room or the apartment whose use is disturbed, with consequences on his/her intimacy within the dwelling. For instance, in this category can be included deeds such as: making any kind of noises that can perturb the peace and the domestic life of the victim (fights, songs, dances, excessive use of the radio or television etc.). The author does not consider that the turbulent deeds that could represent crimes are included in the notion of „disturbing the use of dwelling".

We are not interested if these manifestations are permanent or on certain days of the week; is not relevant either if one of the dweller agreed to such manifestations, if there are other dwellers, even a single one, who are/is disturbed by these deeds and cannot normally use the dwelling. It is of no interest is dances, songs, etc., are masterfully executed, or if on the radio, television are programs of an excellent quality, being enough a single dweller to refuse such manifestations as he/she feels discomfort in the normal use of the dwelling.

As regards the variant consisting of acts of preventing the normal use of dwelling, the material element involves committing deeds that make the dweller not to be able physically to make use of the dwelling, as he/ she is prevented from these by the malevolent deeds of another person.

This characteristic is displayed by the teasing deeds through which are put obstacles, in the way of access to the dwelling or annexes or which prevent the natural light, or interrupt the electric current, or water, or keep dirty animals etc. in order to make the neighbours' life miserable and unbearable and prevent them from using normally the dwelling.

Preventing the normal use of dwelling refers to disturb the right of use in the exercise of the right. For example, the crime of disturbing the possession is committed by the person who, through hitting, drives away the owner of the dwelling or intimidates through the menacing presence of some companions, even if he was not entitled to do this.

In order to exist the material element of the crime, in both variants the deed of disturbing has to take place within inhabited dwellings. If such deeds take place around or in a dwelling where there is no person, for instance in a Mutual Help House, or in a museum, etc., this crime will not exist.

In the legal practice was decided that the crime mentioned in art. 320 in the criminal code does not exist if the disturbing refers to the living space occupied by an institution of education and this does not represent a dwelling[18]. We think that these deeds (when the use of a room that is not used as dwelling is disturbed) could represent the crime stipulated in art. 321 in the criminal code (crime of disturbing the public peace), if, of course, the deed would present a serious danger[19].

In the legal practice it was also decided that the frequent fights between the accused should not be considered a crime of disturbing the neighbours' peace if this consequence was not provoked on purpose[20]. In the same regard, was decided that the nonpayment of the quota of the condominium administrative expenses by the claimant does not justify the accused's deeds of disturbing the normal use of the dwelling[21].

[18] T.S.sp.d.2356/1971, R.R.D., no.8/1972, p.152.
[19] V.Dongoroz et al., *Explicații teoretice ale Codului penal român*, vol. IV, op. cit., p. 665.
[20] Collection of decisions of the Supreme Tribunal for 1966, Editura Științifică și Enciclopedică, București, 1967, decision of the criminal section, no.1442 of 19 August, 1966, p.406.
[21] *Ibidem*, decision of the criminal section, no. 2032 of 14 November, 1966, p.408.

Moreover, the deed of the accused of occupying totally a land surface that belongs to the claimant, meets all the constitutive elements of the crime of disturbing the possession stipulated in art.220 align. 1 in the criminal code and not of the crime of incompliance with the legal decision, even if previously, through a civil sentence that was not put into execution up to the date the deed was committed, the accused had been obliged to release the possession and the property of the civil party[22].

It is not considered a crime of disturbing the possession the deed of occupying a dwelling on the basis of an allocation order or of an eviction order.

The notion of dwelling includes also the annexes that facilitate the use of the dwelling. If the landlord destroys the storehouse of the tenant, this is equivalent to a deed of preventing the use of the dwelling, as the storehouse was meant to facilitate the normal use of the dwelling[23].

The material element of the crime involves a deed of disturbing the use of the dwelling repeatedly committed[24]. This requirement will not be fulfilled if these deeds happen only once, incidentally[25], without being repeated so that the material element of the crime of disturbing the use of the dwelling should be met.

In the literature it was debated if the deed of preventing the normal use of the dwelling should be repeated or is enough only one deed. In a view[26], is considered that would be enough only one manifestation of disturbing the use of the dwelling and would be indifferent if only one deed or repeated deeds of preventing the normal use of the dwelling happened[27]. We think that the two modalities should be separately dealt with.

For instance, it is about the crime of preventing the use of the dwelling *even if* the accused put a wardrobe in the front of the door of another apartment preventing the persons living there from using the dwelling. As concerns the modality consisting of the disturbing the use of the dwelling, law clearly requires that the disturbing deed should be repeated.

An essential request of the material element is that the disturbing of the use of dwelling should regard the normal use of the dwelling, i.e. the use corresponding to an ordinary living. For example, if the dweller that pretends to be disturbed organizes in his/her dwelling gambles or use it for other illicit manifestations (prostitution), he/she could not complain that the neighbours' manifestations disturb him/her as regards the normal use of the dwelling. The same, if a person is disturbed in the use of the dwelling in which he/she regularly organizes noisy parties, through which he/she himself/herself disturbs the neighbours, preventing them from the normal use of the dwelling, will not be able to call for the protection of the criminal law.

The immediate consequence of the deeds, under the both aspects, is the creation of a state of danger for the normal development of the social relations of neighbourhood, regarding the individual use of the dwelling[28].

Under the subjective aspect, the deed is committed with direct or possible intention. The doer has the representation that through his/her manifestations could disturb or prevent

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[22] Appeal Court Pitești, decision of the criminal section, no. 147 of 27 February 2009, www.legalis.ro
[23] *Practica judiciară penală*, vol. III, op. cit., p. 274 and the following.
[24] C.Lungu, *Înțelesul noțiunii de faptă „committedă în mod repetat*", in Revista Română de Drept, no.3/1972, p.94.
[25] *Ibidem*, p.664 and the following.
[26] Ioana Vasiu, *Drept penal roman, Partea specială*, vol.II, Cluj-Napoca, 1997, Editura Albastră, p.505; Ioana Vasiu, *Drept penal. Partea specială*, vol.II, Cluj-Napoca, 2003, Editura Accent, p.430-431.
[27] T.Vasiliu, D.Pavel, *op.cit*., vol.II, p.435.
[28] Tudorel Toader, *Drept penal român. Partea specială*, (5th edition, revised and updated), Edit. Hamangiu, 2011, p.471.

another dweller from normally using the dwelling, aiming at or accepting this result. Usually, the persons committing such deeds which at the same time disturb the individual intimacy, even if they do not aim at disturbing the other dwellers or preventing them from normally using the dwelling, to the extent they act led by selfishness and individualism and watch indifferently the noisy consequences of the scandals they produce, it means that they accept the possibility that through these kinds of behaviour they disturb the use of the dwelling. Thus, they act with indirect intention.

The purpose and the motive are of no interest for the existence of the crime, yet they will be taken into account for punishment individualization[29].

The crime is consummated, either when there were enough repetitions to reveal that it was no accident, but an indifference towards the elementary rules of living in the society, or when was produced even an act of effective prevention of the normal use of the dwelling (for example a neighbour put the furniture in front of the entrance of another apartment while cleaning the house).

The recurrence of the deed in this case is not required by law. Yet, if the deed is repeated a continued crime will exist. Thus, for example, through the criminal sentence no.1479 in 1995 the Law Court in Sibiu stopped the criminal trial started against the accused, by applying art.10 letter f in the criminal code, with the justification that the preceding complaint for the crime of disturbing the possession stipulated in art.220 in the criminal code was tardily formulated[30].

In compliance with art.320 in the criminal code, *the criminal action is started* at the preceding complaint of the aggrieved party, and the reconciliation of the parties eliminates the criminal responsibility[31].

According to art.284 align. 1 in the criminal code, in the case of crimes for which law stipulates that it is necessary a preceding complaint, this should be introduced in term of two months from the day when the entitled aggrieved party made the complaint, knew who the doer is.

This legal provision led to the pronunciation of different solutions regarding the way of considering the moment the crime is consummated, i.e. at the date of occupation or of the completion of the deed[32].

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[29] Vintilă Dongoroz et al., *Explicaţii teoretice ale Codului penal român*, vol. IV, op. cit. p. 565.

[30] Maria Colţan, *Plângerea prealabilă, Tulburare de posesie*. RDP, no.1/1999, p.142.

[31] Ovidiu Predescu, Angela Hărăstăşanu, *Drept penal, Partea specială*, 2nd edition revised, Editura Omnia Uni S.A.S.T., Braşov, 2007, p.404.

[32] V. Dongoroz, et al., *Explicaţii teoretice ale Codului penal român,* vol III, Edit. Academiei, Bucureşti, 1971, p.566; G.Lohin, A.Filipaş, *Drept penal român, Parte specială*, Edit. Şansa SRL, Bucureşti, p.133.

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INSTRUMENTS OF SEMI-DIRECT DEMOCRACY USED IN SWITZERLAND

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Motto: In a democracy, the people are sovereign. (Aristotel)

Abstract: *Our research effort will focus on the most used instruments of semi-direct democracy used in the Swiss confederation: the referendum and the popular initiative. Our study will supply information regarding all types of referendum, as well as the necessary constitutional requirements for their course.*

By frequently using the instruments of semi-direct democracy, the Swiss citizens are part of the decision-making process of representative authorities. Expressing their will by referendum, we can say the Swiss citizens have a role in creating the legislative framework of the Nation and enforce the basic principle of any state, according to which the people are sovereign.

Keywords: *semi-direct democracy, referendum, popular initiative, electoral body, Constitution*

I. Introductory aspects

The people, the holder of sovereignity, exercise the authority in different ways. There is either *direct democracy*, or *representative democracy*. There is also a third type in between these two ones, that is *semi-direct democracy*. In technical literature, semi-direct democracy has been defined as a system where the representativity principle and the so-called „pure democracy" (direct democracy)[1] co-exist and are carried out by appropriate techincal means. The followers of semi-direct democracy believe that it is an extremely useful remedy for representative democracy. Semi-direct democracy is seen as a partial alternative, but a genuine one to representative democracy[2].

The constitutional regulation of some European states emphasized the abundance of instruments that are used within semi-direct democracy. There have been thus institutionalized a number of direct action techniques, that is: the popular initiative, the referendum, the citizens' veto, the popular recall, the plebiscite, the court order recall. Those which are used on a regular basis are the *popular initiative* and the *referendum*.

Popular initiative is the law's inception proceeding (constitutional, organic or ordinary) following a direct proposal made by citizens. Popular initiative is regulated by special constitutional directives. It is usually forbidden in terms of constitutional matters, it

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[1] Ion Deleanu, *Instituţii şi proceduri constituţionale în dreptul românesc şi în dreptul comparat*, C.H. Beck Publishing House, Bucharest, 2006, p. 110.

[2] Jean-Marie Denquin, „Démocratie participative démocratie semi-directe", *Cahiers du Conseil Constitutionnel,* n° 23/2008 (http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-23/democratie-participative-et-democratie-semi-directe.51858.html).

requires a certain number of citizens to initiate such a proposal[3], certain domains are forbidden to popular initiative[4] etc.

The referendum is a method in which the people is associated with the decision-making process[5]. The classic role-model referendum is as a direct participation of the electoral body to law enactment. It can interfere in either before the legislative Assembly enacts the law, or after the enactment.

We don't consider it an exageration when it has been stated that referendum is an absolute imperative of democracy, or at least a way of achieving the goal: a participation of citizens as large as possible in the sovereignity exercise. The referendum isn't and it shouldn't be perceived as an ideal substitute for representative democracy, but it enables the will of people to prevail over the governants' will.

Democracy through referendum is a type of democracy where the demos directly decides over the controversial problems, although without getting reunited, but in a discrete manner, through referendum. It can be percieved as a subspecies of direct democracy. Democracy through referendum means overcoming the spatial and dimensional boundaries of direct democracy by the aid of technological ways. The actor of referendum acts like an electoral actor: he operates all by himself, without „taking part in debates" [6].

The institutions of semi-direct democracy seem to have nowadays the general function of re-establishing direct communication where the political system doesn't allow it or doesn't allow it anymore[7].

II. Types of instruments of semi-direct democracy used by the constitutional Swiss system

Switzerland appears to be an exception to the rule concerning the use of referendum as a tool of direct democracy. If it wasn't for Switzerland, semi-direct democracy would certainly

[3] In *Romania,* art. 74 (1) from the Constitution: „A legislative initiative shall lie, as the case may be, („„) a number of at least 100,000 citizens entitled to vote. The citizens who exercise their right to a legislative initiative must belong to at least one quarter of the country's counties, while, in each of those counties or the Municipality of Bucharest, at least 5,000 signatures should be registered in support of such initiative" and the art. 150 from the Constitution: „Revision of the Constitution may be initiated (…), by at least 500,000 citizens with the right to vote. The citizens who initiate the revision of the Constitution must belong to at least half the number of the counties in the country, and in each of the respective counties or in the Municipality of Bucharest, at least 20,000 signatures must be recorded in support of this initiative"; in *Italy*, art. 71 (2) from the Constitution: „The people may initiate legislation by proposing a bill drawn up in sections and signed by at least fifty-thousand voters"; in *Suisse*, art. 138 and art. 139 from the Federal Constitution dispose: any 100,000 persons eligible to vote may propose a complete/partial revision of the Federal Constitution; in *Austria*, art. 41 (2) Federal Constitutional Law: „Every motion by 100,000 voters or by one sixth each of the voters in three Laender (henceforth called "initiative") shall be submitted by the Federal electoral board to the National Council for action.Eligible to vote, as to initiatives, are those who on the last day of the registration deadline are eligible to vote for the National Council and have their principal domicile in a municipality within the federal territory. The initiative must concern a matter to be settled by Federal law and can be put forward in the form of a draft law".

[4] According to art. 74. (2) from the Romanian Constitution: „A legislative initiative of the citizens may not touch on matters concerning taxation, international affairs, amnesty or pardon".

[5] Dan Claudiu Dănişor, *Drept constituţional şi instituţii politice. Tratat.* C.H. Beck Publishing House, Bucharest, 2007, p. 100.

[6] See Giovanni Sartori, *Teoria democraţiei reinterpretată,* Polirom Publishing House, Iaşi, 1999, pp. 119-126.

[7] Constance Grewe, Hélène Ruiz Fabri, *Droits constitutionnels européens*, PUF, Paris, 1995, p. 263.

be considered an utopic system. Switzerland is the state where „popular rights" are enough developed so that an almost permanent control could be exercised over its representatives[8].

There are significant differences between the referendum in Switzerland and other states. In Switzerland, the referendum is a solemn event, when the leaders move towards the people. It is an ordinary point in the political life of the state, which takes place once in three or six months and aims a large number of matters[9].

Switzerland developed a democratic system which serves for more than two centuries. Another instrument used on a large scale in Switzerland is the *popular initiative*, that emerged in 1848, but only in 1891 had this instrument been put into practice. There are quite a small number of countries where the citizens get so actively involved in the life of the state and Switzerland is one of them. The current manifestation of direct democracy has been encouraged by a series of parameters, such as: a high degree of education, a small number of people and a generous media offer.

The Swiss constituent regulated within the Federal Constitution, Title IV – *The people and the cantons* – (*Peuple et cantons*), Chapter 2 – *The initiative and the referendum*, the two instruments of direct democracy: *the popular initiative* and *the types of referendum* (*mandatory* and *optional*).

1. The popular initiative[10]

As opposed to referendum, which can pull back the Parliament activity, the popular initiative can be regarded as a reform instrument. It can be used to partially or completely review the Constitution of Switzerland[11]. Popular initiative is reduced to the constitutional domain.

Any *100,000 persons eligible to vote*[12] may within 18 months of the official publication of their initiative propose a *complete revision of the Federal Constitution*. This proposal must be submitted to a vote of the People[13].

Any *100,000 persons eligible* to vote may within 18 months of the official publication of their initiative request a *partial revision of the Federal Constitution*. A popular initiative for the partial revision of the Federal Constitution may take the form of a general proposal or of a specific draft of the provisions proposed. If the initiative fails to comply with the requirements of consistency of form, and of subject matter, or if it infringes mandatory provisions of international law, the Federal Assembly shall declare it to be invalid in whole or in part. Proposals that are submitted to the vote of the People are accepted if a majority of those who vote approve them.

If the Federal Assembly is in agreement with an initiative in the form of a general proposal, it shall draft the partial revision on the basis of the initiative and submit it to the vote of the People and the Cantons. If the Federal Assembly rejects the initiative, it shall submit it to a vote of the People. The People shall decide whether the initiative should be adopted. If they vote in favor, the Federal Assembly shall draft the corresponding bill.

An initiative in the form of a specific draft shall be submitted to the vote of the People and the Cantons. The Federal Assembly shall recommend whether the initiative should be

[8] François Hamon, *Le référendum, Étude comparative*, L.G.D.J., Paris, 1995, p. 99.
[9] François Hamon, Olivier Passelecq, *Le référendum en Europe: bilan et perspective*, Harmattan, Paris, 2001.
[10] This tool of semi-direct democracy was introduced in 1891.
[11] The „Total review" of the Constitution doesn't necessary imply changing all the articles, but it takes place according to a much complex proceeding than „partial review" method.
[12] It was only in 1977 when the number of those who could put forth a popular initiative was enlarged.
[13] Art. 138 Federal Constitution of The Swiss Confederation.

adopted or rejected. It may submit a counter-proposal to the initiative[14]. The People shall vote on the initiative and the counter-proposal at the same time. The People may vote in favor of both proposals[15]. They may indicate the proposal that they prefer if both are accepted.

Nevertheless, we have to notice that popular initiative within the Swiss system is not regulated in terms of legislative matters.

2. Referendum

2.1 Mandatory referendum

According to Art. 140 of the Federal Constitution, the following must be put to the vote of the People and the Cantons: a) amendments to the Federal Constitution; b) accession to organisations for collective security or to supranational communities; c) emergency federal acts that are not based on a provision of the Constitution and whose term of validity exceeds one year; such federal acts must be put to the vote within one year of being passed by the Federal Assembly. Proposals that are submitted to the vote of the People and Cantons are accepted if a majority of those who vote and a majority of the Cantons approve them. The result of a popular vote in a Canton shall determine the vote of the Canton. The Cantons of Obwalden, Nidwalden, Basel-Stadt, Basel-Landschaft, Appenzell Ausserrhoden and Appenzell Innerrhoden shall each have half a cantonal vote[16].

According to Art. 140, Indent 2 of the Federal Constitution, the following shall be submitted to a vote of the People: a) popular initiatives for a complete revision of the Federal Constitution; b) popular initiatives for a partial revision of the Federal Constitution in the form of a general proposal that have been rejected by the Federal Assembly; c) the question of whether a complete revision of the Federal Constitution should be carried out, in the event that there is disagreement between the two.

If the decision on ratification of an international treaty is subject to a mandatory referendum, the Federal Assembly may incorporate in the decision on ratification the amendments to the Constitution that provide for the implementation of the treaty.

2.2. Optional referendum

According to Art. 141 of the Federal Constitution, if within 100 days of the official publication of the enactment any 50,000 persons eligible to vote[17] *or any* eight Cantons *request it, the following shall be submitted to a vote of the People: a) federal acts; b) emergency federal acts whose term of validity exceeds one year; c) federal decrees, provided the Constitution or an act so requires; d) international treaties (that: 1. are of unlimited duration and may not be terminated; 2. provide for accession to an international organisation; 3. contain important legislative provisions or whose implementation requires the enactment of federal legislation).*

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[14] Art. 139 Federal Constitution of The Swiss Confederation.

[15] The system of "double YES" was introduced on 7th of February 1987.

[16] Art. 142, Indent 2-4 Federal Constitution of The Swiss Confederation.

[17] In 1874, the number of signatures necessary to ask for a referendum was set to 30 000. In 1977, the number went high up to 50 000 in order to mirror the expanse of the electoral body, but also to stop multiplication of referendums. The signatures were suposed to be gathered within 90 days after the law or the federal order had been issued.

If the decision on ratification of an international treaty is subject to an optional referendum, the Federal Assembly may incorporate in the decision on ratification the amendments to the law that provide for the implementation of the treaty.

Regarding the popular initiative, between 1893 – February 2012:

- 83 popular initiatives – didn't meet the conditions to be submitted to a vote;
- 289 popular initiatives - meet the conditions to be submitted to a vote;
- 85 popular initiatives – were drawn back;
- 2 popular initiatives – were drawn back;
- 4 popular initiatives – were declared invalid;
- 175 popular initiatives – were subject to vote;
- 18 popular initiatives – were accepted by the people and cantons[18].

Most of these initiatives got less than 50% of votes and were thus rejected. Nevertheless, the embedded Proposals triggered intense debates, and have been partially incorporated within laws afterwards. The number of requests for *optional referendum* got larger in time. During the 60's there were only 8 requests, during the 70's there were 17, and between 1991-2000 there were 36 requests. Between 2001-2010, 28 matters were submitted to vote[19].

The impact of referendum and popular initiative doesn't restrict itself to pointwise decisions. They equally influence the function of representative system. This influence is carried out through the agency of political parties. The strategic position of a political party[20] doesn't depend only on its electoral results, but also on the prevailance over the referendum vote [21].

Conclusions

Using these two instruments of participatory democracy on a regular basis: *the referendum* and *the popular initiative*, but also *the petition*, the Swiss citizens turn out to be extremely involved within the life of society. On the occasion of referendums, the Swiss citizens expressed their opinion on delicate matters and of crucial importance for the community they live in (let's take, for instance, the federal popular initiative regarding the expel of foreign law breakers – 2010[22], the federal popular initiative against the establishment of minarets across Switzerland – 2009[23] etc.). Still we have to mention that using these instruments on such a regular basis in Switzerland was possible due to the fact that these consultations aim a small number of citizens, and the state benefits from financial and logistic resources that enables it to set up in good conditions each popular consultation. The event is also a tradition and a specific feature of the Helvetic Confederation.

[18] For details: http://www.admin.ch/ch/f/pore/vi/vis_2_2_5_8.html
[19] For details: http://www.admin.ch/ch/f//pore/vi/vis_2_2_5_8.html
[20] This explains the exclusion of any tool of semi-direct democracy in Germany after World War II, as well as the laziness of Italians to put them into practice.
[21] François Hamon, *op. cit*., p. 110-111.
[22] It's about the popular initiative of 15.02.2008 regarding the expell of foreign law breakers, which has been approved by referendum (52,3%)
[23] 57,5% of the Swiss citizens pronounced themselves against the establishment of minarets across Switzerland (http://www.admin.ch/ch/f/pore/va/20091129/index.html).

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ACT – FACT – OPERATION: DISTINCTION IN ADMINISTRATIVE LAW

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Abstract: *The current study tries to clarify a long dispute in administrative law: what is an administrative act, an administrative fact or an operatian. The final scope of the study is to make this distiction very clear for all law researchers because many discussions about this subject were present in our doctrine. Administrtiave life involves all kind of operations and somewhere it is difficult to put them in a strict frame. This is the reason why it is so important to understand how can be defined any of them.*

Keywords: *administrative act, administrative law*

The activity of public administration can take many shapes, which can be classified, from several viewpoints, depending on different criteria: the aptitude to produce legal effects, the number of parties involved, the applicable legal regime etc. the three-party fundamental division of the forms of activity of public administration is that in legal acts –material-legal facts –material-technical (administrative) operations. To these is added, in the opinion of certain authors[1], the political acts. We shall define them one by one, and then we shall make de proper connections.

The legal acts are those manifestations of the will of an administrative body, made with the purpose of causing legal effects. A construction authorization, a Government decision to increase the pensions, an ownership title issued in view of rebuilding the ownership right of an individual, a local council decision for the acceptance of a donation etc. classify in this category.

The material-legal facts are those forms of activity of public administration which, although are not performed with the purpose of causing legal effects, they produce such effects, on the grounds of the law. With title of example are generally offered a misdemeanor or a contravention of a public servant, the non-settling of a petition within the legal term etc.

The material-technical (or administrative or technical-material) operations represent those forms of activity which do not produce, in themselves, any legal effect, but they prepare an administrative act[2], conferring it an execution character[3] or serving for the fulfillment of the publicity formalities of the already issued act: approvals, communication addresses, the agreement given by an individual in view of issuing a construction authorization are examples of such material operations.

The political acts are the manifestations of will of an administrative body, issued for the purpose of producing political (but not also legal) effects: the message of the President of Romania addressed to the Parliament (art. 88 of the Constitution), declaration of the prime-minister regarding the general policy of the Government [art.107 para. (1) of the Constitution] etc.

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[1] R.N. Petrescu. Drept administrativ, Hamangiu Publishing House, Bucharest, 2009, p.276.

[2] This is precisely why some authors call them preliminary acts – see, for example, C.G. Rarincescu, Contenciosul administrativ român, 2nd edition, „Universala" Alcalay & Co. Publishing House, Bucharest, p.249-251. The author speaks of them in the context of analyzing the object of the action in administrative contentious, which must be an administrative act, and not a preliminary one.

[3] It is a matter of formalities (administrative operations) which lead to the forming of complex administrative acts: the administrative consent, the actual approval, the confirmation, as synonym of the latter.

As a rule, political acts originate from the authorities at the top of the administrative pyramid.

In reality, the categories that count are those of legal act, respectively material – technical (administrative) operation. The other two categories are, generally, only mentioned, and not analyzed by the administrative law authors. And this because, as far as the political acts are concerned, once defined, they rather classify in the matter of constitutional law than in administrative law.

On the other hand, the *material-legal facts* (namely, those facts material to which the law attached legal effects[4]) do not present such a high practical importance. And this because if we speak of the illicit deeds of the public servants (veritable manifestations of will which, through the lawmaker's will, produce legal effects), have a too low importance for a general theory of the administrative act; and if we are talking about the unjustified refusal to settle a petition, we must notice that, according to art. 2 para. (2) of Law no. 554/2004 of the administrative contentious[5], it is assimilated, as legal regime, to the administrative act; as a consequence, the creation of such a distinct category could be purely formal[6].

The fundamental distinction between the legal act and the material-technical operation is, as can be seen from their definition, that of the legal effects that only acts produce. On the contrary, the administrative operations do not cause such effects[7]. At most, in certain situations of forming complex acts, we could argue that such operations contribute to the production of legal effects by the administrative acts. Therefore, essential for the distinction in case are the legal effects that the manifestation of will of the administration causes or not. Thus, as noticed in the legal practice[8], to the extent to which the document analyzed causes legal effects, thus being „susceptible of damaging the rights of the person who enjoyed the exercise of certain prerogatives until that moment", it is an administrative act of authority, censurable via the administrative contentious, even if it bears a name specific to the material-technical operations (address)[9].

If we analyze the activity of the public administration structures, we shall establish that the greatest part of their activity is not occupied with legal acts, but with the operations of the administration and with the material facts, which make up the second above-named category.

We shall dedicate this chapter to the forms of activity which do not produce legal effects because the administrative act, as main form of activity of the public administration authorities, producer of legal effects, will be widely analyzed starting with section II.

Administrative operations present special importance because with their help are performed the issuing, execution and execution control of administrative acts, as well as of other legal acts. The administrative operations are concrete forms of achieving public administration, of the executive activity performed by the authorities, public institutions, in

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[4] T. Drăgan, Actele de drept administrativ. Ştiinţifică Publishing House, Bucharest, 1959, p.11 and the following.

[5] Published in the Official Gazette no. 1154 of December 7th, 2004 and modified through Law no. 262/2007 (Official Gazette no. 510 of July 30th, 2007).

[6] Still, we shall mention that, from the theoretical viewpoint, the legal acts and the material-legal facts are distinguished by that, in the case of the first, there is a perfect concordance between the manifestation of will, its purpose and its effects, concordance which, however, does not exist in case of the material-legal facts – I. Iovănaş, Drept administrativ, Servo Sat Publishing House, Arad, 1997, p.14.

[7] For example, in case of a conform approval, the issuing body is free to issue the administrative act or not (in the same sense, see T. Drăganu, Actele de drept administrativ, Ştiinţifică Publishing House, Bucharest, 1959, p.127; R.N. Petrescu, Drept administrativ, Hamangiu Publishing House, Bucharest, 2009, p.321).

[8] C.A. Cluj, Administrative and fiscal contentious section, Civil decision no. 1493 of October 9th, 2006, in J.B. 2006, Sfera Juridică Publishing House, Cluj-Napoca, 2007, p.463-465.

[9] O. Podaru, Drept administrativ, vol. I. Actul administrativ (I), Repere pentru o teorie altfel, Hamangiu Publishing House, Sfera Juridică, 2010, p.7.

achieving the duties conferred upon them through the law, which do not produce, by themselves, legal effects, regardless of whether they accompany a legal act or not.

A synthetic definition of the administrative operations shows that these are „office operations executed by the public administration personnel during the administrative process".[10]

Exceptionally, some of them can produce legal effects, but only in the conditions and cases expressly established by law.

Some administrative operations are performed in the execution of the public authority, such as, for instance, the handing of an ownership title according to Law no. 18/1991, while others do not imply this, being simple office or chancellery operations: document drafting, stamping, filing, archiving etc.

Professor Al. Negoiță defines administrative operations as being „those material operations performed by the personnel of the public administration bodies along the administrative process".

The higher number of administrative operations in comparison to that of the administrative acts is explained through the fact that for the elaboration and execution of a single administrative act there are also necessary different administrative operations.

The administrative operations can also be grouped according to the moment of their intervention in the different stages of the process of elaboration and execution of the administrative acts.

Thus, in the preparation stage there are performed operations of documenting, establishment, expertise, auditing, report drafting, statistics, minutes etc.

Issuance presupposes first the elaboration of the administrative act draft, its approval by the proper bodies, its dating, signing and registration.

In the execution stage, from the variety of administrative operations occurring, we mention those related to the publicity of the act and to bringing it to the knowledge of the interested parties, the forced execution, control etc. In the specialty literature sometimes a distinction is made between administrative and material operations, withholding the fact that the border between them is also difficult to outline.

Thus, D. Brezoianu withholds the fact that „administrative operations are generally connected to the issuing, execution and execution control of an administrative act or of another actual legal act, determined, while the actual material operations are performed in the exercising of other duties of the public administration bodies, without having a direct connection to a certain administrative act or another legal act, issued by public administration bodies or by other public authorities".

Administrative operations can be measures for the preparation, elaboration, information and putting into execution of the administrative acts and contracts.

The technical-administrative operations are characterized by the following traits:

a) they are concrete forms of achieving public administration and are subjected to the administrative law legal regime and usually intervene in connection to the issuance, execution and execution control of the administrative act and/or contract;

[10] I. Popescu – Slăniceanu, C. – I. Enescu, D.– M. Petrovscki , *Drept administrativ",* Independența Economică Publishing House, Pitești, 2010, p. 299.

b) they are material facts, being able to produce legal effects only in the conditions and cases expressly established by law;

c) they are performed only by the authorities, public institutions and services, by their organizational structures, as well as by the public servants especially empowered with such duties, with the occasion of executing the competences due to them;

d) they can commit the administrative liability of their author, in the conditions of the law.

With respect to the moment of issuing – adopting the administrative act, they can intervene previously, concomitantly or subsequently to it.

The technical-material operations are characterized by the following traits:

a) they are concrete forms of achieving public administration in wide sense, by means of which are created goods and/or are provided public services;

b) they are material facts, which do not produce, by themselves, legal effects;

c) they can be committed by an authority, public institution and service, organizational structure or public servant, as well as by trading companies, formerly state-owned enterprises and non-state organisms.

The technical-material operations produce transformations in the material world, without the existence of any volitional manifestation, without having a connection to the administrative act; this is the supply of thermal energy, of drinkable water, the administration of medical treatment a.s.o.[11]

Apart from legal acts, at the level of the public administration authorities we also meet material facts which do not materialize a legal will; of some of them, the law connects the production of certain legal effects.

The weight of the activity of the public administration authorities is represented by such material facts, the greatest part of the administrative personnel having as job duties to perform the different administrative operations or, as the case may be, of the material ones.

By means of all these operations is ensured the transposing into practice both of the legal acts of the public administration authorities and of the laws, on the basis of which are issued the respective legal acts, or, as the case may be, within the limits of the law, public services are rendered.[12]

The technical-material operations are subjected, in an administration based on scientific criteria, to a permanent process of rationalization and perfection, especially through the introduction of the modern techniques of recording and informing, which contributes to the elimination of the classical operations of administrative technique, without, however, being able to fully remove human activity.

The special significance of the administrative operations was also noticed in the post-war doctrine, starting from the premise that they are the only ones that allow the issuance and the actual execution of the administrative acts. The theorization, however, was appreciated as extremely difficult, even more difficult than that of the administrative acts, especially due to their wide diversity[13].

In the post-war doctrine, administrative operations were regarded as material facts committed by the administrative bodies for the actual execution of the laws and of the other legal acts issued by the state bodies on their grounds, distinguishing from the legal acts through the fact that they were not, by means of their content, manifestations of will made

[11] E. Bălan, Instituții administrative, C.H. Beck Publishing House, Bucharest 2008, p. 157-159.
[12] A. Iorgovan, Tratat de drept administrativ, vol. II, All Beck Publishing House, Bucharest, 2002, p.12.
[13] R. Ionescu, Drept administrativ, Didactică şi Pedagogică Publishing House, Bucharest, 1970, p. 284.

for the purpose of causing legal effects[14].

Apart from these, the same author also identified the so-called operations of administrative technique, also material facts, which are not, however, performed in the exercising of the state power and, hence, are not part of the state administration.

Finally, the category of directly productive operations is evoked, different from the other two categories through the fact that it represents directly productive facts, producing material goods or providing certain material services[15].

The material operations and facts of the public administration authorities are classified in the current doctrine in: technical-administrative operations (power, internal administration, which can be, in their turn, producers of legal effects and non-producers of legal effects); operations for the execution of the public services (in varied fields) and technical-material operations (in the economic and industrial field)[16].

The material operations and facts of the public administration authorities are distinguished from the legal acts of the public administration authorities through common and specific traits.

As common traits, we shall withhold, firstly, that they are material activities and not express manifestations of the will to create, modify of end rights and obligations and, secondly, the fact that they usually intervene in connection to the issuing and execution of legal acts of the public administration authorities.

In addition, we also mention the fact that the legal effects produced by the administrative operations is not due to the will that is at the basis of their achievement, but to the will of the law, which foresees their possibility or, as the case may be, their need.

Thus, in certain cases, the law is the one granting legal effects to certain material facts, characterized as transformations in the surrounding material world due to the occurrence of legal effects, independently of the existence of a manifestation of will in this sense[17].

In addition, not only the action, but also the inaction, may determine certain modifications in the material world. It may produce legal effects.

The legal material facts can be licit, occurring as allowed actions, according to the law and the state interests, and illicit, in contradiction to the law and the state interests and, hence, not allowed by the legal regulations in effect[18].

It must be mentioned, though, that we can speak of the licit or illicit character of the legal facts only when they are also human actions. However, we cannot speak of the illicit character of certain natural events, which, also, classify in this category[19].

Regardless of their licit or illicit character, the difference between these material legal facts and legal acts is clearly seen: in case of legal acts, the legal effect is a direct consequence of a manifestation of will, while in case of the material legal facts, it can produce even in the absence of a manifestation of will, provided that a fact with an own objectivity, most times a transformation or a loss in the material world, would have occurred in the conditions established by the law[20].

The material-legal facts represent, in the opinion of another author, those circumstances which

[14] R. Ionescu, Drept administrativ, Didactică şi Pedagogică Publishing House, Bucharest, 1970, 211 and the following.
[15] R. Ionescu, Drept administrativ, Didactică şi Pedagogică Publishing House, Bucharest, 1970, p.214.
[16] A. Iorgovan, Tratat de drept administrativ, vol. II, All Beck Publishing House, Bucharest, 2002, p.13.
[17] R. Ionescu, Drept administrativ, Accent Publishing House, Cluj-Napoca, 2004 p.276.
[18] R. Ionescu, Drept administrativ, Accent Publishing House, Cluj-Napoca, 2004 p.276; T. Drăganu, Actele de drept administrativ, Ştiinţifică Publishing House, Bucharest, 1959, p. 14.
[19] I. Iovănaş, Drept administrativ, Servo Sat Publishing House, Arad, 1997, p.14.
[20] T. Drăganu, Actele de drept administrativ, Ştiinţifică Publishing House, Bucharest, 1959, p. 14 and the following.

determine the occurrence of legal effects on the basis of the legal norms, without the existence of a manifestation of will, made expressly or tacitly, for the purpose of producing these effects[21] .

Thus, if in civil law we have civil facts, as underlined by another author, also, in administrative law, we have administrative facts, which, without distinction of being performed (in case of actions) or not performed (in case of inactions), belong both to public servants and to individuals, being divided into two categories: licit administrative facts and illicit administrative facts [22].

The technical-administrative operations represent actions performed mainly by the public administration authorities and their clerks, through which is reached the issuance or application of the administrative acts, such activities being possible to be performed also at the level of services belonging to the legislative or judicial power, but as complementary activities[23].

The technical-material operations, according to another author, are a concrete form of achieving the executive activity non-producer of legal effects[24].

According to the current doctrine, the technical-administrative operations of power are characterized by the following traits: they are committed only by public administration authorities and are mainly regulated by the administrative law[25]. In the opinion of another author, they are committed either by decisional bodies or clerks, or by auxiliary, execution factors, unlike the administrative law acts, which are issued only by decisional factors. They are volitional activities, triggering, in some cases, the liability of those committing them, and they do not produce legal effects[26].

The detailed research of the technical-administrative operations is performed, usually, within the science of administration, aspect due to which we appreciate as sufficient their brief presentation in this section. Still, such a presentation is necessary for the correct identification of all forms of activity specific to the public administration authorities.

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[25] A. Iorgovan, Tratat de drept administrativ, vol. II, All Beck Publishing House, Bucharest, 2002, p. 17

[26] I. Santai, Drept administrativ şi ştiinţa administraţiei, volume II, Risoprint Publishing House, Cluj-Napoca, 2003, p.168.

REFLECTIONS ABOUT JURIDICAL NATURE OF THE DEADLINES FOR APPLYING DISCIPLINARY SANCTIONS

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Abstract: *In the context of current legislation we considered necessary to analyze and identify the type of legal deadlines for applying disciplinary sanctions. In achieving this goal we started with the delimitation between the institution of extinctive prescription and decay. Next, we present the legal deadlines for applying disciplinary sanctions, for then to argue the view that the two time periods analyzed are decay terms. We also considered appropriate to present the special regulations regarding the timing of application of disciplinary sanctions for civil servants, policemen and teachers.*

Keywords: *disciplinary liability, disciplinary sanction, extinctive prescription, forfeiture, 30 days, 6 months*

1. General arrangements of extinctive prescription and decay terms in light of the Civil Code - Law no 287/2009[1]

As a civil sanction, extinctive prescription extinguishes the substantive right of action if not exercised within the law. Regarding the notion of „substantive right of action", the current Civil Code gives legal recognition to the definition established in the juridical literature[2]. According article 2500 Civil Code, paragraph 2, the substantive right of action means the right to compel a person, with public force, to execute a specific service to meet a specific legal situation or incur any other civil sanction.

However, a literal interpretation of the article 2545 Civil Code reveals that the decline is that the civil penalty that is subjective or lapsed prevent unilateral act has not been exercised or carried out within the period prescribed by law or by will parties.

Given the definitions and their legal regimes, extinctive prescription is different from decay in the following aspects: a) although both are civil penalties, extinctive prescription extinguishes the substantive right of action action, while the main effect of decay extinguishes the subjective right itself or prevents the perpetration of a unilateral act. b) extinctive prescription terms are legal, but not necessarily imperative - given that under current law limitation is regulated as a legal institution of private order[3]. It is also important to remember that under the provisions of paragraph 3 in conjunction with paragraph 4 of the article 2515 Civil Code, within limits and conditions provided by law, parties with full legal capacity may, by express agreement, change the length of prescription, by reducing or increasing them, but without the new time limit to be less than one year nor more than 10

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[1] Republished in the Official Gazette of Romania, Part I, no 505 of 15 July 2011 under article 220 paragraph 1 of Law no 71/2011 to implement the Law on Civil Code no 287/2009.

[2] See in this direction Viorel Mihai Ciobanu, *Theoretical and practical treaty of Civil Procedure*. Volume I, *General Theory*, National Publishing House, Bucharest, 1996, p.251-260.

[3] Gabriel Boroi, Carla Alexandra Anghelescu, *Civil law course*. *General theory,* Hamangiu Publishing House, Bucharest, 2011, p.324.

years, excluding periods of 10 or more years, which can be extended to 20 years. Decay terms are legal or conventional. The legislator[4] established the following limits: is null and void clause that establishes a limitation period which would make it excessively difficult to exercise the right or to commit an act by the claimant. According to paragraph 2 article 2549 Civil Code, terms of public order can not be modified by the interested parties. Note that this text refers to legal terms established by legal rules that protect a general interest. *Per a contrario*, the interested parties may change, decreasing or increasing, decay terms established by legal rules that protect a particular interest and conventional terms.[5]

c) regarding their legal status, note that, under paragraph 1 art article 2548 Civil Code, unlike the extinctive prescription term, decay ones are not usually covered by suspension or disruption. Exceptionally[6], major force delays the start time of decay terms or, if started, is suspends them, and will resume after the cessation of the suspension cause, taking into consideration the period before suspension. However, term will not come true sooner than five days after the suspension cause ended. We identify three differences form extinctive prescription suspension rate of major force: 1. any part of the legal relation can be in such a situation, whereas in case of extinctive prescription is required that the one against who the term flows would be hindered by such an act; 2. legislator makes no statement about the temporary major force[7] and *ubi lex non distingiuit, nec nos distinguere debemus*; 3. we deal with a special effect[8] of suspending the decay terms which consists in an extension of the fulfilment moment, only that this time, the period between the cessation of major force and the term frame should be, invariably, at least 5 days, regardless of the decay terms duration. The second exception to the provisions of paragraph 1 article 2548 Civil Code, refers to the enforcing the legal rules relating to disruption prescription[9] in the following situations:

i) application for the proceedings / arbitration / formal notice, when the exercise of subjective right involves the pursue of a legal proceeding[10];

ii) disclaimer of the decay benefit of the person in whose favour it was stipulated, when the decay term was established by contract or by a legal provision that protects a private interest[11].

2. The legal terms of applying disciplinary sanctions

According to article 252 paragraph 1 of the Labour Code, employers have disciplinary sanction issue by a written decision within 30 calendar days from the date of the acknowledgment about committing a disciplinary offence, but not later than 6 months from the date of offence. There is established a rule of procedure to be followed in the

[4] Article 2546 Civil Code.
[5] Also see Gabriel Boroi, Carla Alexandra Anghelescu, *op.cit.,* pp.326-327.
[6] This novelty in the suspension of decay terms is brought by paragraph 2, article 2548 Civil Code.
[7] According to article 2532 Civil Code, section 9, major force, when temporary, shall not be considered suspension cause unless it occurs in the last six months before the expiry of the terms.
[8] For discussions about the special effect of the extinctive prescription suspension, see Gheorghe Beleiu, *Romanian Civil Law. Introduction to civil law. Civil rights issues*, Eleventh Edition revised and enlarged by Marian Nicolae, Petrică Truşcă, Universul Juridic Publishing House, Bucharest, 2007, pp.286-287.
[9] About withdrawal of extinctive prescription *de lege lata*, see Gabriel Boroi, Carla Alexandra Anghelescu, op.cit., pp.316-322.
[10] Article 2548 paragraph 3 Civil Code.
[11] Declaimer of the decay benefit is similar to recognition of the right which action is prescribed, according to paragraph 1 article 2549 Civil Code

administrative phase of the application of disciplinary sanctions for committing an act of guilt in connection with work that violate the law, the individual employment contract, collective agreement applicable or provisions and legitimate hierarchical orders.

Compared to these provisions, the Constitutional Court was hearing a challenge, in which motivation the author argued that the limitation of the right to apply disciplinary sanction is unconstitutional because by enforcing a six months deadline, it is restricted the right of making justice, in that it prevents the prosecution of the employee who committed a breach of labour discipline rules by sanctioning his behaviour. The Court rejected the plea of unconstitutionality[12] grounds concerning matters stated in its law cases[13] on the regulations of previous legislation that where there would be no limitation period for the application of disciplinary sanctions would be equivalent to unlimited disciplinary liability, unacceptable and absurd consequence in terms of general principles of liability.

We consider necessary to mention that the inclination of the court in determining terms of disciplinary sanctions as extinctive prescription terms[14], has no influence on the decision to rejecting the plea raised, as both extinctive prescription and decay are causes to remove disciplinary liability. They should not be confused with cases which remove the unlawful nature of the offence, since in the first case, the act is a disciplinary offence that triggers disciplinary action, but this responsibility is removed by the will of the labour legislator, while in the second case, the behaviour does not meet the elements of a disciplinary offence.

3. Terms of applying disciplinary sanctions-extinctive prescription or decay terms?

Next we propose to identify the legal nature of the terms of applying disciplinary sanctions in light of the current Civil Code and, consequently, the legal regime applicable to them.

Being established for exercising the employer's right to sanction employees who violate labour discipline[15], 30 days and 6 months terms are qualified by the doctrine as extinctive prescription terms and, as such, are subject to common law rules in the suspension, disruption and reinstatement of limitation[16].

We begin by recalling that, according to article 247, paragraph 1 and article 40, paragraph 1, letter e of Labour Code, the employer has the right to apply legal disciplinary sanctions to his employees whenever they find that there was committed a disciplinary offence. Therefore, it is an employer's right to coerce an employee or to comply with certain legal situation, as a consequence of his conduct contrary to legal or contractual work. Yet, this is not the same with the substantive right of action, as defined by paragraph

[12] Constitutional Court decision no 136/2004 published in Official Gazette of Romania no 394 of 4 May, 2004.
[13] Constitutional Court decision no 71/1999 published in the Official Gazette of Romania no 352 of 26 July 1999.
[14] For the same opinion expressed in law cases, see Court of Appeal, Section VII civil cases, labour disputes and social insurance, decision no 1281/R/2009 in Pavel Bejan, Gabriela Georgiana Schmutzer, *Labour law. 2008-2009. Jurisprudence*, Moroşan Publishing House, Bucharest, 2010, p.396, quoted by Alexandru Țiclea, *Treaty of labour law*, Fourth Edition, Universul Juridic Publishing House, Bucharest, 2010, p.877, note no. 6.
[15] Vlad Barbu, Catalin Vasile, Ştefania Ivan, Mihai Vlad, *Labour law*, Cermaprint Publishing House, Bucharest, 2008, p.358.
[16] See Alexandru Țiclea, Treaty ..., Fourth Edition, *op.cit*., p.877; Ion Traian Ştefănescu, *Theoretical and practical labour law treaty,* Universul Juridic Publishing House, Bucharest, 2010, p.728 ; Serban Beligrădeanu, Note II to the decision of the Civil Court for Arad no 259/2000 in Dreptul no 3/2001, p.146-148. For the contrary view, that the term of 6 months is a decay term, see Nicolae Voiculescu, *Labour Law. Community and national rules*, Wolters Kluwer Publishing, Bucharest, 2007, p.232.

2 article 2500 Civil Code, since coercion does not require the competition of the state coercive force, but the exercise of disciplinary powers by the employer as part of a legal work relation.

In addition, the two legal terms run against the employer, as an active subject of legal disciplinary juridical relation, so no exercising of the right to hold disciplinary liability of his employees may not result into refusal the contest of state coercive force, but even into disciplinary liability removal.

Finally, we recognize that committing a disciplinary offence, gives rise to a legal obligation relation in which the employer has the right to apply disciplinary sanctions and employee the related obligation to obey the first measures taken. Resort to the method of interpretation of the reduction to absurdity, we assume that the implementation terms of applying disciplinary sanctions are extinctive prescription limitation periods. Knowing the theory of extinctive prescription[17], we conclude that a subjective right and its correlative obligation survive, but they becomes imperfect in the sense that the conservation of the right can be obtained only by exception in case of voluntary execution of the employee's obligation. Solution is nonsense.

By virtue of arguments presented, we consider that the deadlines for applying disciplinary sanctions regulated by the Labour Code article 252 paragraph 1 are decay terms, with all the consequences that result from here. Thus, considering the subject in the first part of our study, we consider that the deadlines are submitted to suspension for major force, but not to disruption, given the specificity of juridical labour relations. We merely recall that article 38 of the Labour Code establishes that employees can not give up their rights conferred by law, any contrary transaction being void, which we consider it to be absolute. In conclusion, the employee, for whom analyzed terms were set, can not renounce to the benefit of decay.

As a first consequence of this point of view, appears to be that the failure to exercise the right of employer to apply a disciplinary sanction of his employees in terms incurs the cessation of this right. However, this right is embodied in the provision of the disciplinary issue - an employer's unilateral act, which means that the employer's right lapse, prevents committing the unilateral act, too, under the sanction of nullity. So, all procedural phases sanction should be consumed completely during this period. In other words, within 30 calendar days calculated from the date of acknowledgment about committing a disciplinary offence will end before or simultaneously with the maximum of six months[18]. In conclusion, paragraph 1 article 252 of the Labour Code does not establish two alternative moments to calculating terms to apply the disciplinary sanction, but two deadlines that shall be cumulatively observed. They do not complete each other, meaning that if the first, short term is not observed is sufficient the compliance of the second one, from that the fact these are calculated from different times[19]. The 30 days term can slide around, therefore, within the period of 6 months, but without exceeding it[20].

The 30 days starts after the employer acknowledges the disciplinary offence by finding a note, report, protocol or any other document with specific date acquired by registration in the

[17] See Gheorghe Beleiu, *op.cit*., p.275; Gabriel Boroi, *Civil law. General theory. People*, Second Edition, All Beck Publishing House, Bucharest, 2002, p.258.
[18] Alexandru Țiclea, *Treaty of Labour law,* Second edition, C.H. Beck Publishing House, Bucharest, 2007, p.779.
[19] Court of Appeal Bucharest, Section VII civil cases and labour disputes and social insurances, decision no 1678/R/2009 in the Romanian labour law Journal no.7/2009, pp.105-111.
[20] Ion Traian Ştefănescu, *Theoretical and practical Treaty ..., op.cit*., p.728

unit registry[21]. In the absence of such document, the date of knowledge must be proven by any means, since becoming aware represents merely a circumstance, a material juridical fact. The date on which the employer is aware about committing a disciplinary offence is different from the time the act was regarded as a disciplinary offence, and hence that the employer must make all necessary disciplinary setting within this period of 30 days[22]. It is also different from the date that is designated a person / committee to conduct pre-disciplinary research and the date on which research results are communicated through employer official report marking the completion of disciplinary research. Basically, the specific activities of prior disciplinary investigation must be included within 30 calendar days.

The term in question is established within days, and under paragraph 1 article 2553 Civil Code, it is calculated according to the free system, meaning that it does not count the first and last day of term. Given that it is an act done at job[23], the specified term will be fulfilled at the time it ceases normal working hours on the last day and not at 24.00 hours.

Term of six months starts from an objective point – moment of committing the fact that constitutes a disciplinary offence. Therefore, we are not interested into when the harmful outcome occurs, if there is a time lag between the two moments. If we are faced with a continuing or continued disciplinary offence, the term is calculated from the date of consumption the final violations of labour obligations by the employee[24].

As a term established within months, it shall expire on the day of the month corresponding to the day it started, according to paragraph 1 article 2552 Civil Code. The term that ends in a month which does not have a corresponding day to that it began to run, will expire on the last day of that month[25]. When the closing date is a day off, term will be extended until the end of the first working days that follows[26].

4. Special regulations on the terms of disciplinary sanctions

Similarly, paragraph 5 article 77 of Law no 188/1999 on the status of civil servants provides that disciplinary sanctions shall be applied within one year from the date of referral to the disciplinary committee on disciplinary irregularity, but no later than two years after committing the disciplinary offence. In solving the exception of unconstitutionality regarding those legal provisions, the Constitutional Court held that the establishment of such terms is the exclusive attribute of the legislature and is intended to prevent potential abuses regarding disciplinary action and removal possible suspicion about activity of the discipline committee[27].

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[21] Alexandru Țiclea, *Treaty…,* Second edition, *op.cit*, p.778.

[22] Court of Appeal, Section VII civil cases and labor disputes and social security decision Lucia nr.1797/R/2006 in Lucia Uță, Florentina Rotaru, Simona Cristescu, *Labour Law. Disciplinary liability. Legal practice,* Hamangiu Publishing House, Bucharest, 2009, pp.269-271.

[23] Article 2553 paragraph 3 Civil Code.

[24] Court of Appeal Bucharest, Section VII civil, labour disputes and social insurances, civil decision no 1273/R/2008 in Lucia Uță, Florentina Rotaru, Simona Cristescu, *op.cit*., pp.16-22. For a contrary point of view expressed in legal practice, see Court of Appeal Bucharest, Section VII civil cases, labour disputes and social insurances, decision no 2114/R/2007 in Alexandru Țiclea, *Treaty …* , second Edition, *op.cit*., p.728

[25] Article 2552 paragraph 2 Civil Code.

[26] Article 2554 Civil Code.

[27] See Constitutional Court Decision no 1080/2009 published in the Official Gazette of Romania, Part I, no 661 of October 5, 2009.

If police, disciplinary sanction shall be applied within 60 days after completion of the preliminary investigation, but no later than one year from the date of the offence[28]. We emphasize that, in view of the legislature, there is not important the acknowledgment time nor the notification about committing a disciplinary offence, but that the completion of disciplinary research. Hence, we conclude that the preliminary investigation may be initiated at any time after notification or finding time of committing the offence, excepting serious disciplinary offences affecting the image and credibility of the institution or the police profession, when it is imperative[29] to provide the research immediately after becoming aware.

Paragraph 7 article 280 National Education Law no 1/2011 provides that within 30 days of becoming aware of the disciplinary offence, date recorded in the registry book of inspections or general school / university institution. Distinctive element to the regulation of common law is that there is established the duty of relevant bodies (school director, general inspector or minister of education, research, youth and sport) to notify the employee about the disciplinary sanction decision. Legislature fails, however, to set a second time to calculating the time of the offence, that needs to be taken into consideration within a future legislation, for the following two reasons: 1) efficiency depends on the efficiency of disciplinary coercion that is performed, its purpose being better done when it quickly intervenes, meaning at a time as close to that of committing the disciplinary offence and 2) where the disciplinary accountability delays, consequences over time can call doubts about its usefulness. In this matter the regulations in the status of teaching and research staff in higher education are poor, as there are not provided such term, but we appreciate should be applied, by analogy, the provisions envisaged, namely research and communicating the sanction decision made within 30 days of becoming aware of the breach. We concur with the opinion[30] expressed recently in the literature that, in this case, the analogy is possible because those situations are basically the same, and the correspondingly text is built in the same law and even the same title (Teaching Staff).

5. Conclusions

Note that most legal texts establish two different terms, which must be simultaneously satisfied[31]. The fulfilment of any of the two statutory deadlines results into decay from the right of employer to apply disciplinary sanctions to the employees guilty of disciplinary offences[32], any disciplinary sanction imposed after this moment being null and void. In terms of employee preventing background research on the application of the penalty coincides with the removal function of disciplinary sanction. So, as actually situation producing legal effects, the fulfilment of at least one of the terms discussed above, is a question that removes

[28] Article 59 paragraph 9 of Law no 360/2002 regarding Police Status, which was echoed by article 61 of the Minister of administration and internal affairs Order no 400/2004 on discipline of staff of the Ministry of Interior.
[29] Article 62 [1] of the Law on the Police Statute no 360/2002.
[30] See Ion Traian Ştefănescu, *Possible controversies about the interpretation of rules of Law across national education no 1/2011* in Romanian labour law Journal no 1/2011, p.13.
[31] Ion Traian Ştefănescu, *Theoretical and practical Treaty ..., op.cit*., p.727.
[32] Court of Appeal Bucharest, Section VII civil cases, labour disputes and social insurances, decision no 671/R/2010 in the Romanian labour law Journal nr.2/2010, p.141-145.

disciplinary liability[33], making the conflict to end the legal liability relation born between employer and offender employee, if it was not completely solved in the time required by the legislator. If the sanctioning decision was issued under the law, the decay does not affect the execution of disciplinary sanction, even if it means exceeding the time limits, whereas in the cases analyzed, the legislature has established a time limit for completion prior disciplinary investigation, not for the disciplinary sanction full implementation.

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[33] To cancel the decision of disciplinary sanction emitted by not complying the legal term of six months from the date of the offence, see Court of Appeal Bucharest, Section VII civil cases, labour disputes and social insurances, civil decision no 671 / R/2010, *cit.supra*.

ERROR - DEFECT OF CONSENT, BETWEEN DOCTRINE AND JURISPRUDENCE

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Abstract: *A person can not receive more than his own error. This is a rule of equity that has been consistently dedicated to legal literature. The existence of doubt reveal bad - faith, doubt reveal absence while good - faith.*

Keyword: *Error, defect of consent, legal will.*

1. Legal will in civil legal act

The theoretical and practical study of the juridical act was supported from the classics of doctrine to the latest theories in the field. Legal document analyzed for its dynamic function, to accomplish the movement of goods and services, renewal, usually at the initiative of individuals and legal pre-existing legal relations. Main place it occupies in this context contracts, which made the movement of goods and services, in principle, by agreement between the parties. Dynamic function is accomplished in a lesser extent but also through unilateral acts. In their case the majority opinion recognizes two sources of liability, obligation assumed direct perpetrator or unilateral legal consequences which the law binds the manifestation of will.

Essential objective of studying the civil act is to establish common elements of the underlying all civil legal acts, regardless of the peculiarities of each. In order to achieve this goal, the will is essential to study legal and its elements.

Legal will, the psychological element, has the lead role in the delimitation of legal acts and legal facts, which has many legal consequences. This legal document is defined as the manifetare will clearly intended to produce legal effects, those born to, modify or extinguish a specific[1] legal relationship while legal actions consist of human actions that are not intended to produce legal effects. In this case the legal effects occur in the power law.[2]

The interest in the boundaries between fact and act, not only theoretical but also practical. First, to conclude a juridical act, valid and legal effects that need that person to have full legal capacity while for the author of a legal act that causes damage to and bind, is enough to have had discernment when savrasirii fact. Then, on a probation, civil legal acts are subject to a restrictive regime (as article1191 of the Civil Code of 1864[3]), while the legal facts proven by any evidence.

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[1] Gheorghe Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil,* eleventh edition revised and added by Marian Nicolae, Petrică Truşcă, Editura Universul Juridic, Bucureşti, 2007, p.129.

[2] Gheorghe Beleiu, *op. cit*., p. 111.

[3] Expressly repealed by Law no. 287/2009 - Romanian Civil Code, republished by Law no. 71/2011, in the Official Gazette Part I, no. 409 of June 10, 2011, as amended and supplemented subsequently.

Law, by itself, does not create real relationships and does not generate legal obligations. It is limited to regulating only abstract legal relations. The legal concrete Obligation arises from agreement between the parties. At the same time have shown that an agreement of wills can produce legal effects as a legal norm expressed wills lies above agreement, allows birth, creation of legal effect.

From the definition of the juridical act set forth above that of its essential elements are: the presence of manifestations of will that come from a civil law matter, the manifestation of intent will be expressed to civil and legal effect legal effect followed may consist in giving birth, to modify or extinguish a civil legal relationship specifically. This feature distinguishes the civil act of legal acts of other branches of law (such as administrative act).

In this context it is used in a legal act of „negotium" will even legal substance to be expressed, but it can also refer to „instrumentum probationis" title in the material sense, which is evidence of a manifestation of the will to end legal. That will take effect and become generators of legal documents must meet the following conditions: to have legal significance, is not affected by defects and, in most cases, must meet the other will.

2. Essential conditions of validity of the legal act of the legal will perspective

The conditions of juridical act consists understand the elements such an act.[4] In civil law using the term „conditions" to describe the components necessary for signing a valid civil legal act and the terms „contract" and „the contract" to refer to civil legal act in respect of *negotium* and its conclusion. Civil Code Article 1179, reprinted, has:

„(1) Essential conditions for the validity of a contract are:

1. capacity to contract;
2. consent of the parties;
3. determined and legitimate object;
4. moral and legal cause.

(2) To the extent that the law provides some form of contract, it must be respected, under penalty prescribed by applicable law."

You can see that this article refers, in terms of background, only the general conditions of validity, an act can be invalid even if the fund meets the requirements listed in article Civil Code 1179, republished. Second, the article noted, though listed four conditions of validity, not explicitly distinguish them. Consent and actually make up because one fundamental condition (legal will), and capacity can be considered a condition of consent.

Civil Code Article 1179, republished by listing the conditions of validity emphasizes that subjective discernment and will be essential elements of any civil legal act. Thus, the technical elements are listed legal will, that consent and because the act plus the condition for the validity of consent, repspectiv civil capacity and the will expressed as external objects, respectively.Capacity to enter into a civil legal act has different meanings according to doctrine. In an opinion[5] relationship between the capacity of civil legal acts and the ability to use the subject of civil law is part of the whole. The ability of civil legal acts appears as a prerequisite for exercise capacity. Ability to civil legal acts not to be

[4] Gheorghe Beleiu, *op. cit*., p.140.

[5] Ernest Lupan, Ioan Sabău-Pop, *Tratat de drept civil român, volumul I, Partea generală,* Editura C.H.Beck, Bucureşti, 2006, p. 126.

confused with the ability to use that is acquired at birth (in some respects the latter may acquire from conception) nor the ability to exercise that has a different legal regime.

Another opinion expressed in the doctrine[6] is that the ability of civil legal acts is part of civil capacity and ability to exercise consists of the subject of civil law plus some use of his ability. These elements of the capacity of civil legal acts stemming from how it is defined, namely, „that condition and essential background consisting of a subject's skill to become a civil rights holder and civil obligations by signing documents civil law „. This definition shows and character essential condition of validity of the ability of civil legal acts.

From the teleological interpretation of article 1180 Civil Code, republished, which provides that „can not contract any person declared incapable by law, nor stopped to sign some contracts" shows that the rule is the ability to civil legal acts and is the inability exception. As for minors who have not attained age 14 rule is the resulting inability of art work. 42 Civil Code, republished, exhaustively enumerating legal documents that can be entered into by minors (irrespective of whether their age). So whether exercise capacity is limited or not at all, „(1) The minor may conclude legal documents on labor, sports or artistic pursuits on his profession, with parental or guardian consent and compliance with special legal provisions, if any"as article 42 Civil Code, republished. In the case of minors who have reached 14 years acquiring such limited exercise capacity, they have in addition to the rights conferred by article 42 the right to end acts of conservation, management acts and acts of disposal of low values provided that they have current data and run on their conclusion.[7]

The subject of the juridical act is governed by the Civil Code, reprinted in Articles 1225 to 1234. In Article 1225 is defined as: „The contract is the legal operation, and sale, rental, loan, and so on, agreed by the parties as revealed by assembled contractual rights and obligations. The Civil Code of 1864 subject to civil act was defined in article 962 thus: „The purpose of the Convention[8] is that parts or only one party undertakes". It may be noted that, unlike the old law, legislation differentiates the legal operation of this contract, the performance of the debtor (or debtors) to the obligation debt and is seen as a legal relationship. According to article 1266 Civil Code, republished, performance that engages the subject debtor obligation. Civil Code in effect exploit such pre-existing opinions in doctrine[9].

The article 1225 and 1226 Civil Code, republished, shows that under penalty of nullity of the contract must be determined, or at least determinable when the contract ends, is not prohibited by law and not violate public order or morality. Also subject to civil act must meet a series of cumulative conditions to be true. First there must be good when concluding the contract itself, or in the article 1228 Civil Code, republished, be it further if there is no real express stipulation contrary. Second Article 1229 Civil Code, republished, provides that „Only goods that are in the civil circuit may be a performance contract.". Another condition to be met is that the object to be possible, unless the law provides otherwise, the contract remains valid even if its conclusion when one party is unable to perform its obligation.[10]

In order to conclude a valid legal act and thus to bring to fulfillment because it is necessary to have a valid consent. Validity of the consent conditions are governed by Civil

[6] Gheorghe Beleiu, *op. cit*., p.142.
[7] Art. 41 alin. (3) Cod Civil roman.
[8] In the legal text the word „convention" is used to refer to civil legal act in respect of *negotium;*
[9] Gheorghe Beleiu, *op. cit*., p.162.
[10] Art. 1227 Civil Code.

Code and are divided into conditions of life itself [11] and vices of consent [12]. Thus for a valid contract must comply with consent conditions both general and be serious, freely expressed in the know about the cause and come from a person with discernment, and not be corrupted.

To consent to be seriously considered, the expression of the will must not be made in jest (jocandi causa) or have a purpose other than to create legal effects resulting from the contract for which was given consent. This condition is not met if consent seriousness manifestation of the will is too vague to do with a mental reservation destintarul known it, or made under the condition that the pure potestativa undertakes[13].

Consent is expressed in the know about the case when one who has expressed it's mental representation effects agreeing on the legal act in question. You can see that this condition is closely related to individual discernment and age, that ability. A person who is unable to conclude a juridical act is presumed not to have mental representation of the effects arising from the contract and consent can not be considered valid. Lack of discernment can be present in a person who has legal capacity to enter into civil acts. Thus a person may be capable in law, in fact, temporarily free of judgment in cases such as drunkenness, hypnosis, sleepwalking. According to the article 1205 Civil Code, republished, sanction is nullity relative lack of discernment.

3. Error - defect of consent, between doctrine and jurisprudence

The Article 1206 - 1213 Civil Code, republished, regulates error as invalidating consent. Doctrine[14] defines error as a false representation of reality when concluding a civil legal act. Under Article 1207 para. (1) Civil Code, republished, the contract can be canceled at the request of the party at the time the contract is a *critical error, if the other party knew or, as appropriate, should have known that fact on which the error was carried essential conclusion of the contract.* Situations where an error is thought to be essential are listed exhaustively in the article 1207 paragraph (2) Civil Code, republished. Therefore, the error is essential: when the gate of the nature or object of the contract (for example, if one co-contractors believed conclude a maintenance contract and not a sale) when wearing the identity object benefit (when, one of the co-contractors believed it would buy a property, but actually buy another one) or the amount thereof in the absence of a contract which would not be completed, or when wearing the identity of a person or quality of contract without which it would not be completed (for example, when he signed a contract of mandate or intermediary agent or broker to consider personal qualities). Thus, in a case decided[15] admission exception passive lack of standing raised by defendant and plaintiff rejection, have been filed against a person without passive standing. In support of the defense raised by defendant formulated meet the following shows: standing in a passive process implies an identity between the defendant and sued in the legal Obligation person liable to trial by the applicant, the person against whom the applicant wishes to establish the

[11] Art. 1204 -1205 Civil Code.
[12] Art.1206 – 1224 Civil Code.
[13] Gheorghe Beleiu, *op. cit*., p.150.
[14] Gheorghe Beleiu, *op. cit*., p.152.
[15] The civil sentence pronounced on 03.04.2012 in File no. 27355/4/2011 before the Bucharest Court 4th District, Civil Department.

existence a right to claim. Or, as otherwise, the applicant itself admits the action the defendant, as administrator of a corporate[16], due to financial difficulties affecting all operators could not pay the value of a total of 10 bills falling due for payment and that in fact it recognized and accepted them in payment by signature and stamp are applied to invoices . So the legal Obligation which the applicant bases its right to claim arises from an agreement concluded with legal person whose legal representative is not the defendant and the defendant personally. The defendant agreed to sign - 15.04.2010 Minutes of that debt due and is recognized in jointly with legal obligations to pay the debt and delay penalties, as legal representative of the legal person and not their own. Even the signature affixed to that protocol shows good - faith of the defendant was not removed in bad faith claims against the recognition of the applicant, but had faith as a sign that the legal representative of the legal entity that is (and applying the company's stamp which held a manager). So being invoked by the applicant of the status of co-debtors of the defendant can not be considered, so long as good faith recognized as administrator due debt and considering that defendant has no legal knowledge necessary for assessing the legal value given process - Minutes of 15.04.2010 by the applicant. Moreover, the very legislature in 2009 which adopted the Law no. 287/2009 - Civil Code, reprinted in article 209 paragraph 3, expressly provided that „*relations between legal entities and those that make up its management bodies are subject to ... rules mandate ...*", prompting her and the defendant signed the minutes of 04/15/2010 as agent legal person and not their own. In this sense, article 209 paragraph 1 of the New Civil Code, republished, provides „legal person exercising rights and fulfilling its obligations through its administration ..." so that defendant, by signing the protocol in question, to consider that its legal obligations incumbent on it as administrator legal entity, as included in article 213 of the Civil Code, republished - „The members of the management of a legal person shall act in its interest, with care and diligence required of a good owner", and regarding articlr 218. paragraph 1 of the Civil Code, republished, „Legal documents made by governing bodies of legal entities, within the limits of their powers are conferred, are acts of the legal entity itself." In legal value of the minutes of 15.04.2010, cited by the applicant to justify his claims, defendant considered the provisions of article 1206. paragraph 1 regarding at article 1207 paragraph 1 and paragraph 2 section 3 of the Civil Code, republished, which have imperative: „Consent is vitiated when given in error, surprised by fraud or torn by violence," „Party, when signing the contract, is a critical error may rescind it, if the other party knew, or, as appropriate, should have known that fact on which the error was held essential to conclude the contract „and" error is essential: .... when the person wearing it or on a quality or on a ny other circumstances considered essential by the parties without which the contract would be terminated (Article 1207 paragraph 2 section 3 of the Civil Code, republished). „But the circumstance that defendant has founded belief that signs the minutes of 15.04.2010 as legal representative of the legal person and not their own, is just reflects the will of the legislature in 2009 that the disposal of article 1206 paragraph 1 reported to article 1207 paragraph 1 and paragraph 2 item 3 of the Civil Code, republished, sanctioned by the relative nullity of acts signed by any person who was an error in law considered essential and the forfeiture act. Thus, damage to a defendant would suffer, assuming they would not have cancellation minutes of 15.04.2010, would be likely to seriously damage its heritage, taking into account the fact that defendant was in

[16] Legal obligation report was signed between the applicant and the legal person whose legal representative was sued defendant.

error the quality in which signed the minutes. Another novelty in the field error is the possibility of invoking the error of law. This error is defined as the content or existence of legal rules and is considered essential when it concerns a particular legal norm, according to the will of the parties to end the contract. Under article 1208 paragraph (2) Civil Code, republished, *error of law can be invoked if the legal provisions available and predictable.*

The error that the contract concerns the simple reason is not essential, except that the parties will also have been considered decisive reasons. To be invoked in accordance with article 1208 of the Civil Code, the error must be excusable in that the contract may be canceled if that on which the error can be worn after the circumstances known with reasonable diligence. Nor can invoke error assumed, that the error on an item bearing on the risk of error was assumed at that invokes or, as circumstances had to be assumed by it. However, error of law can be invoked if the legal provisions available and predictable. The party was in error when concluding a civil legal act has two options: to request cancellation of the legal act or its adaptation to demand. Adapting contract in case of error is a new mechanism, governed by article 1213 of the Civil Code, republished, implying that the party was in error to require performance of the contract by notice in the way that party understood its terms. Adapting contract may be made only with the consent of other parties. So after being informed about how the party entitled to contract and anulabilitatea understood this to be achieved before the cancellation, the other party shall, within 3 months from the date it was notified or the date when served with the summons application, declare that it agrees with the execution or to execute the contract without delay, as understood by the parties in error. The victim of an error that is not otherwise entitled to the requirements of good faith. Good faith is presumed, the counterparty must bring evidence in that party invoking error does in bad faith. A novelty is that the regulatory provisions governing the error is properly applied when there is an error communicating or transmitting information or documents. Specifically, these provisions are applicable in situations where the gate error in the declaration of will, or the inaccurate statement was transmitted through another person or by means of distance communication. Simple miscalculation forfeiture not contract, but only correction, unless that, resulted in an error on the amount, was essential for completing the contract. Calculation error must be corrected at the request of any party.

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GUARANTEE FOR HIDDEN DEFECTS IN THE NEW CIVIL CODE LIGHT[1]

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Abstract: *With the entry into force of the New Civil Code, the sale contract was reconfigured, introducing or novelty items or modifying certain provisions be keeping the provisions of the old regulation. Warranty for defects the seller, although existing in the old code as seller liability for defects in the work sold, amended, in relation to new social realities, instituting new measures to remedy defects the buyer of a good showing when the surrender to seller. But no current regulation does not cover consumer sphere, based on these materials still remains the law 449/2003, a special law in relation to the civil code.*

Desire that the property offered by the seller or purchaser as agreed between the parties remained often an illusion, so that, by the New Civil Code provisions with those of Law 449/2004 that apply to consumer goods are offered on the one hand guarantees sufficient buyer / consumer as to defects or lack of conformity of products it can require its contractor repair or replace defective goods, or to receive a corresponding reduction or termination of the contract price for those products, on the other hand, if there are some express provision that protects the interests of the buyer / consumer, the seller will be more diligent about the quality of products sold / marketed.

Keywords: *contract of sale, the security flaws, latent defect commodity, according*

1. General on guarantee obligation of the seller for defects in work sold in the Civil Code and the requirement that the product sold under Law 449/2003

Guarantee obligation of the seller for defects in work sold with a guarantee against eviction are defenses which the legislator offers handy buyer for the protection of property purchased under a contract of sale and hence the defense of his interests.

Civil Code is based on material sale purchase civil matter, but there are normative acts especially in consumer goods sales material.

Thus, Law nr. 449/2003[2] on selling products and guarantees associated with them is the current Romanian legal matter based on the general sphere of ensuring consumer protection in the body of this finding is regulated aspects of the products conform to specifications contained in contract of sale, consumer rights, legal means by which the consumer can protect against acts and deeds vendor specific terms for the exercise of specific actions in this matter, and obligations of the seller regarding the provision of guarantees for consumer goods purchased.

As in the first article of the Law has nr.449/2003, regulatory domain of this bill is the sale of issues, including those made to order, and associated guarantees in order to ensure

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[2] amended on O.U.G. no. 174/2008 published in M.OF no. 795 from 27/11/2008

consumer protection[3]. In other words, were regulated in a European seller conditions establishing liability for products delivered to the consumer principles governing such liability, but also situations extension for third parties to such liability (in case of recovery action promoted by the seller against the charge of lack of conformity of the product). In this legislative context, to try to protect consumers from potential abuses which could be subject to the seller, the latter being obliged to deliver consumer products that are in accordance[4] with contract of sale.

In the sale and purchase of civil obligation to guarantee against defects good seller sold buyer-based material is art.1707 art.1718 from New Civil Code. The legislature has made liability under the old regulatory seller must guarantee the work sold, the consequences of this change is especially important in the fact that the seller is founded on fault liability of the seller, while the guarantee is required in any event, the aspect determines that such a duty exists and seller be held liable even if he is not guilty. In other words, the seller shall be relieved of obligations even if appearance of a force majeure, the obligation to be qualified as a result[5].

2.The concept of latent defect. Conditions seller liability for hidden defects

Art.1707 accordance with the Civil Code, „ the seller warrants the buyer against any hidden defects that are inappropriate utilization of the property sold which is intended or reduces them to such an extent that use or value, if they had known, the buyer would not be bought or would have a lower price; that which is hidden defect, the delivery date could not be found, without assistance, by a prudent and diligent buyer, the warranty is due to defect or if there's cause on good teaching."

Analyzing the legal text noted that the definition of „hidden defect" results and operating conditions in the seller's liability for their existence, so the defect is hidden, on the one hand, the element that makes the asset sold is unfit for the use made was acquired or greatly reduce its value so that if it had known buyer would be given either a lower price would be not be bought, on the other hand, need not have been vice discovered only by a person with specialized knowledge.

Therefore, if the defect or cause of the defect could be discovered by a diligent buyer without the need for specialized knowledge, not attributable to the seller guarantee obligation,

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[3] Manuela Tăbăraş, Mădălina Constantin, *Particularităţi ale răspunderii civile a vânzătorului pentru lipsa de conformitate a produselor livrate consumatorului in condiţiile Legii 449/2003*, în Justiţie, stat de drept şi cultură juridică – Sesiunea anuală de comunicări ştiinţifice, 13 mai 2011, pp.647-648

[4] Considering the provision too vague on which rests the obligation of the seller, the lawmaker meant to clarify the phrase *„products that are under contract of sale",* understood by it, according to Article 5, paragraph 2, letter . a) of Law nr.449/2003, *„products that match the description given by the seller and have the same qualities as the seller has the products to the consumer as a sample or model",* falling in this category that the consumer products saw in their materiality, their quality is known, by presenting them to the seller so that when the presentation of the product or sample knows exactly what to sell consumer products and the buyer knows exactly the qualities that its product the time of sale, must comply. Also, according to article 5, paragraph 2 b) of the same law, comply „products that meet any specific purpose required by the consumer, purpose made known by the seller and agreed to the contract of sale" in such a situation is imperative that the seller comply with its obligation to provide the consumer a product adapted and fully consistent with the goals set by this.

[5] Fl.A.Baias, E.Chelaru, R.Constantinovici, I.Macovei (coordonatori), *Noul Cod Civil – Comentariu pe articole art.1-2664,* Ed.C.H.Beck, 2012, p.1769

the criteria against which to determine whether occult vice being that of prudent and diligent buyer[6]. A contrario, if the purchaser is a person with specialist knowledge in relation to the nature of goods sold and that could cause or defect notice but has not shown diligence work in this respect we consider that the seller is not bound by the guarantee since the purchaser had the necessary technical information to observe good deficiencies[7]. As a condition to operate the seller's warranty obligation is that the defect or cause to exist at the time of delivery of the asset. Therefore, the new text of the law requires the seller to guarantee the hypothesis is proved that when teaching a cause likely to lead to a defect, even if the defect that makes them good or decreases inappropriate use made no value when teaching.

All the novelty and when there is cause or defect, and not that good teaching moment when concluding the contract of sale[8]. Thus the parties can agree that good teaching time to do after the signing of the sale contract and in case of non-clauses in this respect, when delivery of the assets hall be deemed to be at the conclusion of the contract of sale, except sale goods teaching is like the time of their individualization. Therefore,if between the time the contract of sale and the teaching there is a longer period of time that may occur due to the defect itself or the seller will be obliged to guarantee even if at the time the contract of sale or because there was no vice.

The parts may, by agreement, modification or removal extent of liability of the seller, unless you are trying to remove or limitation of liability for defects that the seller knew or ought to know the closing date of the contract, in which case such an agreement is null and void[9].

3.Conditions liability for hidden defects seller of consumer goods

Nr.449/2003 law on sale of goods and associated guarantees seller establishes liability for goods sold if they do not conform to those requested by the buyer. In other words, the seller is responsible for the lack of conformity of products sold. As regards product conformity to the provisions of art. 5 paragraph 2 in relation to c) of Law nr.449/2003 are consistent products "that meet the purposes for which they are normally used the same type products, and products the same type and quality parameters showing normal performance, which the consumer can reasonably expect, given the nature of the product and public statements on its specific characteristics, made by the seller, the manufacturer or his representative, in particular by advertising or product label registration," we must distinguish between the first sentence of this article report that we can say that lack of compliance is synonymous with that fault. In other words, although at first sight as the product purchased is taken into account when the consumer has opted for it, the product

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[6] D.M.Gavriş, M.Eftimie, M-L.Belu Madgo, M.Afrănisie, C.M.Niţă, A-M.Mateescu, D.Gârbovan, C.Puşchin, M.A.Stoian, E.Mădulărescu, G.Răducan, V.Dănăilă, E.Oprina, Al.Bleoancă, F.Morozan, N.H.Ţiţ, D.A.Rohnean, *Noul Cod Civil.Comentarii, doctrină şi jurisprudenţă*, vol.III – art.1650 – 2664, Ed.Hamangiu, 2012, p.69

[7] for example, as the mechanic who buys a car buyer can not later claim that there are some deficiencies in the mechanical property at the time teaching himself since he can check your car

[8] A.G.Atanasiu, Al.P.Dimitriu, A.F.Dobre, D.N.Dumitru, A.G.Banc, R.Al.Ionescu, M.Paraschiv, I.Pădurariu, M.Piperea, P.Piperea, Al.S.Răţoi, A.I.Slujitoru, I.Sorescu, M.Şerban, G.A.Uluitu, C.M.Văduva, *Noul Cod Civil. Note, corelaţii, explicaţii*, Ed.C.H.Beck, 2011, p.633

[9] Accordance with Art. 1708 Civil Code., *„unless the parties otherwise agree, the seller is obliged to guarantee against hidden defects, even when they knew not; clause that removes or limits the liability for defects is zero defects about which the seller he knew or had to know the closing date of the contract".*

works as products of the same type, with some damage, the report that it becomes unfit for use made was purchased. Regarding the second sentence of subparagraph c), lack of compliance shall consider situations where the product has certain features that are played either by type of product, either through advertising or on its label, but the product purchased by reference to two criteria is different in content and features of the product presented.

In connection with this description the term „products that are under contract of sale", we see that the legislature does not distinguish between new and used products, which means that, for a product to be sold under the had in mind at the time of agreement between the parties will not need to be new, except that the person buying it to be considered a product used. In other words, the lack of conformity of the product is analyzed by not reporting the status of „new" product, it can be used, but it is necessary to conform to the description given by the seller to a buyer at the time he built its intention to purchase the product. Natural question that may arise is related to the consumer may invoke noncompliance product if at the time the contract of sale has seen this lack of compliance. In other words, the consumer may claim further perfecting the sale and purchase on-compliance of the product if at the time the contract has experienced this failure? Certainly the answer to this question can only be negative, meaning that it considers to be lack of compliance if the time the contract of sale the consumer knew or could not reasonably be unaware of this lack of conformity or if the lack of conformity has its origin in materials supplied by the consumer. In other words, in such a situation, the consumer chooses to purchase a product with certain deficiencies, then you can not defend the grounds of lack of conformity of the product, given the option previously made. Moreover, we can say that such product is delivered according to the time taken into account in perfecting the contract. Consequently, whenever the lack of conformity of product to consumers was not held against manufacturer consumer. Also, the seller is exempt from any liability if the consumer himself was the vendor who provided the materials that led to the lack of conformity of products. In other words, in situations where the consumer chooses to produce the product to make a contribution, in the sense of participating in its creation materials, materials with certain disabilities, can not be held in the seller any fault in perfecting the product. As in common law, the seller is responsible for the lack of conformity of the product that is improper because of work or decrease in utilization of both use-value that the buyer, knowingly, not bought or paid a higher price.

4.Withdrawal effects of defects and warranty under Civil Code

Buyer discovered the hidden vices of work is required to bring them to the seller within a reasonable time, established according to circumstances, under penalty of forfeiture of the right to request and obtain either remove the defects by the seller or the expense or replacement property sold at a good same way, but without vices or a corresponding reduction in price or rescission of the sale. The legislature, though not of the concept of reasonable time explains, I think it can only be short term and in case the buyer is professional quality and tangible movable property is sold, the time is two working days.

If the defect occurs gradually, time will begin to run from the day the buyer realizes the seriousness and extent of the defect. If the purchaser provides to the seller the appearance of vice, the latter has a right to opt for more remedies provided by law, in relation to the severity of defects, good nature and purpose of the contract purchased, respectively, by

removing defects seller or expense, a good replacement sold the same way, but without defects or, in the event that the property is improper use made and can not be replaced with property of the same gender, thus reducing the price or rescission of the sale.

We appreciate that, in case the buyer should request rescission of sale (which is the most drastic of remedies), although the seller could provide an alternative buyer likely to lead to good remedy, court could order a remedy other than the termination requested by the buyer.

5. Denouncing defects and warranty for non-compliance effects of consumer goods sold

Regarding means that consumers can use against the manufacturer in the event that after the signing of the sale contract notice the lack of conformity of the product purchased, the Romanian legislator to offer customers a range of alternatives can wear it in relation to interest its so:

1.consumer may require repair or if necessary, replacement;

2. consumer may request a corresponding reduction in price or rescission of the contract.

We note that the alternative offered by the legislator consumer can be made jointly by the two parties, but there is a possibility in case of dispute, the Contracting Parts to notify court to settle disputes arising.

1.Thus, according to Article 11 of Law no. 449/2003, the consumer has the right to require the seller to repair the product, in which case it will be repaired exclusively at the expense of the seller, including all costs of bringing products to compliance, including costs of postage, shipping, handling, diagnostic expertise , removal, installation, labor, materials and packaging.

Also, when non-compliance entails impossibility of using the product according to its destination, the buyer is entitled to require the vendor to exchange, and this time all account and seller account.

However, if the extent of repair or replacement of product is impossible or disproportionate, then the seller is exempted from liability to the buyers. A repair measure is considered disproportionate if it imposes costs on the seller are unreasonable compared to other remedy, taking into account where appropriate, the value that a product had it not been the lack of conformity importance of lack of conformity, and if the other remedy could be achieved without significant inconvenience to the consumer. On the other hand, a remedy is considered impossible if the seller can not provide the same product for replacement or repair parts, including due to lack of equipment or related technology. From the time the consumer introduced to the seller of the lack of conformity of product sold, the seller has available for a period of 15 days to repair or replace the product if necessary. Any repair or replacement products will be made within a reasonable period of time agreed in writing between seller and consumer, and without any significant inconvenience to the consumer, taking into account the nature and purpose for which the products requested products. In the event that the manufacturer does not fulfill these obligations, meaning that either no repair or replace the product within a reasonable time, either by repairing or replacing it creates an inconvenience to the consumer, the latter may require a proportional reduction of price in relation to the reduction in value by the lack of conformity of the product or avoidance of the contract and replacing parts in the previous situation. Limitation of consumer's right to require repair or replacement of the product manufacturer

is two years, calculated from the date of product delivery, unless the product has an average by more than two years, in which case the term is reduced at this time.

2. Therefore, an alternative to repair or replace the product when it is not possible is to reduce the price or the contract rescinded appropriate in the circumstances in which the consumer does not benefit either repair or replacement of product, if the seller was not a remedy a reasonable time and in case the seller was not remedy without significant inconvenience to the consumer.

In other words, the legislature provides the buyer, so redhibitorie action (asking Avoidance of sale), as well as an estimation action (to reduce cost commensurate with the reduction in value caused by the lack of conformity of the product).

We appreciate that redhibitorie action can not be exercised if the product non-conformity is minor, the court receives such a request can determine that the right of consumer choice has been exercised improperly and possibly have a proportional reduction in the price alleged non-compliance report.

6. Conclusions

Whether it is the obligation of the seller for defects warranty work sold under the civil code or manufacturer's liability for non-compliance of consumer products delivered under Law 449/2003, the common denominator is the responsibility of the vendor whenever he teaches or buyer delivers a product / good to have some weaknesses capable of being good or unused responding destination the buyer wants to give it or reduce its value so much that if he had known that vice buyer refused sale.

Of course, the liability of the seller for lack of conformity of products delivered to the consumer under the Act nr.449/2003 has some features in common law in relation to the subject concerned primarily, in the sense that such liability arises from the sale of operations a movable whose final destination is the consumption or use of individual or collective, is not possible to establish liability in case of immovable or movable but whose destination is different than that of consumption. Second, the law distinguishes between hidden defect of the product and its lack of conformity, there are differences between the two concepts both form and substance. Also, alternatives to sanction non-compliance manufacturer for products liability has similarities with the seller's clothing hidden defects of common law work, but also significant differences.

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THE SUBJECTIVE SIDE OF THE OFFENCE OF MURDER SPECIFIC DIFFERENCES WITH OTHER OFFENCES RESULTING WITH THE DEATH OF THE VICTIM

Lavinia Mihaela VLĂDILĂ*

Abstract: *The interest for such a study resides from the correct decoding of certain practical situations, not infrequently confusing, on the differentiation of the offence of murder from other types of offences which have resulted in the death of the victim. On the other hand, it is important to mention the fact that the offence of murder is committed only with INTENTION, in both its versions, unlike those offences which have resulted in the death of the victim and which can be committed only with PRAETERINTENTION or have unintended consequences. In this paper we have used a very rich jurisprudence, precisely to observe the specific differences between the two types of offences.*

Keywords: *murder, intention, praeterintention, other offences resulting in the death of the victim*

1. Introduction

This study started from the idea of differentiating, quite often cumbersome, the specific features of the subjective side of the offence of murder with other offences which resulted in the death of the victim. From the quoted relevant practice, it has resulted that in many cases the jurisprudence encountered difficulties in delimiting the offence of murder from other offences which resulted in the death of the victim. We shall start our analysis with the clear statement that the only form of guilt for the offence of murder is the INTENTION, in both its versions (direct or indirect), unlike those offences which resulted in the death of the victim and can only be committed with praeterintention or have intended consequences.

2. The subjective side of the offence of murder

The *only* form of possible guilt in an offence of murder is the *intention*, either direct or indirect[1]. In practice, the intention of murder is deduced from the way in the murder was committed[2]. The intention exist even when the offender confuses the victim he aimed to kill with another person (*error in persona*), or when he murders another person as a

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[1] Matei Basarab et al., *Codul penal comentat. Partea specială, vol. II,* Hamangiu Publishing-house, Bucharest, 2008, pp. 73-75; Alexandru Boroi, *Drept penal. Partea specială*, C.H. Beck Publishing-house, Bucharest, 2006, pp. 74-78; Tudorel Toader, *Drept penal român. Partea specială*, 4th and revised edition, Hamangiu Publishing-house, Bucharest, 2009, p. 33; Avram Filipaş, *Drept penal român. Partea specială*, Universul Juridic Publishing-house, Bucharest, 2008, pp. 142-143

[2] Gheorghe Nistoreanu et al., *Drept penal. Partea specială*, Europa Nova Publishing-house, Bucharest, 1999, pp. 99-100

consequence of misusing the instruments he intended to use to murder the aimed person (*aberration ictus*)[3].

For simple murder it is not relevant neither the purpose, nor the mobile for which the lethal result was aimed. If there is even a mobile or a qualified purpose, then it is possible that the judicial framing of the offence to be changed from the offence of murder into first degree murder or particularly serious murder. Regarding the mobile, it must be noticed that the actual regulation does not differentiate when the murder of a person which occurred at his request to end the sufferance caused by a serious or incurable disease. In other words, *euthanasia* is incriminated as an offence of murder. The possible demarcation between this situation and a simple murder is the individualization of penalty, the court using the general criteria for individualization (Art 71 of the Criminal Code)[4]. The new Criminal Code states this situation by incriminating it under the offence of murder upon the request of the victim (Art 190 of the new Criminal Code)[5].

Any other form of guilt, associated to an action or inaction which has caused the death of a person shall lead to another judicial framing. For instance, if a murder was committed out of negligence then the judicial framing shall be that of the offence of homicide out of negligence (Art 178 CC), or if it has been committed with praeterintention we are dealing with the offence of hitting or injury causing death (Art 183 CC) or with any other offence resulting in the death of the victim, such as first degree theft resulting in the death of the victim, first degree rape resulting in the death of the victim etc.

But from practice it has resulted that not always it is easy to establish the degree of guilt and to correctly qualify the offence from this point of view. Multiple confusions have been created when it was necessary the differentiation between offences against corporal integrity or health of the person, or the differentiation between the offence of murder from the offence of homicide out of negligence or the offence of hitting or injury causing death. For these differentiations to be possible, the former Supreme Court of Justice[6], actual High Court of Cassation and Justice managed to extract certain general criteria with which the practitioners to be able the deduce the degree of guilt in the offence that resulted in the death of a person or in the harm of a person. **These general and objective criteria**, applicable to all situations in which such confusions are susceptible of appearing, for each situation adding supplementary ones, on which we shall insist in the future, **are**:

- All circumstances in which the offence was committed
- The manner and means used to general the final result
- The nature of the vulnerable object
- The intensity and effects of the hitting
- The aimed body area (if such area was or not aimed)
- The consequences generated or which may have been generated.

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[3] Valerian Cioclei, *Drept penal. Partea specială. Infracţiuni contra persoanei*, C.H. Beck Publishing-house, Bucharest, 2009, p. 23; Alexandru Boroi, *op.cit.*, p. 77; Gheorghe Nistoreanu et al., *op. cit.*, p. 99; Avram Filipaş, *op. cit.*, pp. 143-145

[4] Ibidem, pp. 23-24

[5] According to Art 190 of the new Criminal Code: „*Murder committed upon the explicit, serious, conscious and repeated request of the victim who suffered from an incurable disease or from a serious infirmity medically attested, causing permanent and unbearable sufferance is punished by imprisonment from 1 to 5 years*".

[6] Case decision No 3037/24.11.1998 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *Probleme de drept din jurisprudenţa Curţii Supreme de Justiţie în materie penală*, Juris Argessis Publishing-house, Curtea de Argeş, no year available, pp. 166-167; Case decision No 2259/14.09.1995 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 174-175; Case decision No 1901/06.09.1996 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 171

3. Specific differences from other offences which resulted in the death of the victim

a) The difference between the attempt of murder and one of the offences against corporal integrity or health (Art 180-182 of the Criminal Code)

Besides these general criteria, regarding the difference between the two offences, we might add that from the subjective point of view, the Supreme Court has established in a relatively new case decision that *in the case of attempt of murder, the means of execution... must reveal, by their nature, the circumstances in which were committed, that the offender has the general intention of murdering, but not the general intention of harming*[7]. Also, to these arguments can be added the differences between the degrees of guilt with which these offences are committed; therefore, must be considered that the element differentiating the attempt of murder from the offence of bodily harm or the offence of serious bodily harm in a subjective relation is that the last two offences may be committed also with praeterintention, which assumes a different reference of the offender to the determined result.

Moreover, framing the offence as an attempt of murder and not as another offence against corporal integrity or health of the person (Art 180-182 CC) is made regardless of the needed number of days of medical care of the victim. Thus, though in a case were needed only 15 days of medical care, and the conclusions of the medical-legal expertise have shown that he victim's life was not endangered, still the Supreme Court appreciated that hitting the victim with a knife in the left side of the chest causing a stabbed wound, which touched the lung is an attempt of murder and cannot be framed as the offence of hitting or other forms of violence (Art 180 Para 2 CC)[8]. In a similar manner the Supreme Court trialled the case in which three defendants, all armed with knives, after an altercation with the victim, hit the latter, stabbed him in the back, causing a penetrating plague in his chest, for which the victim needed 20 days of medical care, the medical-legal expertise concluding that the victim's life was not endangered[9].

As well, by applying the same criteria of the aimed area, to which was added the intensity of the hits, the jurisprudence established that it is an attempt of murder (Art 20 related to Art 174 of the Criminal Code) and not serious bodily harm (Art 182 Para 2 CC), with the intention of murder, in the following situations:

- The victim was hit in a vital area, for instance the victim was hit in the head with a club or a cudgel, as consequence of some skull fractures[10].
- The victim was hit by a single shot deep in the neck area[11]
- The victim was hit with fists and legs repeatedly in his face, chest and abdomen[12].
- The offender hit the victim twice with an axe handle, aiming the head, but he defended by countering with his left hand suffering a fracture of his forearm and needing 55 days of medical care[13].

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[7] Case decision No 1227/02.04.2009 of the High Court of Cassation and Justice in the ***, *Buletinul jurisprudenței. Culegere de decizii pe anul 2009. Culegere de decizii pe anul 2009,* C.H Beck Publishing-house, Bucharest, 2010, pp. 679-685

[8] Case decision No 366/07.03.1991 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 175-176

[9] Case decision No 2683/03.12.1996 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 178-179

[10] Case decision No 1242/08.07.1993 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 169-170; Case decision No 2230/19.05.2000 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 170-171

[11] Case decision No 1130/09.05.1996 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 167-168

[12] Case decision No 1559/23.04.1999 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 205-206

[13] Case decision No 1901/06.09.1996 above mentioned (*see footnote 4*)

- Hitting the victim with a wooden chair of 8 kg, causing a parietal-occipital fracture and needing 50 days of medical care[14].
- The victim was stabbed in the left side of the chest for which he needed a medical intervention, his life being endangered and needing 25-30 days of medical care[15].

b) The difference between the offence of murder (Art 174-176 of the Criminal Code) and the offence of homicide out of negligence (Art 178 of the Criminal Code)

As it was shown in the beginning of the analysis of the subjective side, murder is committed with direct or indirect intention, while in the case of first degree murder the offence is committed with guilt, and more often with premeditation. The issues of judicial classification arise when murder is committed with indirect intention, namely when the person foresees the result of his action, but without aiming it, admits its occurrence[16]; we used to say that the offender assumes the risk that this result will occur, or i.e. the result is indifferent to him. In the case of murder with premeditation, the offender foresees the result of his action, does not aim it, and considers without reason that it will not occur[17]. Starting from these two definitions of the two forms of guilt, in practice was established that it is murder, and not murder with premeditation, when a military, who stands sentry, deadly shots in the head one of his colleagues from approximate 2 meters, who was passing in front of him without summon, though he had a legal obligation to do so[18], or when a public guard using his gun shot a colleague, after an altercation between them, being agitated, pull out his gun, loaded it and pointed to the victim, who he shot at a few centimetres[19].

In a similar case was mentioned the offence of homicide out of negligence, and not murder. Thus, in that case a soldier, who was playing by inserting and ejecting cartridges in his gun and pointing it to his colleague and by pressing the trigger, thinking that the safety was on, shot to death his colleague. It was also noted that the defendant, after shooting the victim manifested with desperation, being a good friend of the victim, aspects revealing a subjective position of the guilt in relation to the outcome, situation which characterize negligence and not indirect intention specific to murder[20].

Unlike this case, throwing during daytime from the terrace of an eight-floors building of two bricks in a market area proves the *indifference* of the offender regarding the outcome of his action. Because in this case a person hit by a brick died, the action is framed as murder with indirect intention, and not as homicide out of negligence[21].

Other situations in which the offence of indirect murder and not homicide out of negligence was invoked were:

✓ The offence of the driver, who was insistently asked by the victim to stop the car, otherwise he will jump out of it running, situation in which the driver, instead of pulling over speeded up, and the victim jumped out of the vehicle and dying[22].

[14] Case decision No 1789/12.11.1991 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 173-174
[15] Case decision No 2259/14.09.1995 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 174-175
[16] According to Art 19 Point 1, Letter b) of the Criminal Code
[17] According to Art 19 Point 2, Letter a) of the Criminal Code
[18] Case decision No 1/29.01.1996 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 221
[19] Case decision No 505/20.01.1995 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 222
[20] Case decision No 29/18.02.1991 of the former SCJ, in panel of 7 judges, in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 245-247
[21] Case decision No 369/14.02.1997 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 222-224
[22] Case decision No 1620/11.06.1998 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 219-220

✓ The victim fell from the 2nd floor, while trying to escape from the aggressive actions of the woman-offender who has entered the apartment by breaking the door and threatened the victim with death, situation in which the victim went out the window intending to escape in a neighbouring apartment, with the risk of falling and dying[23].

✓ The action of the offender, who by knowing the aggressively potential of his animals, set on 4 dogs against the victim to determine him to leave the premises in which they were, resulting in the death of the victim as a consequence of multiple dog bites[24].

c) The difference between murder (Art 174-176 of the Criminal Code) and the offence of hitting or injury causing death (Art 183 of the Criminal Code)

As in the previous case, the essential difference between the two offences, murder and hitting or injury causing death, consists of the degree of guilt involved, murder with intention, as it was previously stated, and hitting or injury causing death with praterintention or unintended consequences. Though it is not a normative form of guilt, praterintention was defined by the jurisprudence, starting from the statement of some offences by the Criminal Code (*as that stated by Art 183*), as being that form of guilt in which the offender aims a certain result (*intention*), but another and more serious result occurs, which was not foreseen nor aimed by the offender (*guilt*)[25]. Therefore, by reporting to these two definitions, and also to the manner in which the offence was committed, the Supreme Court established in many decisions, that the offence of murder was committed, instead of the offence of hitting or injury causing death, when the offender admits the death of the person as result of his action[26], to this being added as objective criteria for a correct differentiation between the two offences the vulnerable feature of the instrument used, the vital area aimed, the intensity of the hit applied, its eventual repetition[27] or the precariousness of the resistance of the victim[28]. Precisely, the judicial qualification given to the following situations was murder, and not hitting or injury causing death:

- Intensively hitting the victim in the head with a bottle of champagne, with the result of causing a cranial-cerebral trauma, eventually leading to the victim's death[29].
- Repeatedly hitting the victim with the legs and fists in his vital areas, such as the head, causing serious injuries which resulted in his death[30].
- Repeatedly hitting the drunk victim with the legs and resulting with the often fell down of the victim, the defendant continuing to hit in the chest area, causing fractured ribs and sternum and a pulmonary contusion[31].
- Repeatedly hitting the victim with hands and legs and with a rubber belt and hitting his head on the floor causing a cerebral trauma, even if the lesions were not correctly treated[32].

[23] Case decision No 976/24.04.1996 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 217-219
[24] Case decision No 1671/25.03.2004 of the High Court of Cassation and Justice, available on www.scj.ro
[25] Lavinia Vlădilă, Olivian Mastacan, *Drept penal. Partea generală*, 2nd and revised edition, Universul Juridic Publishing-house, Bucharest, 2012, p. 71
[26] Case decision No 1080/19.03.1999 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 201-202
[27] Case decision No 1559/23.04.1999 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 205-207
[28] Case decision No 1472/20.04.1999 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 213-214
[29] Case decision No 94/1.07.1991 of the former SCJ, in a panel of 7 judges in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 202-204
[30] Case decision No 454/23.02.1998 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 204-205
[31] Case decision No 102/20.01.1995 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 207-208
[32] Case decision No 2097/05.10.1992 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 208-209

- Hitting the victim, who was the offender's three-years old daughter, with a stick, as a consequence of the fact that the victim was drunk, and the victim started to scream even louder, the defendant threw her on the bed and hit her with the head and the spine on the edge of the bed, dying shortly after[33].
- The offence of throwing a piece of iron over a group of children aged between 7 and 8 years, one of them dying[34].

d) The difference between the murder and other offences with the praeterintended result in the death of the victim (rape, theft etc)

The most often met issue in such a case is that of invoking a single complex offence, such as rape or theft in its aggravated form which resulted in the death of the victim, or invoking a plurality of offences from which one is murder, in its different forms. Solving such dilemma assumes to answer the question on how the offender related himself to the outcome of his action, with an indirect intention or with praeterintention? The first answer determines the framing of the offence in a plurality of offences, and the second one the framing as a complex offence.

One of the criteria that must be considered in establishing the guilt is that the offender aimed not only the specific result (for instance, a rape or a theft), but also thought of the death of the victim, which even if he did not aimed it, accepted it as a result which is about to occur[35]. Over the initial intention of the offender shall be overlapped an indirect intention determining material actions in the causality and leading to the existence of a plurality of offences. If these material actions are part of the offence initially aimed by the offender, but as a consequence of certain circumstances, or circumstances in which the offence occurs, a more serious result arises, such as the death of the victim, then the offence has an aggravated form. In this respect, it was considered aggravated theft – Art 211 Para 3 of the Criminal Code – the situation in which the defendant, being caught by the victim while stealing his goods hit the latter one so powerfully causing his death, while to trying to escape with the stolen goods, considering that violence subsumed the initial purpose of the offender, the death of the victim being a praeterintended result[36].

On the other hand, the Supreme Court appreciated that there is a plurality of offences between an attempt of rape and an attempt of murder in their simple forms when the defendant accompanied the victim in her apartment and tried, by violence, to have a sexual intercourse. After he threaten the victim that there is no escape and she has no other options, the victim stated that if the defendant would not stop she would threw herself out of the window, which she did when he started to come closer, suffering lesions and needing 120 days of medical care. It is obvious that in this case, the defendant committed an attempt of murder with an indirect intention, and an attempt of rape with a direct intention, being no praeterintention related to the outcome, because from the manner of the offence the defendant assumed the risk of the victim throwing herself out of the window, fact which always characterizes direct intention, as a mean of intention[37]. Also, a plurality of offences between aggravated rape and simple attempt of murder – Art 20 in relation to Art 174 and 197 Para 2 Let c) and Para 3 of Thesis I of the Criminal Code – was invoked in the case in

[33] Case decision No 1472/20.04.1999, above mentioned (*see footnote 26*)
[34] Case decision No 1040/01.09.1990 of the forrmer SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 214-215
[35] Matei Basarab et at., op.cit., p. 90
[36] Case decision No 1169/25.03.1999 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 348-349
[37] Case decision No 1114/8.05.1997 of the former SCJ in Gabriel Ionescu, Iosif Ionescu, *op. cit.*, pp. 184-186

which the defendant luring the victim aged 13 years and 10 months that he will take her home, diverging the car from the correct direction, suggested his purpose to the victim, firstly by gesture and words, after which noticing her refusal, hit her, and when the victim asked him to stop the defendant speeded up, even when the girl asked him for the second time to stop the car, opened the door and jumped out of the moving vehicle[38].

4. Conclusions

All the numerous cases mentioned show that in many cases there were confusions in delimiting the offence of murder from other offences resulting in the death of the victim. On the other hand, for the offence of rape, theft or illegal deprivation of freedom was raised the issue of the existence of a plurality of offences between murder and these, so that the spectrum of situations considerably diversified. In all cases, to be able to distinguish between these types of offences and murder, the criteria proposed by the Supreme Court have a great practical value. In cases of juridical framing doubts a starting point is represented by the analysis of the aimed body area, of the used vulnerable object, as well as of all circumstances in which the offence occurred. By doing this, theoreticians, as well as practitioners, shall have the first guide marks in the correct framing of the nature of the offence.

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THE EUROPEAN POLICY OF FRANCE DURING THE PROCESS OF EUROPEAN CONSTRUCTION

Ioana PANAGORET*

Abstract: *The study registers the first moments which defined the process of European contruction, and the necessity of its rise, then, it points the most meaningful moments in which France interceded by its foreign policy in this process. France abndoned the desire to find in Great Britain a partner for its foreign policy, De Gaulle refocused his policy to an agreement with West Germany, his success being explained by his excellent relation with Chancellor Adenauer. By its foreign policy in the process of Eurpean construction, France pursued the fulfilment of the national interests and the conception of an European frame in which France to be the spokesperson of Europe. As predited by De Gaulle, the process of European construction evolved from „The Six" to its twenty- seven members, France supporting by its policy the extension of the European Union, and the famous Gaullist formula „Europe from the Atlantic to the Urals" is about to turn into reality.*

Keywords: *process, European construction, European policy*

In order to draw the necessary conclusion in what concerns the policy of France in the process of European construction, it is necessary to list the first moments which outlined this process and the need of its rise, then to point the most representative moments in which France intervened by its foreign policy in a negative or positive mode in this process.

Even though the first thinking of Europe appeared in the 1920's, after the turbulence produced by the First World War when a real workshop of ideas for Europe emerged, the only major politician interested in the European idea was the French minister of foreign affairs

Aristide Briand, who, from the tribune of the League of Nations in Geneva, initiated the project of an European Federation and of the United States of Europe in 1929, project which was abandoned, remaining a simple archive document.

Nevertheless, after the Second World War the situation changes due to the fact that Germany was split into four zones of occupation and was not an existing state anymore and the Soviet Union, ideological state founded on marxism- leninism desired to expand its political- economic system in the rest of the world and became a great military and political power which encompassed in its area of influence whole Central and Eastern Europe.

It also has to be mentioned that, the United States extended its presence in Europe, cooperating in its reconstruction and maintaining an important army of occupation in Germany, Europe was split in two (in the East, the popular democracies under USSR political and military control and, in the West, the pluralist democracies defended by the USA) and Germany, situated in the middle of Europe, was the major post of the Cold War between East and West.

Since the international context had changed dramatically, the discussions and debates related to the structure of Europe were resumed and the attention was directed towards France and the French politicians who were the only competent to make an European

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proposal. Thus, Jean Monnet, a convinced Europeanist, designed the idea to create a superstate organism to control the French- German steel and coal production, project which has undergone approval of the French government.

On 9 May 1950, Robert Schuman, French minister of Foreign Affairs, on the basis of the idea of Jean Monnet, made a solemn declaration in which he profferred the creation of an European Coal and Steel Community. This project of a ''Coal and Steel Cartel" was accepted, apart from F.R.G, by Italy, Belgium, Holland and Luxembourg, which sign with France, *on 18 April 1951, The Treaty of Paris, the famous European Coal and Steel Community being created. (E.C.S.C.).*

However, the British, who were hostile to any idea of supranationality, remained outside of the organization in 1952, the institutions of E.C.S.C (The High Authority, The Council of Ministers, The Parliamentary Assembly and The Court of Justice) allowing the effective commencement of the Europe of the Six on 10 February 1953. President of the High Authority, forerunner of the present European Commission, was chosen *Jean Monnet*. Hence*, by establishing E.C.S.C* not only the pressure over the West Europe was diminished, but also the French had the possibility to develop direct relationships to Germany.

Desiring to sustain its military effort in Coreea, the Americans were forced to reduce their troops in Europe, therefore a worrying disequilibrium was generated and the USSR might have taken advantage. In order to restore this equilibrium of forces, the USA requested the participation of the Federal Republic of Germany in the Western defence.

The rearmament of Federal Germany met the opposition of the USSR, the hostility of the French and the reservations expressed by many Germans. In resisting the rearmament of Germany, France was sustained by Belgium. For removing this high peril, Jean Monnet had his team working on designing an European Community for Defence, thus avoiding the presence of the German divisions in NATO. Nevertheless, this plan generated a real storm both in France and in FRG and USA (Adenauer desired German soldiers and not European and in France, the gaullist and the communist objected resoundingly, and also the military personnel who had not been consulted in this matter).

Thereby, *on 27 May 1952, the governments of the Six Member Countries of E.C.S.C, established the bedrock of the European Community for Defence (E.C.D)*, Great Britain did not join, and this will not be ratified in the French parliament. As a consequence, on a military level, the cancellation of the European Community for Defence ensured the supremacy of NATO and paralysed the creation of an European defence for forty years. *Françios Mitterand*, who, as a minister in the government of Mendès France, did not participate in the vote of 30 August 1954, took more times this project into consideration during his presidency, but he was affraid not to bring to life the ghosts of the past, preferring to keep silence. Only after the disruption of the Soviet bloc did he take the initiative to form a French- German brigade and organize the parade of the German troops on Champs Élysée on the 14th of July 1994, forty years after the abandon of the European Community for Defence. He also engaged in the establishment of ***Eurocorps***, which had in the beginning a French, German and Luxembourg element and which the Spanish, the Portuguese and the Italians joined.

With the return to power of general De Gaulle in 1958 and the proclamation of the fifth Republic, the Europeans expressed a certain concern, being aware of the previous statements of the general and of the gaullist in connection with the process of European construction.

President De Gaulle advocated a « Europe of States » aimed to cooperate and take decisions unanimously and desired an Europe less dependent on the USA and which was able to have a dialogue with the USSR as peer.

The essential theme of the French policy was the rise of an *European Europe*, expanded from the Sixth to the East and independent of the two antagonist blocks.

In order to open the path for this autonomy, De Gaulle desired to endow France with nuclear weapons. In fact, the general merely accelerated an irreversible evolution, which allowed, within a budget similar to that of its neighbours, having much more effective military resources. In what concerns this issue, there were pros and cons, but, beyond these contradictory opinions, France was heading, slowly, starting with 1958, to a certain military autonomy.

The avowal of a policy for national independence in what concerns the USA and that is – the withdrawal of France from NATO in 1960- strenghtens the position of France and attracts the sympathy of small states, of USSR and its allies, as well as the friendship of China.

The French cooperation in the EEC during the years following 1958 reveals the fact that the stubborn Charles de Gaulle was trying to reshape E.C.C according to his own interpretation and he only saw Europe as an extension of France, looking perpetually the formula in which France was the spokesperson of Europe in the relationship with the rest of the world, trying to create a climate of moderation and approach with the Eastern Europe nations, especially with the Soviet Union (where the formula „ Europe from the Atlantic to the Urals). Whereby in the middle of Europe was situated Germany, the general intended to establish relations based on trust with the Republic, taking into account the personal relationship with Chancellor Adenauer.

Thus, the defence of the economic interests of France in the Common Market was ensured by the general and by his ministers, who succeeded in obtaining some significant results: the recovery plan from the end of 1958 brought France in the state of implementation of the first measures for accelerating the Customs Union, due to which the country finally interrupted a secular and disastruos protectionism; the common agricultural policy was a condition to follow the Common Market.

The issue of the accesssion of the United Kingdom to the Communities clarifies and strenghtens the coherence of de Gaulle's policy on European level and the contradictions of France' s partners. Thus, the general had permanently believed that something must have been done in order for France to be able to obtain all the advantages from the Common Market, in his view France saving the Common Market from collapse two times.

The first time at the end of 1958, when, by the voice of Maurice Couve de Murville, he opposed to the conception of a free- trade area, proposed by London, the other five partners declarind themselves in favor of this, displaying at the same time the direction for an Europe under the double sign of superstate and of integration and , the second time, France intervened in a spectacular manner at the press conference on 14 January 1963 when the general ascertained that „ England is insular and it does not have to be a part of Europe".

So, the entire strategy of De Gaulle and at the same time the most important points of his diplomatic theory had the roots in the French- German relationship, and the relationships with the main powers, the French- German agreement being even from the first meeting with Chancellor Adenauer in Colombey, the foundation of his European policy. When he observed that the negotiation of the Fouchet Plan would fail, he desired that this agreement evolve in the Cooperation Treaty which was signed in Paris on 22 January 1963, by De Gaulle and Adenauer. This treaty, after twenty- five years from its

signing, was celebrated as a structure of the French European policy, and the French-German agreement as a foundation of the European construction.

The progress of the European construction under the presidency of general De Gaulle allowed the fulfillment of the conditions prior to the adoption, after twenty years, of the Single European Act in 1987, the Single European Act generating the approval of the decisions related to the proceedings for the Great Market in 1993 with a qualified majority.

As regards the fulfillment of the union of the peoples and the European states, which was decided to be named The European Union, the first agreement project, voted in 1984 by the majority of the European Parliament and with the support of the deputies from all the groups, stipulated institutional connections between the countries, much tighter than De gaulle was willing to accept. However, his thinking and actions were the ones which consolidated the structure and made possible the subsequent development.

Later on, the European policy of *Georges Pompidou and Giscard d'Estaing* remains Gaullist in principles, ie the national independence, hostility towards the American hegemony and rejection of federalism, but not also in practice as Pompidou accepts without difficulty Great Britain joining the European Community. If these new perspectives and relationships were the center of the international evolutions, the emerging European Union will be the core of bringing closer the two parts of Europe and the body of an increasing communication between the continental peoples.

The scenery in which the national symbol will be able to consolidate in parallel with the European power, the last contributing to the preservation of the peace and progress in the XXI century, is the world which had been broadly announced by the major French leader of the XX century.

After the election of F. Mitterand as president of the Republic in 1981, positive events in the European construction occured, also due to the fact that in FRG came to power Helmut Kohl (1982), and together, they knew how to find the points on which they agreed, preserving the French- German agreement.

In 1983 he supported the Chancellor in the affair of the Euro- missiles, and they based on their complicity in the management of the European affairs and on the silent battle they had to keep in order to put up with the intentional verbal sideslips of the conservatory prime- minister Margaret Thatcher, who, in the eleven years of power, the only Europe she was interested in was the one of free- trade. She was oriented towards a minimalist Europe, obstructing the process of the European construction.

From January 1985 until January 1995, Delors will be the president of the European Commision, thus becoming the leader of an institution more deprived of decision power than any other national institution, sometimes being intentionally weakened by some anti-European national leaders (or European until a certain point), as we can mention Charles de Gaulle, Margaret Thatcher, but also in the favour of the european construction as V. Giscard d'Estaing and F.Mitterand. As president of the European Commission (January 1985- January 1995), Jacques Delors[1], designated also as „ Mr. Europe", will contribute effectively to put into force the Single European Act in June 1985, one of the most important measures being the creation of a large single European market in which the free movement of the goods, persons and assets will be take place.

Application of qualified majority rule permitted what was called „ the Delors packages", the first one in 1988 which involved a PAC reform and the creation of a new

[1] Jacques Delors – minister of economy and finace from May 1981 until July 1984.

budgetary source based on a percentage of the gross internal product of each country and the second one in 1992.

In this period, the resources for the years 1995- 1999 are reorganized, and it is launched the Political Union in 1990, which will materialize in the Maastricht Treaty in 1992, signed by twelve states and put into force in 1993. The European Union Treaty means a new stage in the integration process, without assigning new jurisdiction to the commission. Beginning with this date, the goods, the services and the capitals moved freely in the EEC. An, in December 1993 the second White Paper was accepted. All these are considered to be strong parts of the European construction, Delors declaring that his European activity is the period of his life he is most delighted with.

The death of Fraçcois Mitterand and the electoral defeats of John Major in Great Britain and Helmut Khol in Germany, caused that the baton be taken by a new generation: Schrőder, Blair and Chirac.

Elected president in 1995, Chirac kept for a long period on a Gaullist line, although he had accepted the single currency and had given a positive vote in 1992. After he lost the elections in 1997 and was obliged to coexist with the left, he tried for the policy of France not to take another direction.

J.Chirac never talks about Europe with warmth and enthusiasm, stating that, in his opinion, it is a necessity, a constraint France is obliged to respect. In September 2003 he declared in New York Times: „ I have never been an Euro- militant, I am an Euro-pragmatic; *I see that Europe is inevitable, without making a theory out of it." This realistic approach grants, according to the president, the association and the preservation of the interests of France and of the European Union.* It is situated on a Gaullist line of an Europe of states, enough remote from a federal and superstate line of Robert Schuman and Jean Monnet.

Between 1995- 2002, „ the French- German couple" , which was considered by the press the engine of the European construction, did not run anymore and, from the collaboration of the two countries, there came no new proposal. But from 2002, the relationship Chirac- Schroder improved.

The years 1995- 2004 were marked by the slow implementation of the perspectives generated by the reunification of Europe and the Treaty of the European Union: the path to the single currency was made in ten years and was ended for the countries which took it over on January, 1st 2002. On 1 July 2008, the presidency of the EU was taken by France for six months. The Government in Paris set high goals for the following fields: Agriculture, Environment Protection; Migration and Asylum; Opening new chapters fot the adhering of Turkey to the EU; The implementation of two French initiatives in the field of education and culture.*;*

At the European Council from 15- 16 October 2008, France succeeded to convince the partners from the EU to adopt the European Pact on Mygration and Asylum, this being a political agreement by which the member states commit to respect four principles: organization of legal immigration on each state' s necessities and support of social integration; fight against illegal immigration, in particular by repatriation; increase of effectiveness in border controls; creation of a global partnership with countries of origin and transit to encourage simultaneous migration processes.

Also during the French presidency of EU, the twenty- seven member states signed on 28 November the PAC agreement which establishes the principles and objectives that will define the agricultural policy of the community: EU' s Food Security; the contribution to the

guarantee of global food balances; the preservation of balance in the rural areas in order to maintain the teritorial cohesion; the development of an agriculture based on economic performance and ecological efficiency. The French presidency of EU succeeded in the Council from 11-12 December 2008 to reach a compromise on „ a historical agreement which will allow a 20% reduction on gas emission until 2020 by comparison with 1990."

In what concerns France' s mandate to the presidency of the Council of the European Union,the greatest challenges were ratifying The Treaty of Lisbon (rejected by the Irish by referendum on June, 15 2008), France supporting the resumption of the process of ratifying the Treaty of Lisbon by organizing a new referendum at the end of 2009 and the conflict in Georgia which determined the leaders from Paris to establish with priority the initiation of negotiations for a cease- fire agreement and sending an observation mission in South Caucasus.

As a conclusion, we can tell that:

- France and the French politicians were able to make an European proposal in the 1950's in view of creating a superstate body to control the French- German production of steel and coal;

- France promoted a „ Europe of States", it desired an Europe less dependent on the United States and which was able to have a dialogue with USSR as peer.

- France abndoned the desire to find in Great Britain a partner for its foreign policy, De Gaulle refocused his policy to an agreement with West Germany, his success being explained by his excellent relation with Chancellor Adenauer

- By its foreign policy, France pursued, in the process of the European construction, the attainment of the national interests and the conception of an European frame in which France to become the spokesperson of Europe.

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MATRIMONIAL CONVENTION - COMPLEX LEGAL ACT OF CHOOSING THE MATRIMONIAL PROPERTY REGIME

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Abstract: *The marriage contract called in the doctrine „matrimonial agreement" or „marriage contract" designs the act throughout the future spouses, using the freedom provided by the legislature, establish or change their own matrimonial regime during the marriage, the matrimonial regime under which they got married. Marriage is strictly organized and regulated by the legislator, in terms of its conditions and effects, and the parties cannot change these rules by private agreements, on the contrary, the marriage contract enjoys an exceptional freedom and the parties may freely determine its terms.*

Keywords: *Marriage agreement, family, matrimonial property regime, spouses, mixed property matrimonial regime, separatist regime*

Marriage agreement is the legal complex document by which the spouses jointly decide on the legal status of property acquired during marriage, choosing the most suitable matrimonial property regime in fact their monetary situation.

In the new Civil Code, concerning the family relations the most spectacular news can be found, given the fact that this matter is the future of the Civil Code, will be confronted with some of the most profound news throughout the abolition of the Family Code. Thus, in the matrimonial matters, the most dramatic change is to establish the principle of autonomy of will for the spouses within the meaning of choice, within certain limits, the applicable law to matrimonial regime (following the model established by the Hague Convention of 1978 on the law applicable to the reaffirmed matrimonial regimes in the Green Paper on 17 July 2006 the European Commission on developing a European regulation on conflict of laws in matrimonial matters, jurisdiction and recognition of judgments).

The marriage contract called in the doctrine „matrimonial agreement" or „marriage contract" designs the act throughout the future spouses, using the freedom provided by the legislature, establish or change their own matrimonial regime during the marriage, the matrimonial regime under which they got married.

Although these terms are usually considered synonymous and used as they are, in the doctrine there was made the difference between the marriage contract and matrimonial agreement, the contract of marriage can contain in addition to matrimonial conventions (regulating the matrimonial regime adopted by the future spouses) also other provisions such as the recognition of a child, donations made by other people (especially parents) to spouses or to one of them, etc.

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Given that synonymous terms used in the literature for matrimonial convention is „marriage contract" or „marriage contract", some clarification is necessary to distinguish between the institution of marriage and matrimonial agreement.

Regarding marriage, it is considered by some authors[1] as a contract between spouses. Contractual theory has roots in the French Constitution of 1971, which provided in the art. 7 that: „marriage is a civil contract."

Other authors[2] share the view that marriage is primarily a contract and matrimonial agreement is considered an ancillary contract towards marriage , about its existence and duration.

However, the legal act of marriage differs to matrimonial agreement from a number of issues such as, marriage gives rise to both economic and personal relations, while only matrimonial agreement governs matrimonial property relations between spouses, marriage is concluded in front of the delegate of civil status, while marriage agreement is concluded in front of the public notary; , the principle of freedom of will, which gives parties the opportunity to determine the content and effects of marital agreement is inefficient in the matter of marriage. By consent freely expressed at the end marriage, spouses agree to personal and property rights and obligations, predetermined by the legislature[3].

Matrimonial agreement is separate and not confused with the institution of marriage, it complements the economic side of it, not a relationship of interdependence between them, concluding and carrying out the marriage can take place without any matrimonial agreement, spouses being subject to matrimonial law, and those who wish to apply the system are able to express this option by entering into a marriage agreement, which may take effect only within a marriage validly concluded, outside or in the absence of her conclusion, the agreement is null and obsolete.

In the French doctrine, the marriage contract has been defined as „the agreement by which the future spouses establish their matrimonial regime, the condition of their present and future goods in pecuniary relationships arising from marriage"[4] or „a faculty granted by law to regulate conventionally and within certain defined limits the effects of the patrimonial powers and disabilities resulting from marriage as a civilian state report". Also in Romanian doctrine, it is considered that marriage itself is a contract, the main one, the matrimonial agreement is a lateral contract, as the existence and duration of it depend on the existence and duration of marriage, between marriage and the marriage contract the following main difference being found.

Freedom to choose a matrimonial regime or adapting matrimonial law, recommended by legislation is traditional in European countries. This principle has the advantage of allowing an adaptation of the widest possible matrimonial property regime in special circumstances, taking account of his property, profession, habits, age of the spouses.

The object of the matrimonial convention is the matrimonial agreement made of future spouses of their choice as an alternative to matrimonial law. But freedom of the intending

[1] M. B. Cantacuzino, *op. cit*., p. 656.
[2] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *op. cit*., p. 4.
[3] Emese Florian, *Dreptul familiei, cu referiri la Noul cod civil*, Editura CH Beck, 2010.
[4] Marie Gorie- „*La determination du regime matrimonial*",în „*Droit patrimonial de la famille*",sub direcția lui M.Grimaldi, Dalloz 1998,p.83.

spouses to establish matrimonial applicable during marriage is not absolute. In this respect, there are limits both general and specific limitations restricting that freedom.

General limit is applicable in contract law , can not derogate from mandatory law rules and morals. As applications of public order, matrimonial agreements can not derogate from: the principle of equality between men and women; patrimonial effects of marriage, parental rights and duties, legal transfer on succession rules.

Marriage is a relative contract about the person and condition of the spouses, while the marriage contract is only relative in the goods of the spouses. Marriage is performed in front of an officer, but the marriage contract is made in court or by a notary. Marriage is strictly organized and regulated by the legislator, in terms of its conditions and effects, and the parties cannot change these rules by private agreements, on the contrary, the marriage contract enjoys an exceptional freedom and the parties may freely determine its terms. These considerations are largely valid today, although the family law has undergone in the meantime quite important developments.

As an agreement of the intending spouses, the marriage contract is subject to common law legal documents. But he is first the subject, to the rules which have been established in consideration of its main object, the adoption of a matrimonial regime. Although it expresses a pecuniary status, the marriage contract is a complex document, intimately connected by the status of the future marriage. If tradition makes from the matrimonial convention a family pact the law gives it the form of a contract. The general characters of the marriage contract were thus summarized in Romanian doctrine: the marriage contract is a solemn and public contract, sinalagmatic, free in its terms and in the determination of its clauses and accessories, irrevocably.

On the subject of freedom in establishing the clauses of this contract, there are some nuances. In general, the laws of different countries do not impose restrictions on the choice of matrimonial regime. Future spouses are free to adopt one type of matrimonial regime to create one by combining several regimes. However, in the private international law, spouses have the principle of election the law under which they can choose the law of the place where they are both domiciled or will reside after marriage or the law of a state according to the nationality of one of the spouses[5].

The only restrictions found in all systems of law arise from the common law of freedom of contract. Usually, matrimonial agreements are free to the extent that they are not contrary to public order and morality. It should be mentioned also that the matrimonial regime adopted is not the only main element that governs the economical relations between the spouses. Whether the future spouses adopt the regime of community of goods, the regime of separation of goods, that of participation in acquisitions or any other matrimonial regimes, there are certain situations in which they are subjected, especially on the organization of their management powers on heritage and mutual representation in relationships with third parties, the same rules[6]. Like any legal document, the marriage contract must meet certain conditions of substance and form to be considered valid.

In general the marriage contract is subject to the same background conditions as marriage, on the capacity and consent of the parties. The capacity of the intending spouses is required by law under the same conditions as for marriage. The conditions for the

[5] Cristiana-Mihaela Craciunescu - *The right of spouses to dispose of goods belonging to them in different matrimonial regimes*, Editura Universul Juridic, 2010, p.113.

[6] Marieta Avram, Cristina Nicolescu, *Matrimonial regimes,* Editura Hamangiu, 2010.

possibility of minors and adults to be able to conclude a marriage contract are specifically governed by the laws of each state. Personal consent of the intending spouses is always necessary , it is a prerequisite to the conclusion of the marriage contract.

Capacity to contract marriage agreement is the same as for marriage, the principle of *habilis ad nuptias, habilis ad pacta nuptialia*[7], which means that those who conclude a valid marriage may enter into a matrimonial agreement. So, it is not applicable general rules on capacity to contract, but requires capacity (age) marriage.[8]

According to art. 272 of the New Civil Code „(1) Marriage may be concluded if the future spouses have reached the age of 18 years. (2) For good reasons, minor 16 years of age can marry under a medical opinion, with the consent of parents or, where appropriate, the guardian and the guardianship court authorization in whose jurisdiction the minor resides. If the one parent refuses to approve the marriage, the guardianship court decides and on the differences, considering the interest of the child. (3) If one parent is deceased or is unable to manifest the will, consent of the other parent is sufficient. (4) Also, according to art. 398, parent consent is sufficient parental authority. (5) If no parent or guardian can approve the marriage, the person is necessary approval or authority was empowered to exercise their parental rights. „

As the child's ability to enter into a matrimonial agreement, according to art. 337 of the New Civil Code, „(1) minor of age may enter or change a matrimonial agreement only with the consent of his legal protector of the guardianship court authorization. (2) Unless a declaration of or authorization referred to in art.(1), the Convention of the minor may be canceled in accordance with art. 46, which apply accordingly. (3) An action for annulment may be made if there has been a year of marriage. „

Also, to conclude matrimonial agreement by a minor it will require the approval of legal protector and guardianship court authorization; regarding approval of legal protector, will be considered art. 272. The declaration of approval of the guardianship court regarding the minor will be required, only if the agreement is concluded before marriage, if the agreement is concluded or modified after marriage or during the marriage, even if the husband has not reached the age is no longer necessary legal protector consent, because marriage once concluded it has acquired full legal capacity.

In principle, the mutual consent of the intending spouses is sufficient, but there are situations in some legal systems (eg French system), where the law requires the consent of other persons in the contract of marriage, such as those in favor for marriage (even in the case of capable spouses) and those whose consent is necessary if one spouse is unable, one may conclude the matrimonial agreement.

The formal requirements differ from country to country. In general, they can refer to the formalities concerning the preparation of the marriage contract and its publicity. Thus, in French law for example[9], the contract of marriage is a solemn act, subject to such formalities whose failure has the result in an absolute void act (*ad solemnitatem*). This

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[7] Paul Vasilescu, *Matrimonial regimes*, ediția a II-a, revizuită, Editura Universul Juridic, București, 2009, p. 235. First rule *habilis ad nuptias, habilis ad pacta nuptialia* was interpreted strictly and only in reference to minors (in Romanian law, it has remained the same, D.Alexandresco - op.cit. P.68). Over time it has become general vocation (Ph. Malaurie).

[8] Alexandru Bacaci, Viorica Dumitrache, Cristina Codruta Hageanu, *Familiy Law, under the provisions of the New Civil code*, VII edition, Editur aCH Beck, 2012, p. 32

[9] Jean Champion - *Patrimoine du couple. Union libre, PACS, Mariage, Regimes matrimoniaux, Contrat de mariage*, edition Delmas, 2010, p 240.

translates into the strict requirement of concluding the contract of marriage in front of a notary, who, being a sort of family counselor may intervene to advice the spouse on their choices and how to formulate the clauses, which can sometimes be quite complex[10]. He gives authenticity to the elements of the contract that he registers - closing date, payments of amounts held in front of him. The simultaneous presence of parties at the moment of signing the contract is another requirement whose failure results in a void act. Each party though has the possibility to be represented by a procurator being designated by an authentic power of attorney to be present at the moment of signing the contract (this is considered to be a difference from the imposed formalities for concluding a marriage, which is not possible without a procurator)

The object of matrimonial agreements is the choice that future spouses make as an alternative to matrimonial law. But freedom of the intending spouses to establish matrimonial applicable during marriage is not absolute. In this respect, there are limits both general and specific limitations restricting that freedom.

Regarding the principle of equality between spouses, it could not, by matrimonial agreement, to adopt a matrimonial property regime in defeat of that principle by reviving, matrimonial regimes based regulations in inequality between men and women. Thus, it would be impossible to adopt so-called „double regime without community", whose feature was the separation of goods, but the man gave the woman all property management, but also the obligation to bear all the burdens of marriage[11]. Therefore, although there was a community of goods, men have spouse's property management. Such a regime is unacceptable according to the principle of equality between man and woman who, in terms of property relations between spouses, is expressed in the rule of public policy, that each spouse has the management his own goods.

Spouses, who choose to conclude a marriage, want to deviate from matrimonial law, seeking to apply the economic relations of matrimonial regime they agree that their living standard, social status, a voluntary system size and concrete. In the matrimonial convention spouses are free to regulate their materials relations, may adopt a Community, separatist or mixed property matrimonial regime.

Usually, matrimonial agreement is concluded before the celebration of marriage. Matrimonial agreement may be concluded on the day of marriage, as can be can be completed during marriage , it has the effect of an agreement amending the matrimonial regime.

Traditionally, marriage agreement is a formal act, which is required for its authenticity and involves the respecting *ad validitatem* form.

Justification for which was imposed this condition is the same as for solemn acts in general: legal protection of parties are therefore advised by a specialist in law, given the seriousness and complexity of marital agreement. However, given the ancillary character between the two institutions, because marriage is a solemn act, it is natural that matrimonial agreement to be put all in solemn form, authentic, regulating monetary relationships of spouses.

However, art. 330 of the New Civil Code provides that, „Under penalty of nullity, matrimonial agreement is concluded by written certified by public notary, with the consent

[10] Marieta Avram, Cristina Nicolescu, *Matrimonial regimes,* Editura Hamangiu, 2010.

[11] No community regime was the common-law for Switzerland and Germany; see, Cristina Nicolescu, *Insight the historical evolution of matrimonial regimes. Special view about the origin and evolution of matrimonial agreement* , în A.U.B. Drept, nr.1/2009, p.37-69.

of all parties, expressed in person or by acting as a proxy authentic, special and having predetermined content."

Authentic document includes matrimonial convention has recognized common law evidentiary value and is at the basis of the Convention published in the National Register of matrimonial property, through which any person can know the existence of the agreement concluded between the spouses, thus seeking to protect all participants in the civil circuit .

Given that the conclusion of the marriage Convention is an original act concluded by notary, the spouses get advice from competent legal professional in practice, it will be very rare cases where the marriage agreements will be concluded with violation of the law on matrimonial capacity, the role of the notary public is precisely to verify the legal conditions for the valid conclusion of the Convention.

Therefore, to ensure stability and to know that civil circuit will be applicable to matrimonial property regime, art. 337. (3) of the New Civil Code provides that: „Action for annulment may be made if there has been a year of marriage."

Matrimonial agreement is considered invalid and non-existent and is abolished with retroactive effect. Retroactive effect of avoidance undoubtedly raises many practical problems. The doctrine has shown, for security reasons related civil circuit, it should allow a cancellation of its effects only for the future.[12]

The new Civil Code establishes clear provisions regarding matrimonial regime's advertising, respectively, matrimonial agreements. According to art. 313. (2) „Towards others, the spouses are bound to matrimonial agreement formalities of publication provided by law, unless they knew him otherwise." Paragraph. (3) of that article states that „Failure to make disclosure formalities of matrimonial agreements, spouses to be considered in relation to third parties in good faith, to be married under the legal matrimonial regime of community."

In the concept of the New Civil Code, advertising matrimonial agreements are made both by reference from marriage act and the registration in the National Register of matrimonial advertising.[13]

Statement on the marriage act is regardless the matrimonial choice, even if this is the legal community one. In this case, the officer of civil status communicate a notarized copy of the marriage to the National Register, without the need for drafting a marital agreement, if the spouses don't want to insert special provisions.

As a specific effect of marital agreement, the legal transaction is the same type regardless the matrimonial regime chosen, which may be a system of community or joint separation. Beyond the substantial effect, matrimonial agreement, as *instrumentum,* produce evidentiary effect, act can be valued as evidence of matrimonial regime applicable between spouses. Other legal documents contained in the matrimonial convention (donations, etc. award clauses.) will produce specific effects in common law.

In the material sense, matrimonial property regime is the legal norms that apply to all spouses goods, regardless of when and how these have been achieved. Therefore, they form the subject of regulating all the goods that spouses had acquired during the marriage together or separately, for a consideration or free of charge.

Concluding, compared with current regulations in the New Civil Code indicates a certain flexibility regarding the faculty of spouses in matrimonial regime's choice.

[12] Paul Vasilescu, op.cit., p 244.
[13] Nadia Cerasela Aniței, *Familiy Law, under the provisions of the New Civil code,* editura Hamangiu, 2012, p.92.

However, though they aren't thus quartered in double standards legally binding regime, however, their choice is limited to the imperatives of the provisions governing one or another of the three matrimonial regimes: the legal community , that of separation of goods and the conventional community. Sure that applying the principle of freedom would harm the spouses, on one hand, because then they would have to opportunity to fraud each other, and on the other hand, they could also fraud the interests of third parties. The legislator had chosen a way to avoid this thing as much as possible even though it means sacrificing this principle in part.

From analysis of the elements that make up and give life to marriage agreement, producing specific effects , we find a complex legal document, which includes a whole myriad of legal relations, which structures the pecuniary relations between spouses during marriage, noting the fundamental bond between these two institutions, which are defining each other. Freedom regulating property relations between spouses through marriage convention is the perfect illustration of mirroring in family relationships of daily socio-economic development, the transition from closed economy to the open, capitalist one, leaving husbands total discretion about all the relationships established between them.

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THE EVOLUTION OF LEGAL REGULATION OF INDIVIDUAL EMPLOYMENT RELATIONSHIP

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Abstract: *Employment is done in a democratic state under the competence criterion that provides paid employment, thus only being able to ensure effective and efficient development of society. In the legal work relationship, work is carried out by successive, lasting benefits, on a continuing basis. The person involved in this work relationship provides a continuing activity by repeated use of their workforce. Relationships between employer and employee, as interpersonal relationships, have evolved both in terms of legal regulation, but also in terms of their quality of centerpiece of the labor market. Ideally these relationships should be interrelated, they should harmonize and optimize to create a normal healthy economic and social development, which is not affected by major disturbances. Consequently, the law, doctrine and case law must comply with these goals to ensure support of progress and development of normal social relations of work, both individually and collectively.*

Keywords: *contract, employment, legal work, workforce, development*

1. Work and its types. Concept and object of the legal employment relationship

Work, as a conscious and necessary human activity in the nature control and change process, in order to meet their needs, takes place in society as a social relationship, which, through its regulation by rules of law, takes the form of the legal work. Stated in Art. 41 of the Constitution[1], the right to work lies in free choice of professional work and of employment, social protection of the work, providing weekly rest and paid annual leave[2]. Freedom of choice of profession and workplace are expressions of personal freedom as natural law, the choices made by people being determined by their own qualities, needs and aspirations as well as by certain economic and volitional coordinates.

Employment is done in a democratic state under the competence criterion that provides paid employment, thus only being able to ensure effective and efficient development of society. Therefore, each state that has incorporated into national legislation international regulations on socio-economic and cultural rights, and therefore those on the right to work, should aim, on the one hand, at the corresponding legal regulation of guidance and of technical and professional training and, on the other hand, at developing programs, policies and techniques that ensure economic, social and cultural constant development and optimal use of workforce in conditions that would guarantee individuals the exercise of basic political and economic freedoms[3].

Work performed is not always the object of legal relations of employment, with a number of situations where work leads to the creation of other legal relationships, not

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[1] Republished in „Official Gazette", Part I, no. 767/31 October 2003

[2] Supreme Court Justice S. account. ADM, decision no. 1558 / 1998, the „right" no. 3 / 1999, p. 190.

[3] I. Muraru, ES Tanasescu - Constitutional Law and Political Institutions - All Beck Publishing House, Issue 12, Vol I, Bucharest, 2005, p. 162-163

covered by the central institution of labor law - the individual employment contract. Thus, relationships that arise between the school and students, or between higher education institutions and students, including periods of practice, are not based on the individual employment contract. In these types of relationships, people who attend different forms of training, exercise their fundamental right to education, asstated in art. 32 of the Constitution, and not the right to work. Also a traditional legal work relationship does not exist between service provider and the beneficiary, parts of a civil contract, between agent and principal or between the client and provider of a liberal profession.

In the legal work relationship, work is carried out by successive, lasting benefits, on a continuing basis. The person involved in this work relationship provides a continuing activity by repeated use of their workforce. In this repeated process, skills, training, personal skills of the person providing work are particularly important and make representation unacceptable.

Work may not be performed in all conditions, the essence of the legal work being subordination of an employee to their employer. It is a specific subordination, involving employment in an organization, to a certain organizational structure and some functional hierarchy. Execution of activity takes place in the pre-organizational framework, as opposed to civil or commercial enterprise contracts for services, under which the ones who are required to work for the benefit of others organize their own work commonly framing in a team and without subordinating their contractors[4].

Subordination is manifested in many aspects, among which the most important implies for the employee compliance with work discipline, with its basic component - respecting the working hours. Work discipline is an objective condition, necessary and indispensable to carrying out the activity in compliance with each employer, representing a basic duty of every employee[5]. Under this principle established by the Labor Code, labor discipline objectively means a system of legal rules governing the behavior of employees in the process of working in an organization.

Corollary of this obligation of the employee, the employer is entitled to issue mandatory instructions, subject to legality, to its employee and also under the obligation to pay the employees. It should be noted that it is not a total subordination, a waiver of employee rights and fundamental freedoms. Placing it in this relationship of subordination, the employee may not refuse the conditions imposed by the employer and agreed by signing the individual contract of employment. The employer's exclusive right to organize, under the law, the individual work assigned to their team corresponds to the subordination of the employee[6].

In order to contribute decisively to the creation of employment relationship, the provision of a work activity must have an outcome, that is, obtaining income as salary. In this way the aim of the employee, for whom an individual work contract is established, is reached,that is, obtining the means of existence. Any voluntary work, free, voluntary, can not be subject to the individual employment contract. Employment legal relationships are defined in the literature as those social relations regulated by law, arising between

[4] S. Ghimpu Al Ticlea, The planners, Labor law, ALL Beck Publishing House, Bucharest 2002, p. 19, the Supreme Court, in December. 1627/1975 Reports of decisions in 1975, p.169

[5] Article 39 para. 2 letter. b) of Law no. 53 of January 24, 2003, republished in „Official Journal of Romania", Part I, no. 345 of May 18, 2011

[6] See in this regard Ghimpu S., Al Ticlea The planners, Labor law, ALL Beck Publishing House, Bucharest, 2002, p. 17, IT Stefanescu, the Treaty of employment, Wolters Kluwer Publishing House, Bucharest, 2007, p. 195

individuals, on the one hand, and as a legal rule on the other hand, following the provision of some work by the first person, the benefit of the second, who, in turn, is obliged to pay for and create the conditions necessary for the provision of that work[7].

The definition analysis highlights the two issues of the legal work relationship, that is, employer and employee. The employer may be both a legal entity and an individual, but the employee can only be an individual, fit medically and professionally, who is interested to perform work on behalf of an employer. The individual lays the entire physical and mental strength in the work performed and for the benefit of the employer. Without the existence of the two parties it would not be possible to establish the legal work. Moreover, this legal relationship is created only between two parties, employer and employee relationship unlike the civil or commercial mandatory relationship, in which sometimes a plurality of active subjects and / or liabilities can exist.

Relationships between the legal issues work out but not always, without seizures, according to the law, not infrequently disagreements between employers and employees being born. In these cases, either part of the legal employment relationship may be bound by coercive measures established by the competent courts to resolve these conflicts of rights, respecting the obligations that they violated intentionally or unintentionally[8].

Relationships between employer and employee, as interpersonal relationships, have evolved both in terms of legal regulation, but also in terms of their quality of centerpiece of the labor market. Ideally these relationships should be interrelated,they should harmonize and optimize to create a normal healthy economic and social development, which is not affected by major disturbances. Consequently, the law, doctrine and case law must comply with these goals to ensure support of progress and development of normal social relations of work, both individually and collectively.

2. Theories about the source of legal work

As mentioned before, the legal work relationships have been defined by the national doctrine as those social relations regulated by law, which arise between individuals, on the one hand, and as a legal rule on the other hand, where the first person undertakes to provide some work for the benefit of the second, who, in turn, is obliged to pay for and create the conditions necessary for the provision of that work[9]. Legal work relationships, individual and collective, arethe regulatory subject of labor law.

The individual employment relationship has certain characteristic features, some shared with other legal relationships, not covered by labor law and other specific, distinctive, that define and individualize it as a legal institution. Thus, legal individual employment relationship has the following characteristics:

- it is created only between two people, unlike other legal obligation relationships, where there may be a plurality of active or passive subjects;

[7] Ghimpu S., T. I. Stefanescu, S. Beligrădeanu, G. Mohanu, Labor Law Treaty, Volume 1, Scientific and Encyclopedic Publishing House Bucharest 1978, p. 8-9, S. Ghimpu, Al.Ticlea, The Planners, Labor Law, Second Edition, All Beck Publishing House, Bucharest, 2002, p. 16

[8] M. Volonciu, All about conflicts of rights in relation to persons employed, number one economic truth. 13 of 28 March to 3 April 2001, p. 21

[9] Ghimpu S., T. I. Stefanescu, S. Beligrădeanu, G. Mohanu, Labor Law Treaty, Volume 1, Scientific and Encyclopedic Publishing House Bucharest 1978, p. 8-9, S. Ghimpu, Al. Ticlea, The Planners, Labor Law, Second Edition, All Beck Publishing House, Bucharest, 2002. p. 16;

- one side of the legal work relationship is always an individual person, excluding creation of the legal work relationship between two legal entities;
- it is concluded intuitu ending persons, considering the training, skills and qualities of the person who works, as well as employer characteristics, its organizational culture and working conditions offered;
- a special relationship of legal subordination is born between the work provider and the beneficiary;
- the object of the legal work relationship is represented bythe main interdependent obligations of the parties, that is, work performed by the employee and payment of wages by the employer;
- it is governed by the principle of protection of employee rights, as a feature of the constitutional principle of proportionality, according to which any restriction of rights must be justified by an interest. Thus, the fact that the employee is not on legal equal footing with the employer over the legal enforcement of individual employment contract, required the development of legal rules by which it is protected in this unequal relationship. Justice is primarily equity, provided by the proportionality of the legal working party rights, reflected in the mandatory rules on the conclusion, amendment, suspension and termination of legal individual employment relationship.

The analysis of the Labour Code provisions shows that the legal work relationships mainly arise as a result of concluding an individual employment contract, which does not exclude the possibility that they also have other sources, complementary to the legal act or even completely independent of it.

2.1. In the European legal doctrine, and not only, different theories having as subject the source of the legal work relationships have been confronted. The confrontation has been justified in the light of individual employment relationships, which must be adapted to continuously transforming labor markets.

The attitude of legislature concerning the legal regulation of employment relationships in different countries, was influenced by national characteristics, which led to various weights of different theories about the sources of legal work relationships.

Non-contractual theories mainly state that the legal individual employment relationship does not have its source in a contract, but either in professional statutes or in the provider's effective integration into the functional hierarchy of a legal entity and in the effective provision of labor, as a manifestation of will materialized in deeds and not in legal documents. Within these conceptions the legal work relationship has its source primarily in law and in professional status on the one hand, and in the institutional organization on the other.

Historical development of legal employment relationships of civil servants, of the judiciary, of other professional groups shows that they have their source mainly in professional statutes, as distinct from other legal work relationships. These professionals, being designed to serve the public interest, have a legal individual work relationship with special character as compared to classical employees protected by the rules of labor law. It is true that in the case of these legal relationships the will of the two sides to create an individual employment relationship is involved. But the way the legal will is expressed is regulated by law, by professional statutes and not by concluding a bilateral legal act. We

can say that administrative law has created a distinct individual employment relationship, different from the classic legal source, that meets the objectives of this branch of law.

Thus, in Romania, as in other European countries, boundaries have been defined between the legal labor relations of those who hold an office of public power and and legal labor relations arising by signing individual contracts of employment. The national doctrine[10] stated that the appointment to public office is based on the consent of the person who gradually agrees to it, from enrolling in the contest for public office to taking the oath. Therefore in this case there is also an agreement of wills, an administrative contract, „unnamed, complex, with clauses specific both to condition (predominantly) and subjective acts (in areas where negotiation is permitted by law, solemnly sinalagmatic , for consideration, with successive execution concluded intuitu personae[11]". The formation of a statutory employment relationship under an individual administrative act, generating rights and obligations, however creates a legal relationship that is the subject of an analysis of the subject separate from this paper.

Another theory, mainly supported by German scholars, followers of the employment relationship governed by law, focuses on integrating employee in the working team established within the company as a legal entity as a hierarchically organized whole, as a combination of material and human well-structured resources and with a common goal. According to this theory, freedom of work does not manifest according to its valences, particular interests being overshadowed by the group interest, by the common interest of the legal entity employing. The mployment relationship is governed only by law and by the institutional framework of the employer and doues not have its source in a legal act, which sometimes causes the legal relationship to be characterized as one sprang from legal facts and not from legal documents[12] .

2.2. Contractualist theories

Throughout the historical development of individual employment relationship, the contractual grounding concept has seen its different variants, from the theory of exchange contract to the adhesion contract theory, theories which we be summarized below.

a. The exchange contract theory. At the beginning of the industrial revolution, the individual employment relationship was contractually conceived as an exchange of providing work for pay. Based on this bilateral mechanism, the legal work relationship is created individually, enjoying legal recognition that generally provides binding to the agreement.

Viewed from another perspective, however, the legal contract of employment based on the contract of exchanging salary for work performed, highlights a conflict between employer and employee. Thus, the employer's interest is to constantly reduce production costs, with its various components, including living labor costs, that is, salaries, obviously opposing the interest of the employee. Moreover, the contract is only a legal point of intersection of the two sides' wills, which basically differ in terms of purpose of concluding the legal act.

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[10] See in this respect, Al. Athanasiu, L. Dima, labor law, ALL Beck Publishing House, Bucharest, 2005, p. 3; IT Stefanescu, the Treaty of employment, Wolters Kluwer Publishing House, Bucharest, 2007, p 23-24, R. Postelnicu, Public Staff, Carol Davila University Publishing House, Bucharest, 2006, p.371

[11] IT Ştefănescu, Treaty of employment, Wolters Kluwer Publishing House, Bucharest, 2007, p. 24

[12] For a development of the subject see M. Jamoulle, Le Travail contract, Tome I, Faculty of Droit, d et de Sciences Sociales Economics of Liege, 1982, p 7-55

The only flaw of this contractual concept is that it fails to regard workforce as intrinsic to the human being, that is, to the worker, who cannot therefore be treated as an ordinary commodity, because it can not be separated from the consumer in the work process.

Due to the fact that workforce has a character intrinsic to the human nature, the idea of clarifying its not belonging to the category of goods was imposed forcefully. Thus, according to the ILO Constitution „ work is not a commodity „„ having the following distinctive features of the concept of commodity[13]: it is inseparable from the individual that provides it, it is impossible to be preserved, as it is consuming and creating on a continuous basis, it is impossible to increase its amount without affecting the health of the person providing it.

This actual contractualist view of the legal work relationship based on the exchange of work performed and salary is still maintained, however it is to be mentioned that this qualification of the individual employment contract as a contract of exchange does not have the meaning in the civil law, that is, that of exchanging things[14].

Moreover, the report submitted in 2006 by the General Director of the International Labour Organisation, entitled „Changes in the World of Work", categorically rejected again the economic thesis according to which work is simply a factor of production - a commodity - emphasizing the social size of this human activity, both in terms of individual and family, collectively and nationally. „Work is not an inert, lifeless product, like a machine or some kitchen furniture that can be negotiated in order to get the best return or the lowest price. Work is part of daily work and it is fundamental to human dignity, welfare and happiness[15]. „

b. The theory of adhesion contract, according to which the employee is free to join or not the predisposition of the employer to provide a certain work, under certain circumstances[16]. The employment relationship is actually created on a „diktat" imposed by one party, namely the one that is dominant in the execution of the legal work. The argument of supporters of this concept lies in the fact that, in order to have an individual employment contract, this does not necessarily have to be the fruit of negotiations on different terms, but it is sufficient that a party would adhere to conditions imposed by the other party. The employee consents to an individual employment relationship as the result of a formal freedom and equality between the two parties when concluding the individual employment contract. However, these circumstances are not covered by legal rules governing freedom of contract.

Advocates of the adhesion contract concept trie to support their thesis by the idea that more rights and obligations of the parties in an individual contract of employment are still established by law, by applicable collective agreements, being pre-established, impersonal and often imperative. Thus, imposed from the outside, these rules are brought to life by consent of both sides of the individual work contract to make them part of a contractual sphere[17].

c. The theory of associative contract, according to which between employer and employee there is an unusual combination, based on the existence of a common purpose between employer and employee, function of the common overriding interests[18]. The theory can not be sustained because the two sides of the individual employment contract can not

[13] See in this regard IT Stefanescu, the Treaty of employment, Wolters Kluwer Publishing House, Bucharest, 2007. p.12-13
[14] IT. Stefanescu, the Treaty of employment, Wolters Kluwer Publishing House, Bucharest, 2007, p. 190
[15] A. Popescu, International Labour Law, CH Beck Publishing House, Bucharest, 2006, p. 45
[16] IT Stefanescu, the Treaty of employment, Wolters Kluwer Publishing, Bucharest, 2007, p. 191
[17] Jamoulle M. Le Travail contract, Tome I, Faculty of Droit, d et de Sciences Sociales Economics of Liege, 1982, p. 17
[18] IT Stefanescu, the Treaty of employment, Wolters Kluwer Publishing, Bucharest, 2007 p. 191

have absolutely common interests, their legal willingness intersecting at the time the individual employment contract is concluded, but their purpose being essentially different. The employee has a general obligation of fidelity and loyalty to the employer and mainly has an indirect interest in the entity development for the benefit of which work is performed. But to generalize this and to support that the legal work relationship has its source in an associative contract concluded by the parties considering a common goal prejudices the legal character of the legal work relationship, particularly the relationship of subordination between the two parties as a defining element of this type of social relationship.

In the labor legislation of our country, the rule usually resulting from the analysis of the Labour Code provisions, is that the individual employment legal relationships are born by concluding the individual employment contract. As an exception, legal work relationships can also arise according to the regulations of special laws, mainly for professional groups exercising their powers under the law and under professional statutes.

Thus, the provisions of the Labour Code are applicable to legal relations of employment of civil servants, persons holding a public function, the judiciary and other legal relations of employment similar to those based on individual employment contract such as diplomatic personnel, members of craft cooperatives, military personnel, to the extent that the special laws governing the exercise of their profession contain no derogatory specific provisions. All these legal relations are based, in fact, on the agreement between the one who will provide work and the beneficiary, being essentially legal work relationships.

Out of all these legal work relationships, this paper deals only with those which are born based on concluding the individual employment contract.

3. The individual employment contract

Place and importance in the legal sources of law of individual employment relationships.

The individual legal work relationship is a social relationship involving the most citizens in the active population of a state. In one form or another, directly or indirectly, every citizen is dependent upon an employment relationship. The legal work relationship is performed for long periods, usually during the active life, taking effect in the periods in which the former provider withdraws from the active life, following the occurrence of social risks.

In considering the importance of these legal relations in all social relationships, not only in terms of numbers, but also especially in terms of the intrinsic relationship between workforce and human personality, at the sources level we find a multitude of internal and international regulations and occupational statutes, of collective agreements governing the conclusion, execution, amendment, suspension and termination of legal work relationships. Thus, the legal labor relationship finds its regulation in the fundamental law, which establishes with a principle value social security rights of employees, then in the Labor Code, as the general law governing the legal relations of both the individual and collective work and the ones related to them, and then in the legal documents that establish the institutional framework of the employer and employee coordinates as the subject of law, as well as legal acts that are based on the free will of parties to conclude contracts (collective agreements and individual employment contracts).

The individual employment contract is the legal instrument, left to the reach of the legal parties, by which they will cross their legal will to exercise rights and to meet obligations in order to obtain benefits. The legal rights and obligations of the legal relationship parties, stipulatedby legislation or in regulations and statutes, are applicable only to an established legal relationship, that is concrete, established between the employee and employer, only as effect of the individual employment contract. Elements such as the type of work, salary, duration of employment relationship shall can be established only by contract, which becomes the law of the parties. Rights and obligations of the employer and of the employee are respected only by executing the individual employment contract.

Considering the above mentioned, the Romanian legislator stated that employment is made by signing an individual contract of employment and regulated the fundamental principles governing labor relations. Thus, in art. 3 of the Romanian Labor Code attributes specific to freedom of labor are highlighted, namely: freedom of choice of employment and occupation, freedom of the individual to decide whether to work or not. In this regulatory context, the individual is free to decide whether or not to exercise their right to work[19], whether to conclude or not an individual employment contract.

The individual employment contract is presented as a legal instrument which reflects the rights and obligations of two legal subjects, employer and employee, intended to stimulate the parties in the continuous achievement of the terms established. Life confirms that a clear understanding, occurred from the beginning, between the contracting parties, the unequivocal knowledge of the mutual rights and obligations, the observance of laws, are likely to avoid subsequent complaints or disputes, with all the range of effects that they produce [20].

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[19]Al. Athanasiu, Comment (to art. 3) the Labour Code. Comment on articles, Vol I Art. Al 1-107. Athanasiu, M. Volonciu, L. Dima, O. boiler, Ed CH Beck, Bucharest, p. 9

[20] Ghimpu S., G. Mohanu, Concluding the individual employment contract terms, Scientific and Encyclopedic Publishing House, Bucharest, 1988, p. 133-134

CERTAIN ASSESSMENTS RELATED TO THE STAGES OF THE CRIMINAL PROCEEDINGS IN THE NEW CODE OF CRIMINAL PROCEDURE

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Abstract: *The criminal proceedings can be defined as an activity regulated by law, performed by the criminal judicial authorities, in order to make liable the persons who have committed criminal offenses and to apply the penalties.*

This activity is carried out by certain public authorities specifically empowered by law to fight crime. The criminal judicial authorities are the ones through which the criminal judicial activity is carried out: the prosecution bodies (attorneys and prosecutors) and the courts (the High Court of Cassation and Justice, courts of appeal, courts of justice, specialized courts, military courts). In the new Code of Criminal Procedure, article 30, the specialized state bodies performing the judicial activity are: the prosecution bodies, the prosecutor, the judge of the rights and freedoms, the preliminary room judges and the courts of justice.

The definitions from the doctrine given to the criminal proceedings are similar to the one that is based on the specifications of article 1 Criminal Procedure Code in force and which stipulates the purpose of the criminal proceedings.

Keywords: *criminal proceedings, stages, functions, immediate aim, new Criminal Procedure Code.*

Committing an offense gives rise to the criminal juridical report of conflict, which in order to achieve its contents determines the State's right to hold the offender liable and to apply a sanction to him/her that he/she has to execute. In order to defend the general interests of society, the citizens' rights and freedoms, the criminal law provides the deeds which constitute offenses and the penalties imposed for committing them.

Considerations on the definition of the criminal proceedings

Wishing to avoid arbitrariness in criminal law enforcement activities of those who committed the crime, the society broadly regulated this activity by the provisions of the law and instructed some specialized state bodies to accomplish it[1].

The activity which ensures the enforcement of the criminal law to the offenders is called criminal proceedings, being the subject of regulation of a set of legal rules known as Criminal proceedings law[2]. In the last period the name of criminal proceedings was used more than the one of procedure, the two terms being different. Thus, the name of procedure indicates more a set of procedures by which the criminal liability is achieved, while the

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[1] Gheorghe Ivan, „The criminal proceedings between tradition and innovation", in the Law journal no. 7/2011, p.182.

[2] Grigore Theodoru, Treaty of Criminal proceedings law, 2nd Edition, Hamangiu Publishing House, Bucharest, 2008, p 3.

name of criminal proceedings judiciously characterizes the progressive research and trial of criminal proceedings[3].

The Criminal Procedure Code, in the chapter „Purpose and basic rules of the criminal proceedings" provides only the term of „criminal proceedings".

The criminal proceedings can be defined as an activity regulated by law, performed by the criminal judicial authorities, in order to make liable the persons who have committed criminal offenses and to apply the penalties.

Article 1 of the Criminal Procedure Code provides the aim of the criminal proceedings, so that starting from these provisions, we can conclude that the criminal proceedings is an activity regulated by law, performed by certain specialized bodies of the state, attended by the interested parties and other persons concerned, with the purpose of determining the timeliness and completeness of the facts constituting the offense, so that any person who has committed a crime can be punished according to his/her guilt and no innocent person can be held liable.

In the new Code of Criminal Procedure[4] the legislator no longer expressly stipulates the purpose of the criminal proceedings, but the purpose of the rules of criminal procedure in article 1 paragraph (2), stating that the rules of criminal procedure govern the conduct of the criminal proceedings and are meant to „ensure the effective performance of the judicial bodies with the guarantee of the parties' and the other participants' rights in the criminal proceedings so that to observe the provisions of the Constitution, of the constituent treaties of the European Union, of the other European Union regulations on criminal procedure, as well as of the covenants and treaties on the fundamental human rights in which Romania is a party". As compared to the current Criminal Procedure Code, we notice in the new Criminal Code the striking nature of observing the human rights and of the treaties and covenants in this field to which Romania is part. In paragraph 1 the legislator stipulated the object of the rules of criminal procedure, noting that the rules of criminal procedure govern the conduct of the criminal proceedings and of other judicial proceedings in connection with a criminal case, and in paragraph 2 the purpose of the rules of criminal procedure is stated.

Such regulations are not present in the legislation of many countries (of reference for us). For example, the Italian Criminal Procedure Code begins the regulation with the „Subjects", also showing their authority (Book I), then it continues with the „Documents" (Book II) and so on. The French Criminal Procedure Code contains a preliminary article, dedicated to the basic rules of the criminal proceedings (but without any reference to a possible object or purpose of the rules of criminal procedure or of the criminal proceedings), and then it regulates the prosecution and the civil action, etc. The German Criminal Procedure Code dedicates the first two provisions to the powers of the courts, without referring to a possible object or purpose of the rules of criminal procedure or of the criminal proceedings[5].

The definitions from the doctrine given to the criminal proceedings are similar to those that are based on the stipulations of article 1 Criminal Procedure Code in force and which stipulate the purpose of the criminal proceedings.

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[3] Ibid.

[4] Adopted by law no. 135/2010, published in Romania's Official Gazette, Part I, no. 486 of July 15, 2010. The new Code of Criminal Procedure shall enter into force on the date to be established by law to implement it.

[5] Gheorghe Ivan, work cited, p. 191-192.

There are, however, differentiations. Thus, some authors[6] show that in the criminal proceedings take part the persons or parties involved, as holders of rights and obligations.

Other authors[7], in the definitions they give to the criminal proceedings, state together with the immediate purpose, and its mediated purpose, making the observation that by showing in the definition the immediate purpose, the immediate purpose is implicitly prefigured, namely the defence of the rule of law, the defence of the person, of his/her rights and freedoms, crime prevention, as well as public education of the citizens in the spirit of complying with the law.

The immediate goal of any criminal proceedings lies in finding the offences and the just punishment for the offenders, the law emphasizing that the procedural activity will take place in time, foreshadowing, thus, efficiency as one of the fundamental principles of the judicial activity, and completely, respectively so that the facts are known in all the aspects of interest and which are necessary to solve the case[8].

The criminal proceedings are regulated by law. This activity is carried out by certain public authorities specifically empowered by law to fight crime. The criminal judicial bodies are the ones through which the criminal judicial activity is carried out: the prosecution bodies (attorneys and prosecutors) and the courts (the High Court of Cassation and Justice, courts of appeal, courts of justice, specialized courts, military courts and tribunals). In the new Code of Criminal Procedure, article 30, the specialized state bodies performing the judicial activity are: the prosecution authorities, the prosecutor, the judge of the rights and freedoms, the preliminary room judge and the courts of justice.

The doctrine[9] emphasized that criminal proceedings can be started only when there are indications that a deed was committed provided by the criminal law, and thus it violated a provision of this law.

However, the initiation of the criminal proceedings occurs at the time of notifying the judicial body with a deed provided by the criminal law.

The Universal Declaration of Human Rights of 1948, as well as the International Covenant on Civil and Political Rights of 1966 had, belatedly, an influence on our legislation as well; thus the right to defence was stipulated in the Constitution of 1965 as a fundamental right of the citizen, and the Criminal Procedure Code of 1968, while retaining an authoritarian style, represented a step towards strengthening the right of defence and granting more guarantees for the fundamental human rights. A movement of progressive ideas has manifested starting with 1977 in order to reform the prosecution by introducing certain adversarial and advertising elements, of participation of the counsel for defence in

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[6] Gr. Theodoru, L. Moldovan, Criminal proceedings law, Didactic and Pedagogic Publishing House, Bucharest, 1979, p. 20; V. Păvăleanu, Criminal proceedings law. General Part, Volume I, 2nd edition, Lumina Lex Publishing House, Bucharest, 2004, p. 16; A. Şt. Tulbure, A. M. Tatu, Criminal proceedings law Treatise, All Beck Publishing House, Bucharest, 2001, p. 3-4 cited by Gheorghe Ivan in the work cited, p. 182.

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[8] Nicolae Grofu, „Some reflections on the purpose of the criminal proceedings" in Law, no. 1/2012, p. 267.

[9] Vintilă Dongoroz and others, Theoretical explanations of the Romanian Criminal Procedure Code. General Part, Volume V, 2nd edition, Romanian Academy and All Beck Publishing House, Bucharest, 2003, p 10.

all criminal prosecution acts, but without bringing, however, an appropriate legislative change or without improving the practice of judicial authorities in the communist period[10].

The revolution of 1989 led to a change in the regulation of the criminal proceedings. The Constitution of Romania of 1991 brought forward the principle of separation of powers, the judicial power gaining the third position in the state. The Criminal Procedure Code of 1968 has suffered a series of changes in order to highlight the defence of individual interests and of the fundamental rights of citizens. The revised text of the Constitution of 2003 further emphasizes the defence of the human rights, being extremely rich and nuanced in this direction. The laws amending and supplementing the Code of Criminal Procedure (1990, 1993, 1996, 2003, 2006) were adopted based on the principles enshrined in the Constitution of 1991[11].

Romania's process of accession to the European Union led to the harmonization of the legislation, including the one of criminal procedure, with the Community rules in the European Union in criminal proceedings, according to the principles of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights in Strasbourg. In the same way the project of the New Criminal Procedure Code was developed, taking into account the rules enshrined in the international documents, especially regarding the observance of the human rights and fundamental freedoms, and the jurisprudence of the European Court of Human Rights.

1.1. The stages of the criminal proceedings

The stages of the criminal proceedings represent divisions of it, in which certain categories of judicial bodies operate in carrying out the functions falling within their procession function and after whose exhaustion a particular solution can be given on the criminal case[12].

The Romanian Criminal Procedure Code from 1864 provided five stages: the detection and investigation stage, the prosecution stage, the pre-instruction phase, the judgement stage and the enforcement of judgments stage[13].

The Romanian Criminal Procedure Code of 1937 provided four stages: first research, preparatory instruction, judgement and execution of the sentence[14].

The current Criminal Procedure Code (the Code of Criminal Procedure in force since 1968) regulates the criminal proceedings in its typical structure which includes three stages: **prosecution, judgement and enforcement of judgments.** There is also the atypical form of the criminal proceedings in the situation in which the criminal prosecution is missing (for example, after the prosecutor's provision not to proceed to judgment, following the removal from criminal investigation or termination of prosecution, the aggrieved party makes a complaint and the court, admitting the complaint, decides the trial of the case).

In the criminal proceedings the following functions are performed: the monitoring function, the function of judging, and the function of enforcing the judgment[15].

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[10] Grigore Theodoru, work cited, p. 16.
[11] Ibid, p 17.
[12] Ion Neagu, Criminal Procedural Law. General part. Treatise Lex Global Publishing, Bucharest, 2004, p 33 and Gh. Mateuţ, Criminal procedure. General part, Vol 1, „Chemarea" Foundation Publishing House, 1993, p 31.
[13] I. Tanoviceanu, Law treatise and criminal procedure, revised and completed by V. Dongoroz, C. Chiseliţă, Şt. Laday, E. C. Decusară, second edition, vol V, Curierul Judiciar, Bucharest, 1927, pp. 3-4.
[14] I. Ionescu-Dolj, Romanian criminal procedure course, Socec Publishing House, Bucharest, 1937, p 233.
[15] Gheorghe Ivan, work cited, p. 193.

The prosecution is the first stage of the criminal proceedings, which aims to identify the perpetrators, to administer the evidence, to take the procedural measures in order to send or not to send the offender to court. As initial limit it is represented by beginning the prosecution and the final limit is the act provided through which the prosecutor may order the prosecution, the removal from prosecution, the termination of prosecution or dismissal.

Judgement is the next stage of the trial, which begins with the notification of the court; it is conducted by observing the principles of advertising and contradiction, continuing the activity begun in the investigation stage, in order to make the defendant liable. The initial limit of the judgement stage is the notification of the court by indictment, by another judgment or by other complaint against the criminal prosecution acts and measures. The final limit is the judgment of the court (sentence or decision) through which the conviction of the defendant may be decided, the acquittal or ceasing of the criminal proceedings.

The enforcement of the final criminal judgments is the final stage and it encompasses the entire procedure by which the final decision is implemented, until the notification of the execution body in order to achieve the purpose of the criminal law and of the criminal proceedings law. In the event of the enforcement of the main sentences the initial limit represents the release of the execution warrant by the court of justice and its sending by the competent body, in the situation of enforcing the alternative sanctions it consists of the sending to the court of a copy of the enacting terms of a judgment to the competent body, and in the event of enforcing the safety measures, it is differentiated according to the nature of the decision ordered.

As final moment, we take into consideration the situation of enforcing the imprisonment sentence which consists of drafting the minutes by the commander of the prison, where the date of the first execution is also recorded, and in the event of enforcing the criminal fine in filing the written acknowledgement of receipt of full payment of the fine to the court of enforcement.

However, it should be noted that the enforcement of the criminal decision does not represent the final moment of the criminal proceedings, there are also other situations related to the execution itself and they are governed by the rules of procedure (for example, the appeal to the execution, the suspension of the prison sentence or life imprisonment, the payment of the fines to the financial authority and the submission of the convicted of the written acknowledgement of receipt of full payment of the fine to the court of enforcement)[16].

The new Criminal procedure code assigns four stages to the criminal proceedings: **criminal prosecution, preliminary room, judgement** and **criminal enforcement**. Article 3 of the new Criminal Procedure Code (Separation of judicial functions) provides that in the criminal proceedings the following functions are performed: **the criminal prosecution function, the function of disposal of the fundamental rights and freedoms of individuals in the criminal prosecution, the assessment function of the legality of suing or not suing and the judgement function.**

The criminal prosecution function shall be exercised in the first stage of the proceedings, the prosecution. Under paragraph 4 of the same article, in exercising this function, the prosecutor and the prosecution bodies gather the necessary evidence to determine whether there are grounds or not to prosecute.

[16] Ibid, p. 194.

The disposal over the fundamental human rights and freedoms of the person are also exercised in the prosecution stage. On the acts and measures of the criminal prosecution, which restrict the fundamental human rights and freedoms of the person, the judge has the rights and freedoms, except the cases provided by the law (article 3 paragraph 5 new Criminal Procedure Code).

T**he function of checking the legality of suing or not suing** is made by the judge of the preliminary chamber who rules on the legality of the act to prosecute and on the evidence on which it is based, as well as the legality of the solutions of not suing (article 3 paragraph 6 of the New Code of Criminal Procedure). This function is exercised within the preliminary procedure room.

The judgement function is exercised by the court of justice, in the legally established group of judges within the judgement stage (article 3 paragraph 7 new Code of Criminal Procedure).

The function of executing the criminal judgments is exercised within the last stage of the trial, the execution of the criminal judgments.

The above mentioned judicial functions are exercised ex officio, except the situation when the law provides otherwise (article 3 paragraph 2 of the new Criminal Procedure Code).

In carrying out the same criminal proceedings, the exercise of a trial function is incompatible with the exercise of another procedural function, except the one of disposition over the fundamental rights and freedoms of individuals in the criminal prosecution stage which is compatible with the function of checking the legality of suing or not suing (article 3 paragraph 3 of the new Criminal Procedure Code).

In the situation of the New Code of Criminal Procedure the atypical form of the criminal proceedings is also possible. Thus, this situation is possible when it is decided to dismiss or abandonment the prosecution under the New Code of Criminal Procedure or the termination of the criminal prosecution or the release from the criminal prosecution under the Code of Procedure in force. In this case the other stages are no longer reached – the preliminary room, the judgement and the enforcement of decision according to the New Criminal Procedure Code, namely, the judgment and enforcement of the judgments under the Code of Criminal Procedure in force. The stage of enforcement is no longer reached when the dismissal or ceasing of the criminal proceedings are decided.

According to the Code of Criminal Procedure in force, during the criminal prosecution stage the prosecution authorities - judicial police investigation bodies and special investigation bodies - and the prosecutor, who is the judicial body that leads and controls the activity of criminal investigation, carry out their activity. In some cases expressly provided by law, the prosecutor has to perform the criminal investigation.

The documents which mark the beginning of the criminal investigation are the resolution of the criminal investigation body when he/she is notified about an offense by complaint, denouncement or notification on its own or order of the prosecutor, in the hypothesis of his/her solving a conflict of jurisdiction arose between the research bodies of the judicial police, before ordering the criminal prosecution. The final moment of the prosecution is marked by the following acts: indictment, if sued; ordinance, in case of removing the criminal prosecution, termination of the criminal prosecution or dismissal and resolution, or termination of the prosecution charges.

According to the New Criminal Procedure Code the start of the criminal prosecution is marked by ordinance[17], and the final moment is solved by ordinance[18] or indictment. [19].

In the new criminal procedure regulation, the second phase of the criminal proceedings is the preliminary room, in which the preliminary room judge operates, without the participation of the prosecutor or defendant. The initial limit of this stage is marked by the notification of the competent court by indictment[20], and the final limit by pronouncing a final conclusion[21], in the council room.

The court performs its activity in the judgement stage. The new Criminal proceedings law marks the start of this stage by the decision of the preliminary room judge who ordered the beginning of the trial and the final moment by pronouncing the decision.

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[18] The attorney settles the case by ordinance, deciding:

a) dismissal, when he/she does not exercise criminal proceedings or, according to each case, he/she terminates the criminal proceedings carried on, as there is one of the cases provided for in article 16 paragraph 1;

b) waiver of criminal prosecution when there is no public interest in the criminal prosecution of the accused (article 314 of the New Code of Criminal Procedure).

[19] The prosecutor issues an indictment through which he/she decides the prosecution if from the prosecution material it results that the deed exists, that it was committed by the accused and that he/she is liable (article 327). The same indictment may order the prosecution of a defendant, the dismissal or abandonment of the criminal prosecution on other facts or other suspects or defendants.

[20] According to article 344 paragraph 1 of the new Criminal Procedure Code, after the registration of the file sent by the prosecutor in the competent court of justice, it is sent the same day to the judge of the preliminary room.

[21] The judge of the preliminary room decides by a motivated sentence, in the council room, without the participation of the defendant and of the prosecutor (article 345 paragraph 1of the new Code of Criminal Procedure).

THE INTERNATIONAL LEGAL FRAMEWORK ON THE RIGHT TO NATIONALITY AND STATELESSNESS REDUCTION

Loredana PÎRVU[*]

Abstract: *Statelessness is the legal status of a person who had no citizenship or has lost it without acquiring another. Statelessness has expanded to become a matter of international law in the interwar period. It is caused by differences between laws of various states on the people who lose their citizenship, without being accepted by other states. This way, children of stateless parents are born stateless.*

Stateless, being deprived of any connection with a state are subject to state jurisdiction on present territory, where they are seen as foreigners. But, unlike foreigners who enjoy diplomatic protection of the state to which they belong, stateless persons are not entitled to such protection.

Keywords: *stateless, foreign, nationality, citizenship, convention*

1. The international legal framework on the right to nationality and statelessness reduction[1]

Nationality is a very sensitive issue because is an expression of a country's sovereignty and identity. Disputes over citizenship can lead and they often do, to tensions and conflicts within the states and between them. In the twentieth century, there was an increased incidence of statelessness around the world, a growing awareness about human rights and a concern for both of them combined. International law on nationality grew, therefore, in two directions: to protect and support those who were already stateless and to try to eliminate or at least reduce the incidence of statelessness.

Normally, questions of nationality submit to the laws of each state. However, the state internal decisions apply in a limited way, based on similar actions of others states or international law.

In Opinion Advisory on nationality decrees in 1923 held in Tunisia and Morocco, Permanent Court of International Justice stated: „The question whether a certain issue belongs exclusively to internal jurisdiction of a state is a doubtable topic and depends on the evolution of international relations."

Pointedly, the Permanent Court said that while nationality issues normally belong to internal jurisdiction, states must nevertheless honor their obligations to each other according to international law. This approach was repeated seven years later in the Hague Convention on certain aspects of conflicts of nationality laws.

Indeed, many states have commented on the 1923 Advisory Opinion of the Permanent Court, as it relates to the grounding of the 1930 Hague Convention over nationality topic. Most states have translated the advisory opinion as a limited practicability of nationality

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[1] Nationality and Statelessness: A book for parliamentarians / Marilyn Achiron, trans. made by UNHCR - representative for Romania, Bucharest: Official Gazette R.A., 2010

decisions of a state outside its territory, especially when those decisions dispute other states nationality decisions.

The Hague Convention of 1930, held under the favorable conditions of the League of Nations Assembly, was the first attempt to asure a nationality to all people. The first article of the Convention provides that: „*Each state shall determine by law who are its citizens. This legislation is recognized by other states only if it complies with the international conventions, customs and general principles of law recognized in the field of nationality. „*

In other words, the method in witch the state exercises its right to establish its citizens should be according to the relevant provisions of international law. During the twentieth century, these provisions have progressively developed with the purpose of promoting human rights in the state sovereignty.

The 15th article of the Universal Declaration of Human Rights of 1948 articles: „*Everyone has the right to a nationality. No one can be arbitrarily void of citizenship or the right to change it. „*This right is based on authentic and effective links between the individual and the state. The first time when this link has been recognized as the ground for citizenship was in Nottebohm Case, a case solved by the International Court of Justice in 1955.

In this case, the Court established: „*According to state practice, arbitration, legal resolutions and the authors' opinion, nationality is defined as a legal bond that is based on a social fact of belonging, open link of existence, concern and feelings, while there are mutual rights and duties. „*

Genuine and effective connection, occurred by birth, residence and / or descent, is now found in citizenship preventions of law on most states, as in recent international instruments on nationality, such as the 1997 European Convention on Nationality.

Nationality is also defined by the Inter-American Court of Human Rights as „*political and legal commitment that links a person to a country through loyalty and fidelity bonds, giving him the right to diplomatic protection from the state"*[2].

Although the 15th article of the Universal Declaration of Human Rights stipulates that everyone has the right to a nationality, but it does not set to what particular nationality. To make sure that no man is deprived of minimum nationality rights, the international community has developed two major pacts: the 1951 Convention targeting refugees and the 1954 Convention concerning the stateless persons.

Following the World War Two, one of the urgent issues for the new member of the United Nations Organizations was to solve the needs of millions refugees or stateless, who came after the war. A resolution of 1949 the UN Economic and Social Council (UNESC) has led to the nomination of an ad-hoc committee whose task was to take into consideration a convention on refugees and stateless persons as well as approaching the idea of eliminating statelessness .

Eventually, members of the Board drew up a Convention on refugees figure and a protocol attached to it on stateless people. The Committee did not fully engage in solving the problem of statelessness as it was assumed that the newly established International Law Commission (ILC.) will focus on this issue. Historically, both refugees and stateless persons have received protection and assistance from international organizations that preceded UNHCR. The draft protocol on statelessness has to reflect this link between refugees and stateless persons. But refugees urgent needs and the imminent dissolution of the International Refugee Organization led to insufficient time for a detailed analysis of the

[2] Castillo-Petruzzi et al v. Peru, Judgment of May 1999, IACHR [ser.C] no. 52 1999

refugees situation at the 1951 Ministers Conference which addressed both problems. Thus, the 1951 Refugee Convention was adopted at this Conference, while legitimating the Protocol was postponed to another time.

In accordance to the 1951 Refugee Convention, a stateless refugee receives protection due to refugee status, because arbitrary denial of citizenship based on race, nationality, membership of a particular social group or political opinion can indicate that one must be recognized as refugee.

Regarding the stateless persons protocol witch was drafted as addendum to the 1951 refugee Convention was named the 1954 Convention. *The 1954 Convention*[3] *is the essential international instrument that aims to balance and improve the position of stateless persons,* as well as, to ensure that they enjoy absolute rights and duties without discrimination. The convention's indications are, in many ways, similar to the 1951 refugee Convention. *Accession to the Convention is not a replacement for granting nationality to residents newborns.* No matter how wide the refugee rights are, they do not guarantee the citizenship. In 1954 the Convention included this strict legal definition of stateless one: *„a person who is not considered a citizen of any state into implementing its laws"* (so-called de jure stateless)[4].

Although the authors of the Convention considered it necessary to distinguish between dejure stateless (thosewho haven't received a nationality automatically or upon any individual decision of state law appliance) and de facto stateless persons (those persons who can not establish the nationality), they recognized the similarity between the two.

The final Act of the Convention refers to the problems of de facto stateless through a unrequired recommendation: *„That each contracting state, when coming upon a valid reasons why a person has given away the protection of his state, should consider granting similar treatment given by the Convention to refugees".*

The decision on a person's right to benefit over the Convention's writtings is taken by each state according to its procedures.

In August 1950, by a resolution of UNESC that require ILC to prepare a convention or international conventions draft for the elimination of statelessness. ILC has prepared two draft agreements to be taken into consideration, both addressing the issues of statelessness due to legislations coflicts. One of the convention on the discharge of future statelessness,

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[3] Romania has made three rations for the 1954 Convention on the status of stateless persons:
1. granting public aid only to stateless refugees and only in national law limits (Article 23 of the Convention).
2. providing identity documents only to those who were granted to remain permanently or for a specific period (Article 27 of the Convention).
3. when committed a crime, the person lawfully in the territory, must be expelled (Article 31 of the Convention).

[4] To be considered a citizen in the legal sense means that a person is automatically considered a citizen in state law terms on nationality, or that a person has received any nationality due to complement authorities. Such tools can be the Constitution, a presidential decree or a law of citizenship. Most people are considered citizens through the eys of the legal system of a single state -usually either the state law where that person was born (jus soli) or the state law of the parents nationality at the time of birth (jus sanguinis). Whenever an management procedure allows free choise in granting citizenship, the applicants can be considered citizens only when the request was completed and approved and that state citizenship is legally granted. People who requested citizenship and those who are considered eligible by the law to apply for citisenship, but whose applications were rejected, are not considered citizens under the laws of that state.
Those who did automatically or through an individual decision of any law, recived any citizenship are called „de jure stateless": stateless through the legislation. It is assumed that a person has a nationality until the contrary is proved. However, there are cases in which states that a person could have a real connection with can not agree on which one has granted the citizenship. The person is thus unable to demonstrate that it is de jure stateless. Unable to demonstrate that it is de jure stateless, has no nationality and no national protection. This person is considered de facto stateless.

contained items that went far beyond the ones in the second draft agreement, which focused on reducing the incidence of statelessness in the future. The conference participants specialy summon to address this issue considered the first text of the convention too radical and have decided to work on the convention draft about statelessness draw backs in the future.The instrument that outcame from this process was the 1961 Convention on the reduction of statelessness.[5]

CDI and state envoy considered that international assistance was needed because when a person's citizenship is denied, it will have no financial resources or experience to assert citizenship by addressing the state authorities. Since no other state can plausibly support the person, was very important to establish an independent and international entity who can do just that. Being presented by an international agency would avoid the question of whether a person may or may not be the subject of international law. In addition, an agency devoted to this task will in time, develop expertise, which could be useful not only to advise people involved, but also to propose ways of achieving effective nationality and statelessness reduction in general.

Trying to reduce the incidence of statelessness, the 1961 Convention required states to adopt a nationality legislation in order to reflect the standards named when obtaining or losing one's nationality. If disputes arise based on the interpretation or application of the Convention between the contracting states, and these aren't resolved by other means, they can be addressed to the International Court of Justice at the request of any party.

Final Act of the Convention includes a recommendation similar to that enclosed in the Final Act of the 1954 Convention which encourages member states to extend the Convention to de facto stateless persons whenever possible.

2. Identification and protection of stateless persons

Despite the attempts to reduce the incidence of statelessness through national laws on citizenship and through appliance of the 1961 Convention on the reduction of statelessness and other international instruments, it is estimated that there are millions of people worldwide without a nationality. United Nations Convention on the standing of stateless persons of 1954 identifies stateless persons, promotes the gain of legal identity for these people and makes sure that stateless persons enjoy fundamental rights and freedoms without discrimination.

3. Who is a stateless person?

The 1954 Convention defines a stateless person as that „person who is not considered a citizen of a state, by its laws" (Article 1). This is a solely judicial definition. It doesn't refer to nationality, to the manner in which a nationality is granted or to the access of a nationality.

This definition refers solely to an action through which a state's legislation defines „ex lege" or automatically, who has a citizenship.

[5] Romania joined the two conventions on January 27, 2006, enunciate reserves to articles 23, 27 and 31 of the Convention on the status of stateless persons.

Given this definition, to be named „stateless", a person must prove a disclaim, meaning he has no judicial association with none of the states involved in its case[6].

Attempting to establish the proof of statelessness, the state must analyze the nationality legislation of the states with which a person had previous connections to (for example: by birth, by previous residence, the state/states in which the husband/wife, the children and the grandparents are citizens), must advise with those states and ask for proof if necessary. The states must ask for the person's full cooperation in giving them all proof and information needed.

The documents certifying that a person is not a citizen of a state, issued by the state's responsible authority, are usually a credible proof in demonstrating the statelessness. Although this kind of proof might not be available at all times. The authorities from the residence country or from the previous residence country may refuse to issue the official documents certifying that a person is not a citizen, or simply not replying to a request. Some sate authorities may consider that it's not their duty to state out the persons who have no judicial connection with that country. Therefore, if a state refuses to confirme the citizenship of a person, that refusal may be taken as proof, because usually a state grants diplomatic protection to its citizens.

4. Can a person be excluded from the application of the 1954 Geneve Convention stipulations?

The 1954 Convention's head note reasserts that stateless refugees are under the 1951 Convention incidence regarding the refugee status, and therefore not under the 1954 Convention's.

Apart from the definition of statelessness, Article 1 from the 1954 Convention states out that, although some people are under the Convention's incidence (meaning that they are statelessness), they find themselves excluded from the application of the Convention for different reasons, one being that they don't need this protection because they benefit from other specific judicial schemes or international assistance, or that they are not worthy of international protection due to some crimes. This definition applies to *people*[7] that:

--"benefit from protection and assistance from UN's agencies or organizations, other that UN's High Commissioner for Refugees."

UN's Relief and Works Agency for Palestine Refugees in the Near East is the only relevant agency in this case.

--"that are recognized by a residence country's qualified authorities, as having rights and obligations derived from their citizenship."

This means that if the stateless person obtained the residence permit in a state and given other rights than those stipulated in the Geneve Convention, especially complete economical and social rights equivalent to those of a regular citizen, and he is protected against deportation and expulsion, then it's not necessary to apply the Geneve Convention provisions although he is a stateless person.

--"those who have committed a crime against peace, a war crime or a crime against humanity, as defined by the International Law; who have committed a severe nonpolitical misdemeanor outside their country of residence, before being admitted in that country; or who are guilty of actions contrary to UN's principles and goals"

[6] Velişcu Viorel, Pîrvu Loredana, *Drept Internaţional Public*, Editura Sitech, Craiova 2012, p.165
[7] Velişcu Viorel, Pîrvu Loredana, op.cit., p.166

5. Where does the stateless status end?

The stateless status ends when a person gets an effective nationality.

6. What are the procedures used to establish if a person is stateless?

Although the 1954 Convention defines statelessness, it doesn't elaborate a procedure to identify the stateless persons. Therefore, it's in the interest of the states and persons who are under the incidence of the Geneve Convention to enact laws that offer guidelines regarding the methods of identifying a stateless person. This kind of legislation should designate the decision making factor, but also to establish the consequences of identifying a person as being stateless.

Some states[8] have adopted laws which appoint specific agencies within the governments – offices that focus solely on political asylum, refugees and stateless people, or as an example – the Ministry of Interior – which analyses and makes decisions regarding the situations in which people claim to be stateless.

Other states that don't have a specific legislation that establishes the procedure granting the statelessness, have founded an administrative or judicial authority that is competent to establish if a person is stateless or not. However, many more states have not established a specific procedure. In many cases, the statelessness problem occurs during the procedures that determine the refugee status. In these cases, the demands of stateless people can be „processed" during these procedures, which include humanitarian or subsidiary protection. Actually, stateless people can be forced to apply for asylum solely because no other procedure is available for them.

Some states[9] don't have specific procedures in recognizing stateless people, but this problem can only occur when a person request a residence permit or a traveling document,

[8] In *France,* the procedure acknowledging the stateless status is made by the French Office for the Protection of stateless people and refugees (OFPRA) which is commissioned to offer stateless people judicial and administrative protection. The applicants must address directly to OFPRA. In *Spain*, Foreigner's law stipulates that the Ministry of Interior, by royal decree, acknowledges the stateless status. The applicants can address the Police stations or the Office for Asylum and Refugees (OAR). Following an investigation, the OAR follows the procedure and then forwards a justified evaluation to the Ministry. In *Italy,* the decree issued in 1993, implementing the amendments to the Law of Nationality enacted a year before, authorizes the Ministry of Interior to recognize the stateless status.

[9] Romania adhered to the Convention regarding the abridgement of the statelessness cases, enacted in New York on the 30th of August 1961, through Bill 361/2005, and to the Convention regarding the stateless persons's status, enacted in New York on the 28th of September 1954, through Bill 362/2005, which has 3 exceptions. At the same time, Romania adhered to only one instrument enacted by the Council of Europe – the European Convention regarding the citizenship enacted in 01.05.2005, to which had drawn 3 exceptions and a series of declarations.
According to the Constitution, foreigners and stateless persons who live in Romania, benefit from protection of persons and goods, guaranteed by the Romanian Constitution and by other laws. Specific legislation regarding the status of foreigners defines the stateless person as a foreigner who doesn't have any other state's citizenship.
According to Bill 639/2007, regarding its organization and duties, the Romanian Office for Immigration is the authority responsible for the implementation of the laws regarding the entering, staying and the departure of foreigners (including the people without a citizenship) on Romanian territory, their rights and duties, including the implementation of specific measures of controlling the immigration, in compliance with the commitments taken by Romania through international documents.
Up until now, no institution has been established to determine or to acknowledge the status of stateless people or for those without a citizenship and in the same matter, no procedure has been appointed.

or when a defection request is denied and that person requests to stay in a country that offers defection/asylum, from different reasons.

Qualified personnel who is specialized in the stateless domain examine in an impartial and objective manner, the request and the proof regarding this matter, must be designated to determine the statelessness. A central authority, responsible with the assessement of statelessness would reduce the risk of unfounded decisions, and would be more efficient in obtaining and disseminating the information regarding the birth countries, and focusing its activity only on those aspects, could easily develop its expertise on the matter of statelessness.

Collecting and analyzing the laws, rules and implementations is needed when determinating the statelessness. Even without a central authority the decision making factors rely on the collaboration with other colleagues who know the legislation regarding the nationality and other aspects of the statelessness, not only on a governmental level but also on an international one.

According to the national regime, the Romanian legislation assimilates the statelessness and the foreigners, giving them the same rights as the Romanian citizens , except the political ones [10].

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[10] „*Romanian citizenship law"* (1991), in art.40 introduces the notion of „honorable Romanian citizen", which can be given by the Romanian Parliament without any other formality to some foreigners for special services brought to the country and to the nation.

OBJECT OF THE CHATTEL MORTGAGE

Alexandru-Mihnea GĂINĂ*

Abstract: *The framework regulation on the chattel mortgages is represented by the provisions of Book V, Title XI of the New Civil Code.*

The chattel mortgages are established by agreement and become efficient only after producing the secured obligation and after the constitutor (debtor) has acquired the rights on the mortgaged goods

The New Civil Code does not give an express definition for the chattel mortgage agreement.

The object of the chattel mortgage agreement must be analyzed both concerning the obligations which may be secured, and concerning the goods which may be mortgaged, as a matter of fact, these represent the material (derived) object of the agreement.

The obligations resulting from a contract, unilateral deed, business management, unjust enrichment, undue payment, illicit deed, as well as from any other deed or fact to which the law connects the creation of an obligation, may make the object of the chattel mortgage.

The goods which may be mortgaged must be movables (art. 2350 of the New Civil Code) and to be in the civil circulation. The New Civil Code contains in art. 2389 an exemplifying enumeration of the goods which may be mortgaged.

Keywords: *chattel mortgage, movable goods, chattel mortgage agreement, obligations*

I. Initial considerations on the chattel mortgage agreement

1. Legal framework

The framework regulation on the chattel mortgages is represented by the provisions of Book V, Title XI of the New Civil Code[1] (hereinafter called NCC).

The chattel mortgages are established by agreement and become efficient only after producing the secured obligation and after the constitutor (debtor) has acquired the rights on the mortgaged goods[2].

The New Civil Code[3] stipulates two exceptions from the rule concerning the establishment of the chattel mortgages by agreement: a) the chattel mortgages on the financial instruments are established according to the rules of the regulated market on which these are traded; b) the chattel mortgages on the stocks and shares of the trade companies are established according to the rules stipulated by the special law in matter.

2. Notion

The New Civil Code does not give an express definition for the chattel mortgage agreement. Starting from the notion of *„agreement"*[4] and *„mortgage"*[5] as provided for in the above-mentioned normative act, we appreciate that the *„chattel mortgage agreement"* is defined as that accessory agreement by which a party, hereinafter called the guarantor

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[1] See art. 2323-2332, art. 2343-2376 and art. 2387-2477 of the NCC.

[2] Art. 2387 of the NCC.

[3] Art. 2390 of the NCC.

[4] Art. 1166 and the following of the NCC.

[5] Art. 2343 and the following of the NCC.

(debtor)[6], establishes in the favor of the other party, hereinafter called the secured party (creditor), a chattel mortgage on certain goods or rights owned by him/her/it and/or found in his/her/its possession, having the purpose to provide for the execution of the obligation undertaken by him/her/it or by a third person.[7]

3. Legal nature

The qualification of the legal nature of the chattel mortgage brings up certain controversies having as cause the parallel regulation in the New Civil Code of the security interests under the form of the pledge or under the form of the chattel mortgages. To this end, we hereby appreciate that the following hypotheses may be put forward: a) the mortgage agreement is a variety of the pledge agreement; b) the mortgage agreement represents the common right *(framework),* and the pledge is its variety; c) the mortgage agreement is established in the common law in the matter of the securities without dispossession, and the pledge is established in the common law in the matter of the securities with dispossession.

In our opinion[8], the chattel mortgage agreement establishes the common right (framework), and the pledge agreement is its presentation form (variety)[9]. In the argumentation of such an opinion, there are the major differences between pledge and chattel mortgage consisting in: a) the scope of the obligations which may be secured is larger than that of the chattel mortgages; b) the chattel mortgages do not imply the express dispossession of the debtor of the mortgaged/affected good; c) the establishment of the priority rank, advertising, execution and execution of the pledge are made according to the rules stipulated for the chattel mortgages.

II. Object of the chattel mortgage agreement

4. Initial considerations

The object of the chattel mortgage agreement must be analyzed both concerning the obligations which may be secured, and concerning the goods which may be mortgaged, as a matter of fact, these represent the material (derived) object of the agreement.

5. Obligations which may make the object of the mortgage

Generically speaking, according to art. 2369 of the New Civil Code, any obligations may make the object of the chattel mortgages. Thus, analyzing the provisions of art. 1165 of the New Civil Code on the sources of the obligations, the obligations resulting from a contract, unilateral deed, business management, unjust enrichment, undue payment, illicit

[6] The use of the term *„guarantor"* has the purpose to avoid the confusion between the person who guarantees and the debtor of the main agreement. In practice, there may be situations when these do not coincide, thus causing confusions.

[7] For further details concerning the chattel mortgages (security interests - according to the old name established by the Title VI of the Law no. 99/1999 – abrogated at the moment), see I. Şchiau, *Curs de drept comercial român,* Ed. Rosetti, Bucureşti, 2004, p. 344.

[8] G. Boroi, D. Boroi, *Garanţia reală mobiliară reglementată de Titlul VI al Legii 99/1999* in Juridica, nr. 4/2000, p. 129. The opinion is also shared by R.I. Motica, E. Lupan, *Teoria generală a obligaţiilor,* Ed. Lumina Lex, Bucureşti, 2005, p. 301and E. Poenaru, *Garanţiile reale mobiliare,* Ed. All Beck, Bucureşti, 2004, p. 33.

[9] To this end, see J. Teves, *Contractul de garanţie reală mobiliară (I),* în Juridica, nr. 8/2000, p. 291; I. Şchiau, *cited works,* 2004, p. 345; M.L. Belu-Magdo, *Contractul de garanţie reală mobiliară,* in Revista de Drept Comercial nr. 1/2007, pp. 9-13.

deed, as well as from any other deed or fact to which the law connects the creation of an obligation, may make the object of the chattel mortgage.

Nevertheless, we consider that the determination of the obligations which may make the object of the chattel mortgage implies certain discussions.

a). (Conventional) contract obligations. To this end, the obligations resulted from a (synallagmatic) bilateral or unilateral agreement consisting in any type of obligation to give, to make or not to make may be secured.

b). Obligations resulted from juridical deeds. At the same time, we appreciate that the obligations resulted from (licit or illicit) juridical deeds may also be secured. Before the apparition of the New Civil Code, the doctrine[10] showed that the security may have as object the obligations whose source is in a licit juridical deed, but which becomes a bilateral juridical deed afterwards, such as a contract of mandate ratified by the managed. We consider that such an approach is not correct, as the security interest in this case shall be established to secure a contract obligation.

c). Obligations resulted from unilateral juridical deeds. The apparition of the New Civil Code regulated the doctrinal controversy[11] concerning the unilateral deed as being or not the source of an obligation, in the sense that the former does represent the source of an obligation and, consequently, the latter may make the object of the mortgage.

d) Imperfect obligations. The (imperfect) natural obligations may not be secured, as they do not give to the creditor the possibility to achieve the rights against the debtor's will by the use of the State's coercive force[12].

e). Possible/future obligations. The future or possible obligations may make the object of the security interest agreement[13] (art. 2370 of the NCC). A chattel mortgage on such an obligation[14] contradicts the accessory feature of the mortgage, being unconceivable for the accessory to be without the main.

f). Obligations affected by proceedings/modalities. Although the New Civil Code does not expressly provide for it, we appreciate that the obligations affected by proceedings/modalities may also be secured. To this end, both the obligations affected by a term[15], and the obligations affected by a condition[16] there are liable to be secured.

g). Divisible and indivisible/joint obligations. At the same time, we consider that both the divisible obligations, and the indivisible[17] ones, as well as the joint[18] ones, are liable to be secured. The parties must expressly stipulate in the chattel mortgage agreement the

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[10] R. Rizoiu, *Garanţiile reale mobiliare. Legislaţie comentată şi adnotată,* Ed. Universul Juridic, Bucureşti, 2006, p. 23.

[11] See for opinions according to which the unilateral juridical deed is not a source of obligations R.I. Motica, E. Lupan, *cited works,* 2005, p. 126. For opinions according to which certain unilateral juridical deeds give result to the obligations, see C. Stătescu, C. Bârsan, *Drept civil. Teoria generală a obligaţiilor, Ediţia a IX-a revizuită şi adăugită,* Ed. Hamangiu, Bucureşti, 2008, pp. 100-101.

[12] As related to the natural obligations, see L. Pop, *Drept civil. Teoria generală a obligaţiilor,* Ed. Lumina Lex, Bucureşti, 2000, p. 23.

[13] The principal of securing the future or possible obligations is also regulated by art. 2370 of the NCC.

[14] As it concerns the security of the future obligations, a situation often met in practice is represented by the credit lines which may have negative balance or positive balance during the crediting period.

[15] For details concerning the term as proceeding/modality of the juridical deed, see I. Dogaru, S. Cercel, *Drept Civil. Partea generală,* Ed. C.H. Beck, Bucureşti, 2007, pp. 144-147.

[16] As related to the notion and effects of the condition as modality/proceeding of the juridical deed, see *Idem,* pp. 147-153.

[17] As it concern the divisibility and indivisibility of the obligations, see L. Pop, *cited works,* 2000, p. 24 and pp. 395-397.

[18] As it concern the joint obligations, see I.P. Filipescu, *Drept civil. Teoria generală a obligaţiilor,* Ed. Actami, Bucureşti, 1994, pp. 238 and the following.

feature of the obligation as, in case of divisible obligations; the plurality of the debtors implies that they may be sued only for their part of obligation.

6. The goods which may be mortgaged/affected to the mortgage

The goods which may be mortgaged must be movables[19] (art. 2350 of the New Civil Code) and to be in the civil circulation[20]. These may be tangible or intangible, consumptible or unconsumptible, individually determined or generically determined. At the same time, the future goods[21] may also make the object of the mortgage.

The immovables by destination[22], as well as the movables by anticipation *(forest, harvests, and so* on) may be mortgaged/affected to the mortgage.

At the same time, a mortgage may also have as material object the individualized or generically determined movables or the universalities of movables[23].

The fungible (interchangeable) and/or non-fungible (uninterchangeable) movables may represent the object of the security interest.

The inalienable or imperceivable goods[24] may not make the object of a security interest, as these may not be alienated and, respectively, may not make the object of an enforcement of judgment. Nevertheless, these categories of goods may make the object of the chattel mortgage as a mortgage on a good in the future, in the situations in which the good in case is affected by an inalienability or conventional imperceivability[25].

The New Civil Code also contains in art. 2389 an exemplifying enumeration of the goods which may be mortgaged. These goods may enter each of them, according to the classification criterion taken into account, one or more of the mentioned categories of goods.

a). The rights of claim. The material object of the chattel mortgage may be represented by the pecuniary receivables resulted from the sale agreement, the lease agreement or any other deed concluded related to a good, those resulted from an insurance agreement, those created in the consideration of undertaking an obligation or of establishing a security, of using a credit or debit card or of winning a prize at a lottery or other gambling organized under the terms of the law, as well as the receivables established by the registered securities[26].

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[19] The immovables may not make the object of the mortgage. The movables accessory to the immovables may be mortgaged only if they may be taken out of the immovable and without being affected the nature and destination of the real estate. According to art. 2356 paragraph 2 of the NCC, the chattel mortgage on the building materials is redeemed upon their incorporation in the building. We appreciate that the dismountable or temporary buildings may make the object of the mortgage , but it will be on the dismountable elements of the building and not on the building as a unit. At the same time, an unfinished building, as well as a concrete structure, consisting in poles, steps, and so on, may not make the object of a chattel mortgage.

[20] C. Stătescu, C. Bârsan, *cited works,* 2008, p. 412.

[21] The chattel mortgage established on the future goods produces its effects from the moment in which the debtor (guarantor) acquires the ownership right on these goods, in this situation the effects of the agreement being suspended until the debtor has acquired the ownership right on the good. Moreover, the security is not valid if, upon concluding it, it does not comply with the minimum requirements necessary for its validity. A requirement to this end is that the goods submitted to the security should be determinable.

[22] For considerations on the immovables by destination, see I. Dogaru, S. Cercel, *cited works,* 2007, p. 64; Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil, the 7th edition,* Ed. Universul Juridic, Bucureşti, 2008, p. 99.

[23] Art. 2368 of the NCC.

[24] Art. 2351 paragraph 1 of the NCC. See for details concerning these categories of goods, Gh. Beleiu, *cited works,* 2008, p. 106 and the following.

[25] Art. 2351 paragraph 2 of the NCC.

[26] Art. 2389 letter a) and b) of the NCC.

These rights are part of the category of the intangible assets[27] and are correlated to the obligations *to give, to m*ake *or not to make.* The rights of claim correlative to obligation intuitu personae[28] or attached to a personal quality of the debtor (the right to pension, the right to receive support, and so on)[29] may not make the object of a mortgage.

The material object of the mortgage may be established from patrimonial rights *(of claim)* resulting from the insurance policy, which, in fact, is only the document stipulating the clauses and terms of the insurance.

As concerning these mortgages, the problem that may be brought up is the determination of the person who may establish the security, i.e. the insurer or the insured. We consider that both parties of the insurance agreement may establish securities because patrimonial rights result from this agreement both for the insurer *(the right to cash the insurance premiums),* and for the insured *(the right to receive or cash the indemnity for the occurrence of the insured risk).*

b). Bank accounts. The material object of the chattel mortgage may be made up of bank accounts[30]. We appreciate as wrong the terminology used by the New Civil Code concerning the mortgage on the bank accounts as, in fact, the mortgage is established on the rights of claim that the depositor has against the credit institution. In this situation, we appreciate that the chattel mortgage on these rights is governed by the juridical regime of the mortgage on the rights of claim in general[31].

The credit balances of the bank accounts are rights of claim that the depositor has against the bank and whose object consists in the return of an mount of money[32]. In the consideration of the laws on the credit institutions[33], we appreciate that the object of the chattel mortgage may be represented by the accounts opened at institutions such as banks, credit corporations, savings and credit banks in the housing sector, banks of mortgage credit, institutions issuing electronic money[34].

Generally, such a mortgage is the same thing with the dispossession of the guarantor of the affected good as the possession of the amounts of money shall belong to the bank, either as third depositor of the amounts affected to the security, or as secured party.

c). Stocks and shares, movable values and other financial instruments. The chattel mortgage may be established on the stocks[35] and shares of a trade company[36], but their establishment is made according to the special laws in the matter[37].

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[27] I. Dogaru, S. Cercel, *cited works,* 2007, p. 71.

[28] C.I. Stoica, R. Rizoiu, *Consideraţii teoretice şi practice asupra regimului juridic aplicabil garanţiilor reale mobiliare în materie comercială (I),* in Revista de Drept Comercial nr. 1/2001, p. 64.

[29] R. Rizoiu, cited works, 2006, pp. 61-62.

[30] Art. 2389 letter c) of the NCC.

[31] R. Rizoiu, *Unele aspecte particulare ale garanţiilor reale mobiliare constituite asupra depozitelor bancare, in Revista Română de Drept al Afacerilor,* no. 2/2005, p. 12.

[32] R. Rizoiu, *cited works,* 2006, p. 47. The security interests on the amounts of money are also known as financial securities. See to this end R. Rizoiu, *Transpunerea Directivei 2002/47/CE privind contractele de garanţie financiară în dreptul român,* in Revista Română de Drept Privat no. 3/2008, p. 169.

[33] The legal framework concerning the credit institutions is represented by the Emergency Governmental Ordinance no. 99/2006 on the credit institutions and the capital adequacy published in the Official Gazette of Romania no. 1027/December 27th, 2006.

[34] For the categories of credit institutions, see art. 3 of the Emergency Governmental Ordinance no. 99/2006.

[35] Principally, the assignment of stocks is a civil deed. See to this end P. Dalion, J.P. Pamoukdjian, *Dreptul societăţilor,* Editura Economică, Bucureşti, 2002, p. 246.

[36] Art. 2389 letter c) of the NCC.

[37] Art. 2390 paragraph 2 of the NCC.

The special rules provided for by the special laws[38] consist in: a) the chattel mortgages on the stocks are established by deed under private signature, showing the value of the debt, the value and the category of the stocks brought as security; b) if the security is established on stocks issued in a materialized form, this amendment shall be made on the shareholder's certificate (share) signed by the creditor and debtor shareholder.

Before the apparition of the New Civil Code, the problem of securing with the shares held in a limited liability company was controversial as, on one side, according to the Law no. 31/1990, only the stocks[39] might be pledged, and, on the other side, according to the Commercial Code[40], a pledge might be established on the shares of interest and stocks.

The New Civil Code does not expressly specify if a security interest may be established on the shares of interest which have a strong personal feature, going as far as to say that their transfer to third parties is not possible. As a result, the mortgaging of the shares of interest would be impossible. Nevertheless, we appreciate that the parties of interest, having the feature of movable values may be mortgaged alt least in the following situations: a) when the articles of incorporation of the company expressly stipulated that the shareholder's contribution[41] may be assigned and b) when the articles of incorporation stipulated the possibility of the shareholders withdrawal[42]. Moreover, this non-inclusion is a simple omission of the lawmaker, and not an express limitation, as the enumeration provided for by art. 2389 of the New Civil Code on the goods which may be mortgaged has an exemplifying feature[43].

The financial instruments establish a right of claim, and not an ownership right, presenting themselves under the form of credit instruments[44].

The main negotiable instruments which are liable to be brought as security are the trade/commercial acts (bill of exchange, promissory note, cheque) and the negotiable deposit certificates.

d) Intellectual property rights and any other intangible property. The intellectual property rights and any other intangible property may be mortgaged (art. 2389 letter e of the New Civil Code). The rights resulting from inventions, trademarks and other industrial or commercial intellectual property rights are part of the category of the intellectual property rights. Generally, these rights divide in two categories of rights: impersonal patrimonial rights and personal non-patrimonial rights[45]. As a result, we appreciate that only the impersonal patrimonial rights may make the object of a security. The personal patrimonial rights *(the right of previous personal use, inheritable royalty, and so on)* may not make the object of the security.

e). Oil, natural gas and the other mineral resources which are to be extracted or which have been extracted. These categories of goods are stipulated by art. 2389 letter f) of the New Civil Code as likely to be the object of the chattel mortgages. This legal text

[38] Art. 991 of the Law no. 31/1990 republished.
[39] To this end, see art. 106 of the Law no. 31/1990 in the republished form in the Official Gazette of Romania no. 33/January 29th, 1998.
[40] Art. 479 paragraph 3 of the Commercial Code abrogated by art. 105 of the Law no. 99/1999 abrogated at its turn by the New Civil Code.
[41] Art. 87 paragraph 1 of the Law no. 31/1990.
[42] Art. 87 paragraph 4 of the Law no. 31/1990.
[43] Art. 2389 letter I) of the NCC.
[44] V. Luha, *Trăsăturile generale ale titlurilor de credit,* in Revista de Drept Comercial no. 7-8/1998, pp. 160 and the following.
[45] For such rights, see art. 10 of the Law no. 8/1996 and art. 36 paragraph 1 of the Law no. 64/1991.

establishes the rule according to which the movables by anticipation may make the object of the chattel mortgage. Before the New Civil Code, the doctrine considered that the underground riches, as they are in the State's public property[46], may not make the object of the chattel mortgage unless they are to be extracted or have already been extracted, within the limit of the quantities determined by law.

Although the New Civil Code does not stipulate it, we appreciate that the natural resources exploitation rights and the public services operation rights may make the object of the chattel mortgage. Principally, the Romanian State is the owner of the mineral resources found on the territory and underground of the country and of the continental platform in the economic zone of Romania from the Black Sea. The mineral resources are the exclusive public property of the State[47]. As owner of these mineral resources, the State may divide (separate) the ownership right in different rights, such as an administration right, concession right, which, at their turn, are divided in exploitation rights, such as the right to explore a territory to find resources, the right to prospect a region to identify possible resources and/or the right to extract the resources.

The operation of the public services is made, principally, by the State's public institutions and is governed specially by the rules and principals of administrative law. The public authority may decide, based on certain special provisions of public law, that the operation of certain public services should be made by juridical persons of private law based on administrative agreements giving the holder of the public service the right to terminate for default the agreement, which represents a resolutive condition. In these conditions, we consider that, for the establishment of an efficient security, the holder of the operation rights must get the approval of the public authority.

f). Livestock. According to art. 2389 letter g) of the New Civil Code, the livestock[48] may make the object of the chattel mortgage. The notion of „livestock" on which a chattel mortgage may be established refers to all the species of animals stipulated by article 2 of the Law no. 72/2002.

g). The agricultural harvest which is to be reaped and the forest which is to be cut. The Law no. 99/1999 stipulated the rule according to which the movables by anticipation, such as forest, agricultural harvests, may make the object of a chattel mortgage.

h). The tangible property making the object of the lease agreement, which are held for sale, rent or delivery based on a service agreement, which are supplied based on a service agreement, as well as the raw material and materials meant to be consumed or processed in the exploitation of an undertakings, the products in course of manufacturing and the finished products. These situations refer to the fact that the goods on which the guarantor has a right of user (those making the object of a lease agreement, the object of a consignment agreement, and so on) or an ownership (raw materials, materials) may make the object of the chattel mortgage.

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[46] E. Chelaru, *Curs de drept civil. Drepturile reale principale,* Ed. All Beck, Bucharest, 2000, pp. 40-41.

[47] See art. 136 paragraph 3 of the Romanian Constitution republished in the Official Gazette of Romania no. 767/October 31st, 2003.

[48] According to art. 467 of the Old Civil Code „*The livestock given by the fund owner to the tenant for culture, are movable as long as their destination is maintained".* At the same time, art. 468 of the Old Civil Code stipulates that „*(1) The objects put by the fund owner for the service and exploitation of this fund are immovable by destination. (2) Thus, they are immovable by destination, when put by the owner for the service and exploitation of the fund: the animals affected by culture...".*

We appreciate that, in the situation in which the pledge debtor is the user of the good, the object of the security interest shall be represented in fact by the right of user that the user has on the good. The establishment of such a security is limited by the existence of an interdiction in the deed for the transfer of the right of user concerning the transfer of this right.

I. Equipment, plants and other goods meant to serve sustainably at the operation of an undertaking. The chattel mortgages may be established on the equipment, plants, agricultural vehicles and other similar goods (art. 2398 letter k).

We consider that both the industrial goods movable by destination[49] *(equipment, plants, machinery),* and the proper industrial movables *(agricultural vehicles, vehicles, and so on)* may make the object of the security.

The ships and airships may not make the object of the chattel mortgage (art. 2359 of the New Civil Code).

j). Universalities of movables. The universalities of goods are stipulated by the New Civil Code as goods which may make the material object of a chattel mortgage (art. 2350 paragraph 2). The material object of the security is represented in fact by the universalities, as they have in their content only the asset items, while the universalities in law also include liability items[50]. Thus, the mortgage is established on the universalities of goods regarded as a distinctive good and not on its constitutive items (components), as the main feature of the goods making up the universality is represented by the fact that these are fungible.

The establishment of the chattel mortgage on an universality in law is unconceivable as a good which includes a debt may not be brought as a security.

k). Mortgaged goods and their products. The goods affected to the security are the goods themselves and their products, too (art. 2392 of the New Civil Code). In fact, the doctrine[51] showed that not the good affected to the security represents its object and that the object consists in the economic value[52] of the good, in its substance submitted to the liquidation. The notion of „product of a good" must be understood as being any good received by the debtor after the sale, exchange, the fruits and products[53], as well as the amounts from insurance or other form of administration or disposal, including the amounts acquired from any other further operations. By the use of the term „*products*", the lawmaker intended to designate a larger scope of goods affected to the security which contain, besides the fruits and products of the good itself, also the goods replacing it due to the real subrogation with a particular title, including the price representing the counter value of the good and the insurance premium (indemnity) received due to the occurrence of the insured risk (loss or deterioration of the good)[54]. Moreover, they represent products of the good affected to the security and t[55]he products of the products, as, by the valorization of the good, we understand getting the economic value of a good affected to the security by any juridical operation, even in the situation in which these are received by other persons than the debtor.

[49] For the development concerning such goods, I. Dogaru, S. Cercel, *cited works,* 2007, pp. 64-65.
[50] For distinction, concerning the two categories of universalities, see R. Rizoiu, *Garanţia reală mobiliară asupra universalităţilor de bunuri,* in Pandectele Române no. 2/2005, pp. 140-141.
[51] R. Rizoiu, *Încercare de (re)definire a garanţiei reale mobiliare,* in Pandectele Române no. 4/2004, pp. 166-178.
[52] For further details concerning the economic value of the good, see P. Crocq, *Propriété et garantie,* LGDJ, Paris, 1995, p. 225 and J. Teves, *cited works (I)*, in Juridica no. 8/2000, p. 292.
[53] For explanations concerning the „*fruits"* and „*products"*, see I. Dogaru, S. Cercel, *cited works,* 2007, p. 70.
[54] L. Mocanu, *Garanţiile reale mobiliare,* Ed. All Beck, Bucureşti, 2004, pp. 75-76 and G. Boroi, D. Boroi, *cited works,* in Juridica, no. 4/2000, p. 130.
[55] To this end, see R. Rizoiu, *cited works,* 2006, p. 106.

l). Any other tangible or intangible movables. The New Civil Code also stipulates in art. 2389 letter l) that any other movables may make the object of the chattel mortgage. This legal text offers/confers to the parties of the chattel mortgage agreement unlimited rights concerning the establishment of the object of the mortgage, being practically an application of the principle of freedom to contract, of course within the limits and with the compliance with the imperative provisions of the law.

We must emphasize that the old regulation of the chattel mortgages (security interests) also contains such a provision[56] and that this enumerated, with an exemplifying title, a larger scope of the goods which might be brought as security. At the same time, we notice that the entire regulation of the New Civil Code in the matter of the security interests has as its source of inspiration the old regulation in matter (Title VI of the Law no. 99/1999).

7. Description of the goods affected to the security

The parties of the chattel mortgage agreement have the obligation to include in the agreement a description of the good affected to the security[57].

The description of the good brought as security consists in the mention of certain items which could make possible the identification of the good which the parties understood to affect to the security.

As is concerns the description modality and the items which must be contained in the description, the legal provisions do not impose special conditions. The goods may be described by simply indicating their kind. The description of the goods may be made object by object, by drawing up a list with those goods, the quantities, or by any other formula by which their reasonably identification can be provided. We appreciate that the use in the content of the security interest agreement of such an expression for the description of the goods affected to the security is not the same thing with the establishment of a security interest on universalities in fact.

The valid description of the goods consisting in an amount of money deposited in an account is limited to a special condition, which must be complied with, consisting in the fact that, for a sufficient description, the account in which the amount of money is deposited must be individualized.

The methods used by the parties for the description of the good affected to the security have only a descriptive role, missing the volitional element. For the existence of a volitional element, the goods affected to the security must represent universality in fact.

[56] Art. 5 letter q) of the Title VI of the Law no. 99/1999 – abrogated at the moment.
[57] Art. 2391 of the NCC.

CONSIDERATIONS ON THE LEGAL MAINTENANCE OBLIGATION IN THE NEW CIVIL CODE

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Abstract: *The New Civil Code regulates the legal maintenance obligation in Title V of the Second Book – „About Family", generically entitled „Maintenance obligation" (articles from 513 to 534). These provisions are completed with those of articles 389, 499 and 2612. Comparing the provisions of the New Civil Code with the provisions of the Family Code, we have presented the main elements of novelty and the improvements brought by the current regulation, but also certain weaknesses regarding the legal maintenance obligation.*

Keywords: *Civil Code, Family Code, legal maintenance obligation*

Preliminaries

The legal maintenance obligation can be defined as the duty of a person imposed by law to provide for another person means of living, meeting including their spiritual needs and, in terms of maintenance obligation of the parents regarding their minor children, the means for their education, learning and professional training[1]. We consider, as other authors do, that its general basis is represented by the feeling of solidarity and mutual aid which the legislator mainly circumscribes concerning the family but also regarding other relations assimilated to the family relations.[2] The New Civil Code regulates this cardinal institution in Title V of the Second Book – „About family", generically entitled „Maintenance obligation", in the articles from 513 to 534. The provisions of this title are completed with those of article 389 N.C.C. on the maintenance obligation between former spouses, of article 499 N.C.C. on the maintenance obligation between parents and children and of article 2612 N.C.C. on the law applicable to the maintenance obligation which includes foreign elements; overall, there are 25 articles on the maintenance obligation.

In general, in relation to the relevant provisions of the Family Code[3], the New Civil Code contains provisions which regulates in a more detailed manner the legal maintenance obligation and includes significant improvements, some of the retained solutions being in accordance with rules long established in the doctrine and confirmed through a constant jurisprudence, while others come to settle doctrine disputes that have

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[1] See I.P. Filipescu, A. I. Filipescu, *Family Law Treaty (Tratat de dreptul familiei)*, Eighth Edition, U.J. Publishing House, Bucharest, 2006, p. 541.

[2] A. Bacaci, V..C. Dumitrache, C. Hageanu, *Family Law (Dreptul familiei*), Third Edition, AllBeck Publishing House, Bucharest, 2002, p.284; M. Soreață, *Family Law (Dreptul familiei*), Universitaria Publishing House, Craiova, 2004, p. 287. For more details on the basis of the statutory forms of maintenance, see I. Dogaru, S. Cercel, D.C. Dănişor, *Maintenance in the Context of Fundamental Rights (Întreținerea în contextul drepturilor fundamentale)*, Themis Publishing House, Craiova, 2001, p. 105.

[3] Family Code published in the Official Gazette no 13/1956, repealed by Law no. 71/2011 for the implementation of Law no. 287/2009 of the Civil Code, 1 October 2011, Official Gazette no. 409/2011.

been perpetuated in the silence of the law. In the following, we are going to analyze: the juridical characters of the maintenance obligation (1), the persons between which there is a maintenance obligation and the order in which the maintenance is due (2), the conditions of existence of the maintenance obligation and the maintenance obligation between parents and children (3), the establishment and performance of the maintenance obligation (4) under the N.C.C., focusing on the brought elements of novelty, on the strengths and weaknesses of the present regulation.

1. The juridical characters of the maintenance obligation

The first element of novelty of the Civil Code regarding this issue is to expressly state the legal character and the personal character of the maintenance obligation. As shown in art. 513 N.C.C., marginally entitled „the legal character of the maintenance obligation", this obligation exists only between the persons stated by law and is due only if the conditions required by law are fulfilled. The regulation of the maintenance obligation is done through mandatory norms because they are stated for protection purposes, to ensure the existence of the specifically stated persons which are in need, therefore[4], this obligation does not extend to other persons through a broad interpretation of the legal provisions.

The provisions of art. 514 (1) N.C.C. state that the maintenance obligation has a personal character; this obligation being inseparably linked both to the person which is entitled to receive it and to the person which is obligated to provide it, it must ensure the livelihood of the beneficiary of the maintenance. As a consequence of the personal character of the maintenance obligation, paragraph 3 of art. 514 states that the right to maintenance cannot be transferred and cannot be pursued in other conditions than those provided by law. As a rule, according to art. 514 (2) N.C.C., the maintenance obligation is not transferable through inheritance, a similar provision existing in art. 95 Family Code. As an exception, according to art. 518 (1) N.C.C. (art. 96 Family Code), the heirs of the person who has a maintenance obligation towards a minor or who has offered to maintain the minor without having the legal obligation to do so are required, in the value of the inheritance, to continue the maintenance only if the parents of the minor have died, are missing or are in need and only while the child is still a minor. Last but not least, art. 515 N.C.C. states the prohibition to renounce in the future at the right to maintenance; the penalty applicable for non-complying with the requirements of the text is absolute nullity.[5]

2. Persons between which there is a maintenance obligation and the order in which the maintenance is due

To a large extent, in terms of persons between which there is a maintenance obligation and the order in which the maintenance is due, the provisions of the New Civil Code are similar to those of articles from 86 to 92 Family Code, but they also contain some elements

[4] Ş. Cocoş, *Family Law* (*Dreptul familiei),* second volume, Lumina Lex Publishing House, Bucharest, 2001, p.114.

[5] For the development of legal character of the legal maintenance obligation see S. Cercel, I. Dogaru, „*Considerations on the foundation and the juridical character of the Legal Maintenance Obligation" („Unele consideraţii asupra fundamentului şi caracterelor juridice ale obligaţiei legale de întreţiner"e*), Journal of Legal Sciences (Revista de Ştiinţe Juridice), no. 22/2001.

of novelty. Firstly, those between which there is a maintenance obligation are restrictively determined by law[6]. According to art. 516 (1) of Civil Code, which incorporates nearly all the provisions of art. 86 Family Code, there is a maintenance obligation between the following persons: husband and wife, direct relatives, brothers and sisters and other persons specifically stated by law. One can notice that, unlike the former regulation, which stated that the maintenance obligation between the direct relatives exists only until the third degree of kinship[7], currently, the maintenance obligation between the ascendants and the descendants exists *ad infinitum*, solution with which we fully agree.

Then, art. 519 N.C.C. marginally entitled „payment order of the maintenance", states the following: the spouses and the former spouses have the maintenance obligation to each other before the other persons; the descendent has the maintenance obligation before the ascendant, and if there are more descendants or more ascendants, the closest one has the maintenance obligation before the furthest one; the brothers and sisters have the maintenance obligation after the parents but before the grandparents. The current regulation keeps the order established by art. 89 Family Code, with the observation that the legislator found it necessary to expressly stated that the former spouses have the maintenance obligation to each other in the same degree as the spouses, therefore firstly[8]. The order in which the maintenance obligation is due is mandatory, therefore, the creditor of the obligation has to demand maintenance from the first category of obligated persons and, only if the person is unable to give it at all, the maintenance is requested from the next person obligated in the order stated, his/her obligation being subsidiary[9]. In accordance with the provisions of art. 522 N.C.C., if the first obligated person does not have the abundant resources to cover the needs of the creditor, the guardianship court can oblige the other persons which owe maintenance to supplement it, in the aforementioned order.

As art. 90 and 92 Family Code states, also art. 521 and 523 N.C.C. states the divisible character of the maintenance obligation, in an active and passive manner. Regarding the passive divisibility, if more persons are obligated to provide maintenance to the same person, the division of the maintenance will be made proportionally, according to their means and not according to the number of persons obligated to provide it, this aspect being related to the specificity of the divisibility of the maintenance (art.521 (1) N.C.C.)[10]. In terms of the active divisibility, art. 523 N.C.C. shows that, if the debtor cannot perform, in the same time the maintenance towards all the creditors, the guardianship court will decide, taking into account the needs of each of these persons, either the maintenance to be paid only to one of the persons, or the maintenance to be divided between more persons or between all the persons which are entitled to demand it; in the latter case, the court also rules on the manner in which the maintenance is going to be divided between the persons which are going to receive it. From the rule of the divisibility of the maintenance obligation, N.C.C. provides three situation in which there exists a passive solidarity. The

[6] T.R. Popescu, *Family Law (Dreptul familiei),* second volume, Didactic and Pedagogic Publishing House (Ed. Didactică şi Pedagogică), Bucharest,1965, p. 198.

[7] According to art. 86 Family Code, „the maintenance obligation is between spouses, parents and children, the one who adopts and the one adopted, grandparents and grandchildren, great grandparents and great grandchildren, brothers and sisters, as well as other persons specifically stated by law".

[8] For a contrary opinion, see A. Bacaci, V.C. Dumitrache, C. Hageanu, quoted work. p.323, A. Lesviodax, *Legal Maintenance Obligation (Obligaţia legală de întreţinere*), Scientific Publishing House (Ed. Ştiinţifică), Bucharest, 1971, p.19.

[9] Also see D. Lupaşcu, *Family Law* (*Dreptul familiei),* Rosetti Publishing House, Bucharest, 2005, p.257.

[10] See I. Dogaru, S. Cercel and D.C.Dănişor, quoted work p. 176.

first situation is regulated by art. 521 (2) N.C.C, which literally states the provisions of art. 90 Family Code, which provides that: „If the parent has the right to maintenance from more children, he/she may, in emergencies, take action against only one of them" and „the one who paid the maintenance can turn against the others, requesting their part". Also, according to art. 518 (2) N.C.C., the maintenance obligation of the heirs is solidary; if there are more heirs, each contribute with the proportion of the value of the inherited assets. Lastly, in our opinion, an important novelty of the N.C.C. is represented by the fact that in art. 499 (1) N.C.C. it is expressly stated the solidarity of the maintenance obligation of the parents towards their minor children; according to this legal text, „the father and mother are solidary obligated to ensure maintenance to their minor child, ensuring the living needs as well as the education, learning and professional training".[11]

3. Conditions of the maintenance obligation

Another element of novelty is represented by the fact that the current regulation does not take the norm stated by art. 86 (2) Family Code according to which „only who is in need, who does not have the power to provide for himself/herself because he/she is unable to work is entitled to maintenance" and the new text (art. 524 N.C.C) no longer conditions the maintenance right to the incapacity of the creditor to work[12]. Note that the solution chosen by the authors of the N.C.C. is notably different from the previous regulation, modifying the sphere of the persons who might benefit from maintenance to all those who are in need, „which cannot provide for himself/herself by working…. or from his/her assets". In this manner, a jurisprudential solution which has been allowed for a long time is stated, according to which the person which has income generating assets or assets which, according to the normal living conditions, the creditor can renounce at by selling them, is not entitled to maintenance[13]. The assessment of the status of need is made in concreto, taking into account any evidence[14], not only the basic living means of the persons entitled to maintenance but also their standard of living[15], taking into account the age, sex, heath of the creditors and even the „costliness" of the place where they live (rural or urban location, for example)[16]. Compared to those stated, the text of art. 524 N.C.C. referring to the person which cannot provide for himself/herself by working, therefore both to the situation in which he/she has no income and to the situation in which the income is not enough, the courts must exhibit caution in estimating the state of need. [17]

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[11] The previously, the literature unanimously acknowledged the fact that the maintenance obligation has a *in solidum* character. Regarding this aspect, see, for example, R. Petrescu „Regarding the Peculiarities of the Obligations in Solidum" ("Cu privire la particularitățile obligațiilor in solidum"), DRR, no. 12/1968, p 90, A. Bacaci, *Patrimonial Relations in Family Law (Raporturile patrimoniale în dreptul familiei*), Second Edition, Hamangiu Publishing House, Bucharest, 2007, p. 219.

[12] The idea of not conditioning the maintenance right to the incapacity to work was supported in the literature; in this regard see I. Dogaru, S. Cercel, D.C.Dănișor, quoted work, p. 134.

[13] In this respect see A. Bacaci, V.C. Dumitrache, C. Hageanu, quoted work, p.293.

[14] Art. 528 N.C.C.

[15] See I. Albu, quoted work, p. 302.

[16] M.D.Stănescu, *About Food Obligations (Despre obligațiile alimentare*), Bucharest, 1933.

[17] For a similar opinion see C. Irimia in the *New Civil Code. Comments on articles*, coordinators F.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, C.H.Beck Publishing House, Bucharest, 2012, p. 568.

Important novelties are also regarding the maintenance obligation of the parents towards their minor children, obligation which N.C.C. states in the following texts: art. 516 (1) which refers to the maintenance obligation of the direct relatives, art. 525, marginally entitled „Minor maintenance right" from Title V on the maintenance obligation and art. 499, marginally entitled „Maintenance obligation" from Title IV on the parental authority. In what concerns us, we have reservations regarding regulating the maintenance obligation of the parents towards their children in an uneven manner, especially if, the legislator wrongly introduces a provision on the maintenance obligation towards the child which became of full age in a chapter on parental authority (art. 499 (3) N.C.C.).

Art. 525 (1) N.C.C. states: „*The minor which requires maintenance from his parents is in need if he/she cannot provide for himself/herself from his/her work, even if the minor is in the possession of certain assets*"; per a contrario, if the minor child would be employed and have an income from which he/she can provide for himself/herself, then the minor is no longer entitled to food. If the minor has his/her own income, but the income is insufficient, the parents have the obligation to ensure the conditions necessary for the growth, education and professional training of the minor[18]. The guardianship court must conduct a flexible assessment of the game of the two variables: the need of the minor and the means of the parents[19], therefore, it can allow that the maintenance be carried out through the sale of the assets of the minor, except for those which represent basic necessities, if the parents cannot provide the maintenance without endangering their own existence. The scope of the persons which are obligated to provide maintenance under the special conditions of art. 525 N.C.C. is limited to parents[20], therefore all the other persons owe maintenance towards the minor under the conditions of the Common Law[21], therefore the minor proves to be in need if he/she cannot provide for himself/herself from work or from his/her assets. Art 525 N.C.C. expressly establishes a solution which is unanimously accepted by the recent doctrine[22], to which we also subscribe, solution which states that in the case of a minor the state of need is to be broadly interpreted, the minor being able to request maintenance from the parents even if he/she has assets which can be sold in order to meet his/her costs and thus making a clear boundary of the situation of the minor in relation to the other creditors of the maintenance obligation which are stated in art. 524 N.C.C. However, the manner in which the text of art. 525 (1) N.C.C. is drafted, could give rise to conflicting interpretations because it can also be interpreted in the sense that the legislator conditions the state of need of the minor on the proof that the minor cannot provide for himself/herself by working or, in reality the causes of the state of need of the minor are the education and the incapacity to work until the age of 16[23], and after this age the cause of the state of need is only the education[24]. In our opinion, a contrary solution can be reached through a systematic interpretation of the incidental legal texts, especially art. 525 and 499 (1), (3) N.C.C.,

[18] N.C.C., art. 499 (2).
[19] A. Bacaci, quoted work, p 218, E. Florian, *Protection of Child Rights* (*Protecția drepturilor copilului*), Second Edition, CHBeck Publishing House, Bucharest, 2007, p 82.
[20] While the Family Code used the term „minor descendant".
[21] Art. 524 N.C.C.
[22] In this respect, see D. Lupaşcu, qouted work, p.271, Şt. Cocoş, quoted work, p. 128. In the older literature, there were expressed also contrary opinions, in this regard see T.R. Popescu, quoted work, p. 204.
[23] C.M. republished in the Official Gazette. no. 0355/2011, according to Article 13 (1), „An individual obtain the capacity to work at the age of 16 years", according to art. 49 (4) of the Constitution „minors under the age of fifteen years cannot not be hired as employees.
[24] A. Bacaci, V.C. Dumitrache, C. Hageanu, quoted work, p. 296.

solution that we consider to be a correct one. In addition, the doctrine stated that, in relation to their parents, the minors are considered to be in need when, from their own means, they cannot ensure living conditions at the same level as their parents[25]. The Family Code regulates the maintenance obligation of minors in art. 86 (3), according to which „The descendant, while a minor, has the right to maintenance, regardless of the cause of his/her need". If in the previous regulation any cause could have determined the state of need of the minor, and there are opinions in the doctrine that state that it is an relative presumption[26], in the current regulation the cause of the state of need of the minor is limited to the failure to provide for himself/herself by working. Regarding the maintenance obligation of the children towards their parents, this situation is included in the provisions of art. 524 N.C.C.

In art. 510 N.C.C. it is stated that the loss of parental rights does not relieve the parents from providing child maintenance.

N.C.C. states for the first time, *expressis verbis*, in art. 499 (3) that: „Parents are obligated to provide maintenance for the child of full age if the child is continuing the education, but without exceeding the age of 26", solution embraced by the recent doctrine and jurisprudence, after a period of differences on this issue[27]; adopting a legal text in this regarding being necessary. We will mention that, if the text of art. 499 (2) N.C.C. states that the minor which has insufficient income has the right to maintenance from his parents in order to complete it, for the same reasons, the same solution is required for the child of full age and which is continuing his/her studies [28]. Consistent with the view expresses in literature[29], we argue that the phrase „child which became of full age and which is continuing his/her studies" covers both the theoretical professional training and the practical one, regardless if the school is a public or a private one. In the case of the child of full age which requests maintenance from his/her parents, the question is whether his/her state of need is interpreted according to the common law (if he/she is in a state of need if he/she does not has any income or other assets which could be sold in order to ensure his/her maintenance) or *lato sensu*, assessing that the child of full age is in a state of need if he/she cannot provide for himself/herself from his/her work, even if the child of full age has assets from the sale of which he/she would ensure all those necessary for existence. We consider that the text of art. 525 – The right of the minor to maintenance does not apply to this situation. Last but not least, we consider that the legislator should have regulated in a more detailed manner the right to maintenance of the children of full age which are continuing their studies and we fully share the point of view stated in the doctrine that it should not be regarded as an absolute right, but as a justified and revocable one, if the

[25] A. Lesviodax, quoted work, p. 27.

[26] In this respect, A. Bacaci, V.C. Dumitrache, C. Hageanu, quoted work, p.294, C. Turianu, „The obligation of the parents to provide maintenance for their child which became of full age and which is continuing his/her education", in Law no. 7/1991' in a different opinion, the incapacity to work during the period of minority is juris tantum presumed and the state of need must be proven, in this regard see T.R. Popescu, quoted work, second volume, p. 204, I. Albu, quoted work, p. 304; there are other authors which have considered that also in the case of maintenance obligation of the children towards their parents the state of need must be proven, in this regard see I. Filipescu, A.I. Filipescu, quoted work, p. 551.

[27] About a detailed overview of the evolution of the jurisprudence and judicial practice in the maintenance obligation of the parents towards their children who are continuing their studies after coming of age, see I. Dogaru, S. Cercel, DC Dănişor, quoted work, p. 263-277.

[28] For instance, one may consider the scholarship.

[29] D. Lupaşcu, quoted work, p. 274.

obtained results are no longer satisfactory, failing to prove real aptitude and inclination for the chosen profession.[30]

The current Code contains in art. 389 provisions on the maintenance obligation between former spouses, article which incorporates the provisions of art. 41 Family Code. Thus, paragraph (1) of art. 389 states that the maintenance obligation between former spouses terminates at the divorce. Under paragraph 2, the cause of the state of need of the divorced spouse is limited to the incapacity to work, cause which must occur before the marriage, during the marriage or within an year from the divorce, but in the latter case, only if the incapacity is caused by a circumstance relating to the marriage. If the divorce is decided only due to the exclusive fault of one spouse, the spouse in question in entitled to maintenance only for one year from the divorce (art. 389 (4) N.C.C.); if the divorce was decided due to the fault of both spouses, each of them has the right to maintenance for an undetermined period of time. The maintenance concerning former spouses is calculated according to the general regulation[31], but its amount must not exceed a quarter of the net income of the spouse obligated to pay it and, together with the maintenance towards the children, it must not exceed half of the net income of the debtor.[32]

4. Establishment and performance of the maintenance obligation

Under the first paragraph of art. 529 N.C.C., the maintenance is determined according to the need of the one who requests it and in accordance with the means of the one who is going to pay it. Taking the provisions of art. 94 (3) Family Code, paragraph 2 establishes a maximum amount of the maintenance, when it is owed by the parents, namely: a quarter of the monthly net income for one child, a third for two children and a half for three or more children; and paragraph 3 establishes the maximum amount of the maintenance at half of the monthly net income of the one who is obligated to provide it to the children and to other persons. As a novelty, the phrase „work income" which generated various interpretations regarding the scope[33], was dropped.

The legislator chose new solutions regarding the manners of performing the maintenance obligation. Firstly, art. 531 N.C.C. established as a rule the performance of the maintenance obligation in kind and, alternatively, if it is not voluntarily performed in kind, the guardianship court may enforce its performance by paying a cash alimony[34]. Then, art. 530, last paragraph, states the possibility to establish the maintenance alimony in the quantum of a percentage of the monthly net income of the debtor; the option of the legislator will allow the quantum of the maintenance alimony to oscillate according to the monthly net income of the debtor. The guardianship court decided the modification or the termination of the payment of the maintenance alimony if a change occurs in the means of the one who is ensuring the maintenance and the needs of the one who is receiving it (art. 531 (1) N.C.C.). In our opinion, an error has slipped when drafting the text, the legal text following to adapt the maintenance

[30] V. Pătulea, „Some Considerations on the Subsidiary Maintenance Obligation" ("Unele considerații în legătură cu obligația subsidiară de întreținere"), R.R.D. no. 11/1982, p.37.

[31] As a rule, maintenance is due according to the need of the one who requests it and the means of the one who is going to pay it.

[32] Art. 41 (3) of the Family Code states a maximum amount to be paid for maintenance of a third of the net work income of the spouse obligated to pay it.

[33] For the opinion that work income means net income, also see I. Dogaru, S. Cercel, D.C. Dănișor, quoted work, p. 258.

[34] In the previous regulation, the court decided the performance of the maintenance obligation in kind, by paying a alimony or a part in kind and the other in cash depending on the circumstances, in accordance with art. 93 Family Code. For further details see C. Filipescu, quoted work, p. 599.

obligation to the new situation of the report between the parties, situation which can be changed either by modifying both terms of the report or by changing only one of them[35]. Another novelty that deserves our attention is the quarterly indexing of law, depending on the inflation, of the maintenance alimony set in a fixed amount[36]. In the Comparative Law, there are similar legal texts. Therefore, *exempli gratia*, according to art. 590 Civil Code of Quebec, „If support is payable as a pension, it is indexed by operation of law on 1 January each year, in accordance with the annual Pension Index established pursuant to section 119 of the Act respecting the Quebec Pension Plan, in order to maintain the real monetary value of the claim resulting from the judgment awarding support".

Being designated to meet the current needs of the creditor, the performance of the maintenance obligation is successive, through regular services[37]; as an exception, N.C.C. takes a solution accepted by the doctrine and practice according to which the maintenance may be performed by paying in advance a global amount if the debtor has the means necessary to cover this obligation[38]. The legislator also states the hypothesis according to which the creditor dies during an installment period, situation in which the maintenance is due in full for that period[39].One last element of novelty which caught our attention is represented by the provisions of art. 534, marginally entitled „Return of the undue maintenance" which stated that „if, for any reason, it is proven that the maintenance performed, voluntarily or pursuant to a court decision, was not due, the one who performed the obligation can request the reimbursement of the maintenance from the one who received it or from the one who was in fact required to provide it, in the latter case, based on unjust enrichment". Therefore, the legislator established that the one who paid the maintenance without having the intention to make a donation may bring action against the creditor for the reimbursement of the benefits on the basis of unjust enrichment[40] or on the basis of payment of undue work[41] or this action may be brought against the real debtor on the basis of unjust enrichment[42].

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[35] The Supreme Court, civil decision no. 159/1960, CD 1960, p. 305. Also see Supreme Court, civil decision no. 1590 of the 30th of September 1960, C.D., 1960, p. 305 according to which „it is not necessary for the change to intervene in a cumulative manner, both in the state of need of the one who receives the maintenance and in the means of the one who provides it, it is enough only one of these two elements to change."

[36] According to art. 531 (2) N.C.C.

[37] Also see I. Albu, quoted work, p 315.

[38] Art. 533 (1), (3) N.C.C.

[39] According to art. 533 (2) N.C.C.

[40] According to art. 1345 and the following one of the N.C.C.

[41] According to art. 1341 and the following one of the N.C.C.

[42] For a comment of art. 534 N.C.C. also see I. Irimia, in the *New Civil Code. Comment on articles*, coordinators F.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, CH Beck Publishing House, Bucharest, 2012, p. 576 and the following one.

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MODERNIZATION OF THE ROMANIAN PUBLIC ADMINISTRATION AT THE CONFLUENCE BETWEEN POLITICAL AND SOCIAL VALUES. CRITICAL REFLECTIONS

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Abstract: *The satisfaction of the interests and needs of the Romanian society calls for the rethinking and consolidation of the public administration system, from the structural-functional, managerial, legal, procedural, control and assessment perspectives, within a modernization effort that allows the passing to a new public, innovator, performant, efficient and transparent apparatus, capable of implementing the measures necessary for managing the current socio-political and economic challenges at the level of Romania.*
Keywords: *public administration, modernization, social – political values.*

I. Introduction

The management of the challenges due to the transformations in the socio-political and economic Romanian environment determined the redesigning of the State's activities and duties, with direct implications on the functions, objectives and forms of operation of the public administration system.

In practice, the organization and functioning of this system did not demonstrate the administrative capacity called for by the need to integrate Romania in the European Union or as a consequence of implementing the enlarged portfolio of administrative reform strategies and which were grounded on the „principle of modifying the relations between public administration and society, in the sense that administration should have been in the service of society, and not society subordinated to the administration's objectives and interests"[1].

The X-ray of the economic-social and political problems presently faced by Romania do not reflect a real interconnecting with the commitments comprised in the government programs corresponding to different post-December executive formula, on the same coordinate finding the advanced measures of the public administration reform strategies, as well as the vision on the foreseen results, the discontinuities developing the relative failure of the public administration modernization.

The non-existence of a stat-society dialogue on the problematic of administration understood as space for articulating the socio-political values, but also as a central topic of public controversy, determined that administration lost its status as change engine, at the impulse of the political power, the role of catalyst being undertaken solely by civil society.

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[1] Manda, C., Manda, C. C., *Ştiinţa administraţiei*, 3rd edition, reviewed and added, Universul Juridic Publishing House, Bucharest, 2008, p.344.

Enclosed in an asphyxiating bureaucracy, the weight center of public administration shifted outside its traditional points of support, orientation towards the citizen, quality services, impartial and apolitical public servants, competence etc., between the social values and the political action, often embracing political values.

The reforming of the administrative system by importing certain administrative success models supported by the *transfer of good practices* between the *public administrations in different states or between different levels of a state public administration* proved to be an illusion[2].

Not ready to face the exigencies of the new democratic values, in fact, we have today an administration that calls for other pillars in order to build a new identity. This process is imposed even more attempting to earn a personal identity based on performances in relation to the political power, which has become an important actor, in competition with other actors, in the context of satisfying the population's needs.

The identification of the new administration support pillars imposes an analysis performed at *two complementary levels*. A first level of diagnosis and reflection on the administrative reality and a second level of outlining a sustainable administration model, competitiveness factor also for the future generations of citizens.

The new public administration, modernized, must represent an instrument in the service of society, a receptive, pluralist one, which deserves the trust given by the citizens, which increases citizen participation and which ensures the supply of quality services, the institutional change operating as a true *mechanism for changing values*.

II. The Romanian administrative reality

In what concerns the first analysis level, we identify the following *main contrasts* with the ideal desired by the modernization of public administration:

***A. The internal dimension*:** absence of a reference organization and functioning frame, transparent, impartial, neutral and competent. The absence of this referential leads to the following unbalances:

a) Weaknesses of local democracy. The changes to an enlarged democracy and a modern administration aimed that the citizen, within the local community, should be involved in the decisional process by means of citizen participation mechanisms, through authentic dialogue, and to play an essential role in key-aspects such as control and social audit.

Undertaken at the formal level, objectives such as the decentralization of public services and the autonomy of the territorial collectivities did not efficiently materialize in the administrative practice. This fact is due both to the *vertical and horizontal layout of the administrative authorities, and to the use of inadequate levers for the transfer of competences*[3], in order to corroborate the different administrative procedures or in order to increase the conditions for making the low-performance local administrations more responsible.

b) Relative failure of public function management. The modernization of the administrative system significantly depends on the human resources management ensured both by the political elite, but, especially, by the administrative one. The attempt of the

[2] Nicolescu, C.E, Murgescu, D.M., „Good practices-development vector of the Romanian public administration", *Revista Studii de Ştiinţă şi Cultură*, Year VI, no. 1(20), March 2010, Arad, pp. 142-143.

[3] Alexandru, I., *Tratat de administraţie publică*, Universul Juridic Publishing House, Bucharest, 2008, p.759.

Romanian politicians to establish a body of professional, apolitical, public servants demonstrates that the approach is still in an incipient form and with trials to alter it, revealed by the repeated attempts to politicize the public function, to recentralize certain competences etc.

Public servants do not have very clearly defined their roles, such as to consolidate and promote an administrative life which to succeed in *bringing closer the governance to the governed*, by harmonizing the political and the social values.

The directions that their actions must follow must have in view the authority based on ethical compromise, the power of example, as dialectic unit between thought and action, devotion based on the public interest.

It is noticed a deep crisis of administrative leadership, at the basis of the current drift in the management of the administrative system, reflected both through the absence of a set of viable, radical, solutions for the modernization of administration, and in the *inability to offer integrated political action lines to the* political *decision-makers*[4].

c) The opaque-making of public administration. In spite of the efforts to consecrate an impeccable administrative behaviour, the permanent reconstruction of the administrative architecture, closely followed by the elaboration of a large legislation, gradually allowed the installation of a high degree of opaqueness of the activity of the administrative institutions and authorities.

The carousel of the Romanian administrative reform generated gaps between the legislation and the administrative transparency-making measures, significantly diminishing the expected impact and which target a substantial advance in what concerns the probity and closeness of public function exercise to the citizens.

The absence of the political will to introduce the administrative procedure code, essential instrument for correcting the irregularities and for ensuring a quality public management, as well as the inability to modify the citizen's status from beneficiary to customer of public services, worked for the decrease of the sympathy degree that public administration enjoys from its citizens.

The spiral of the administered persons' silence is reflected at every electoral cycle, causing the modification of the electoral prognosis, sometimes with undesired effects at the level of the continuity of the public administration modernization measures.

d) Inconsistency and lack of perspective in designing local autonomy. With respect to the problematic of administrative decentralization, at the level of the Romanian administrative system, it bears a simplest approach, in the philosophy of the governments alternating at the helm of the country, being reduced to a sum of competence and function transfers and not at all seen as an intention to rebalance the political system by redefining the territorial levels of the state, for the purpose of *ensuring a high degree of democracy and the transformation of the autonomous territorial collectivities in „real counter-powers" in relation to the central government's action*.[5]

As result, we see a public administration incapable of redefining the state-society relation by obtaining performances in the economic development process of the local collectivity. This is also one of the reasons why the outlining of a third administrative level, the regional one, even though there is an intention towards „regional openness", to be considered a

[4] Alexandru, I., *op.cit*, p.761.

[5] Manda, C. C., „Autonomia locală şi protecţia juridică a drepturilor minorităţilor naţionale în România- explicaţii şi delimitări conceptuale", *Transylvanian Review of Administrative Sciences*, No. 1(28), Accent Publishing House, Cluj-Napoca, pp.88-121.

premature process, still resorting to the formula of administrative deconcentration or to the administrative solution of the development regions without legal personality.

In spite of the actions to modernize the traditional management of the interests and problems of the local collectivity, which are of a nature to demonstrate the *consistency and wide content of the principle of local autonomy enjoyed by the local collectivities in Romania*[6], there are visible conservatory tendencies of dependence towards the central administration in solving the local interest problems.

***B. The external dimension*:** unbalances administration - the socio-political environment

a) Civil society passivity. The vertical decentralization of the state prerogatives was not accompanied to an equal extent by a horizontal decentralization of certain responsibilities of the state, towards the civil society. The result, more than visible, consists of a sum of claims and protests of NGO's statute bodies, but which, in practice, are not finalized through the fulfillment of its main role, to structure the state-society dialogue, but rather through a sort of social turbulence.

The state's attempt to create an open, transparent and authentic administration cannot find support in a sea of organizations that, by means of continuous commitment, would contribute to the society's mending. The non-coagulated range of Romanian non-governmental organizations can only accidentally be associated with the increase of the community prosperity, due to their inability to obtain a set of economic and social results in accordance with the citizens' expectations.

b) The significant reduction of the administration's subordination towards the political power. The model of organization, functioning and management of administration reveals at least two sensitive points of this system. A first point refers to the multiplication of the administration's tasks, not so much as a consequence of increasing the state's intervention fields, but more as of the progressive expansion of the regulatory power conferred to the Executive, become political decisional pole concomitantly with an increased transfer of competences in favour of administration.

A second sensitive point refers to the putting into practice by the administration of the political values. In the conditions of creating the new power pole, the administrative one, for the management of the transposing of these values according to the political will, it was resorted to a formula as unfortunate, as serious under the aspect of the effects produced, namely that of the politicization of administration, manifested especially through the *political appointment to public functions belonging to the upper level of the administrative system, on political, partisan, group criteria*[7].

The phenomenon determined the increase of the functional autonomy of public administration, but, more seriously, of the subordination of the state's general interests to the private ones, generating tensions in society, due to the differences in values.

Also, the excessively close contact between political and administration, without a clear separation between the two levels, has lead to the formulation of inadequate legislative solutions for the problems targeted by the public administration modernization process.

c) Supra-ordering of the economic towards the administration. In the current Romanian context, we witness a series of political negotiations, failed though, oriented towards the correcting of the errors in the economic model imposed by the western

[6] Manda, C., Manda, C. C., *Dreptul colectivităţilor locale*, 4th edition, reviewed and added Universul Juridic Publishing House, Bucharest, 2008, p.485.

[7] Alexandru, I., *op.cit*, p.754.

capitalism, which our country aligned to. The errors are triggered, to a large extent, as a consequence of promoting state non-interventionism, as well as of the expansion of the free enterprise, especially through the accelerated, but uncoordinated privatization process, following which the administration lost its coordination and control leverages on the economic institutions.

The defragmentation of the different public services as a result of total privatizations, especially of those in the strategic sectors, was achieved to the detriment of the public sector. The weakening of the state's role, and, implicitly, of the administration's role in market economy is rebalanced through increased regulatory and fiscal mechanisms, which leads to the continuous deepening of the fracture installed in the administration-economy relation.

d) The administration's legitimacy crisis. The worsening of the State's legitimacy crisis reflects to an equal extent on the legitimacy of public administration, the main cause being inadequate management incapable of satisfying the interests of the citizens it serves. The tendency to consolidate legitimacy merely through the conformation to the legal norm, and not by orienting towards results, continues to manifest.

Therefore, the administrative activity emits, further, formalism, excessive obedience towards the political power, often completed by power excess, orientation towards satisfying clientele interests, as well as by a gap between the results obtained and the administration's expectations and values.

III. Sustainable administration model, competitiveness factor also for the future generations of citizens

The diagnosis of the Romanian administrative reality discloses the need to operate a set of measures and actions at the administrative level for the purpose of increasing this system's ability to absorb the changes it is subjected to, in other words, which allow its *modernization*.

Before presenting the set of actions necessary for the modernization of the administration, we consider that the model closest to the Romanian reality must derive from reaching the following *set of objectives*, generically called *Decalogue for modernization* and which constitutes the way for a 21st century administration: *close* to the citizens and in their service; *sustainable*, whose main topic is constituted by the sustainable policies; *electronic*; with an administrative culture which stimulates administrative behaviour *oriented towards the citizens*; center of *excellence* and quality in supplying public services; *responsible*, with a body of professional public servants; situated in a *cooperation* relationship with the other public administrations; integrators of the elements that perfect *organization and management*; promoter of *citizen participation*; *competitive* and high-performance.

In this sense, the *fundamental objectives of the administration's modernization* target the separation of politics from administration, maximum closeness to the citizens, the improvement of the degree of serving the citizens' interests and needs, the increase of efficiency and economy in the process of managing public affairs and, not lastly, the increase of the state authority.

The reordering of the entire administrative structure and life for the purpose of obtaining an administration with increased management ability, more transparent, oriented towards improving the efficacy, efficiency and economy of the administrative act and of the public service, is facilitated through the integration of certain axis which aims:

a) To obtain the *stability and professionalism* of the public servants for the purpose of depoliticizing administration, of eliminating political clienteles and of combating corruption. The creation of a professional group of public servants, stable and neutral from the political viewpoint implies the reconsideration of the entire process of recruitment, selection and promotion of the human resource, both from the perspective of the examination commissions for public servants and from the perspective of the procedures applied. It is recommended the stabilization on the public function by means of using a *hybrid system*, dynamic, of access and promotion, which combines the *career system with the performance-based system* and which allows the offering of a *set of guarantees* to the human resource.

Secondly, the spirit and behaviour of *responsibility* among public servants must be consolidated and promoted, but, to an equal extent so must be the assurance of a favourable institutional environment in this sense.

b) *Rationalization of the administrative activities,* for the purpose of de-bureaucratization of the administration. For the purpose of eliminating the bureaucratic burden, it is necessary that the organizational structures be simplified, restructured, potentiated and activated. Thus, are eliminated the futile administrative tasks, as well as the tasks performed inefficiently or as a result of improper delegation.

A solution consists in the adoption of the Administrative Procedure Code, the place of maximum expression of the harmony between the social and the political values. Another solution consist in the undertaking by the administration, of the *complete implementation* of the citizens' electronic access to the public service, the guaranteeing of this right to the served citizens being achieved by means of its transposing into normative acts.

c) *Consolidation of the territorial collectivities' autonomy*. The achievement of this desiderate, particularly from a functional perspective, in the ideal context of double integration of the global command of the central administrative level and of the local control, imposes the closeness of the administration to the citizen by supplying operational and quality services, less expensive, with value for the collectivity, but especially the efficiency of the framework for decentralizing the competences transferred from the central to the territorial level.

d) *Strengthening of the control on the public administration system.* The assurance of the conformity of the activity of public administration's authorities with the exigencies of the law imposes that whatever form of control exercised over this system, it must be instrumented by making correlations between the activities performed, the organizational structures of the institutes and authorities of this system, as well as with their duties and competence.

e) *Simplification of the legislative framework*. In consonance with the requirements of the *Strategy for a better regulation at the level of the public central administration 2008-2013*[8], the simplification and consolidation of the legislative framework under which public administration performs its activity calls *either for the regulation of new simplification legal instruments, or for the inducing at the level of the initiators of normative acts, of a certain type of behaviour which to concur, even from the project elaboration stage, to the generation of simplifying effects in the system of the active legislation*[9].

[8] Public policy document, whose declared purpose is constituted by the „*improvement of the quality and the simplification of the national regulations at the level of the central public administration, in view of increasing the competitiveness of economy and of creating new jobs*".

[9] Manda, C. C., „Simplification of the national legislation – a prerequisite for the improvement of the legislative regulatory framework in Romania", *Transylvanian Review of Administrative Sciences*, No. 29E/2010, p.93.

IV. Conclusions

Without claiming to have performed an exhaustive approach, we express our hope that, at least in a general and extremely synthetic manner, we were able to outline at least the priority directions of the modernization process of the Romanian administration which to answer the exigencies and social-political, economic and cultural values at the beginning of the 3rd millennium.

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FIDUCIA: FROM *FIDES* TO *TRUST* AND THE NEW ROMANIAN CIVIL CODE REGULATION

Mihnea-Dan RADU[*]

Abstract: *Since the times of Roman law, the possibility to realise patrimony transfers with the purpose that the property would be transmitted to a third person at a later time or restituted to the initial proprietor was known and provisioned. Governed by the Fides, the goddess of loyalty and good faith, these operations were not concentrated in a unitary institution.*

Along the Mingle ages the institution of The Trust was crystallised in the Anglo-Saxon system of law, also based on the idea of trust but also on the theory of divided property, specific to feudalism. In the states that apply the common law, this institution had a prodigious development, getting to know many practical uses. More recently, the institution was also received in the states of Roman-Germanic law, though with some modifications.

In our country the institution called fiducia was provisioned for the first time by the New Civil Code, being inspired especially by the French legislation. Because of some arguable solutions chosen by our lawmaker, it is unclear in what measure this new institution will also know a successful practice.

Keywords: *fides, fiducia, trust, comparative law*

1. Introduction

Amidst the great novelties brought on by Law no. 287/2009 regarding the Civil Code, is the inclusion of the *Fiducia* institution within the Romanian legislation. Of course, even before the entering in effect of the New Civil Code, this legislative novelty roused numerous doctrine debates, concentrated on the acknowledgement of the way that this institution of Anglo-Saxon origin will be integrated within our legal system.

Through this study, we do not aim at entering into details about the factual regulation, as over its 19 articles (art. 773-791), it sometime comprises provisions that are insufficiently clear. We do aim, however, plan an incursion into the roman and Anglo-Saxon law in order to disclose their common essence through a juxtaposition of the old Antique institutions with the more recent *trust*. In the end, we will try offer an answer to the question: Has the Romanian lawmaker succeeded to identify and invigorate the essence of Fiducia through the new provisions, in order to spawn an institution that could practically benefit from successful execution?

2. In Roman Law

Fiducia[1] consists of a property transfer, accompanied by a convention through which he who has received the good, commits oneself to give it back to the giver or to a third person.

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[1] Gaius, I., II, 59-60; IV, 62; Paul, Sent., II, 13, cf. P.F. Girard, „Textes de droit romain", cinquième édition, Paris, 1923; A. Berger, „Encyclopedic Dictionary of Roman Law", The American Philosophical Society, Philadephia, 1958, pp. 471-472;

The transfer was realized either through *mancipatio* or through *in iure cessio*, a simple *traditio* not being enough. The transfer of the property was doubled by the *pactum fiduciae*, through which the debtor's obligations were stipulated. This pact did not however have a juridical effect, only a moral one, basing itself, as its name points out, to *fides* or the good will of the parties. *Fides* was the goddess of good faith, the personified symbol of loyalty in Roman mythology, its emblem being the symbol of two joined hands[2]. The cult of this goddess was celebrated by the early Romans and the fact that the goddess was represented as an old woman with grey hair demonstrates that respecting one's word was a fundamental value, the base of social and political order[3].

It seems that in the *legis* actions procedure, *fiducia* was sanctioned through a *judicis arbitrive postulatio*[4] on the basis of which *actio fiduciae* was created from the formal procedure. This was an infamous procedure, being considered that the fiduciary debtor betrayed the trust of the giver, thusly committing an act similar to a crime.

In the Archaic époque, the domain of appliance of the *fiducia* was limited to that of the transfer of goods. Gaius tells us that the most important forms of the *fiducia* were *fiducia cum creditore* and *fiducia cum amico*[5]. The first one's finality was the constitution of a real guarantee. A debtor transmitted to the creditor the property of a good, following that after the execution of the guaranteed obligation this good would be then returned to him. *Fiducia cum amico* could play either the role of a deposit or of a bailment agreement.

At a later time, at the proposal of the jurisconsults, the *fiducia* agreement received diverse functions, linked both to the juridical situation of the persons and that of the goods. In emancipation or adoption of a son, the successive *mancipatio* to which he was subjected were accompanied by *fiducia* agreements through which he who was mancipated the son obligated himself to release him. Women could resort *sui iuris* to a fiduciary *coemptio* in order to escape the agnates' authority. The owner of a slave could mancipate him to a third person that would obligate himself to release the slave after a certain amount of time (*fiducia manumissionis causa*). Another form of *fiducia* could be observed in inheritance law: the primitive testament called *mancipatio familiae*, through which *de cuius* transmitted to a *familiae emptor* his whole wealth with the request that after his death it should be handed over to those indicated. The *fiducia* could as well serve for a *mortis causa* donation or one with donation by proxy (for example in order to avoid donations among spouses).

Practically, a transfer of power took place, conditioned by its subsequent retransmission, according to the wishes of *tradens*. This way it was possible to create new juridical institutions like adoption or emancipation.

On the other hand, this contract presented grave disadvantages for the creditor. By the transmission of the good's attributes of property, the creditor also lost the attributes of pursuance and preference, leading to the consequence that in the event of the debtor's insolvability, the creditor would have to be satisfied to use the personal action that would

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[2] Daremberg et Saglio, „Dictionnaire des antiquités greques et romaines d'apres les textes et les monuments", Paris, 1873-1908, Tome II, vol. 2, pp.1115-1117; V. Kernbach, „Dicţionar de mitologie generală", Edit. Albatros, Bucureşti, 1995, p.197; A. Ferrari, „Dicţionar de mitologie greacă şi romană", Edit. Polirom, Iaşi, 2003 p. 357

[3] P. Grimal, „Dicţionar de mitologie greacă şi romană", tratranslated by M. Popescu, Edit. Saeculum I. O., Bucureşti, 2001, p. 189

[4] See R. Monier, „Manuel élémentaire de droit romain", t.II, quatriéme édition, Édition Domat Montchréstien, Paris, 1948, p. 122, against this opinion Girard, „Manuel élémentaire de droit romain, huitiéme edition", revue et mis a jour par F.Senn, Paris, 1929, p. 556

[5] Institutiones, II, 60

not grant him great odds in retrieving his claim. On top of this, a series of cumbersome formalities had to be met for the transfer of property, that were accessible only to the Roman citizens. The remedy of these drawbacks was found in the practice. *Tradens* renounced to transfer the property off *accipiens*, granting the former only the possession of the good. By keeping the property, the giver had the reclaiming action at his disposal for recovering the good, even in the case in which it was given to a third person. Also, he had a series of penal actions at his disposal, like *actio furti* or *actio legis aquiliae*, the Law of the XII Tables granting a special doubling action, in the case of the deposit.

An important facility that was given to the creditor was *usureceptio fiduciae*¸ a special form of *usucapio* through which he could become proprietor of the good through a possession of one year's time, without necessarily needing a just title or good faith. This way, if the initial owner managed to regain possession of that good, he could regain his property right this way.

In the 2nd Century B.C., the *praetor* created an infamous action, *in factum*, in favour of the giver, based on the idea that the refusal of restitution of the good was a fact of a delictual nature. Later on, in the Ist Century B.C, *fiducia* became a true imperfect reciprocal contract, sanctioned through civil actions of good faith: *actio fiduciae directa* and *actio fiduciae contraria*[6].

As *mancipatio* and *in iure cessio* gradually faded out of use, a juridical sanction according to existent realities was granted, using *in factum* actions. Thusly, the new good faith real contracts were born: the bailment agreement, the deposit and guarantee that had a similar evolution, presenting many common elements but also individual traits.

Another important application of *fides* was in the inheritance domain. In the archaic époque, the testament was a solemn juridical act that presumed the fulfilling of some very restrictive formalities and for this reason, the Roman citizens sought alternative modalities of transmitting the patrimony for *mortis causa*. To this purpose, *mancipatio* was used, through which the giver transmitted his whole patrimony to a *familiae emptor* to whom it was indicated in which way he should transmit the goods and towards which persons[7]. Of course, this act was perfected in time, reaching form of the oral testament and praetorian one, in which the written form plays an essential role. In the first phase though, the fulfilling of the will of *de cuius* by the *familiae emptor* was just a moral obligation based on *fides*.

Wishing to avoid the constraints of formalism, this time concerning legate-ship, Rome saw the introduction of the *fideicommissum*. The testator asked the fiduciary inheritor to transmit a good to a certain third person called fideicommissary. Such operations were included in the juridical sphere in the time of Octavian Augustus, being initially administratively sanctioned and later using the *extra ordinem* procedure. The hereditary *fideicommisssum* which regarded the whole wealth of *de cuius*[8] was initially realised through fictive sales realised by the stipulation between the fiduciary and the fideicommissary. The inconveniences of this solution were set aside at a later time through praetorian measures and through the senatus-consult Trebellian. Thusly, the transition of a universality towards the person intended by the giver was achieved, through the fideicommissary, even with evading legal prohibitions. The testator could also dispose that

[6] P.F. Girard, *op. cit*., p. 557; E. Cuq, „Manuel des institutions juridiques des romain", ed. II, Paris, 1928, pp. 412-413

[7] M.D. Bocşan, „Testamentul – Evoluția succesiunii testamentare în dreptul roman", Edit. Lumina Lex, Bucureşti, 2000, p.30

[8] Gaius, *Institutiones*, II, 248-251

the fideicommissary title be subsequently transmitted towards beneficiaries chosen by him through the so called fiduciary substitutions.

The *mortis causa* donation also implicated resorting to fiducia. The donor, being threatened by an imminent danger (like a grave disease or a battle that he will have to take part in), transmitted the property of a good to the beneficiary through mancipatio, the latter promising at the same time that if the donor will escape the danger alive he will return the good[9].

3. The Trust in Anglo-Saxon Law

The institution of the trust was developed in Anglo-Saxon Law since the Middle Ages. When a knight went to war (especially during the crusades) he was, rightfully, preoccupied of the fate of his own wealth. Who administrated the patrimony during his absence, in order to assure the revenue necessary to his family's sustenance? What would happen in case he didn't return home from war? In order to be able to go to battle with ease at heart he would leave his wealth in the hands of a trustee, in order for this person to be able to efficiently administer and distribute the revenue generated to the indicated beneficiaries. In the case in which the knight would find his end on the battlefield the patrimony would have to be divided among the indicated persons[10].

The Trust is therefore, an institution through which a person called settler, leaves the property over a patrimonial fund to a trustee, in the interest of a third person beneficiary (*cestui que trust)*. However, the full transfer of property did not take place. In the Anglo-Saxon system there is the distinction between the legal ownership, according to common law and the equitable ownership, in accordance with equity rules. This split property is a juridical fiction specific to the Anglo-Saxon Law. That which is transmitted is thusly the juridical property, while the economical property remains in the constituent's ownership.

In order to understand the motives at the base of this complex construction, we must take in account the vassality relations specific to feudalism. *Dominium eminens* belonged to the state sovereign, the use over the territorial domains being transmitted in a pyramid fashion through the vassality system. A vassal could not freely dispose of the terrains that had possession of, having obligations towards his senior. The right of inheritance belonged to the first born and in the absence of direct descendants, the title over the domain reverted to the senior. The purpose of the specific operations of the Trust were also to evade these restrictive provisions when there was an intention to transmit the wealth to other persons.

Although apparently very different by the Roman Antique provisions, the Anglo-Saxon Trust nevertheless has a series of common elements, especially the *fideicommissum*. The idea of distinct patrimonial funds wasn't unknown to Roman Law, that knew the institution of *peculium*[11].

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[9] R. Monier, „Manuel élémentaire de droit romain", t.I, sixiéme édition, Édition Domat Montchréstien, Paris, 1947, p.531

[10] See M. Iovu, „Fiducia – o instituție juridică milenară, dar modernă prin aplicabilitatea sa și în secolul XXI", Caietele Juridice ale BNR, nr. 1/2012, p. 57; I. Popa, „Contractul de fiducie reglementat de Noul Cod Civil", Revista Română de Drept Privat, nr. 2/2011, p. 217; C. Tripon, „Fiducia, rezultat al interferenței celor două mari sisteme de drept: dreptul civil continental și dreptul anglo-saxon. Conceptul, calsificarea, evoluția și condițiile de validitate ale fiduciei", Revista Română de Drept Privat, nr. 2/2010, p. 179;

[11] See W. Buckland, A.D. McNair, Roman Law *&* Common Law a Comparison in Outline, Cambridge University Press, 2008, pp. 176-179

At a later time, the institution knew an distinct development, especially in countries like England, USA or Canada, reaching a remarkable complexity and some varied forms. Among these, we recall the following[12]:

- The trust in the benefit of the constituent (*trust to manage for settler*) – its purpose is the separation of a patrimonial fund which, sheltering it from the pursuance of creditors, so that it would assure revenues for a certain amount of time; the quality of constituent being in this case the same with that of beneficiary
- Trust for creditors – its purpose is the coverage of the constituent's debts in the order of the falling due
- Family Trust – Its purpose is the administration of the constituent's goods within a certain amount of time, starting with the day of the constituent's death, the benefits being destined to the persons indicated by contract; at the end of the determined period of tie, the residual patrimony is to be distributed to those nominated by the constitutor; is also called testamentary trust and can manifest itself through diverse forms like: discretionary trust, *annuitas* trust, trust in the benefit of the espoused descendant, trust in support of the minor
- Charitable trusts – their purpose is the financing of persons which perform cultural, social, scientific or sportive activities, is also called endowment.
- Honorary Trust for Animals – have the purpose of assuring the necessary resources to sustenance of pets after their owner's death
- Employees Pension Trust – have the purpose of assuring supplementary income for retirees
- Deed of Trust as a Substitute for Mortgage – Limits the possibility that the bank who's interest spawned the guarantee would sell the affected immovable property in the debtor's disadvantage because, in case of lack of return of the credit the one that will sell the good will be the fiduciary, not the bank
- The Massachusetts Trust – initially was purposed to evade the restrictions referring to commercial societies imposed by British authorities in the North American colonies; several constitutors contribute with capital for a common lucrative purpose, forming an entity which is administered by specially appointed persons that have fidelity and diligence obligations in administering the common patrimony (fiduciary obligation); the beneficiary constitutors do not have voting rights, the power of the fiduciary administrators being absolute.

One can distinguish several domains in which the Trust proves its utility:

- The realization of a patrimonial separation to the purpose of affecting different activities with their respective creditors, different lumps of goods, thusly easing the debt management;
- The management of some actives put together by several persons to the purpose of obtaining benefits;
- The assurance of constant revenue in the benefit of some persons as long as they are incapable or elderly or even in the benefit of some animals;
- The guarantee of some of the constituent's debts, in advantageous conditions;
- Realizing direct liberalities.

[12] For further details, see C. Tripon, *op. cit.*, p. 172 şi urm.

As a consequence of the acknowledgement of the irrefutable advantages of the trust, the states with a Roman-Germanic legal system became interested in receiving this institution in their legislations[13]. The process of the globalization of the trust was marked by the Hague Convention of 1985 regarding the law applicable to the trust, being passed into effect in January the 1st 1992[14]. Among the convention's signing states is France, which despite its doctrinal opposition, adopted a special law[15] in order to introduce the Trust in the French civil Code under the concept of fiducia.

Faithful to the francophone cultural tradition, the Romanian lawmaker chose the French model as a source of inspiration in provisioning this institution in our country.

4. The New Romanian Civil Code Regulation of Trust[16]

Article 773 of the New Civil Code defines fiducia as being „the juridical operation through which one or more constituents transfer real, claim, patrimonial rights or guarantees or an ensemble of such rights, present or future, towards one or more fiduciaries that exercise them with a determined purpose, in the use of one or more beneficiaries". This definition corresponds to that of the French Civil Code (art. 2011).

In the conception of the Romanian lawmaker, fiducia can be legal or contractual, the Civil Code only presently provisioning the former.

The parties of the fiducia contract are the constituent and the fiduciary, existing a third interested lawful subject, the beneficiary. As long as the role of the constituent can be played by any physical or juridical person, the role of the fiduciary can be fulfilled only by specialized entities, like lawyers, public notaries, credit institutions[17] or legally established assurance and reassurance societies. Factually, article 776 contains a restrictive enumeration which limits the possibility of other lawful subjects to undertake such fiduciary activities. Probably, the purpose of the lawmaker in the moment of introducing such a limitation was that of preventing the money-laundering activities or fiscal fraud[18].

We believe, among other authors[19], that the invoking of the so called need of social security can be dangerous, because it allows the state to restrain the rights and liberties of its citizens in a discretionary fashion. We consider that the solution for preventing fraud is not the creation of a monopoly of a professional corps but a more careful supervision of the fulfilling of the minimal conditions on the behalf of the fiduciary. We do not understand why, as long as every capable person can set up a commercial society on the basis of a simple declaration of responsibility with a small social capital which does not even come

[13] For an analysis of the causes for trust transfer, see H. Hansmann, U. Mattei, „The Functions of Trust Law: A Comparative Legal and Economic Analysis", New York University Law Review, vol. 73, 1998, pp. 434-479

[14] L. Tuleaşcă, „The concept of trust in romanian law", Romanian Economic and Business Review, vol. 6, nr. 2, p. 151

[15] Loi n° 2007-211 du 19 février 2007 instituant la fiducie, can be consulted at the following adress http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000821047

[16] See R. Constantinovici, in F. Baias, „Noul Cod Civil comentariu pe articole", Edit. C.H. Beck, Bucureşti, 2012, pp. 822-836; B. Florea, „Drept civil. Drepturile reale principale", Edit. Universul Juridic, Bucureşti, 2011, pp. 215-223; M. Uliescu, A. Gherghe , „Drept civil. Drepturile reale principale", Edit. Universul Juridic, Bucureşti, 2011, pp. 154-161; G. Atanasiu, „Fiducia", Revista Română de Drept al Afacerilor, nr. 4/2011

[17] For the problems concerning the alignment of the provisions of banking legislation to the New Civil Code, see B. Ştefănescu, „Instituţia fiduciei reglementată de Codul civil şi consecinţele asupra legislaţiei bancare", Caietele Juridice ale BNR, nr. 1/2012, p. 20

[18] M. Iovu, *op. cit.*, p. 60.

[19] C. Tripon, *op. cit ,* p. 196

close to offer the guarantee of solvability, why it is not sufficient to demonstrate the honour and solvability of that person in order to benefit from the quality of being a fiduciary.

The beneficiary of fiducia can be the constitutor himself, the fiduciary or a third person. We are not referring to a third person related to the rapport of obligations, being in the presence of an exception from the relativity principle of a contract's effects, as in the case of the stipulation for another. As long as it was not accepted by the beneficiary, the fiducia contract can be unilaterally denounced by the constitutor, according to the provisions of art. 789 of the New Civil Code. After the beneficiary's acceptance, the contract cannot be modified or revoked by the parties or unilaterally denounced by the constitutor, unless the beneficiary agrees to this or in the absence of this agreement, with the authorisation of a court of law. Thusly, even though the beneficiary's acceptance is not a condition of validity for the fiducia contract, it serves to strengthen it. Of course, in the situation in which the qualities of constitutor and fiduciary are cumulated in the same person, the person practically has the right to unilaterally denounce the contract at her discretion. In these kind of situations, one must evaluate in what measure can the rights of the constitutor's creditors be affected.

The rights transmitted by the constitutor make up an autonomous patrimonial lump, separate from the other rights and obligations of the fiduciaries' patrimonies. This provision of art. 77 is in accordance with the provisions of art. 31 referring to the patrimonial lumps and the affected patrimonies. The utility is evident because, according to the provisions of art. 786 of the Civil Code, the goods of the fiduciary patrimony can be traced, according to the law, only by the titular holders of claims born in relation to these goods of by those creditors of the constitutor which have a real guarantee over his goods and who's opposability is acquired, according to the law, before the establishment of the fiducia[20]. The right of pursuance can also be exercised by other creditors of the constituent but only on the base of a definitive court decision of admittance of the action through which the contract of fiducia was declared to be undone or has become un-opposable in any way, retroactively. On the other hand, the titular holders of the claims born in relation to the goods from the fiduciary patrimony can only trace those goods, with the exception in which the fiducia contract establishes the obligation of the fiduciary and/or of the constitutor to answer for a part or for all the passive of the fiducia. In this case, the active of the fiduciary patrimony will be pursued and then if it is necessary, the goods of the fiduciary and/or constitutor, in the limit and order of the fiducia contract.

Regarding to the purpose sought after through the fiducia contract, one must underline the fact that, according to the provisions of article 775 of the New Civil Code, if it aims at realising an indirect liberality towards the beneficiary it is stricken with absolute nullity. Practically, the implicit prohibition of the fiducia for *mortis causa* stems from this express interdiction, which would be the equivalent of a testamentary donation[21] but also to other types of fiducia that could be interpreted as pursuing the purpose of indirect liberalities. We do not understand the motive of this interdiction, especially in the conditions in which the fideicommissary substitutions were admitted in the New Civil Code (art. 993-1000). We consider that, in this regard, the lawmaker could have found more concentrated preventive means, in order to avoid the excessive limitation of the licit exercise of some rights.

[20] H. Burian, „Fiducia în lumina Noului Cod civil", Scientia Juris – Revista româno-maghiară de ştiinţe juridice, nr. 1/2011, pp. 30-48

[21] C. Tripon, *op. cit ,* p.169

In these conditions, the applicability of the fiducia in Romanian law will be mostly confined to the management-fiducia and guarantee-fiducia[22]. In this context, we cannot but evoke the antique *fiducia cum amico* and *fiducia cum creditore*.

5. Conclusions

As a consequence of comparing the institutions regulated by the three analysed systems of law, one can observe that firstly, the idea that makes up the foundation is that of trust between the parties involved, trust that was initially the only guarantee of executing the obligations assumed by the fiduciary. Even after the consecration of some juridical sanctions in this regard, the name of the institution continued to reflect this essential idea. Unfortunately, in today's society the inter-human relations have become so altered, that the lawmaker always starts with the premise of the existence of intentions of fraud, taking by consequence measures that, as we have shown, we consider to be exaggerated and of a nature that excessively limits the liberty of citizens.

Another very important element is the possibility offered to the subjects of law to fragment their own patrimony this way, in several patrimony lumps, without the need of creating distinct juridical entities to this purpose. This procedure can have a special utility when one wants a better management of some actives, avoiding their pursuance through the execution of some claims that were not established in relation to that activity.

De lege ferenda, we propose that some better calibrated solutions be found regarding to the prevention and combating of fraud, through which one would not unjustifiably limit the rights of the participants in the civil circuit. Otherwise, the newly established institution will not be able to reach its full potential.

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[22] About several aspects related to the bailment-trust, see I.P. Mangatchev, „Fiducia Cum Creditore Contracta in EU Law", Social Science Research Network

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FEATURES OF THE DISCIPLINARY LIABILITY OF TEACHERS

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Abstract: *Teachers have some peculiarities due to disciplinary liabilities derogating from the common law - The Labor Code - establishes, in particular, the specific activities of the concerned persons.*
Keywords: *disciplinary liability, teachers' staff, Law no. 1/2011 of the National Education*

Title IV of the National Education Law no.1/2011[1] (hereinafter referred to law – our note) governs the status of teachers, which is divided into two chapters „The status of teachers in pre-university education" (art. 232-284) and „The status of the teachers and research staff in university education" (art. 285-327), with no common provisions applicable to both categories of teachers [2]. As the doctrine defined the concept of „status" as being „all legal norms" which „includes the State wish to regulate, authoritatively, a certain category of social relations or legal institutions"[3] and the question arises whether we are dealing with one state or two.

Independent by the tradition regulations, we can see that there are not common rules in Title IV of the National Education Law, applicable to both categories of teachers but that they are found in the content of the law disparately, such as law principles governed from the very beginning of the law. We believe that there are two separate statutes[4] but we mention that there is a point of view in the doctrine that shares the idea that it would be a single status[5].

I. Disciplinary peculiarities of higher education teachers

By the misconduct of the teachers and...of the auxiliary staff, of the manager, de îndrumare şi de control din învăţământul superior of guidance and control from the higher education, it is understood, related to art. 312 paragraph 1 from the law, „breaking the duties assigned under the individual employment contract and for breaking the conduct rules[6] are detrimental to the interests of education and unit / institution prestige".

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[1] Published in Official Gazette of Romania, part I, no.18 from 10th of January 2011.
[2] We refer, in this study only to teachers but not to students and research staff.
[3] Valentin Prisăcaru, *Public officials*, All Beck Publishing House, Bucharest, 2005, page 59.
[4] Both Law no. 6/1969 regarding the Status of teachers in R.S.R. (published in Official Bulletin no. 33 from 14th of March 1969, expressly repealed by art. 147 from Law no. 128/1997) and Law no. 128/1997 related to the Status of teachers (published in Official Gazette of Romania, Part I, no. 158 from 16th of July 1997, expressly repealed by art. 361 from Law no. 1/2011) even structurally lead to the idea of a unique status.
[5] Ion Traian Ştefănescu, „Possible controversy about the interpretation of rules of Law no.1/2011 of national education nr.1/2011", in *Romanian journal of law labor* no. 1/2011, page 15-16.
[6] Art.312 paragraph 1 thesis II from Law no.1/2011: „Rules of behavior are established in the University Charter, without prejudice to the right of opinion, freedom of speech and academic freedom."

The literature has shown that sanctions of „the conduct rules" falls within the range of labor relations [7], this being a reality for those categories of staff that the law imposes an intact reputation [8], as the teachers are, even if violations of these rules has occurred outside the assigned unit[9]. They are incompatible and harm the quality of teacher education interest and prestige of the unit/ institution, for example, the public disregard of the strengths of education and committing immoral or indecent acts[10].

Disciplinary sanctions that may apply to the teacher's staff are expressly and exhaustively provided by paragraph 2 of art. 312 from the law:

a) written warning;
b) reduction of base salary, combined, when appropriate, with the management, guidance and control compensation;
c) for a period of time, the right of not-entry to a competition for a teaching or a higher management position, of guidance and control as a member of the doctoral, master or license committee;
d) dismissal from the education management function;
e) disciplinay deposition of the employment contract[11].

On the disciplinary panel we notice that there is no disciplinary sanction of demotion, option that is explained by the fact that it is difficult for a professor to be relegated[12].

Another feature is that in the common law we have two sanctions for teachers, letter b, art. 312 from the law is formulated as a unique penalty but, in fact, there are two.

Generally, disciplinary sanctions consisting in reducing wages can be taken only on fixed term, none of these shall be permanent[13] and within the limits regarding the maximum duration of the sanction and the decrease percentage[14].

A lack of this regulation expressly specify the maximum penalties provided by article 312 paragraph 2 letter b and c from the law. Although the Labor Code, in art. 248 paragraph 2, allows by professional status, to establish another sanctioning regime, doctrine [15] and practice [16] have ruled that no disciplinary action which translates in reducing the wages can be ordered for an unspecified period of time because such a solution for an

[7] Ion Traian Ştefănescu, Şerban Beligrădeanu, „Overview and critical comments on the new Labor Code", in *The Law* no.4/2003, page 67-68.
[8] Ion Popa, „Reputation – condition of acquiring and exercising the magistrate position", in *Romanian journal of law labor* no.8/2009, page 9-53.
[9] Ion Traian Ştefănescu, *Theoretically and practically treated law labor,* Edition II, revised and added, Universul Juridic Publishing House, Bucharest, 2012, page 732.
[10] Ion Traian Ştefănescu, *Theoretically and practically treated labor law*, Universul Juridic Publishing House, Bucharest, 2010, page 713, note 4.
[11] Paragraph d and e of the art.312 from the law those situations where the leadership function is different than the teaching quality.
[12] It is not impossible, as it may, during the qualifier, only the person concerned to carry out certain activities such as seminars and laboratory.
[13] Ion Traian Ştefănescu, *in the work cited,* 2012, page 720.
[14] It is illegal the sanction consisting of basic salary reduction of 25% per month. The Court of Arad, civil sentence no. 613/2003, cited in Alexandru Ţiclea*, Treaty of law labor,* Universul Juridic Publishing House, Bucharest, 2007, page 649.
[15] Ion Traian Ştefănescu, *Theoretically and practically treated law labor,* 2012, page 742; Alexandru Ţiclea, *in the work cited*, page 766.
[16] The Supreme Court, decision no.17/1978, in *Collection of decisions on year* 1978, page 196; Court of Appeal of Ploieşti, decision no. 2006/1999; The Court of Arad, the civil section, decision no. 40/2003, in *Romanian journal of law labor* no.3/2003, page 102-104; The Court of Neamț, decision no.46/1981, in *Romanian journal of law* no.10/1981, page 68 .

indefinite period would be a unilateral amendment of the employment relationship. Given that the art. 316 from law says that, if the disciplinary sanctioned person committed disciplinary offenses during the year of sanction, the sanction is risen and removed, we consider that these sanctions may be applied for more than one year. Art. 278 paragraph 2 from the of the Labor Code provides that „ the common law applied to those working on legally unfounded on an individual contract of employment, provided that local regulations are not complete and their application is not inconsistent with specific features of the work in question". Since the Labor Code is the law, if the special law does not contain express provisions is applicable. It follows that the present application is art.248 of the Labor Code.

To avoid any controversy concerning the interpretation, we consider it necessary to modify *art. 312 paragraph 2 letter b and c of the Law for the purposes of specifying the maximum applied for these sanctions, but no more than a year.*

The warning is a written communication (notice) by which the teacher concerned is warn that he committed a disciplinary offense and he is warned that if he committed new offenses and more serious penalties will apply, his employment contract may have a disciplinary deposition[17]. Since the warning applies in writing, a verbal reprimand to the teacher is not a disciplinary sanction[18].

Reducing the basic salary is not applicable for teachers with management responsibilities, guidance and control of some serious misconduct or for repeated systematic lighter deviations, of those that, if committed for the first time, be punished by warning writing.

Reducing the basic salary combined with compensation of management, guidance and control is a penalty for teachers with function of management, guidance and control exclusively and those occupying similar positions[19].

Suspension for a period of time, the right of entry to a competition for teaching positions or a higher management positions, guidance and control, as a member of committees doctoral or master's degree, is a penalty to the effects on career development and the sanctioned economic effects.

Dismissal from the education management entails providing the appropriate salary according to the position held from a previous contest. It is applied of course only to teachers with positions of leadership, guidance and control[20].

Disciplinary deposition of individual employment contract is the most severe disciplinary action, which applies to the teacher committing a serious or repeated violation of the disciplinary rules set by the individual employment contract, rules of conduct established in the university Charter.

Applicable sanction will be determined on an individual basis, taking into account the criteria referred to in art.250 of the Labor Code, criteria aimed to ensure a better implementation of preventive and educational role of disciplinary liability. Accordingly, the sanctions will be applied gradually, depending on the seriousness of the offense committed

[17] Ion Traian Ştefănescu, *in the work cited*, 2012, page 739; Alexandru Țiclea, *in the work cited*, page 846.
[18] Ion Traian Ştefănescu, *in the work cited,* 2012, page 739.
[19] Respectively rectors, vice-chancellors, general administration, deans, vice-deans, department heads, as listed exhaustively in paragraph 2 of article 207 of the law, and those occupying similar functions (such as research Council director for doctoral studies - paragraph 3 of article 207 of the law), except the general administrative director who is not a university professor or even as a teacher does not teach activities in higher education institution which holds this management position.
[20] Unlike the Labor Code, that the demotion can not be ordered or maintained in effect for a period exceeding 60 days or an unspecified period, this sanction enables the re-appointed.

and the degree of fault of the teacher, the fault is crucial in determining the disciplinary sanction[21].

The specific disciplinary liability for breaking the academic ethics and for good conduct in research.

The rules governing the rules of academic ethics are established in the code of ethics and professional conduct. According to art.306 of the Law, each university operates with the university ethics committee, whose structure and composition is proposed by the Board of Directors, approved by the University Senate and approved by the rector and has the following duties:

a) analyze and resolve violations of the academic ethics, based on complaints or on their own initiative, under the Code of university Ethics;
b) realize an annual report on the observance of academic ethics and the ethics of research that are showed to the rector, University Senate and it is a public document;
c) help develop the Code of university Ethics, which is proposed to the university senate for adoption and inclusion in the University Charter;
d) duties established by law no.206/2004, with subsequent amendments;
e) other duties under this law or established under the university Charter, by law.

The commission members are people with professional prestige and moral authority but may not be members of the Commission of academic ethics any of the persons occupying the following positions: president, vice-rector, dean, vice-dean, managing director, head of department or a research and development, design , micro-production unit.

The decisions of academic ethics, according to art.307 of the Law, approved by the university's legal counsel, legal responsibility for decisions and activities of the Commission of university ethics belonging to the university.

Reset procedure on research misconduct by members of the academic community is based on the self-notification of the Commission or through notifications from the university or outside the university, considering confidential the identity of the notification author (art.308 of the Law). It is possible that the Council shall provide the person's innocence and that wish to address the court to grant damages due to injury. In conclusion, this rule violates the principle of access to justice enshrined in Article 21 of the Constitution.

Teacher research misconduct procedures are established by the University Code of Ethics (art. 309 of the Law) and must comply with the disciplinary notice.

Commission, according to art. 309 second sentence of the Law, meets the author's notification within 30 days of receipt of notification and provides him with the outcome of the proceedings, upon their completion.

Breaking of academic ethics and deviations from good conduct in scientific research.

We notice that the art.318 of the law takes notice that the same sanctions under paragraph 2 of art. 312 of the Law. For this reason, it is necessary the recast of the art.318 of the Law, for the respect of legislative technique, in the sense that: „For academic ethics violations or deviations from good conduct in the scientific research, the penalties provided by article 312 paragraph 2 of this law can be applied to teacher's and research staff and auxiliary staff of the university ethics committee".

[21] The Court of Appeal of Bucharest, section for labor disputes, civil decision no. 310/2003, in *Romanian journal of law labor* no.3/2003, page 101-102; Alexandru Țiclea, *in the work cited*, page 863.

Penalties may be applied by the university ethics committee ... -doctoral students for academic ethics violations, according to art.319 of Law, are the following:

a) written warning;

b) expulsion;

c) other penalties provided by the Code of university Ethics.

In the case of deviations from the Code of ethics and professional ethics, academic ethics committee determines *one or more of the penalties provided for in art. 318 or art. 319 (art.320 of the Law).* This norm breaks down the principle *non bis in idem*[22], enshrined in the work legislation of the Labor Code 249, paragraph 2. Moreover, in any form of liability, for a single offense we can not speak of two or more sanctions of the same kind [23]. And, even if in practice it would be possible the cumulating some sanctions (such as dismissal from the management of education and suspension for a period of time, the right of entry to a competition for teaching or management positions, guidance and control, as a member of the doctoral committee, the master or license) the cumulative application would represent a disregard of generally accepted principles of individualization of their disciplinary and gradualness.

The penalties set by the university Board of Ethics, according to art. 322 of the Law, are implemented by the Dean or Rector, as appropriate, within 30 days of determining penalties.

II. Disciplinary particularities of school education staff

Disciplinary violations for which teacher's staff (...) as well as the leadership, guidance and control in the pre-universitary education are met in art. 280 paragraph 1 defined as violations of law, the guilt *of their duties under the contract of individual work and for breaking the conduct that harms the interest of education and prestige of the institution.*

The disciplinary sanctions that may apply to the teaching, management, guidance and control staff from pre-school education, compared with the seriousness of the deviation, are, according to art.280 paragraph 2 of the Law:

a) written observation;

b) warning;

c) reduction of base salary, combined, when appropriate, with the management, guidance and control compensation up to 15%, for a period of 1-6 months;

d) for a period up to three years, of the right of entry to a competition for teaching positions or obtain higher education degrees or a function of leadership, guidance and control;

e) dismissal from the function of management, guidance and control of education;

f) disciplinary termination of individual employment contract.

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[22] Moreover, in the decision of the E.D.O. Board from 5 May 1966 because of Gutmann c. Germany, it is stated that the rule „non bis în idem" is applied to EU law, prohibiting the combination of two penalties of the same nature. http://eur-lex.europa.eu/ro/treaties/dat/32007X1214/htm/C2007303RO.01001701.htm

[23] Mircea Costin, *The law liability of R.S.R.,* Dacia Publishing House, Cluj, 1974, page 100; Mona-Lisa Belu Magdo, „The disciplinary action in the general system of labor law", *Romanian journal of law labor* no.1/2005, page 60.

We note that, in relation to other regulations [24], the order of the first two penalties is different at least in that, if both are set, the second one is written. We believe that this is an omission of the legislature, following two other variants in which the law could be amended for a clear text:

- *a) observation;*
  b) written warning
- *a) written observation;*
  b) written warning;
- *a)warning;*
  b) written observation.

Initiation of disciplinary proceedings occurs as a result of a complaint, about to commit a disciplinary offense which may be made in writing by any person registered at the registry unit / educational institution, according to art.280 paragraph 3 of the Law.

Following the notification, it is constituted a disciplinary committee of discipline (art.280 paragraph 4 of the Law). Its composition is as follows:

a) for the teaching staff, committee consisting of 3-5 members, of which one is the trade union of which the person under discussion or a representative of employees and others teaching position at least equal to the one who committed the offense;
b) for management of school education, committee consisting of 3-5 members including a representative of employees and others teaching position at least equal to the one who committed the offense of which an inspector from the County School Inspectorate of Bucharest;
c) and for guidance staff of the Ministry of Education, Youth and Sports Commission consisting of 3-5 members, of which one is the trade union of which the person under discussion or a representative of employees and others teaching position at least equal to the one who committed the offense;
d) for management of school inspectorates / of Bucharest, committee consisting of 3-5 members including a representative of employees and others teaching position at least equal to the one who committed the offense.

According to art.280 paragraph 5 of the Law, the appointment power belongs to the disciplinary research committee:

a) board of school education, for its teachers and management staff ;
b) Minister of Education, Youth and Sports, for guidance and control functions of the Ministry of Education, Youth and Sports, as well as for management of Inspectorates / of Bucharest.

[24] In the case of the teachers in higher education, there is no „observation" sanction, the easiest sanction being a written warning penalty (article 312 paragraph 2 letter a, of law). Similarly, for employees, the Labor Code provides, in art. 248 paragraph 1 letter a, as the first sanction the written warning also.
Disciplinary sanctions for civil officers are provided by Article 77 paragraph 3 of the Law no.188/1999, the easiest being the written reprimand.
For the police officers, according to article 58 of Law no. 360/2002, the written reprimand can be applied for irregularities of gravity low, and disciplinary warning not.
There are disciplinary sanctions applicable to auditors and accountants, according to article 17 paragraph 1 of the Government Ordinance no. 65/1994 (republished in the Official Gazette, Part I, no.13, 8 of January, 2008, subsequently amended and supplemented), related to misconduct against gravity, there are:
a) reprimand;
b) written warning;

Disciplinary research purposes, as provided by paragraph 6 of art.280 of the Law, establish the facts and their consequences, circumstances in which they were committed, whether or not guilt, and any other. Making hearing his defense of the investigation and verification are required, in case of breaking of this obligation, making the application of Article 251 of the Labor Code.

According to art.280 paragraph 6 thesis III fron the Law, „the refusal of the investigated person to appear in court, although he has been notified in writing at least 48 hours before and to give written statements shall be recorded in minutes and does not prevent completion of research".

We take into consideration the unjustified refusal of the disciplinary investigated person, otherwise it is considered there were violated his rights of defense. In this respect article 251 of Labor Code refers to „failure to call ... with no objective reason". From these reasons, we *propose* the change of thesis III of paragraph 6 from art.280 of the law as „Unjustified refusal of the investigation to appear in court, ...and to give written declarations…".

In the period of minimum 48 hours it should be seen by reference to the manner in which the actual notice is realized. Thus, it should be calculated from when the disciplinary investigated person signed the register of unit / educational institution or from the receipt of correspondence. As the moment of the receipt does not coincide with the mail receipt when informing its content, we consider it necessary that this be done by registered letter with acknowledgment of receipt. We propose, *by ferenda law*, as a sintagme „although he was acknowledged in writteh with a minimum of 48 hours before" to be eliminated from the text of the law and in its turn, to be introduced: „*The notification of the disciplinary investigated person is at least 48 hours before the hearing, either directly through the registry structure of the unit / educational institution or, if it is not possible, by registered letter with acknowledgment of receipt".*

To achieve its right of defense, the sought teacher is entitled to know all the research instruments and produce their evidence in defense (art.280 paragraph 6 thesis IV of the Law).

Paragraph 7 art.280 fron the law provides: „Deed research and communicating the decision is made later than 30 days after its finding, recorded in the general registry book of inspections or pre-university / institution. *Innocent person is notified in writing to the absence of facts it was investigated for."*

The formulation „*Innocent person is notified in writing to the absence of facts it was investigated for*" from thesis II paragraph 7 art.280 from the law seems irrational. First, if a person is not guilty of an offense, does not mean that the act was not committed by another person. Secondly, an act which was investigated was committed, can not be searched absent. Third, the act may have been committed, but not in the nature of gravity character of a disciplinary deviation. We propose, *by ferenda law*, the modification of the rule in the sense that: „*The decision will be communicated in written to the disciplinary investigated person*".

Art.280 from the law disposes that: „The penalty is determined based on the report of the research, by the authority which appointed the committee and notify the person in question, by written decision, as appropriate, by the school director, inspector general or the minister of education, research, youth and sports".

By the analysis of art.281, 282 and 280 paragraph 5 from the law the following results:

a) for teachers of pre-schools,
   - the *proposal for sanction* is made by the Director or at least 2/3 of the total number of board members and
   - the sanction shall be settled (approved), on the research basis of the report, *by the Board of Directors*
   - the sanction is *implemented and communicated* by the decision of pre-school director.

b) for the management staff of pre-school institution ,
   - *proposal* for sanction is made by the board of pre-university institution
   - the penalty is determined based on the report of the research, by the same Board of Directors
   - the sanction decision shall be communicated by the General Inspector.

c) for the management staff of school inspectors and teacher houses,
   - *proposal* of sanction is made by the *Minister* of Education, Youth and Sports
   - the sanction *is established*, the basis of the research report, by the *same minister*
   - the sanction *is comunicated* by the order.

d) for the staff guidance and control of the Ministry of Education, Youth and Sports,
   - *the proposal* for sanction is made, where appropriate, by the Minister of Education, Youth and Sports, respectively by the Secretary of State or by the hierarchical superior of the person concerned
   - the sanction is established on the basis of the research report, by the *same minister*
   - the sanction is comunicated by the order.

Thus, in some cases, the proposal of penalties and sanctions are the responsibility of the same persons or governing bodies. We believe that to eliminate this inconsistency, the proposed sanction shall be made by the Board, in all cases, being necessary *the modification*, in this sense of art. 281 of the Law.

Dreptul de a contesta decizia se sancționare disciplinară se realizează, în baza prevederilor alin.8 al art.280 din lege astfel The right to appeal the disciplinary decision is made under the provisions of art.280 paragraph 8 of the law this way:

a) for sanctioned persons employed in schools within 15 days from the notification, at the College of discipline of the school inspectorate;
b) for the management, guidance and control staff of school inspectorates and the Ministry of Education, Youth and Sports, within 15 days from notification, at the Central Disciplinary Board of the Ministry of Education, Youth and Sports.

After completing the administrative phase, the sanctioned person might address to the courts, being responsible, under civil law, the court.

We note that the exposure way of analyzed norms can lead to different interpretations and therefore propose that the provisions of art.280 paragraph 7-10 of art. 280 becomes paragraph 5-8 of art. 281 the Law.

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SALE WITH REPURCHASE OPTION IN THE LIGHT OF THE NEW CIVIL CODE

Mihaela Miruna TUDORAŞCU[*]

Abstract: *The sales with repurchase option were forbidden, because in the most situations they hidden the loans with usurious interest (which were real guaranteed with the good itself), the lender requiring in the sale contract, the stipulation according to, as a price, a disproportionately large amount to the sum borrowed, the difference representing the interest. Legislature demonstrates by the New Civil Code preoccupation for this institution, in art. 1758-1762, under the name of Sale with repurchase option. The sale with repurchase option has roman origins, we have it also in Calimach Code (art. 1439 and the following), after that we find in Civil Code from 1864, being really defined in the New Civil Code.*

Keywords: *sale; repurchase option; nullity; terminate condition*

Sale with repurchase option (pact, clause) is a variety of sale through which the salesman reserves the right to repurchase the good or the transmitted right to the buyer, paying back to the buyer the price, the costs and sometime the increased value (art. 1758-1762 NCC[1]).[2]

This kind of sale in the old Civil Code from 1864 (art. 1371-1387) was null and void (art. 4 from The Law against usury from 1931), even if the repurchase pact was settled through another act, but which, as the parts wish, was integrated in contract.[3] The prohibition regarding the sale with repurchase option was not about the acts of retrocession by which the buyer of a good, through a separate and ulterior of the initially sale contract, used to sell to the ex-salesman.

The repurchase option sales were forbidden because in the most of the cases they hidden loans with usurious interests (real guaranteed with the good itself), the lender requiring in the sale contract, the stipulation according to, as a price, a disproportionately large amount to the sum borrowed, the difference representing the interest. More than that, if the borrower failed to pay in time the agreed amount as contract price, he lost definitively the good for a sum which usually was lower than the real value. But, because the contract was hit by nullity, the borrower regains the good and repays the proved amount that has been borrowed, with lawful interest.[4]

In doctrine we find that the sale affected by a terminate condition is null and void only if represents a sale with repurchase option. If the repurchase option is missing, the

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[1] NCC – New Civil Code.

[2] Gabriel Boroi, Liviu Stănciulescu, *Civil Law Institutions*, Hamangiu Publishing House, Bucharest 2012, p. 397.

[3] TS, Civil Collection, Decision No. 964/1955, pp. 61-63. To analyse of judge practice, very reach in repurchase pact sale material (simulated often as a temporary sale) , to see M. Niculescu, „Considerations over the imobiliar guarranted modalities of usury lendings", *Studia Universitatis Babes-Bolyai , Jurisprudentia*, No. 1,Cluj-Napoca, 2000, pp. 84-96.

[4] Francisc Deak, *Civil Law Treaty, Special Contracts, Vol. I*, Universul Juridic Publishing House, Bucharest 2006, p. 138.

terminate condition (like the suspensive one) can be included in the contract, according to the general rules.[5]

The repurchase pact is an express terminate condition, potentate from the seller, operating retroactively against the buyer (and to his successors) but also against the third-party purchasers.[6]

Therefore, retaining its legal nature as a contract of sale, but affected by the legal ways (in light of the new civil code as variety of sales), in defining the sale with repurchase option, we say that this is a conditional sale under resolutory express condition which is a faculty for to regain the sold thing, returning the price and expenses incurred by the buyer, in a certain period, the retaking operating retroactively against both: buyer and rights of third-party purchasers of the sold good, only fruits redemption charges not being subject to restitution.[7]

There is why the legislature demonstrates by the New Civil Code preoccupation for this institution, and this fact we find at art. 1758-1762, under the name of *The Sale with repurchase option.* Art. 1758 NCC says: „(1) *The sale with repurchase option is a sale affected by a resolutory condition by which the salesman reserves the right to re-buy the good or the transmitted right to the buyer. (2) The repurchase option can not be stipulated for a period longer than 5 years. If there was established a longer period, this will be reduced at 5 years. „*

The conditions for this repurchase option are clear for this point, like the definition for this juridical institution, there is no space now for other interpretations.

The characteristic of this kind o sale comes from the fact that it is affected by a resolutory condition, by which the salesman can re-buy the good or the transmitted right to the buyer, in some sort of period, no longer than 5 years.[8] In the situation that the parties are settling a longer period, by art. 1758, al. 2 NCC, this term will be reduced to 5 years.

So, the fate of the contract is different:

If the salesman exercised his repurchase option, he has to return to buyer the price that he received and the costs for concluding the sale, but also the costs for picking up and transporting the good, necessary costs, and also the utile costs (the latest, only in the limit of value growth).[9]

If the salesman has not exercised the repurchase option, the resolutory condition which affected the sale is considered not to be fulfilled, and the buyer right, got by the sale contract, becomes consolidated.[10]

Under article 1762 NCC „*if the difference between the redemption price and the price paid for sale which exceeds the maximum established by law for interests, the redemption price will be reduced to the price paid for sale".* According to art. 1760, al. 1 of the New Civil Code, the seller is bound to respect the consent locations by the under resolutory condition owner, but not for more than 3 years after the option is exercised.

If we are talking to art. 1761 NCC, in the situation of the sale with repurchase option which has as an object a part of a good, the partition has to be asked also regarding the

[5] Example: the buyer may reserve the right to return the bought thing, according the terms and conditions of contract, seller being the owner, until to refund, supporting risk of fortuitous destruction as owner under the terminate condition.
[6] M. Cantacuzino, *Elements of civil law*, Cartea Romaneasca Publishing House, Bucharest 1921, p. 633.
[7] Fr. Deak, St. Carpenaru, *Civil and Commercial Contracts,* Lumina Lex Publishing House, Bucharest, 1993, p. 76.
[8] Florin Motiu, *Special Contracts in the New Civil Code,* Second Edition, Universul Juridic Publishing House, Bucharest, 2011, p. 98.
[9] Gabriel Boroi, Liviu Stănciulescu, *op. cit.,* p. 398.
[10] *Ibidem.*

salesman if he did not exercised yet the option, the salesman who din not exercised yet this option in the partition procedure collapsing from the option right, even in the situation that the good is given partially or integrally to the buyer.

In jurisprudence this institution is used as a warrantee instrument for money loans between individuals.

The institution evolution in Romanian law. The sale with repurchase option has roman origins, we find it also in Calimach Code (art. 1439 and the following), after that in the Civil Code from 1864, like we said before.

The sale with repurchase option opened the road for non-legal acts, to the specula processes, being in the most of case the way to disguise some usury loans[11]. Later, the pact was forbidden by the Law No. 61/1931 (The Law against usury), which repealed the rules from art. 1371-1387 (The Old Civil Code), being in this situation an absolute and irrefragable presumption of non-legality of the pact.

In jurisprudence the reality was another one[12]. In short way, DL[13] 1700/1938 for establishing the interest and avoiding the usury, repealed the Law against usury from 1931, taking ban pact with repurchase. The Decree 311/1954 for establishing of legal interest repealed DL 1700/1938. So, even was not settled in the Old Civil Code, the repurchase option was not forbidden anymore, and it used to apply the common law.

What we can observe in our days, it is the fact that the New Civil Code is settling the rules for this institution.

The civil decision no. 3136/R/2000 of the Appeal Court from Bucharest[14] demonstrates that the institution of repurchase option was reborn; producing a lot of discussions and proving that in the real life the things are different. This decision modified the optic of perception over the sale with repurchase pact (option), which is also settled by many other civil codes, like: French Civil Code, Swiss Civil Code, Obligation Code-Quebec Civil Code (art. 1750)[15].

The utility and inconveniences of institution. The disguise of some usury practices by this institution, was feeding the idea of necessity to forbid the repurchase pact. Yet, the reality said that this institution is a very important one and very useful. In traditional way, the sale with repurchase option was used as a credit instrument, but now we find it as a way to economical titles temporary assignment. Ownership transmitted to the creditor buyer is convenient[16] for this, and the loans are submitted in the seller account – debtor under the price of the sale. The creditor buyer has no modality to pressure the seller to give back the founds by exercising the repurchasing, the seller keeping the hope to gain back the good, if the financial situation will be improved.[17]

In our days, this kind of sale is very actual, we find it extremely frequently in practice.

The main purpose for the titles seller is to obtain the funds by the temporary sale of the titles to a financial establishment.

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[11] Ioana Romana Munteanu, „The sale with repurchase option", *Pandectele Romane Review,* No, 1 Bucharest, 2004, p. 242.

[12] A. Nicolae, N. Crăciun, „Considerations regarding the actual valability of the sale contract with repurchase pact", *Dreptul* Review, No. 3, Bucharest, 2001, pp. 20-21.

[13] *Decree Law.*

[14] Section 4, Civil, *Dreptul Review*, No. 12, Bucharest, 2000, pp. 132-133.

[15] „*La vente faite avec faculté de rachat, aussi appelée vente à réméré, est une vente sous condition résolutoire par laquelle le vendeur transfère la propriété d'un bien à l'acheteur en se réservant la faculté de le racheter*".

[16] Cl. Witz, *Jur. C. Civ,* art. 1659 a 1673, No. 1, *cite by Ioana* Romana Munteanu.

[17] *Ioana* Romana Munteanu, *op. cit.,* p. 245.

Validity conditions of the repurchase option. Regarding of the form conditions, the sale with repurchase option has the same conditions as the classical sale, so it is a consensual contract, exception making the situations in which the law provide the solemn form *ad validitatem.* Regarding the background conditions, we have also the same as in classical contract of sale.

Even if we have the general rules, we have to make some opinions regarding to the object of the repurchase option and the price.

Maybe presumptuous[18] we consider the following: talking the sale contract, the ownership right is transferred for a good for a sum named price. In this situation, the object of the contract is that good. Talking about the sale with repurchase option the effect is the resolution of the contract, not the reborn of the property right for the seller, the good coming back to his property. For that, the object of the pact is not the good itself, but even the sale contract, which will be retroactive disbanded after exercising the redemption right.

Talking about the price of the sale with repurchase option, we have to say that the disbanding of the contract supposes to return the price with afferent costs to avoid non correct richness. Usually, the returned price is bigger than the price paid for the initial transaction.

A special problem which can create dissentions between French doctrinaires, it is the question if the potestative right *is not some kind of law abuse*?

Even if the convention belongs to a contractual part, the risk does not exist – the idea in fact for the potestative right.

We find ourselves in the presence of a discretionary right which can not be controlled in any way without interfere in his essence[19].

Regarding *exercise term* of the sale with repurchase option, it can be established in express or implicit mode, resulting from the parts will. In the situation that the term is not settled, we are talking about a reasonable term, on which the legal instance will decide.

Paying the price: repurchase option is a potestative right, as we already said. Therefore, in the moment that the repurchase option is exercised, the sale will be automatically cancelled and the good will come back in the seller property, without that these effects to be conditioned by the simultaneous pay of the repurchase price. The seller becomes debtor of the price and other costs, and the buyer has a retention right over the good until he gets the whole claim[20].

Talking about the actuality to clarify the institution, French doctrinaire opinions are proper.

Missing of consent is in second spot, now we have [21]new criteria with new coordinates: arbitrary – contractual unbalance – unjust advantage.

The sale with repurchase option keeps the role also in actual conditions.

When we talk about credit we refer to a legal interest loan, loan without interest, which is a consuming loan – *mutuum,* or usury loan, a form of non-legal credit, case when the interest is bigger than a legal interest.

In French doctrine, there was a study regarding the sale with repurchase pact as a credit way, of the sales with value title, economical obligations etc.[22]

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[18] *Ibidem,* p. 246.

[19] D. Chirica, „Unilateral cancellation of reciprocal obligations promise of sale under a forfeiture clause or resolutory clauses", *Dreptul Review,* No. 12, Bucharest, 1998, p. 32.

[20] Ioana Romana Munteanu, *op. cit.,* p. 253.

[21] *Idem,* p. 249.

[22] A. Perrot, „La vente a remere de valeurs mobilieres", *RTD com,* no. 46, 1993.

The sale with repurchase option is a commutative contract, the obligations of the parts being well known from the very first of beginning. The repurchase option inverses only the initial benefits by cancelling the contract.

Over the time, the repurchase option made place for some discussions. Some authors considered that the seller has only a claim right over the sold good, and others mentioned that the seller has only a real right over that good.

"*You can not simultaneously make an asset over a good and in the same time dispose of the good with all property attributes.*[23]" The seller in this situation is a simple creditor of the right to ask for repurchase the good, the seller can not sell twice that good, but he can give the repurchase right, as a claim right.

Another opinion is that the right of the seller is equal as an owner right under suspensive condition. The seller conserves and transfers the property to a buyer, but he is not loosing definitively any right over the good, which allows to the seller to exercise the repurchase action, even against a secondary seller.

The repurchase option can be exercised only by the buyer, if it is stipulated this thing, or if this clause is missing, even by other interested persons.

The New Civil Code, to art. 1760 says: „(1)*The effects of the sale with repurchase option are established by the dispositions regarding the resolutory condition, which is applied the same. Above all this, the seller is bound of settled locations by the buyer before exercising the option, if they were under the publicity formalities, but not more than 3 years beginning with the moment of exercising.*

(2) The seller who intends to exercise the repurchase option has to notify the buyer, like any other sub acquirer for who the option right is opposed and by who wish to exercise this right.

(3) In one month from the notification, the seller has to pay the sums mentioned to art. 1759, al. 1, to the buyer, or to the third part sub acquirer, under the lapse of the right to exercise the repurchase option."

The prove of repurchase option. The repurchase option is a part of the sale contract.[24] This thing is essential, because the written form of the contract is a way of proving in this manner.

In the situation that the law is requiring a solemn form, any non-constant will agreement in required form has no legal efficacy. For this situation, also the repurchase option is integrated in the authentically act.

The issue of proving presents importance in practical way, because the repurchase option was forbidden for a long time in our legislation, so the contractual parts did not inserted the pact in the frame of the sale contract.

The prove can be realized only by an act which contains the option (pact).

Comparing with similar institutions.

Comparing with the forfeiture clause sale. The contractual parts can stipulate in the sale contract a forfeiture clause by which confers to one of them the right of unilateral cancellation of the conclude sale in some term, for a price – forfeiture, sum that will be paid to the co-part of the contract.[25] The Professor J. Kocsis said that this institution can be very easy with the sale with repurchase option, but the border is the fact that the forfeiture operates just until the moment when the effects of the sale are not finished, after this moment being operable only the repurchase option.

[23] J. Ghestin, B. Desche, „Traite des contrats, la vente", *LGDJ*, No. 575, Paris, 1990.
[24] Ioana Romana Munteanu, *op. cit.,* p. 262.
[25] D. Chirica, *op. cit.,* pp. 27 and the following.

Comparing with the buy-back contract. This kind of contract is proper for leasing field. We have the situations when the provider of goods is repurchasing from the buyer (leasing societies), the goods that were sold in leasing manner.

The repurchase option is stipulated in advantage of the seller, and in the buy-back contract in the advantage of the buyer.

Comparing with lease-back contract. This one is a variety of leasing being the juridical complex operation when the same person is both seller and buyer, and this person contracts with the credit institution. So we have only one juridical rapport between two juridical subjects: the user (as a seller) and the credit institution (in case of the leasing we have three parts: the user, the seller and the financing institution).

The lease-back contract has as an object a good from the user patrimony, which needs finance from the credit institution, he guarantees with the property of the good, until he pays the credit, under a rent form. When the contract expires he is paying the rest of the sum and he will get back the good in property[26].

The difference between the two institutions is that in case of the lease-back contract we have two sales, and in the sale with repurchase option case we have only one sale.

Instead of conclusion, we say that in current life, the sale with repurchase option is very frequently, raises a lot of interest for doctrinaires, Romanians or French, but it imposes as necessity, especially in practical life.

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16. http://www.rubinian.com/dictionar.php

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SOCIETAS. REFLECTIONS ON THE ACCULTURATION OF EUROPEAN REGULATIONS IN THE NEW ROMANIAN CIVIL CODE

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Abstract: *In 2011, once the New Romanian Civil code came into force, its sphere of application has been extended to the legal relationships in which one or both parties are professionists. Therefore, the dichotomy civil law and commercial law has ceased to exist. The provisions regarding partnerships were much affected. Partnerships were given the legal means in order to acquire legal personality, a simple mechanism frequently used in European law – registration in the Register of Commerce.*

Through this study we aim to capture important moments in the evolution of this legal institution in order to identify its genuine legal configuration and to outline the acculturation process of European regulations in Romanian Civil code.

Keywords: *partnership, company, legal personality, Register of Commerce.*

1. THE ORIGINS OF SOCIETAS

The first consensual contract known by Romans was *societas*. It was basically an agreement between at least two persons – *socii* who imparted a common propose and shared profits or losses[1]. The first form of association was *societas alicuius negotiationis* defined by Gaius as a partnership confined to a business[2]. The most common application of the contract was *societas publicanorum*. Its aim was to help publicans collect taxes for the state more easily. But this partnership had a particular legal regime. Although ordinary *societates* were not distinct legal entities from their parties, *societas publicanorum* had legal personality, therefore had a separate patrimony from that of the *socii.* From this privilege also benefited *societates vectigalium*[3] which were given the franchise of public works. Nevertheless, the death of one party did not led to the dissolution of the partnership, as the heirs became themselves parties.

The matrix of this legal figure was a form of undivided property, known as *ercto non cito.* Roman families owned a patrimony, called *heredium.* In order to built a house and a garden, Roman citizen were given plots of about half of hectare of land. After the death of *pater familias*, his heirs continued living in a *consortium fratrum*, without dividing the land - *ercto non cito*[4]. This particular property was acknowledged by *Duodecim Tabularum* and it was in close relationship with the exploit of land or of mobile goods in order to conserve

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[1] A. Berger, *Encyclopedic Dictionary of Roman Law*, Vol. 43, The American Philosophical Partnership, 1991, p. 708.
[2] Gaius, *Institutiones or Institutes of Roman Law*, with a translation and commentary by Edward Poste, M.A., Clarendon Press, Oxford, 1904, p. 375.
[3] Const. Stoicescu, *Curs elementar de drept roman*, Ed. Universul Juridic, Bucureşti, 2009, p. 138.
[4] Const. Şt. Tomulescu, *Manual de drept privat roman,* Litografia şi tipografia învăţământului, Bucureşti, 1958, pp. 293-294.

the unity and thus the economical value of the property[5]. The heirs had the legal means to divide the patrimony throughout an *actio familiae herciscundae*[6].

At first, the right to create a *consortium* was exclusive to the heirs. But, Roman citizens who were not bounded by family ties were also permitted to form a *consortium*. Therefore, a new type of *societas* was born – *societas omnium bonorum*[7].

According to Gaius, this particular form of partnership could not be created only by consent, but the agreement had to be made before a praetor throughout a *certa legis actione*[8]. The *socius* had the possibility to dispose of a common good, for instance a slave, who would become a free man for all parties. It was also possible to transfer the property of a common good to a third person. The parties owned in common all present and even future properties[9]. Their agreement and actions were based upon the *bona fides.* Upon this raison, the contract of partnership occupies a privileged place in Cicero's *indicia bonae fidei*[10].

The agreement regarding only future acquisitions was known as *societas omnium quae ex quaestu veniunt* and it was the most common type of partnership. The contract according to which the parties shared one particular good[11], such as an animal, was known as s*ocietas unius rei*.

In order to create a valid *societas*, a series of legal conditions ought to be satisfied. Firstly, the parties must express their intention of creating a partnership - *affectio societatis* and their will must be under no doubt, as it can not be presumed. Secondly, every party has to contribute to a common property (mobile or immobile goods, reputation, rights, labour or a hybrid of those[12]). The parties must participate in profits or losses – *communicatio lucri et damni*. The lack of an agreement in this matter led to the equally distribution of incomes and costs. If the parties decided only to share the profit, then the loss would be divided according to the proportions in which the profit would be shared[13]. Gaius mentions that it was much debated whatever a party should have a greater share of the benefits than he has of the losses. Such an agreement was considered to be valid if the value of the contribution of a party justified it. If no agreement regarding the share of profits and losses is made, they were to be divided equally. The aim of the partnership, a *sine qua non* condition, must be moral and legal. The *societas* which served as a means of committing crimes was void.

Societas was not a distinct legal entity because it did not benefit from legal personality. It was basically the sum of the parties` rights and obligations. Therefore, in case of litigations, the partners wore responsible, not the partnership itself.

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[5] The fragments of *Institutiones* in which Gaius describes *ercto non cito* were discovered in 1933.
[6] M. V. Jakotă, *Drept roman*, Vol. II, Ed. Fundației „Chemarea" Iași, 1993, p. 306.
[7] V. Hanga și M. D. Bob*, Curs de drept privat roman*, Ed. Universul Juridic, București, 2011, p. 252.
[8] W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, Cambridge University Press, Cambridge, 2007, p. 404.
[9] H. F. Jolowicz, B. Nicholas, *Historical Introduction to the Study of Roman Law*, Cambridge University Press, Cambridge, 1972, p. 295.
[10] E. Molcuț, *Drept privat roman. Terminologie juridică română*, Ed. Universul Juridic, București, 2011, p. 307.
[11] *Ibidem*, p. 308.
[12] A. Berger, *op. cit.,* p. 506.
[13] Gaius, *op. cit.,* p. 376.

Ordinary s*ocietas* ceased to exist in any of the following situations [14:]

1. *Renunciatio (ex voluntate)* - any party could denunciated the contract. If one party, by his renunciation, intended to deceive the others, all his obligations towards his partners ought to be respected, while they had no obligation towards him – *socium a se, non se a socio liberat*[15]*;*
2. *Morte (ex personis)* – the death or the incapacity of a partner led to the end of the partnership because it is an *intuitu personae* contract. If one of the parties became captive, the partnership would dissolve presuming that the will of a prisoner does not exist anymore, as the Roman citizen captured was considered dead[16]. According to Roman law, the civil death produces the same legal effect as the physical death. There is a contrary opinion[17] according to which the death of a partner does not necessary leads to the end of the *societas*. It was possible the partners to agree that in case of death, the partnership can continue with the remaining *socii;*
3. *Ex rebus* - the partnership would dissolve if the purpose was achieved or if it became impossible;
4. *Egestate* – the bankruptcy of a partner;
5. *Ex actione* – by an *actio pro socio,* the partners could renounce of their status as *socii.*

According to Modestin, only *dissociamur renunciationes (separation)*, *mors (death)*, *capitis deminutio (the limitation of legal capacity)* and *egestate (impoverishment)* led to the dissolution of the contract[18]. On the other hand, contemporary authors[19] have expressed the opinion that a partnership is dissolved also e*x tempore,* if the partnership was temporary and the period of time for which it was created was fulfilled.

Nevertheless, a partner in a *societas* had also legal obligations. Every party had to contribute to the creation of the partnership's property. If the partner brought to the partnership *res mancipi,* the transmission should have been made by *mancipatio*[20]. *Res mancipi* were the most valuable goods of the familiar property such as: italic land, buildings, rustic servitudes, domestic animals, slaves[21]. Every party should act with diligence as if the partnership was his own. Every *socius* should share the profits and the losses. Roman law prohibited the partnership in which one party beard all the losses and had no share of the profits– *societas leonina*[22], because it was contrary to the idea of brotherly association of equals on which the *societas* was based on. As the partnership did not benefit from legal personality, the partners could exercises their rights or oblige a party to respect its obligations by means of *actio pro socio*[23].

In the hypothetic situation that two Roman citizens, *Primus* and *Secundus* decide to create a *societas*, but *Secundus*, from different reasons, does not contribute to the partnership's

[14] R. Gidro, A.Gidro şi V. Nistor, *Instituţii juridice romane,* Ed. Galaxia Gutenberg, 2009, p. 203.
[15] Const. Stoicescu, *op. cit.,* p. 281.
[16] M. V. Jakotă, *op. cit.*, Vol. II., p. 157.
[17] W. W. Buckland, *Elementary Principles of the Roman Private Law*, Cambridge University Press, Cambridge, 1912, p. 295.
[18] V. Popa, R. Motică, *Drept privat roman*, Ed. Presa Universitară Română, Timişoara, 1994, p. 178.
[19] G. Campbell, *A Compendium of Roman Law: Founded on the Institutes of Justinian Together with Examination Question Set in the University and Bar Examinations (With Solutions) and Definitions of Leading Terms in the Word of the Principal Authorities ,* The Law Book Exchange Ltd, New Jersey, 2008, p. 221; E. Molcuţ, *op. cit*., p. 311.
[20] C. Murzea, *Drept roman,* Ed. All Beck, Bucureşti, 2003, p. 274.
[21] V. M. Ciucă, *Lecţii de drept roman*, Vol. I, Ed. Polirom, Iaşi, 1998, p. 222.
[22] *Black Law Dictionary*, Sixth Edition, St. Paul, Minn. West Group, 1990, p. 902.
[23] V. V. Popa, *Drept privat roman*, Ed. All Beck, Bucureşti, 2004, p. 255.

patrimony, and taking into the consideration that this particular situation is not included as a means of ending a partnership, what will happen to the partnership? We consider that each party must participate in forming the common property. This is an *ad validitatem* condition, therefore, the partnership can not be valid without *Secundus* contribution.

2. THE INFLUENCE OF CONTEMPORARY EUROPEAN REGULATIONS ON THE CONTRACT OF SOCIETAS

Before the Romanian Civil code[24] came into force on the 1st of October 2011, the dichotomy civil and commercial partnerships was certain. Under the influence of Napoleonic Civil code, the Romanian Civil code from1865 has regulated two distinct types of partnership for more than a century. The distinct consecration of commercial law is still common in some European legislation. For instance, according to Greek law, private partnerships can be either civil (associations, foundations, fund-raising committees) or commercial (corporations, limited liability companies, general partnerships)[25]. The provisions concerning commercial partnerships can be found in both Greek Commercial code and special statutes, while regulations from the Civil code are applied to civil partnerships.

The Romanian New Civil code has adopted, in what concerns the contract of partnership, the monist theory. Therefore, the regulations regarding its legal nature have been unified: the partnership is a civil contract. However, this is not a European premiere.

In Italy, in 1942, a New Civil code came into force. It revealed a unitary set of regulations regarding private law. In other words, the commercial provisions were incorporated in the civil regulations. Once the legal optics has changed, concepts such as *commercial activity* or *merchant* were replaced by *economical activity* and *entrepreneur*[26]. The Romanian Civil code application law[27] contains similar provisions. According to art.8 the sense of *professionist* used by the legislator includes and replaces the concept of *merchant*, *entrepreneur, economic agent* and *other people who deploy economical or professional activities*. Nevertheless *trade activity*, *production activity* or *services* cover the expressions *commercial act* and *commercial fact*.

It is worth mentioning that the Italian Civil code[28] statues that the partnership which deploys commercial activity[29] must be reorganized according to the provisions of the Civil Code, Chapter III, Title V regarding civil partnerships. On the other hand, the Romanian Civil code application law permits the transformation into one of the legal types of partnership regulated by the Civil code or special statues only to civil partnerships that were created under the previous Civil code, excluding, therefore, commercial partnerships.

Under no doubt, the Swiss legislation has being a source of inspiration in the elaboration of the provisions regarding the partnership in the Romanian Civil code. In Switzerland, partnerships are submitted to civil provisions and are codified in the Swiss

[24] Law no. 287/2009 regarding the Romanian Civil code.
[25] V. M. Ciucă, L. Damşa, Gh. Durac, *Lecţii de drept privat comparat*, Vol. III, Ed. Fundaţiei Academice Axis, Iaşi, 2009, pp. 251-252.
[26] S. D. Cărpenaru, *Dreptul comercial în condiţiile Noului cod civil,* Curierul Judiciar, nr. 10/2010, p. 544.
[27] Law no. 71/2011 regarding the Application of the Civil code.
[28] Art. 2249 Italian Civil code.
[29] According to Italian regulations, the partnerships that have commercial activity can be organized as one of the following: *società semplice*, *società in nome collettivo*, *società in accomandita semplice* and *società per azioni*.

Code of obligations which is considered to be a portion of the Civil code[30]. Yet, there is an obvious distinction between civil and commercial partnerships, taking into consideration their object of activity. Thus, according to the Swiss law, if a partnership does not operate a commercial business, it does not exist as a general partnership[31] until it is recorded in the Register of Commerce[32].

The interpretation of the Romanian civil provisions concludes that partnerships can be either simple or special (such as *partnership in participation*, *partnership in collective name*, *limited partnership*, *limited liability company*, *share company*, *limited and share company, cooperative company* or any other forms of partnership regulated by statutes). The new special partnerships are actually the former commercial partnerships. A novelty in Romanian private law consists in the possibility of acquiring legal personality throughout the registration the Register of Commerce. Still, the simple partnership is not recognised as a legal entity[33], in the good Roman tradition. As a consequence, the partnership cannot be a legal subject and does not have a patrimony, all contributions form a distinct undivided property of the partners[34]. Therefore, similar to Swiss provisions, the simple partnership is a civil contract by its essence; it can not be a legal entity[35]. The registration in the Register of Commerce is mandatory for others types of both Romanian and Swiss partnerships, in order to acquire legal personality.

Referring to the liberty of parties to choose a particular form of partnership, in Swiss legislation, the partners are limited to the partnerships that are regulated by the law. It is believed to be an effect of the Anglo-American law influence[36]. In other words, it is forbidden to create a new form of agreement by combining the legal provisions of different types of partnerships. According to Romanian private law, the parties can create a simple partnership in accordance to their own will.

The Romanian partnership contract is consensual, therefore the consent of parties is enough in order to create the partnership, and no other special formality is needed[37]. Still, it must be written whenever the legal texts demand so, for instance when the contribution of a party consists of immobile goods or rights, the contract will be authentic[38].The Italian law is quite similar regarding this particular aspect. The law states that the simple partnership is not subject of special provisions except those that regulate the nature of the parties' contribution. In other words, the transfer of an immobile good is governed by particular regulations, for example the contract must be made by a public notary or under private signature[39].

Due to the brotherly investments into the *societas*, the Roman law banned the *leonine clause*. This interdiction is still actual. According to previous Romanian civil code provisions, the legal remedy for the leonine clause was nullity. On the other hand, the New civil code statues that the leonine clause is considered to be unwritten. Therefore, this

[30] B. Becchio, U. Wehinger, A. S. Farha, S. Seigel, *Swiss Company Law,* Kluwer Law International, Hague, 1996, p. 5.
[31] In Swiss legislation a general partnership is considered to be an association with economical purpose that deploys commercial activity.
[32] Art. 553 Swiss Code of Obligations.
[33] Art. 1892, alin. (1) Romanian Civil code.
[34] C. M. Niță, *Contractul de societate* în *Noul Cod civil. Comentarii, doctrină și jurisprudență*, Vol. III, Ed. Hamangiu, București, 2012, p 246.
[35] F. Dessemontet, *Introduction To Swiss Law*, Kluwer Law International, Hague, 2004, p. 184.
[36] B. Becchio, U. Wehinger, A. S. Farha, S. Seigel, *op. cit.,* p. 9.
[37] F. Moțiu, *Contracte speciale în noul Cod civil*, Ed. Wolters Kluwer, Romania, 2010, p. 216.
[38] Art. 1883 Romanian Civil Code.
[39] Art. 1350 Italian Civil code.

particular provision included in the partnership's contract must be ignored by both parties and others persons[40]. As a consequence, the parties must share the losses according to the distribution of profits. But the New Romanian law states that the party whose contribution is knowledge or labour can be excluded from the sharing of losses[41]. The reason of such exception might be that whenever the contribution consists of labour, it is meant to bring profit to the partnership[42], being taken into consideration the profession or the skills of one party[43]. We find a similar regulation in the Swiss Civil Code, which permits a partner whose contribution consists of labour to participate in the profits but not in the losses[44]. On the contrary, the provisions of the former Romanian Civil code stipulated that the legal remedy for leonine clause was nullity with no exception. The Italian Code still knows no exceptions, contractual clauses according to which one or more partners do not participates in both profits and losses is void[45].

It question that raises is what is the difference between the voided clause and the unwritten clause in terms of legal effects. We believe that the nullity implies *restitutio in integrum*, while unwritten clause is to be ignored by the parties and third parties. In this particular case, in the absence of express stipulation, the legal provisions will be applied.

Consequently, the New Civil law has brought along many novelties under the influence of both Italian and Swiss private law provisions. It is, certainly, a small step towards the unification of European legislation, a trend that Romania is not a stranger to.

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[40] Fl. Baias, E. Chelaru. I. Macovei, R. Constantinovici., *Noul cod civil. Comentariu pe articole*, Editura C. H. Beck, Bucureşti, 2012, p. 1922.
[41] Art. 1902 alin. (6) Romanian Civil code.
[42] Fr. Deak, *Tratat de drept civil. Contracte speciale*, Ed. Actami, Bucureşti, 1999, p. 471.
[43] C. Toader, *Drept civil. Contracte speciale*, Ed. C.H. Beck, Bucureşti, 2008, p. 287.
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THE JURIDICAL STATUTE OF THE PREFECT

Doina POPESCU*

Summary: *The public administration has as objective to achieve the political values, which are expressing the general interests of society, interests that are formulated by law. The government institutions have missions related to the content of the administrative activity, management activities, and not to the political power. The prefect's institution is ancient and traditional in the public administration from Romania. In all democratic countries, at the level of the administrative-territorial unities of the highest level, was established a representative of the state, of the executive power, designed to ensure the application of law by the local public administration authorities organized on the basis of administrative autonomy. To the Prefect have been established general administration tasks, such as coordination at the local of the activities of the ministries territorial services and exercise control regarding the legality of administrative acts of local public authorities.*

The importance and the specific of the function of prefect requires completion of the prefect's status, being established by the law his quality of high level civil servant, as well as the technical-professional training in the domain of public administration

Keywords: *public administration,prefect's institution,administrative act,govern,local publc authority*

1.Introduction

The institution of the prefect is old and traditionaly in Romania's public administration, popular in Walachia and Moldavia before the Princedoms Union in 1859. It is true that the ones who represented it bore another name, the so-called ,county doers' or ,administrative doers'.Afer the Princedoms Union there were essential changes in the Romanian Countries administration imposed by the consolidation of the state union and the modernization of the administrative structure.The first issuance of the prefect institution in the Romanian society administration as such dates from the second half of the XIXth century being establishd by the law for setting up the county councils from the 2nd of April1864 and the Public Law from the 1st of April 1864, inspired by the French model of that time. By the 1864's law there are organised for the first time the country county administration. The county wasn't only an administrative subdivision of the state but also a legal person endowed with a certain political power and patrimonial rights.The institution of the prefect by the law from the 1st of March 1883 which modified the provision of the law from 1864 and that from March 1872, has a restraint of the prefect's responsabilities becoming only ,an executer agent of the council and committee's decisions which he consignes to the permanent committee president. The prefect has to give him the neccesary tournament'. In the administrative unification in 1925 the prefect institution was seen as representing the central authority, having contol responsabilities. The prefect was assigned by royal decree, as a result of the Internal Secretary. To be assigned as a prefect, apart from the general conditions asked by the white collars, the candidate had to be 30 years and to have a degree of a state recognised university, apart of those who were in this possition at least one year .The law for administration organisation in 1929 is the first to delimitate the authorities of the elected collectivity from the

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assigned ones. He practiced, the control and supervising of all the local administrations'. As a deputy of the central authority he represented the Government and the executive. The law brings into the administrative life plan of the country a new institution – the county administrative committe, whose president was the prefect.[1]

By the administrative law in 1938 was dissolved the county autonomous administration, founding the heath, the county remaining only a district where the ministry external services function. The prefect becomes a career servant assigneed by royal decree and has the right to assignee the mayors of unresidence urban and rural villages and to designate them as of right members in the village council. Between 1940-1944, on the strength of the decree law from the 21st of September 1940 come back to the institution of the prefect as a white collar, to village and county as administrative teritorial units with legal entity, patrimony and own budget.[2] The prefect maintain his role and responsabilities as a representative of the Goverment. After 1944 the laws that followed abbated the institution of the prefect these one being restored in its place and role after December 1989.

2. The Prefect Institution constitutional principles of working and establishment

The Romanian Constitution enabled by the Parliament and voted through referendum in December 1991, reviewed in 2003, restates the institution of the prefect on new organisational and functional principles starting from the Romanian traditional materials in. The prefect, according to the reviewed Constitution and Law215/2001concerning the local public administration is an institution that represents the Government in the local area and manages the public services of the ministries and other local authorities in county.

The reform of the prefect status in the legal settlement took place in 2004 once with the issue of law 340/2004 – The Prefect Law and then by reforming in 2005 by Government Urgent Order 179/2005 to reform Law 340/2004 that states, the prefect and sub-prefect sit on the cathegory of high white collars'.The local authonomy, especially in an unitary state, can be conceivable only in certain limits. It can't be admitted in a law state the slight of law, the authority of the central executive or the justice because of appling the principle of local authonomy. The local authonomy can be brought into effect only in the principles of law state, the principle of local authonomy being one of these. That's the organic link that must exist between the local authonomy and law, between the local interests (village, town, municipality, counties) and the national interests expressed by law. That is the explanation for the fact that in all the democratic countries, at the level of the teritorial administrative highest level units, there was appointed a state, an executive power representative with the role of watching the law appliace by the local public administration authorities, organised on the strengh of administrative authonomy.According to the French system,[3] this role in our country was the prefect's, situation regulated by the Constitution enacted in 1991, reviewed in 2003 that states in clause 122, paragraph 2: , the prefect is the representative of the Government in the local area and manages the public services of the ministries and other central body authorities in the teritorial-administrative units'. It is seen that on the principle of disconcerting takes place the transfer of some responsabilities of the

[1] A. Iorgovan, Tratat de d*rept administrati vol.I,* Ed. All Beck, Bucureşti, 2005, p. 16.
[2] Paul Negulescu, *Tratat de drept administrativ,* ediția a IV-a, Editura „F. Mârvan", Bucureşti, 1934, p. 41-42.
[3] G. Burdeau, *Traite de science politique,* vol. I, Paris, 1966, p. 406.

central authorities as well as the right of administrative tutely from the state central bodies (the Government) to his local representative (the prefect). The prefect was assigned general administrative charges as would be the ministries teritorial services activities locally dispatching, as well as the carring out of the control concerning the local public authorities administrative documents legality.

3. The prefect's role and responsabilities according to the Romanian Costitution and the Organic Law

The prefect is a public administration unipersonal body invested with limited teritorial and general material attribution at the level of the county in which he acts. In the state's highest lengh teritorial administrative districts - the counties – the prefects act as Govern representatives. These ones carry out a directive and dispatching authority of the disconcerted ministerial services and in the same time they control law conformation of the local authorities by administrative documents issued by the prefect.

By clause 19 from law 340/2004 the prefect, as a Government representative on the local level, is assigned his responability: ,he acts for the county and municipality of Bucharest fulfilment realisation of the aims included in The Goverment Schedule and rules the neccesary actions for their fulfilment according to the authority and attributions coming to him according the law'.

By its status the prefect is subordonated to the Govern; by its attributions the prefect is the holder of state authority in the county and the direct representative of the prime minister and of every minister.

As an invigilator of respecting rooles by the local authority, the prefect can tackle, totaly or partial, in the administrative legal department the decisions adopted by the local councils - towns, villages, municipality counties – as well as the directives issued by the mayers or the county committee presidents, in case he considers some of the documents or provisions being illegaly. The document or its provisions that were tackled are hooked as of right. On the strengh of carring out of the legalty control over the documents enacted or issued by the counties or local public administration authorities as well as by the county council president, the prefect can tackle these documents in the administrative legal department if he considers them illegally only after he meets a preliminary proceeding that consists of a motivated demand addressed to the issuing authority within 10 days from its information to the prefect to reanalyse the document for its improvement or as it's the case to repeal it. Although are submitted to legal control the current inventory can't be tackled in the administrative legal department court. For certain the legislator kept in view the contractual documents submitted to the common law whose legalism could be censored according to the civil routine.

To accomplish the responsabilities that falls on him the prefect issues decrees with a regulatory or individual state on law conventions. The ordinances that appoint technical or speciality actions are issued after counseling the disconcerted ministries and other central bodies services from the teritorial administrative organisations and they are registered by their leaders. The prefect can propose to the ministries and other special central public administration authorities actions to improve the disconcerted public services activities organised at the county level.The prefect's decree that contains normative instructions becomes executory only after it was publicaly notificated or from the communication date

in the other cases.The normative decree is communicated as soon as the State and Administrative Reform Ministry that can propose to the Goverment, in its hierarchic control carring out, the cancelation of the decrees issued by the prefect if he considers them to be illegal or unreasonable.The prefects are also liable to communicate the decrees issued to the spring ministries. The ministries can propose to the Goverment cancel actions for the decrees issued by the prefect if they consider them to be illegal or unreasonable. The ministies and the other special authorities of the central public administration have the responsability to communicate to the prefects, immediately after the issue, the decrees and the other provisions with a normative nature that are sent to the disconcerted public services.

In his activity, the prefect is helped by 2 sub-prefects and in Bucharest municipality 3 sub-prefects.If the appointment and the relegation of the prefects is made by Govern's decree, in case of the sub-prefects these are made by the prime minister's resolution at the proposal of the prefect and the State and Administrative Reform Ministry.

The sub-prefects carry out the responsabilities given by normative documents as well as the assignments appointed by the prefect by decree.In default of the prefect, the sub-prefect carries out, in the name of the prefect, the responsabilities that comes to him.

During the whole performance prefect or sub-prefect service his labour contract at public institutions, regie, national companies, national firms with major state stock is hooked on.The prefect and sub-prefect can't be deputies or senators, mayers, local councilmen or county councilmen and can't carry out a professional representation commission, another public committment or an activity or committment within the regie as well as trading compnies with sate or private stock.As a Government representative, the prefect watches the local councils, city halls, county councils and county council's presidents activities to be according to law provisions.Between the prefects on one hand and the county councils and mayers on the other hand there are no subordination relations.

The prefect leads the ministries disconcerted public services activity and the other special authorities of the central public administration, organised at the level of teritorial administrative units. The appointment and the relegation of the disconcerted public services ministries leading are made by the prefect's consultative notification according to the law. In well-motivated situations the prefect can draw off the settlement given, proposing, according to the law, the relegation of their leaders.Before Law 340/2004 we can talk about a double extent, a political and a technical one. On one hand he was the governance representative and on the other hand he was the repository of the state authority in the county. In contradiction with the special recognised prefect authorities, he had a precarious personal status.

According to the dogma, the prefect sits on the cathegory of white collars, his commission presuming profesionalism, experience, and administrative education this not being found in the positive law rule, the law of local public administration failling in expressly writting down of the prefect as a white collar. The prefect can be included in the white collar's cathegory whose position is at Govern's ‚mercy'. The law doesn't recognise the prefect's right to commission, only concerning his attribute's practice.On the strenghth of the positive law we can drill the prefect commission as being a political one, at the executive authority demand rather than a profesional one. The reality shows that the prefect commission responsability for desconcerted ministerial services coordination within the county and for legalism control, administrative trusteeship about the local authorities documents are technical, professional, presuming specialization in a certain field and are achieved by a theoretical training and practical experience in the field of public administration.Guarantees

given to the prefects concerning the career's permanence are lingering, the relegation being decided discretionary by the Govern. He had the freedom to choose the prefects being wished that the chosen to be done at least among the graduated of a public administration shool, eventualy with a placement in a sub-prefect committment.The prefect was politically below the Govern that designated him. He was charged with carring into effect, the govern into commission political directios having also a general informative charge of the authority about his county status. This kind of organisation is a resultant of the general phenomenon approch of the administrative and political in society.Reasoning on our country situation we can appreciate that till the advent of law 340/2004 we assisted to a putting on steam of the prefects politicising that in many cases are considered first representatives of the political plurality and then the responsibles for the national interests and supervisors of respecting laws and public commands in the counties.

In our country the prefect's activity bears the political nature thumb-over established by its current status.Over his political and formal character the prefect carries out important administrative responsabilities: representing the state, holding the public order, checking the local collectivity.

Actually these responsabilities carring out organising in our country is rather planned and that is why there must be set a coherent relation system round the prefect.The prefect should be recognised the role representative of the state in justice and in the contractual report.The prefect is also the only person authoritative to express himself in the name of the state in front of the county council. The prefect has to be invest with an authority of geneal administrative police exactly fixed by law. He owns an exclusive competence to ensure public order in the space that exceeds the theritory of a town or village. The prefect has to substitute him to the mayers where they do not carry out their legal responsabilities to ensure public order, disparaging the public services and laws enforcement. The prefect public authority reflects the wish to install an equilibrium between the state unit and public administrative decentralization . In regard to the elected representatives of the local collectivity in councils that have wide administrative competences, the prefect represents the only interlocutor able to engage the state and talk in the name of it.

Under the 1991 Constitution the prefect appears in relation with the other public administrative bodies in three different states:

- the govern's locally representative

Being strictly dependent of the govern whose action plan he has to apply on the local plan, the prefect was recruted on the strengh of his faith for the governance party (coalition), issuing from this that he was a political white collar and not a career one as he was in the inter-war patch.

- the administrator of disconcerted public ministerial services in the teritorial administrative units
- administrative tutory authority called out to watch over law keeping by the public local authorities.

The prefect is a representative of the state in the county, the commission that he fulfils falling under the head of the executive authority, the govern, wherewith through the prefecture is in judicial, administrative law and hierarchic subordination relationship.The prefect has a general informative charge to keep the govern in touch with the county local collectivities requirements, with the public opinion evolution, having an eye to lead this opinion in the direction of politic and govern's programme.

4. Conclusions

The fact that the legislator does not expressly proclaim the prefect as a public commission also had consequences over his status as well as over his relationship with the Govern. We can't talk about prefect's full rights in relation with the public administration, with the one that assigned him – The Govern – which has to provide him the conditions to carry out the responsabilities assigned by law. The prefect's activity runs its course under the govern's authority in all that he does, the neccessary training and showing his professionalism being stunt. Furthermore this makes political and conjunctural interference in the prefect's professional activity that do not pool with the technically carring out of the legalism control – for example.

By law 340/2004 regarding the prefect and the prefect's institution it is stated that the prefect and the sub-prefect sit on the cathegory of honorable white collars. This law directive blocks a future settlement, more logical of the role and place of the prefect's institution. Its judiciousness would proceed from the necessity of ensuring the activity continuity of those who carry out the commission of prefect or sub-prefect, known being the fact that one of the basic law of a white collar (stood at the principle level by Law 188/1999 regarding the Status of white collars) is strengh in carring out the public commission.

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THE CONCEPTS OF POLITICAL REGIME AND FORM OF GOVERNMENT AND THEIR CURRENT USE

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Abstract: *Taking into consideration the ideas stated below we can detach two categories of conclusions: the first about the relation between the form of government and the political regime, which targets disambiguation of the two politico-juridical concepts and to highlight both the points of convergence and their differences, and, on the other side, conclusions on the particular case of the modern Romanian state, with its political culture specificities of constitutionalism and relationship between institutions and between citizens and political power.*

Keywords: *Political regime, republic, constitutional boundaries, public authorities*

1. General thoughts on the matter

In the following paper we are trying to bring new understanding regarding the concepts of political regime and form of government, because sometimes, the two concepts seem confusing or they are misunderstood or not sufficiently so. Also, we aim to determine if a situation like this can affect the normal functioning of the state (the institutions), and so, becoming a real live and day to day problem. It is necessary to fully understand the concept that includes both of the above, the form of state.

1.1. The form of state

The form of state represents a political and juridical concept that expresses the way state power is exerted and the way that the society is organized and led through the state.[1] In other wording, the form of state, expresses the way that the content of power is organized, the internal and external structure of this content.[2] This old concept has resulted from the elaborate study of the statehood phenomenon, and also from state rule and organization. In constitutional doctrine, in order to determine the form of state, three aspects have to be pointed out: state structure, the form of government and political regime. Although distinct, these three aspects are very strongly linked and conditioned one by the other.

It can be said that the form of state can appear under a threefold appearance according to three criteria: the organization and exercise of sovereign power within the state, the body vested with the powers of head of state, the methods of government. According to the three criteria, we can determine some various form of state organization: unitary state/ federal state, monarchy/ republic, will have a democratic political regime/ autocratic or authoritarian.

Regardless of size, economic or military potential, any independent and democratic state, has the prerogative, by virtue of its sovereignty, to decide in accordance to the will of

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[1] Sofia Popescu, *Forma de stat,* Editura ştiinţifică şi enciclopedică, Bucureşti, 1993, pag. 14

[2] Nicolae Popa, *Teoria generală a dreptului,* Editura Actami, Bucureşti, 1996, pag. 106

its citizens, the constitutional form of government, the structure and political system to adopt. The option for a particular form of state is a political option. This choice is not one for the authorities to make, because it would be equivalent to a political act of government. This choice has to be the result of a referendum. The fact of such an option depends upon the degree of participation of citizens in the referendum, the sincerity of the vote, and not ultimately, on the representation that voters had of the form of state and its significance.[3]

Whatever form it takes, in terms of its constitutive elements and of its characteristic features, the state as a political or social phenomenon remains unchanged.

1.2.The form of government

The form of government represents the constitution of the central bodies of state power through the exercise of these organs and division of competence between them[4]. Also, it comprises the conditions in which the duties of head of state span. Monarchy is the form of government in which the head of state is appointed for life or on a hereditary basis; a republic is characterized by the fact that the body acting as head of state – the president - is elected for a period of time either by the electorate or the parliament. A strict association between republic and democracy or between monarchy and monocracy is simplistic and may be misleading.

The theory regarding the form of government is very old. Thus, Aristotle divided the forms of government in: monarchy (which degenerates into tyranny), aristocracy (which degenerates into oligarchy) and democracy (which degenerates into demagoguery). As noted, none of these forms is perfect, each degenerating into its opposite. Therefore, they were considered only tolerable. To prevent the alteration phenomenon of the forms of state, mixed forms were used (Scipio, Cicero). In mixed forms degeneration is almost excluded but may occur, possibly due to defects of leaders.

In the realization of his theory, Cicero, refers to the experience of the Roman state. In its evolution, it has proved the utility of the mixed form. This mixed form, in the minds of Cicero, is the senatorial regime of the flowering period of the republic, the structure created and built before the age of the Gracchi disorders.[5] In this form, the state is nothing but a community of rights, where equality of citizens and gradation merit system coexist, and the leader, the statesman in general, must be an example of spiritual generosity and civic behavior to its citizens.

Another great philosopher, Montesquieu, resuming in his famous works „The spirit of laws" and „Persian letters" the broader issue of the form of government, considered that the models for republic were Rome and Athens, that despotism was reflected in the forms of state in ancient Orient, and the monarchy was represented by all the states which were formed on the ruins of the Roman Empire. Addressing the representative regime, Montesquieu uses England as model and does not distinguish between democracy and monarchy, where ensuring political freedom through the separation of powers is important: „Most ancient republics suffered from a big flaw: that people have the right to make decisions that require certain execution, making the people totally incapacitated. It should not take part in government than to choose representatives, which is wholly in its power".[6]

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[3] Cristian Ionescu, *Instituţii politice şi drept constituţional,* Ed. Economică, Bucureşti, 2002, pag. 67
[4] Nicolae Popa, *Teoria generală a dreptului*, Editura CH. Beck, Bucureşti, 2008, pag. 87
[5] idem
[6] Montesquieu, *Despre spiritul legilor,* Vol. I, Editura Ştiinţifică, Bucureşti, 1964, pag. 199.

We can conclude that there are the following forms of government: democracy, monocracy, oligarchy, mixed forms and specific forms of socialist states.[7]

In a more synthetic expression: „historical reality is far more complex and with specific notes: monarchy has become a more symbolic form of government, building on traditions and being reduced to a ceremonial role; aristocracy has almost disappeared; republic has another meaning than the original, democracy takes the form of representative system, despotism appears in more subtle ways than elementary tyranny, dictatorships are concealed by collective leadership or so-called elected representative bodies, specific also to some of the socialist countries, finally, multiple mixed systems have appeared".[8]

1.3.Political regime

Political regimes are the forms through which state power is exhibited, by its constitutional bodies that regard state power, their mutual action, the role and functions of state agencies covered by the constitution, laws and regulations, etc. The political regime does not come exclusively from constitutional rules, but it results from combining the constitutional system with party systems that shape the political life. Conceptual grounding and defining the political regime in contemporary politology knows a variety of ways which essentially aims to answer the following questions: a) how are the government bodies elected? b) which is the structure of each of them? c) how are the governmental functions distributed between them? d) is there any limit to their power regarding the governed?

The political regime basically expresses how state power is wielded by integrating as constitutive elements the conditions in which the duties of head of state, and the specific relations between the body called upon to perform these tasks and other types of organs, especially the Parliament and the Government are performed. Republic – for example - signifies the political regime in which power is a „public thing" (lat. *res publica*), which involves, necessarily, the exercise of power not by a hereditary, divine right, but under a remit of the social body. Thus defined, a republic opposes a monarchy or a kingdom, but is not to be confused, *eo ipso*, with democracy, so that a monarchy can be democratic and a republic might also be monocratic.

A political regime is the practical form for organizing a political system, political power, in particular, the constitution and action of state bodies regarding citizens – being led, ultimately, by power relationships between citizens and between civil society and state. So, political regime is not identical to the form of government which refers to relations between different state bodies and their formation process. In this sense, the following forms of governance can exist:

a. absolute or constitutional monarchy;
b. Presidential or parliamentary republic.

2. Romanian law regulation of the two concepts

In Romanian law, the form of government shows how the supreme bodies are constituted and function and, also, how it relates itself, in principle, to the defining features of the Head of State and its relations with the legislative power. According to Romania's

[7] Ion Deleanu, *Drept constituțional şi instituții politice. Tratat, vol. I,* Editura Europa Nova, Bucureşti, 1996, pag. 130
[8] *idem*

post-revolutionary context, this concept was implemented in terms of young democracy, at the beginning of its evolutionary path but which has already gone through various trials.

In the Romanian democracy the prerogatives of power belong to the people who is sovereign and who exercises those prerogatives by his electoral body or, by his referendum body. The Romanian people appear as the „original power", and its constituted bodies that express and realize its will appear as „derived powers". In democracy all people have equal rights and duties, without privileges or discrimination. Among the fundamentals and characteristics of democracy in Romania stand out: a) the universality of participation in solving public problems; b) consecration and guarantee of public and private rights and liberties; c) ideological pluralism; d) applying the majority principle; e) institutionalized pluralism.[9]

According to the Romanian Constitution, Romania's form of government is the republic.[10]

Republic is the form of government în which the body which acts as head of state is elected for a certain period. Lato sensu, republics can be presidential or parliamentary. In presidential republics, the president is elected by direct universal suffrage; in parliamentary republics, president is elected by Parliament. If we look at this classification strict sensu, the republican form of government may appear differently from one country to another: parliamentary, presidential, semi presidential, apparent presidential, real presidential, etc., everything depends not only on constitutional prerogatives attributed to the head of state and, consequently, on its relations with other public authorities, but, mostly, on the effectiveness of its prerogatives in the specific circumstances of that form of government[11].

In Romania, a semi-presidential republic can be identified in a confusing and doubtful way. It is mainly characterized by presidential election in direct universal suffrage and the political responsibility of the government to the Parliament, which prints the presidential character, parliamentary character or semi-presidential, to the republican form of government.

As stated above the Constitution establishes a republican form of government to the Romanian state (article 1.2) and, however, does not add any adjective attribute to it. However, from the constitutional provisions results a mixed form of the Romanian republic. Retaining some of the characteristics of the form of government, it can be observed that it is closer to the parliamentary regime. In this respect it resembles – in some ways – the political regime in Austria, Iceland, Ireland, etc., and it gets farther away from the French regime[12].

Examining those stated above we can therefore say that the presidential gene has not taken root in the constitutional regulations concerning the Romanian political regime; however taking into account the current political context danger of blockage of institutions is pervasive[13]. Also, results an intermediate form of government in Romania. The mixed nature of Romanian republic can be attributed to the adaptation of specific traits from classical political regimes (presidential and parliamentary) to the specific features of Romanian politics.

The concept of political regime is attached to governmental institutions, therefore speaking of representative or presidential systems. Yet it is a formal and unilateral concept.

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[9] Mihai Bădescu, Cătălin Andruş, Cătălina Năstase, *Drept constituţional şi instituţii politice*, Ed. Universul Juridic, Bucureşti, 2011, pag. 64

[10] art.1 alin.2 Constituţia României

[11] Ion Deleanu, *Instituţii şi proceduri constituţionale: în dreptul român şi în dreptul comparat*, Ed. CH Beck, Bucureşti, 2006, pag. 386

[12] I. Deleanu, *op. cit.*, page. 389

[13] I. Deleanu, *op. cit.*, pag. 390

No doubt that the organization of state powers and their mutual relations are defining elements of any political regime. But these are not the only criteria for its definition, and not even decisive[14]. There are criteria in addition, like property, level of development for the respective country and its economic and social status.

The political regime is a set of institutions, methods and means of making power, of relations between existing elements that make up the socio-political system, especially revealing the system of fundamental rights and liberties. Thus, if the form of government responds to the question of who exercises political power in a society (a person, a group or population as a whole), defining the political regime places us in the position of highlighting processes or methods by which these persons govern[15].

It, thus, has more complex determinations than the relations between branches of governance. The political regime has not only valuable qualities as the essence and form of state power, but also in classifying the essence of the whole society. It is a synthetic indicator and of significant importance, the most dynamic and most expressive in qualifying a society as truly democratic or undemocratic.

3. Present day political regime of Romania

In Romania, highlighting the elements of originality and specificity afforded by the current political regime, it is recognized the existence of a regime that can be characterized as attenuated semi-presidential or parliamentary, in the way of increasing the contribution of other factors of power and, especially, the Parliament's in the country's political life[16].

With the entry into force of the Constitution of 1991, Romania has established a constitutional system in accordance with its democratic traditions and current international standards.

The most effective and efficient way method to get to know the characteristics of Romanian semi-presidential political system is to emphasize, as derived from constitutional provisions, the defining characteristics of the presidential office:

- The President is not elected by the Parliament, but by the electorate in universal suffrage, and hence the President is a representative body is the same way as the Parliament;
- the President doesn't need a counter-signature to take certain measures required when republican institutions, the nation's independence, territorial integrity or performance of international commitments are seriously and immediately threatened;
- President has the right to resort to referendum, and the possibility to dissolve the Parliament in certain conditions set by the Constitution;
- The executive body is bifurcated in: the head of state – which is not politically liable – and the government – who is politically responsible to the Parliament for its work;
- The President exercises its prerogative to appoint the government, but he cannot do it in discretionary manner, he has to designate him so that he has the support of the Parliament.

[14] I. Deleanu, *op. cit*., pag. 124
[15] Mihai Bădescu, Cătălin Andruş, Cătălina Năstase, op. cit., pag. 72
[16] M. Constantinescu, I. Deleanu, A. Iorgovan, I. Muraru, Fl. Vasilescu, I. Vida, *Constituţia României – comentată şi adnotată*, Regia Autonomă *Monitorul Oficial*, Bucureşti, 1992, pag. 184

Also, under the Constitution (art. 80), the role among public authorities was clearly established for the President, as such, the President shall act as representative of the State, guarantor and protector of the Romanian state attributes, mediator between state powers and an „institutional guard" on compliance with the constitution and functioning of public authorities.

Analyzing the above we conclude that the President is not vested with powers of government and that these roles are assigned to the Prime Minister and his Government[17].

Although we can deduce from the first articles of the Constitution that relate to the role of each public authority that the Government does not subordinate and is not led by the President, this idea is reinforced by other provisions of the Constitution.

Thus, it is clear that the Prime Minister is leading the Government (article 107 paragraphs 1) and, also, it is expressly envisioned that the President can not dismiss the Prime Minister (art. 107 par. 2). Therefore, we conclude that art. 107 of the Constitution is to clearly define the power relationships within the executive branch, and places the two bodies involved: the President and the Government, in relations of cooperation, coordination and not subordination.

Even if the two authorities, the President and the Government don't work on the same kind of mandate, President having a national representative mandate and the Government having a parliamentary majority one, this should not lead to the intervention of the President in the act of governance.

4. Determinations and motions

In light of the statements above, two sets of determinations can be drawn: first on the relationship between form of government and political regime, which aims at disambiguation of the two concepts and underlying of both the points of convergence and of differences, and, on the other hand, determinations on the particular case of the modern Romanian state, with all its specificities of political culture, of constitutionalism and of relation between institutions, and between citizens and political power respectively.

As for the first set of findings, we conclude that associations like monarchy - non-democracy or republic – democracy are no longer up-to-date, equally there are constitutional monarchies, organized on democratic foundations (the English or Norwegian case is to be reviewed), and republics where democracy is, in fact, nonexistent (although it may be in words – the case of the Romanian Communist state for example). Even if in present days, the republic is reborn in response to absolute monarchy, we can say. Studying contemporary context, that now neither republics, as form of government, nor monarchies are no longer beyond any doubt compatible with a particular type of system (regime). The change in pattern and the disaggregation of old congruencies, monarchy – absolutism / republic – democracy has become evident, among other changes, in the era that followed the First World War.

The relationship between the form of government and the political regime is indissoluble, the two mentioned elements, along with state structure, filling, each with the variations it posses the picture of what defines the form of state. The notions of form of government and political system do not overlap, confusion between the two constitutes a

[17] Constituția României art. 102 stabilește că Guvernul: *asigură realizarea politicii interne şi externe a ţării şi exercită conducerea generală a administraţiei publice*

fundamental error. Although both concepts provide clues about who holds political power and how they exercise it, the essential difference between the two is that the form of government starts from the different options which the principle of succession in governance takes (hereditary in the case of monarchy and elective in the case of a republic), while the regime is the true expression of the dynamics of the state's internal policies, either on a vertical axis (the relation of the governed with the governors, both from the perspective ascending control that the citizens can exercise on the political elite, and from a perspective of descent, related to the set of rights and liberties guaranteed to citizens and the degree of conversion of their expectations in public policies), and on the horizontal axis of analysis (regulation of relations between the actors of civil society – citizen, private companies, interest groups, etc. – but also between institutions: whether or not separation of power exists, the right of mutual control between the legislative and the executive branches, the appointment of the president by direct vote or by the Parliament, etc.).

Given these statements, which summarize the previous ones, the only valid conclusion that can be drawn is that the form of government is inseparable from the association with a political regime, but that the two concepts do not overlap - the relationships between them are complementary or of co-dependency.

Regarding the particular case of contemporary Romanian state, already establishing that the political regime is a weakened/parliamentary semi-presidential one, we should mention that it is objectionable and supports improvements on a constitutional level.

Firstly, the type of republic is not specified in the Constitution, and the way that the form of government and political regime are regulated in the Constitution is too general, because when the article 1 paragraph 2 sets republic as form of government, is virtually embodying the notion of political regime, although not fully clarified.

The notion of political regime is derived implicitly from the analysis of provisions of many other articles.

In a fragile participatory political culture and short democratic tradition, unconsolidated, such an omission can prove dangerous. The main type of slippage, in a remissive form, is the hypothesis that the head of state may have the tendency to concentrate, by virtue of popular legitimacy and by a legislative void, more political power than was normally allocated to him in a semi-presidential system. Such slip outside the limits of the Constitution is enhanced by the local habit of political color matching between the majority on Parliament supporting the government, the government and the head of state.

So, even though in theoretical terms the president is a simple referee of the political game, he will indirectly have the ability to create and implement its own policies, by subordinating to his will the other branch of the executive, and enjoying a great influence in Parliament, where his original political family will take his views and convert them into legislative initiatives. Not to be omitted, in these circumstances, the statement that although the President is constitutionally apolitical, he retains in most cases a capital of sympathy and support from the party who powered him in elections.

We believe that some provisions in the Constitutions must be clarified and others complemented, so as to limit the slippage of authorities, in some cases, beyond the traces of the constitution. Also, we can but observe partial or incorrect operation of some very important mechanisms for democracy like referendum or the constitutional review. Also, in the constitutional practice of recent years numerous legal disputes between authorities have sparked who were not sufficiently clearly resolve even by the intervention of the Constitutional Court, its decisions not being consequent sometimes.

Another kind of situations that have created political disruptions were when the Prime Minister and the President had different political affiliations and views. A situation like this is happening now, when recently, the question of who will represent Romania in the informal summit of the European Council of the European Union has arisen. This can seriously affect Romania's position internationally in the near future.

Thus, the express definition of a political system would be beneficial, as long as we are convinced that within the political system, are established the methods and means of making power and the relations between the elements that make up the social-political system and consequently results that the constitutional limits on the exercise of power by public authorities are a component of a regime. Compliance with these limits imposed by the Constitution is a prerequisite for the proper functioning of the state's central authorities.

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THE LEGAL STATUS OF THE MINOR'S LIABILITY IN THE NEW CRIMINAL CODE

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Abstract: *Minors represent the most vulnerable category of offenders both because of their insufficient psychophysical development and, sometimes, of their inadequate environmental conditions. Therefore, they may experience difficulties in adapting to the requirements of the society and, unassailably, deviant behaviours. Although the current Criminal Code has established a mixed punitive system for the minors, consisting of educational measures and punishments, the Romanian legislator has considered appropriate to waive punishment in the new Criminal Code and has opted for a punitive system of educational non-custodial measures and educational measures involving deprivation of liberty, whose implementation will be under the supervision of the Probation Service.*

Keywords: *minor, criminal liability, the new Criminal Code, educational measures, Probation Service.*

1. The enactment of the new Criminal Code has established educational measures as the only punitive system in terms of minor's criminal liability, thus the Romanian legislator waiving the duality educational measures - penalties that appears in the present-day Criminal Code.

This option was justified by the need for a better adjustment of the social reaction to the minor offender and also the harmonization of national criminal legislation with the European one.

The minor offender is an exception. He basically constitutes a victim of society, an individual still insufficiently developed from the psychophysical point of view, a misfit in terms of moral and legal norms, sometimes a rebellious eager for self-assertion, even if in a negative way. The causes leading a minor to adopt an antisocial behaviour are multiple and diverse. The fragility and vulnerability of the individual undergoing a process of education, acquisition of concepts and values that will guide him throughout his life, may compete with lack of communication in the family, financial insecurity, school absenteeism and, sometimes, the presence of an ill-considered entourage during this period. All these conditions that facilitate the manifestation of a deviant behaviour may be amplified by the consumption of substances with a hallucinogenic or narcotic effect, but also by the presence of adult offenders that can become role models.

The question is „*what kind of social reaction or criminal policy, could be effective in rehabilitating the minor offender?"*

The development of the punitive system referring to the minor offender has varied over time and was marked by the mentality of the society at that time, of what was considered to be just and efficient back then.

2. Therefore, according to the *Criminal Code of 1864* the minor could be held liable since the age of 8 years old, but, if „he worked without discernment" and he was not 15 years old at the time the offence was committed, he would be exempt from punishment[1].

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[1] art.62, the Criminal Code of 1864

However, he was to be entrusted to the supervision and care of his parents or „he would be placed in a monastery" until he would have reached, at most, the age of 20. Yet, if it was proved that „he worked with discernment" or he was between 15 and 20 years old, he was sentenced to imprisonment and it could be reduced in the range of between a third and a half of the punishment of the adult offender, personalised from one case to another[2].

The *Criminal Code of 1936* was remarkable because of the concepts that it displayed and modified both the time interval during which the minor offender could have been held liable, i.e. between 14 and 19 years old, also the sanctions that could have been applied to him, diversifying them. Thus, it made a distinction between *child*, for the minors that were under 14 years old, and *teenager*, for the ones that did not reach the age of 19 years old[3] (between 14 and 19 years old) and stated safety measures (supervision, corrective education), or penalties (reprimand, correctional imprisonment or simple custody)[4] for teenagers who „had worked with discernment". In addition, if the teenager had possessions or a profession he could be given a pecuniary punishment.

3. *The current Criminal Code*, established as early as 1968, dedicates Title V[5] of the general part to minority and includes provisions regarding the limitations of minor's criminal liability and the punitive system applicable to this category of offfenders. Its regulation keeps the minimum limit of 14 years old for the age at which the minor offender could be considered criminallly liable, if it is settled that he had committed the offence with discernment, but modified criminal responsibility as an adult at the age of 18; during the time interval from 16 to 18 years old, there exists a presumption of criminal liability, yet the sentencing limits would be reduced in comparison to those applicable in the case of an adult offender.[6] Although, apparently, it seems to keep the structure of the Criminal Code of 1936, still preserving the punitive system composed of penalties and other measures, we observe that the safety measures previously provided for have become educational measures and have been diversified. Thus, according to art. 100 of the current Criminal Code, the Court may choose between taking an educational measure and inflicting a penalty on the minor offender. The choice will be determined by the degree of social danger implied by the offence that has been committed and the level of the minor's psychophysical development, his behavior and the circumstances in which he was brought up, as well as any other elements that could lead to a fair and efficient decision. It is important to underline the fact that the application of a penalty is appropriate in cases where it is considered that the educational measure would not be sufficient for the rehabilitation of the minor offender. While concerning the type of educational measures that may be inflected, these are: reprimand, supervised release, internment in a rehabilitation centre and internment in a medical educational institute.

Of course, over time, the political and social changes led to a continuous adaptation and addition to the provisions contained in the Criminal Code.

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[2] art.63, the Criminal Code of 1864

[3] art.138, the Criminal Code „Regele Carol al II-lea", published in the Official Monitor no.65 from 18th March 1936

[4] art. 144, the Criminal Code „Regele Carol al II-lea", published in the Official Monitor no.65 from 18th March 1936

[5] art. 99-110^1 , Title V „Minority", the Criminal Code of Romania enacted by Law no.15/1968, with subsequent changes and additions

[6] art.99, the Criminal Code of Romania enacted by Law no.15/1968, with subsequent changes and additions

Thus, the Decree no. 218/1977 on transitional measures referring to sanctioning and rehabilitation through work for persons who have committed offences under criminal law restricted penalties applicable to minor offenders only to educational measures. The act of making such a decision was determined by real life experience, which has long shown that the evolution of youthful offenders had the adverse effects, under the circumstances that they interacted with adult and more vicious offenders through incarceration. Therefore, it was considered that reassigning the minor to the community in which he worked and studied or sending it to a special rehabilitation and educational house, in the case of a serious offence, would much better achieve the goal of rendering the individual to society. Although the regulation laid down in the Criminal Code was not abolished by these provisions specifically, however, it was stipulated that the only penalties inflected on the minor offender are the ones provided for by the Decree.[7]

After the events of 1989 the provisions of the Criminal Code have been reenacted[8], this way Romania returning to the mixed punitive system.

Moreover, according to the Law no. 140/1996, that reffered to changes and additions made to the sanctions applicable to minors in the Criminal Code were again redesigned, the provisions of article 103 regulating the educational measure of supervised release were also amended with the possibility of the Court to impose the defendant's compliance with one or more obligations during this period, whose implementation shall be monitored by the Probation Services[9]. In addition, there has been standardized for minor offenders the recess of penalty execution under supervision release or control.

The past 20 years have also brought at the level of criminal regulations rethink moments of the criminal matter, that resulted in their redesigning based on changes in society and, consequently, the need to harmonize the national legislation with the European norms. So, going through the experience of a Criminal Code established in 2004, whose enforcement has been postponed and it is going to be repealed, a Code that did not produce dramatic changes in matters of minor's criminal liability, the Romanian legislator considered it appropriate and necessary to adopt a new Criminal Code in 2009.

4. Thus, the provisions of the *new Criminal Code* from 2009 draws in Title V of the general part, „Minority", the positive results obtained at the international level in rebutting juvenile deliquency.[10] Accordingly, the Romanian legislator waives the penalties applicable to minors in favour of educational measures which he deems appropriate and sufficient for the achievement of the goal pursued.

Regarding the limits of minor's criminal liability, the article 113 preserves the provision of the current Criminal Code. We can still find the provision that the minor who has not reached the age of 14 years old is not criminally liable for his acts (paragraph 1).

Therefore, the minimum age at which the possibility of criminal liability for a minor intervenes is 14 years old when, there appear some situations that can make him realize the nature of his acts and to behave freely, although the minor's psychophisical capacity is still insufficiently developed. Thus, even though we may talk about a „presumption of the

[7] Paşca V., Criminal Law. The General Part, Bucharest: Universul Juridic Publishing House, 2012, pp. 437-438
[8] Law no.104/1992 abolished the provisions of the Decree no.218/1977
[9] Rule no.92/2000 concerning the organization and functioning of social reintegration services for delinquents and surveillance of non-custodial sanctions execution, modified by Law no.123/2006
[10] Antoniu G. (coordinator), Preliminary Explanations of the New Criminal Code, 2nd volume, Bucharest: Universul Juridic Publishing House, 2011, p.328

minor's lack of capacity to be held criminally liable for his acts" [11] for a time interval between 14 and 16 years old, this may be rebutted if it can be demonstrated that the offence was committed with discernment.

In the case of the minor who has reached the age of 16 he will be held criminally responsible. However, even if it is deemed that such a defendant has been able to realize the seriousness and the socially dangerous consequences of his deed, he is subject to a punitive system that differs from the one of a felon adult, as it is considered that his low lexperience and lack of maturity can influence his conduct.

We find that age and discernment constitute the criteria which define the different categories of juvenile delinquents.

5. The new Criminal Code further provides in paragraph (1) of the article 114, on the consequences of criminal liability: „Against a minor who, at the date of the offence was aged between 14 and 18 years old, an educational non-custodial measure shall be taken". So, it is confirmed that the legislator puts greater emphasis on the educational aspect of the punitive system applicable to minors.

Paragraph (2) of the same article clarifies the situations in which an educational measure involving deprivation of liberty against a minor shall be taken, namely:

- *when he committed an offence for which he was sentenced to an educational measure which had already been executed or whose execution had begun before committing the crime for which he presently stands trial*. We note the absence of a firm indication of the type of educational measure that the minor offender had been previously sentenced to. We can conclude that the simple commission of a criminal offence under the conditions in which the young person has been sentenced to an educational measure before, be it custodial or non-custodial, triggers the application of a custodial educational measure;
- *when the penalty stipulated by law for the offence committed is 7 years imprisonment or longer or life imprisonment.*

Pursuing the development of provisions we find out that some of the most important changes related to the punitive system applicable to minors that are brought about by the new Criminal Code refers to the educational measures applicable to them. Thus, paragraph (1) of article 115 divides educational measures depending on how they are executed into:

- *educational non-custodial measures*: probation of civic training, supervision, home confinement at the end of the week and daily assistance;
- *educational custodial measures*: internment in an educational center and internment in a detention center.

Thus, the legislator has maintained the measure of „supervised freedom" in the corresponding regulation stipulated in the new Criminal Code, yet it is simply named „surveillance" and „internment in a re-education centre" appears as „internment in an educational centre", the other educational measures representing elements of novelty inspired by the laws of other European countries.

Hence, as specified in the regulation from article 117 of the new Criminal Code, probation of civic training aims at empowering the young person, understanding of the

[11] Antoniu G. (coordinator), Preliminary Explanations of the New Criminal Code, 2nd volume, Bucharest: Universul Juridic Publishing House, 2011, p.331

legal and social consequences which may result from committing certain offences. The organization, ensuring of participation and supervision of the minor during the 4 months training period shall be carried out under the coordination of the Probation Service, without affecting the current educational or professional activities. The solution proposed by the legislator allows classes and programmes attendance in order to facilitate the reintegration of the delinquent into society.

If such a measure is deemed insufficient, there is the possibility under article 118 of the new Criminal Code for the educational measure of surveillance to be taken, under the coordination of the Probation Service, which allows controlling and guiding of the minor for a period of 2 to 6 months, in order to observe his conduct during classes at school or professional courses, also to prevent his involvement in any other activities or relationships that might jeopardize the process of social reintegration.

With an increased degree of severity, *home confinement at the end of the week* (article 119 in the new Criminal Code) consists in the minor's obligation not to leave his home on Saturdays and Sundays, for a duration of 4 to 12 weeks. The exception is represented by participation in activities or programmes imposed by the Court. The measure shall be taken under the supervision of the Probation Service, and it is intended to prevent the minor from meeting with certain people who can influence him in the sense of committing new offences.

While concerning *daily assistance,* stipulated in the article 120 of the new Criminal Code, it constitutes the minor's obligation to comply with a strict timetable, which takes into account his real needs, it being put together by the Probation Service for a period of 3-6 months.

The Court may also impose that the teenager has to respect certain obligations which would restrict his freedom of movement and shape his socializing pattern.

It should be asserted that the implementation of such measures is a more complex process, that allows a deeper personalisation of the sanction applied to the minor offender, a gradual increase in severity can also be determined by the delinquent's reactions during its execution and the Court may, in such circumstances, require the extension or replacement of educational non-custodial measures.

The new Criminal Code stipulates, if deemed necessary, the possibility of taking more severe educational custodial measures, stating in articles 124 and 125 the *internment in an educational centre* for a period of between one and three years, respectively, the *internment in a detention center* for a period between 2 and 5 years.

Internment in detention centres is the most severe educational deprivation of freedom measure that the Court can sentence a minor offender to and involves internment in an institution specialized in the rehabilitation of minors, with security guards and surveillance regime for a period between 2 and 5 years, or between 5 and 15 years when the penalty for the offence is 20 years imprisonment or detention for life, where they shall attend intensive programmes of social reintegration, as well as school training and vocational training programmes according to their skills. Therefore, this measure is ruled to minor offenders that represent a danger for the community and who are considered difficult to re-educate by means of other measures. Regarding the offender that in the meantime has become an adult and has not given any sign of rehabilitation, exhibiting a conduct that hinders the process of social reintegration, article 126 of the new Criminal Code provides for the possibility of changing the execution system. Thus, the Court may order the continuation of the execution of that educational measure in a prison.

The Court shall be able to opt for the educational measure that has to be taken against the minor offender based on the general criteria for punishment individualization.

6. Starting from the new approach to the treatment of minor offenders we observe that modern society has chosen to emphasize mainly their character shaping and less their coercion, leaving the task of guidance, support and education of the young delinquents to parents, relatives or specialized institutions. This is why, a particularly important role in the individualization of penalties applicable to minors and in pursuing their execution is played by the Probation Service.

Established initially as institutions for the social reintegration of offenders and to monitor the enforcement of non-custodial sanctions[12], they have been redefined as Probation Services by Law no. 123/2006 on the status of the personnel of the Probation Services, at which time they began to make their presence felt. Their purpose is to increase public safety by informing and advising victims of several crimes, the promotion of alternatives to detention, crime prevention, reducing the risk of recidivism and reintegration into the community of the persons who have broken the criminal law.

When it comes to the professional activity of the Probation Service staff inside the punitive system applicable to minors, this constitutes a support for judges and prosecutors, with an important role in the process of punishment individualization, enforcement of non-custodial penalties, assistance and advise for the victims of offences..

Thus, in order to choose the most effective and appropriate sanctions against the minor offender, the new Criminal Code expressly stipulates in the article 116 that it is compulsory for the Probation Service to draw up an *assessment report*. It shall have an advisory and orientational character, shall be drawn up by the competent probation officer and shall also include pieces of information regarding the behaviour of the minor, his level of training, as well as his prospects of social reintegration.[13] In addition, the Court may require some detailed proposals from the Probation Service referring to the nature and duration of the social reintegration programmes that the minor offender should follow, but also to other obligations that should be imposed with this respect.

Nowadays, we realize once again that the minors who do not benefit from special attention within the family, the school, the community to which they belong, are prone to acquiring deviant behaviours. We also find out that once they become offenders, there are several factors that often lead to the failure of their reeducation and reintegration into society, such as: inadequate measures taken as a result of the superficiality with which they are treated, either by the Courts or institutions legally responsible for their supervision, or even by the legislator.

As a conclusion, the punitive system applicable to the minor offender is extremely important as regards their rehabilitation and a decrease in the level of juvenile deliquency, and if the system manages to achieve the objective of re-education its effects are extended over the general level of crime.

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[13] Antoniu G. (coordinator), Preliminary Explanations of the New Criminal Code, 2nd volume, Bucharest: Universul Juridic Publishing House, 2011, p.339

THEORETICAL ASPECTS OF UNWORTHINESS SUCCESSION

Ana-Maria GHERGHINA*

Abstract: *The new regulation of the Civil Code there are many new elements in the unworthiness of succession, it being part of the general conditions to come into the inheritance.*

Unworthiness succession is considered the legal doctrine as a civil sanction is to remove such unworthy legal heritage and from the testamentary. The new legislation there are two types of unworthiness: law and justice. These effects on both legal legacy and heritage on testamentary

Unworthiness is a civil penalty, because it affects only the guilty. Unworthiness estate is deprived of his right to inherit the inheritance of those who are guilty of committing serious offenses, clearly defined by law, against the deceased or his memory. These situations are: attempt on life of those who leave legacy, capital calumnious accusations against those who leave legacy, whom hiding murder victim whose inheritance is not about it.

Keywords: *unworthy, inheritance, civil code, punishment of serious*

By changing the they brought new regulation of the Civil Code included the unworthiness successor regime change. Thus, unworthiness succession characterized both legal legacy and the testamentary. To inherit, not enough for a person to have capacity succession. It must also meet a negative condition: not to be unworthy.

Governed by the law 287/2009 and Art. 958-961 Civil Code unworthiness are deprived heir legal succession or the right to inherit the estate[1], including successional reserves as committed a serious offense, the legislature expressly provided, against the deceased or a successor thereto.

Unworthiness is a civil penalty consisting of forfeiture unworthy of his right to succession to the person who has been guilty of serious misconduct. Unworthy is such a hit legal incapacity to inherit.

Excluding the unworthy punishment legacy is the work of law or court (and not one who will give inheritance)[2]. But unworthiness incapacity should not be confused with another condition is required by law to inherit Peter. Inability conditions occurs by failure to inherit the fault of the heir (for example, where the child conceived from the opening legacy is born dead). Thus, it punishes unworthiness heir which is capable of serious inherit for his actions.

Types indignity estate

The current regulations there are two types of unworthiness: law and justice.

Unworthiness of law is provided in art.958 paragraph (1) Civil Code. and intervenes in the following cases:

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[1] Is success, according to art. Paragraph 1100. (2) Civil code, „the person who fulfills the requirements of law to inherit, but not yet exercised its option right of succession"

[2] Gabriel Boroi, Liviu Stănciulescu, „Institutions of civil law", Publisher Hamangiu 2012, page 527

- A person convicted of an offense with intent to kill the one who leaves legacy (Article 958 paragraph 1 letter a). If the conviction for the offense with intent to kill the one who leaves a legacy of death was prevented by the offender, amnesty or limitation of criminal liability, the law allows to be able to obtain a civil judgment to find the deed so that become operant sanction indignity[3]. Old code was canceled by the ECHR judgments in these cases.

- A person convicted for committing, before opening the inheritance, an offense with intent to kill another success that, if inheritance was opened, removed or restricted as a vocation to the legacy of the perpetrator. (Article 958 paragraph 1 letter b). Heir will not receive any of inheritance, even subject to, one who kills or attempts to kill the heir of a class that overrides the killer, who kills his son's son, comes down as the first of inheritance, or son who kills his father, intending to come to the legacy his grandfather. No deceased son who kills his brother to inherit his entire fortune, or kill the child survivor, which would be shared heritage, they can not come to inherit.

Judicial unworthiness is provided in art.959 paragraph (1) Civil Code. and intervenes in the following cases:

1. person convicted for committing intentional, against one who leaves a legacy of grave acts of physical or moral facts that resulted in the victim's death. This includes any form of violence, any act that is likely to cause fear, threats - including the exercise of a right - injuries, strikes and other forms of violence, coercion, etc. exert psychological pressure. If the facts which resulted in the victim's death is not required that death have been produced directly by the action of the author, but is considered sufficient for this to be caused victim's death, which is a consequence of the actions of the perpetrator (for example, as a result of pressure or threats, suicide victim).

The condition imposed by law on these facts is that they are intentional, direct or indirect. This situation will not penalize the offense committed by negligence. As both situations covered by Art. 959 paragraph 1 letter. a) the act is directed against those who leave legacy. No facts have been sanctioned as those close to the dead recipient's, or acts against a joint-heir, and the unworthiness of law. Judicial doctrine requiring that person to be convicted guilty of committing these acts. Again as with the indignity of law, paragraph 4 of Art. 959 creates the presumption that if a criminal conviction is not possible (because of the amnestied, or death of the perpetrator barred criminal liability), actions likely to lead to judicial unworthiness to be established by a final civil judgment.

[3] Article 958 paragraph (2) of the New Civil Code

2. Person who maliciously concealed, altered, destroyed or falsified testament late (Article 959 paragraph 1 letter. b)[4]. In this case the first condition is that the perpetrator legally required to be in bad faith. In practice, alteration or destruction of a document (in case the will the deceased) is therefore not an act aimed at producing this result (for example, alteration or destruction of wills content occurred in error, a mistake maneuvers during normal household). Can be considered several assumptions, so it is possible hiding testament aim of protecting, in which case it can not be bad faith, but if the modification or destruction of a will was made following provisions of the testator and his science, which will be necessary to check how the provisions of Article 1052 NCC may occur on voluntary tacit revocation of wills. Sanction to be about the indignity, malevolent person should clearly be pursued to prevent the effects of a will whose provisions were not favorable (in that institution some legatees, or certain tasks). Good faith is presumed, but the bad faith of those who committed the facts will be proved by invoking unworthiness. For the acts listed in Article 959 aligned 1 letter. b) the law requires that they not be identified binding by a criminal sentence or the offender has been convicted them of a civil sentence that is sufficient to note that the facts likely to attract legal unworthiness.

3. Person who, by fraud or violence, which prevented the legacy left to prepare, amend or revoke the will. (Art. 959 aligned 1 letter. c). For proper understanding of legal provision, fraud can take the form of action - the use of fraudulent maneuvers - as well as inaction - the failure to inform the testator fraudulent on relevant issues important to represent the will or reason to invoke the judicial indignity, fraud can come from both successful and from a third party, but heir science. Violence may take the form of physical violence and the moral and the author can be directed to the heritage and its close on a person. Will be violence and threat of exercise of a right, if this is done in order to get the results provided by art. Paragraph 959. 1 letter c). Acts of violence may come from both successful and from another person with knowledge or reason heir indications. Heir actions

[4] Hiding a will involves both hiding it, this town was in an inaccessible location, and stealing his will, that document in order to acquire not found by those entitled. The consequences of such acts are serious if we consider the possibility that his will be a handwritten or even the existence of a genuine but is not aware that legatees.
Altering a will is so completely change its content and change parts of the document. Change can be made by erasures, additions, by damage writing so it becomes unreadable by damage to the paper substrate that is written will, etc.. The aim is that alterations have the effect of changing the content of the last will of the testator. If a holograph testament updates, deletions or additions texts, they must bear the signature of the testator, whichever is otherwise have been done without his knowledge, and the person responsible for these changes liable to be punished, including by requiring judicial finding indignity.
Destruction of a will requires physical disappearance, total or partial, whether it be possible to further his recovery through various technical means. Destruction can be done by cutting, burning will, or by any other methods that are capable of abolishing the physical. On these facts we must consider whether the testator knew or not about destroying his will by hand, as the destruction caused as a result of his will, the Order, is to apply the provisions of Article 1052 NCC on voluntary revocation tacit wills and also determines the inapplicability of the provisions on judicial unworthiness.
Forgery of a will involves the very existence of the crime of forgery, as it is covered by criminal law. In fact, if the wording of Article 324 of the Penal Code, we find that there is a way to fake it and altering the content of a document - which would urge us to believe that civil law is somewhat pleonastic expression, including an aspect of his offense false notion of „corruption" and repeating the whole idea of "forgery" in the last part of Article 959 paragraph 1 letter b In essence, the act refers to the deceased and the presentation of counterfeit writing as will its final decision. We believe also that the false can come to success, the document is counterfeit by him personally, or can be custom made work of a third party only uses the heir forged document. Therefore, this act will include both the actual forgery and use of forgery.

must have a clear purpose: to dissuade the author heritage provisions to change his last will or to prepare a document containing such provisions, namely a will, regardless of its form - true, handwritten or privileged. Heir can act both in its own interest and in the interest of successive another, by the establishment, modification or revocation of wills would be affected. If potential heir and was one of the situations provided in art. 959 paragraph 1 letter c), shall be deemed unworthy.

Lapse, any success can request the court to declare unworthiness within one year from the date of opening the inheritance.

If the sentence for the offenses referred to in paragraph (1). a) is delivered after the date of opening the inheritance, the term of one year calculated from the date of the final conviction.

The novelty is required by art.958 paragraph 2 which reads: „If the facts referred to in paragraph conviction. (1) is prevented by the death of offender, through amnesty or limitation of criminal liability, unworthiness operate if those facts were established by a final civil judgment. „In that case, a year runs from intervening cause of impediments to conviction, if it occurred after opening the inheritance. Also, this is true of the indignity of law and the judicial (art.959 paragraph 1 letter a), while French law - the Civil Code art.727 last paragraph. Br, a situation that requires only the second (optional unworthiness), with all consequences following from here, especially on the time within which the declaration as required indignity. French doctrine believes that the rule laid regret should have been applied and the indignity of law, not finding the difference in treatment and justification.

In other cases, one-year term begins on the date you knew the reason of unworthiness heir, whichever is later opened heritage thus entry into force of the new Civil Code.

Effects indignity estate

Unworthiness unworthy to take effect as and from third parties. According to Article 960 of the New Civil Code, the person is unworthy is remote from both legal legacy and from the testamentary. This regulation came to unify both cases unworthy of the two kinds of inheritance (legal and testamentary), the effects of indignity. Text is progress: if the beneficiary testamentary clause of attempt to murder the man who left the legacy, if he was found guilty of delicate cruelty or serious injury given that „no word" refused food.

New Civil Code provides, novelty, that this unworthiness, be it right or legal, can be removed specifically by will or by affidavit, by leaving the inheritance.

Old Civil Code, art. 658 provide that the estate of the deceased will come unworthy children, but by virtue of their own, without the representation, the New Civil Code expressly provides that the unworthy may be represented. Representation means that a more distant legal heir, collect part of the inheritance would have been entitled up or if it would be undignified or would have died before the opening of inheritance

Effects of succession to the unworthy indignity.

The main effect that it produces unworthiness unworthy is that you can not claim the inheritance, as his title of heir is eliminated from the opening sequence.

The unworthy will return, as appropriate, heirs or legatees up / grantee whose excessive favors were subjected to reduction, due to the presence of the former, as the heir to the

reserve. This will facilitate the legal heirs or subsequent legal heirs. This situation will take advantage legatees and grantee, if unworthy heir was a reserve and reserve which could reduce some excessive favors.

Where unworthy took possession of the inheritance before finding the indignity, he will be required restitution to the persons entitled. Return is in most cases in nature, and if not possible, unworthy to be obliged to pay compensation. Unworthy heir is considered the owner of bad faith [art.960 par. (2) Civil Code.] And is in default as of the date of entry into use of property inheritance (from the opening sequence and not on finding indignity). That unworthy is treated more severely than the owner of bad faith, bad faith so that the former should not be proven, since it is implicit in the finding that the declaration of succession indignity. Unworthy is he entitled to claim back the other heirs to be paid for legacy debt repayment and the costs necessary and useful.

Unworthy heir title is canceled retroactively, it is considered to have never had call to inheritance. Finding indignity or, where appropriate, declare the indignity they basically declarative and not constitutive effect.

Effects of succession to the descendants unworthy indignity. Unworthy descendants can come to its own heritage, but also to collect part of the inheritance he would have been entitled by representing his estate. According to art. Paragraph 967. 1 Civil Code. „Unworthy even been alive at the date of opening inheritance" can be represented. Therefore unworthy sons and daughters can come to represent the legacy of their father deceased and unworthy. Therefore, sanction the indignity no effect and for them, being responsible to their parent's crime.

Provisions of Civil Code art.965., The matter of representation inheritance aimed at all representatives - legal representatives „of a more distant", not only unworthy descendants. Thus, included in this category and „subsequent offspring of unworthy" (laterally). For example, the unworthy grandson brother[5].

Effects indignity estate to third parties

Unworthiness produce effects against third parties. According to art. Paragraph 960. 3, acts of worthy conservation and management agreements with third parties stand, and maintain conservation documents and management documents, and documents available for consideration between the unworthy and third party purchasers in good faith. It is almost an exception to the principle of „jus accipientis resolvitur resoluto dantis jure". If this principle would be applied without exception, given the abolition of rights retroactively unworthy, were to be abolished and acts logically concluded it with others. It is considered important to maintain safety but civil circuit. Documents available to third parties for pecuniary interest concluded in good faith continue, according to the second sentence of Art. Paragraph 960. 3 Civil Code. Good faith is presumed under Article 14 Civil Code. Evidence to the contrary is, however, admitted the task of proving bad faith purchasers of belonging to an interest to enforce. Documents available for pecuniary interest concluded with a third party bad faith will be lifted logical conclusion that emerges from a contrario interpretation of the legal provision invoked. As a result of continuing acts of third parties acquiring, unworthy will be obliged to pay damages to the true heirs just as a possessor in

[5] Liviu Stănciulescu, *Civil law course. Succession,* Hamangiu Publishing, Bucureşti, 2012, page 39.

bad faith, as resulting from the application of paragraph 2 of Article 960 NCC. Therefore, he will have to refund the price received or the asset value heirs, if it is higher and the value of fruit with damage caused and proved.

Removing the effects of indignity

Removing the effects of indignity - new provision introduced by the current civil code - is likely to reflect the entire concept of the current regulations, the matter of inheritance, will give more importance its author.

Indignity of law or legal effects „can be removed specifically by will or by a notary authentic" (separately) by leaving the inheritance.

Legal nature of the civil penalty is indignity. Sanctions are acts committed against those who give heir inheritance or against his will. Removing the effects of indignity is only explicit statement.

The new civil code, the general approach that has left the author's appreciation of heritage insofar as those facts remain sanctioned and in terms of inheritance rights unworthy. Rule of law, public order and morals criminal liability is provided by the offender. Indignity effects but can not be removed by rehabilitation unworthy occurred after conviction amnesty, pardon or criminal penalty prescription [art.961 par. (2) Civil Code]. In this regard, Law no. 287/2009 of the Civil Code provides a solution similar to that established by earlier legislation. In terms of the right to inheritance, the actual possibility to collect estate assets, unworthy fate is left strictly up to the deceased site.

Conclusions

Unworthiness is the legal sanction of forfeiture of the right to inherit, which apply to the person (with capacity and vocation succession) convicted of a serious offense against the deceased or to his memory. Unworthiness probate may be filed by any interested person, such as subsequent legal heirs, or grantee, legatees etc. The court did not decide, but found only after opening the inheritance unworthiness and only if the unworthy successors vocation is concrete, not removed from the inheritance by the presence of senior preferred heirs. To mention that unworthiness can only be invoked while it is alive. If death occurred unworthy before opening the inheritance, may be invoked against children unworthiness unworthy, lest they come to inherit by representation. Effects of indignity is retroactive abolition of the title of heir.

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THE OBLIGATIONS TRANSMISSION AND THE ORIGINALITY OF ITS REGULATION TECHNIQUE IN THE NEW CIVIL CODE

Dumitru VĂDUVA[1]

Abstract: *From the way of regulating the obligations traffic, it results that the legislator considers now the obligation to be an economic value, an asset like any other, more than a personal commitment through which the debtor is bound to his creditor and because of this the debt cession is not admitted.*

The debt transmission must be distinguished from the claim transmission. Rationally, the transmission of a claim is a change of the creditor's person: the original one will be replaced by the claim's grantor. For the debtor this change has no importance since his debt has not been modified.

In contrast, debt assumption and novation are modes of transmitting the debt, the latter being at the same time also a transformation mode of the obligation. Their novelty, especially the first, incites a separate study.

Keywords: *contract cession, novation, delegation, debt cession, debt assuming*

1. The contract cession

Notion. If the creditor can be changed without the debtor's approval, the latter can not be changed without the first one's approval, because the debtor's personality, and especially his solvency, represents particularly important elements for the creditor. For this reason the law has not organized a cession of the debt symmetric with the one of the claims[2].

1.1. Definition

The contract cession represents the substitution of the third person instead of a contract part which is in course of execution.

The cessionary acquires with the assignor's debts (the passive side) his rights too (the active side).

1.2. Foundation.

The contract cession mechanism (articles 1315-1320 from the Civil Code) is based on the existence of the ceded co-contracting party agreement (article 1315 from the Civil Code). Without this consent the assignor is not exonerated of obligations in respect with his co-contracting party. In short, the substitution would not be *opposable* to the co-contracting party. An application of this rule is article 1833 according to which *the tenant who has given the contract without the occupant's agreement is not relieved of liability*.

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[2] Regarding the debt cession, admitted by a part of our doctrine also under the old Civil Code. See also: L. Pop, *Teoria generală a obligațiilor*, Lumina lex Publishing House, Bucharest, 2000, pp. 65-467.

But the law provides expressly specific contracts in which the contract cession may take place without the co- contracting party agreement. Like in the previous scenario, the assignor is not relieved of liability. It is such a subcontracting (article 1852 from the Civil Code).

Finally, in some cases, cession is legally required. Therefore the cession is opposable to the third concerned persons.

1.3. Field of applicability

In our opinion, not any contract may be ceded, but only those expressly prescribed by law, or in the hypothesis in which the cession would be a neutral act for the co-contracting party, the substitution being indifferent to him. That is why the special rules of the special contracts expressly foresee the cession faculty of the contractor[3].

In principle, the service contracts without *intuituu personae* character are cedible. The rule is natural because in translative contracts, the holder substitution of the right that represents the transmission subject would be impossible without changing the contract's object.

The law expressly authorizes the transfer of certain contracts both for debts and for claims: the cession of location right (article 1805 from the new Civil Code); the cession of the housing right with some consequences (article 1833); the provider's ceding of his right to another person (article 1769 from the new Civil Code), the mandatary tasks' cession; the cession of the enterprise contract.

In some situations, the law provides for the contract transfer without the co-contracting party agreement. It is a forced cession. Thus the buyer is compelled to respect the tasks of the asset (article 2341 from the Civil Code), as the location contract (article 1811 from the Civil Code); the insurance contract is transferred with the insured asset (article 2220 from the Civil Code), the obtainer of the stocks, of the value titles, in general, if they contain the „at order" clause (article 1317 paragraph 2from the Civil Code) (so not that of the social parts, because the liability company is with people), becomes part in the founding company contract, substituting itself to the former holder of the partner or shareholder quality; by merging, the acquiring company substitutes to the absorbed company all legal reports, such as, for example, work contracts etc.

1.4. The substance and form conditions of the contract cession

The cession contract must fulfil all the conditions foreseen by the common law for the contract validity between the *assignor* and the *cessionary*. Moreover, the law requires:

a. the exigency of the *ceded* co-contracting party consent (article 1315 from the Civil Code).

As it was previously shown, substitution without the existence of the co-contracting party does not exonerate the assignor. He will be held liable as if no contract transmission had taken place. The law makes a specific application of this rule for the substitution made by the mandatary without the client/mandatory's consent (article 2023 paragraph 4 of the Civil Code).

As an exception, in cases expressly provided the cession is opposable to the ceded co-contracting without his agreement, as it was shown before.

[3] L. Pop, *op. cit.,* p. 467.

b. The contract *must not have been executed*.

c. Type. The contract's cession, but also the acceptance given by the ceded co-contracting party, takes the shape of the ceded contract (article 1316 paragraph 1 from the Civil Code).

It is possible though that the ceded co-contracting party may give his principle consent regarding the faculty of the other parts at the date of their contract conclusion (article 1317 paragraph 1 from the Civil Code).

1.5. The contract's cession effects

a. To the ceded co-contracting party. The cession is opposable to him from the moment it was notified to him. If the cession took place with his consent, given when concluding this cession, the notification becomes useless. But if he gave his principle consent, through the initial contract (that represented the cession's object), the contract transfer must be notified to him (article 1317 paragraph 1 from the Civil Code).

b. To the cessionary. He becomes part in the contract through his substitution in the assignor's place, being held by all his debts and benefiting of all his rights. The cession has effect only in the future.

In the hypothesis in which the ceded contract had as object a right that must be registered or signed up to become opposable, it is necessary to fulfil this formality; otherwise the cession is not opposable to the third parties (article 1317 paragraph 3 from the Civil Code). It is necessary, for example, that the tabulation formality be fulfilled in the cadastral register of the real estate transfer owned by a tenant in a previous contract. To the latter one the transfer is not opposable, if the new owner does not tabulate the obtained right.

To him are opposable all the exceptions that the person who has ceded could oppose to the assignor (article 1319 from the Civil Code). But there can not be opposed to the assignor the exceptions from the cession contract unless the latter one expressly reserved this right when he consented to the substitution.

The effects to the assignor. In principle he becomes a third party for the contract he ceded. He is freed from the signed ceded contract from the moment when the cession has become opposable to the assignor (article 1318 paragraph 1 from the Civil Code). Yet he is still held responsible for the co-contracting party when he gave not his agreement to the cession.

In order to be able to act against the assignor, the co-contracting party must notify to him the lack of execution of the cessionary obligations within 15 days from the non executing data or from the date when he found out about the non-execution (article 1318 paragraph 2 from the Civil Code).

Regarding the cessionary, he is bound by the validity guarantee obligation of the ceded contract (article 1320 paragraph 1 from the Civil Code). He can take the guarantee obligation of executing the ceded contract.

2. The debt assuming

Terminology. „*The debt assuming"* is a new name of the institution from the old Civil Code, called *„the delegation"*. Through the new rules it is redefined the old institution that used to organize „the cession debt" of a third person, the new debtor, with the purpose to exonerate it to the creditor. At the same time it was autonomized, being regulated as an

independent institution and not within the novation, like in the old Civil Code (articles 1132-1133) which run a troublesome overlapping of these institutions (the perfect delegation with the debtor change novation) [4].

2.1. Notion

Delegation is an order given by the debtor that the debt should be paid by the third person. Mainly, „the debt assuming" kept the delegation logical scheme. But its foundation was changed. Currently „the debt assuming" is based on the new debtor commitment, a third person, to the creditor, with whom he agreed, to pay the debt of the initial debtor, by substituting him. The new institution's originality is represented by dropping the acceptance that between a third person and the debtor is cession debt; through this it was implicitly removed the overlaping between delegation and novation, which logic of the latter one was previously assuming in some cases.

The commitment of the third person towards the creditor is a new convention, same as for the novation with debtor change. The originality of the new institution is that the third person engaged himself to pay the *same* debt, by substituting the debtor, and not a new one. It is easily understood that between the original debtor and the third person, the new debtor, has been a debt transmission from the first one to the second one or else would have been created a new debt between the third person and the creditor, thus overlapping with the novation by change of debtor. Assuming the debt is, therefore, different from the novation because although the debtor is another person, the debt remains the same, with all its accessories and guarantees.

The purpose of assuming the debt, like for the „old" delegation, is the extinction of the initial debt by a third person.

We define the debt assumption as being a person's commitment to pay the debtor's debt by agreeing with the latter, under the acceptance cession condition by the creditor, or directly with the creditor (article 1599 from the Civil Code).

This operation is similar with novation through the debtor's change, through the fact that, in one of the two ways (the direct contract between the new debtor and the creditor) it may produce its effects even without the debtor's consent, differing from it in effects as for the novation the debt is new, while in the debt assuming case it is the one of the initial debtor, who is substituted.

2.2.Types of debt assumption and their conditions

At a first glance it seems irrational to take the debtor's debt, as no one substitutes the debtor in order to pay his debt. In reality it is rationally justified either by the third party's intention to gratify the debtor, or, most often, by the pre-existence, outside the debt ration between the debtor and the creditor of a relation between the third person and the lender and the borrower, a relationship between the third person and the debtor, this time the latter being the third party creditor. Through the „the debt assumption" the two obligations are extinguished with just one payment: paying the debtor's debt to the creditor, the third party will implicitly end his own debt, avoiding in this manner two distinct payments. Beside the first hypothesis, in short, the purpose of assuming the debt may be the liberating intention

[4] C. Stătescu, C. Bârsan, *Drept civil. Teoria generală a obligațiilor*, 9th edition, Hamangiu Pulishing House, Bucharest, 2008, p.375.

to extinguish, through a single payment, two pre-existing debts, arising from different contracts. For example, between the client (the third person), indebt with the entrepreneur (the original debtor), is agreed that the first pays the latter's debt to his subcontractor (creditor), and the latter accepts the client as a debtor rather than the initial one (the entrepreneur).

The debt assuming is not conditioned by the pre-existence of a report between the intial debtor and the third person, new debtor; in the previous example the report between the client and the entrepreneur may not exist.

But what interests us is the validity of the convention between these persons, through which the initial debtor's debt *was transferred* to the new debtor.

According to the article 1599 from the new Civil Code, the debt cession may be made at choice, in two different manners. Their common element is that, for each of them, the initial debtor's creditor agrees with his substitution with a new debtor.

A. The debt assuming through the agreement between the debtor and the third person (article 1599 letter a, and article 1605 from the Civil Code).

2.3. In order for the debt cession to exist in this form it is necessary:

- to have a contract between the debtor and the third person on the transmission, respectively acquisition, debt of latter (letter a, article 1599 from the Civil Code);
- agreement to take over the debt must be communicated to the creditor. No matter which of the two people communicate the contract and require the creditor to replace the original debtor (art.1606 paragraph 1 Civil Code). It must not be communicated by both parties. It suffices that only one of them sends the contract to transfer the debt and the creditor to have received it (paragraph 2 art.1606 Civil Code).
- Creditor to agree to receive, transmit, debt from the debtor to the third person (art.1605 Civil Code).Agreement by the substitution must be express and not implied or presumed. Until the agreement of the debtor also third parties can revoke the agreement to transfer, respectively acquisition, of debt (art.1606 paragraph 3 of the Civil Code).
- The agreement must be expressed within the deadline set by those who require it, or, failing that, within a reasonable time (art.1607 paragraph 1 Civil Code). If each party has communicated the contract and the fixed term is different, the answer must be given within the time limit which expires last (art.1607 paragraph 2 Civil Code).
- Expiry of the period with no response from the creditor presumes he declined accepting to take debt by a third party (paragraph 3 art.1607 Civil Code).
- release of the debtor (art.1600 Civil Code).

2.4. Effects

2.4.1. Effects between the creditor and the third person who assumed the first one's debt.

a. The transmission to the new debtor of the intact debt. Along with the debt, there were also transmitted its accessories and the accompanying guarantees, minus the obligations of the person who guarantees and pays and also the third person's obligations, who represented a guarantee for the claim achievement (article 1602 paragraph 3 from the Civil Code).

b. The creditor's guarantees. The creditor will be able to take advantage of all his rights in respect with the old debtor, inclusively on the accessories or guarantees, unless they are bounded to the debtor's person (article 1602 paragraphs 1-2 from the Civil Code).

c. Ways of defence.

Transmission requirement under the new debtor may oppose to the creditor all defences which the debtor may oppose them initially (article 1603 paragraph 1 from the Civil Code). But he could not oppose compensation and any other personal exemptions from the original debtor (article 1603 paragraph 1 from the Civil Code).

Neither creditor has other rights to the new borrower than those he had in his claim. By accepting the debt to be taken by the new debtor, the creditor has not acquired new rights for that because by such acceptance there was just a substitution of the new debtor in place of the first.

Correspondingly, nor the new debtor may invoke to the creditor the exceptions they could oppose the initial debtor of the debt ratio transmission (article 1603 paragraph 2 from the Civil Code). Commitment of the new debtor to the creditor is regardless of any report of obligation that might exist between him and the debtor. The debt's transmission has a non-causal regime.

5. Cancellation of transfer contract will make it impossible to accept the creditor obligation to take over the debt by the new debtor. Only the lack of validity of ratio transmission of the debt may be opposed by the new borrower (article 1604 paragraph 1 from the Civil Code).

In this case the debt of the initial debtor to the creditor revives (art.1604 paragraph 1 from the Civil Code).

In addition creditor may request damages from the third person for the harm suffered from the fact that the contract was based on the acquisition of the debt by the latter, presuming the guilt of the invalidation of the contract to take over the debt. He may dispense if he reverses the presumption proving that he is not responsible for the abolition of this contract and therefore of the damage caused to the creditor (article 1604 paragraph 2 from the Civil Code).

2.4.2. The report between the debtor and his creditor

The fate of the original debtor depends on the shape of the assuming convention: perfect and imperfect.

In the first case the debtor *is released* through his substitution with a third person (article 1600 from the new Civil Code). Operation approaches to the substitution by changing the debtor, except that the debt is the same, is not substituted, but the debtor is changed. The creditor must expressly *release* the ex debtor accepting the third person to take his place in the debt execution. All the three participants in the legal operation must express an express undoubtedly will and must *be able to* make such a change within the report.

In this case the creditor loses any appeal against the original debtor, except the case where it was stated otherwise or unless it is proven that the third person was insolvent on the date of the debt assuming and the creditor did not know this state (article 1601 from the new Civil Code).

In the hypothesis, which we may call *imperfect* assuming, by applying the old legal practice in the delegation matter, the new creditor accepts the debt assuming by the new debtor, but the old debtor is not discharged of obligation (article 1600 second thesis). In this case the creditor has two debtors.

2.4.3. The report between the third person and the debtor

a. The hypothesis of perfect acquisition of the debt, the debtor release by accepting the new debtor. In this case the report between the original and the new debtor is governed by taking over contract signed by them and not by the payment or not of the ceded debt. For example, on this basis the debt of the latter to the debtor is extinguished, from a pre-existing report, accordingly to assuming contract of the debt from these people.

b. The imperfect taking over hypothesis. In this case the debt exists in the initial debtor's patrimony, but he holds to the creditor along with the new debtor.

In the reports between the old and the new debtors, they are co-debtors to the creditor. In the absence of some express provision of the acceptance agreement given by their creditor, their debt is not divisible, although they are bound by the same debt. The relation between them is governed by the debt assuming contract so that the original debtor may request the new debtor to execute the debt payment. If this debt has been extinguished under the same contract, for example, the new debtor can claim the extinguish of his debt to the debtor (his creditor in a pre-existing report).

c. The creditor's refuse to accept the debt assuming by a third person.

In this case the debtor is the only hold to the creditor. The absence of the creditor agreement to accept the original the substitution of the initial debtor has no effect on the convention between the debtor and the third person. The latter remains bound to execute on time and in good condition the debt payment (article 1608 paragraph 1 from the new Civil Code).

But the creditor has no right to require to the third parties to pay the debt (article 1608 paragraph 2 from the new Civil Code).

B. Assuming the debt through an agreement between the third person and the creditor (article 1599 letter b).

2.5. Conditions and effects

In this case, in order for the debt cession to exist the agreement directly between the creditor and the third person on the debt assumption is enough. Through this contract is off the initial obligation of the initial debtor. This can not be forced to pay the debt to third person who has paid his debt for the convention between third person and the creditor was to pay the debt and not an assignment of the creditor's claim by third person who would become the new creditor.

Takeover rules does not apply to the debt held by article 1599 letter b from the Civil Code if the third person before has paid in one of the hypotheses legal subrogation (article 1596 from the Civil Code) or agreed of subrogation creditor, for the third person who paid the debt did not order to be subrogated to the rights of paid creditor (article 1594 from the Civil Code).

3. The novation (articles 1609-1614 from the new Civil Code)

Notion. Parties of an obligation may decide to extinguish an obligation and replace it with a new one, being therefore necessary that the latter have a new element in respect to the original one.

In principle, the new element may not consist of a new creditor through the claim's cession as it would be a claim cession, not a novation. Novelty must consist of replacing the obligation or the debtor.

Novation is thus a convention between creditor and debtor, through which it is decided to extinguish the obligation between them, and to substitute it with a new obligation, which differs from the previous by one of its elements (article 1609 from the new Civil Code)). Novation is therefore no modification of the original obligation, but its *substitute* with another one characterized by a new element called *aliquid novi*.

3.1. Novation types.

Novation can operate either by substituting the obligation seen as a liability of the debtor, for example, changing the execution of a debt in nature with one in cash (a); or by changing the elements of the obligation regarded as legal report, meaning of the debtor (b); or by changing the debt and with it the creditor, so that the convention not be a claim cession (c).

a. Novation **by a change in debt (article 1609 paragraph 1 from the Civil Code).**

Parties of an obligational report may decide to hold off a debt of the debtor and to substitute with another one. The new debt may consist in changing the nature of the original obligation, such as a payment instead of a commodity. It is not novation when the change of performance takes place because the convention is a way to execute payment, which has a special regulation: giving in payment (art.1492 Civil Code)[5]. The cause of the obligation may be changed, for example, a chargeable amount as the rent for the debt payment instead of a purchase price, initial operation by bringing a sale through novation to a lease. Therefore, if for example, a debtor is agreed that for sale price to keep the amount on loan. And adding or changing the original ways may be a new element. Even if it is not essential, through parties will have become a constituent part of the contract satisfying the novelty requirement for substituting of an old obligation.

b. Novation through debtor's change (article 1609 paragraph 2 from the Civil Code). The convention between the creditor and a third person, deciding to release the initial debtor, thus extinguishing his debt, and its replacement with a new debt charged to the third party, as the new debtor, is a novation by changing the debtor.

Instead of the original obligation of the debtor, extinguished, it was substituted another one, charged to a new debtor. Also novation by change of debtor is when a third party takes the debtor place, with his consent and with the creditor's consent and thus achieving a debt cession.

(A) Novation through creditor's change (article 1609 paragraph 3 from the Civil Code). Through an agreement in three, it can be extinguished the obligation between the creditor and the debtor and the latter may commit to another person, the new creditor. New commitment of the debtor to the new creditor and the debt extinguish to the old creditor is a novation throug creditor's change.

This form of novation is less used since there are other simple operations, the claim cession in which the debt consent is not necessary and the claim transmission is not accompanied by its accessories, as it creates a new claim without the pre-existing guarantees (*a pari*, article 1611 paragraph 1 from the new Civil Code).

[5] D. Alexandrescu, *Explicaţiune teoretică şi practică a dreptului civil român în comparaţie cu legile vechi şi cu principalele legislaţiuni străine*, vol VI, National Printing House, Iaşi, 1899, p. 665.

3.2. Conditions

Novation requires the existence of *an agreement* between the creditor and the debtor, in some cases to them may add also other parties foreingn from the original obligation, but that are part in the new one (article 1609 paragraph 2 and 3 from the Civil Code). Like any other convention, this must meet the validity elements of contract's common law and, moreover, must reunite other three conditions.

a. Must *substitute* an old valid obligation (article 1609, paragraph 1 from the Civil Code), through a new one, also available.

The novation purpose is the extinguishment of an obligation. It is obvious that this must be available.

b. The *new* obligation must be *different* from the substituted one; otherwise it will be a simple *confirmation*. This difference must be valid for one of the obligation three elements: creditor, debtor or debt, according to the novation types.

c. Finally, for the novation to exist, there must be the intention of the parties obligation to substitute (*animus novandi*), meaning to replace it with a new obligation (article 1610 from the Civil Code).

The novation is not presumed. It does not result from the simple creation of a new obligation. The will to substitute must expressly result from an act or from its extrinsic circumstances.

3.3. Effects

3.3.1. Two effects. From the novation definition it results that its effects are: the *extinguishment* of the initial obligation, along with all its accessories and guarantees and the *born* of a new obligation, the first operation being the cause of the latter one. Difficulties arise when several parties obligations are involved.

3.3.2. Effects of the passively solidary obligations. If the obligation was passively solidary, the concluded novation with one of the solidary debtors extinguishes the others debt and also the debt of the persons who guarantee for other persons, assuming their debts (article 1613 paragraph1 thesis I, new Civil Code). If, however, it was asked the other co-debtors and agreement and they did not approve the novation they remain with an obligation for the old debt, and so for the person who guarantees for another person, assuming his debts and did not agree with the novation (articles 1613 paragraph 2, new Civil Code).

3.3.3. Effects of the actively solidary obligations

When the obligation was actively solidary, the concluded novation by one of the solidary creditors may prejudice, not being opposable to them, without the claim part which would be the part of the creditor who concluded the novation (article1614 from the Civil Code).

3.3.4.The guarantees fate. It is easily understood that the guarantees, being accessories of the main obligation, can not have another fate than the latter one, so that they end with it, although the parties are free to agree that the old guarantees must be attached to the new obligations (article 1611 paragraph 1).

If the guarantee was used by the original debtor and he was substituted through novation, or the guarantee was due by a third party, such as a person who guarantees for another person, assuming his debts, they have to agree to maintain the guarantees also for the new obligation (paragraphs 2-3 of the article 1611).

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PREPARATORY ACT – AS A PART OF THE DEVELOPMENT OF A CRIME

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Abstract: *The author analyzes preparatory act – as a part of the development of a crime. The analysis of the internal phase of the development of the criminal action is important not only for emphasizing the internal psychic mechanisms that trigger the criminal deed, but also to reveal the limits in which these processes present relevance for the criminal law, in other words to specify to what extent the way of development of the psychical processes could influence the subject's criminal responsibility.*

Keywords: *criminal responsibility, the internal phase, preparatory act, criminal decision, psychical processes*

1. The crime, from the material point of view (*actus reus*), represents an activity which involves, like any other activity, a development in time and space, *i.e.* a succession of different actions that lead to a final result, to producing a modification in the exterior world, to what we call criminal consequences. [1]

The preparatory act represents only a segment of the way covered by the exterior manifestation from making the decision to committing the illicit deed and to commitment of the deed. As a part of a whole it is necessary that before presenting what constitutes a part of the whole to examine the whole itself. It is known that the way from the first exteriorization of the criminal decision-making and the final moment of the physical activity is called *the way of the crime* (*iter criminis*[2]).

2. As it is known in the objective reality, even in the commitment of illicit deeds besides simple human actions, there are also more complex actions, composed of different acts that include the acts that prepare the respective actions. In other words, even some of the simplest licit human actions, to the extent they would have duration of accomplishment, they involve, besides an initial decision-making for which the subject evaluate all the possibilities of reaching the planned goal and a succession of exterior acts, some of preparation of the commitment, others of commitment itself. This process ends with producing the result and with the exhaustion of the whole activity

3. During the process of committing a certain act with a certain result it comes first an internal phase (*spiritual*[3]*, subjective*) when it is elaborated and defined the decision-making to commit a crime. In this phase emerges the thought of committing a crime (*moment of conception or ideation*) determined both by external influences and by the internal psychic

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[1] Nicoleta Iliescu, *Incriminarea şi sancţionarea actelor preparatorii*, Studii Juridice, Bucureşti, 1965, p.85.

[2] Vintilă Dongoroz, *Drept penal*, 1939, Ed. Academiei Române, p.257; Matei Basarab, *Drept penal, Partea generală,* vol.I, Edit. Lumina Lex, 2002, p.368.

[3] Vintilă Dongoroz, *op.cit.,* p.257; Ilie Pascu, *Drept Penal*, *Partea generală,* Ed. Hamangiu, Bucureşti, 2007, p.159.

processes of the agent who, transforming the external influences and his/her own impulses mentally form the idea of action. Sometimes, the thought of action could have been suggested to the agent by another person, this suggestion entering the complexity of the psychic processes regarding the adoption of the decision by the subject.

The moment of conception is followed usually by a *deliberation* on the idea that crossed the author's mind, as at the same time with the thought of committing a crime is possible that other ideas - contrary to it - appear in his/her mind, leading him/her to a certain deliberation, weighing both of the advantages and disadvantages of the projected action (the moment of deliberation). After this deliberation, the subject makes a certain decision, opts to act or restrains from committing the illicit act (moment of decision).

These psychic processes can happen in an instance, as only in the ideal way they can be separated, or other times each of them can have certain duration, so that we can identify their content and the limits as regards a concrete planned deed[4].

4. Specific to the processes characteristic for criminal decision-making is that once the decision was made to act in a certain direction, the psychic process of the internal phase is not exhausted, on the contrary, on the base of the criminal decision takes place the continuous direction and orientation of the external manifestation, and the obtained data are transmitted back to the brain, while committing the deed (*feed back*), to allow the correction of the possible errors of execution or the conception and the transmission of new impulses to the organs of execution.

These elements also are not analyzed in the category of the processes characteristic for guilt. The internal subjective phase of the development of the illicit action in its complexity involves thus processes that take place in the subject's *inner forum* and are usually difficult to perceive, even by the subject, if he/she does not have a special ability of introspection or if the action does not happen in a quite long time span to be identified and followed.

5. A long experience of the humanity led to the formulation of the rule according to which the criminal thoughts (*nuda cogitatio*), the criminal decision-making – no matter how serious and threatening – cannot trigger the author's criminal liability. These thoughts, even if they could be known by obtaining the subject's confession through modern means and without his will (truth serum, narcoanalysis, hypnosis etc.) could not represent the base for the agent's criminal responsibility as in this phase the subject does not do anything, but only thinks about what he/she could do. In this phase his/her will has not become definitive yet, has not been exteriorized in an act of committing the criminal thoughts[5].

This solution offered by the law-makers of any periods of time was justified also by sustaining that the criminal thoughts are not punished, not because it would be difficult to prove them, but because even if proved, the decision-making in itself would not represent a potential lesion to the legal good protected by law[6]. At the same time, the simple decision-

[4] Dongoroz, *Drept Penal, op.cit.,* p.256; Dongoroz, *Explicaţii teoretice ale codului penal român*, vol.I, Edit. Academiei, p.132; C.Bulai, *Manual de drept penal, parte generală*, Edit.Universul Juridic, Bucureşti, p.162; J.Pradel, *Droit pénal special,* 2 édition, Cujas, Paris, 2001p.372; the authors show that in teh case of any crime could be identify a phase of the emergence of the idea, followed by the deliberation and adoption of the decision. This phase can at most have an ethcial significance, but not criminal relevance; P.Salvage in *Droit pénal général*, Press Universitaire, Grenoble, 1994, p.35, shows that only crimnal resoultion does not produce any social disturbance and it can be sanctined possibly as an autonomous crime.

[5] Dongoroz, *Explicaţii.., op.cit.,* p.133.

[6] Bettiol, Giuseppe, *Diritto penale. Parte generale,* Cedam, Padova, 1979 p.521.

making belongs to the criminal psychology field and not to the criminal law field which refer only to external manifestations of the subject[7], as the simple decision-making (no matter how immoral) could not produce any social disturbance[8]. Moreover, *nuda cogitatio* has no relevance as law is a relation between persons (*relatio ad alterum*), that is why everything that does not goes beyond the individual sphere has any legal relevance[9]. At the same time, the social laws regulate the relations between people, and these relations could not be disturbed unless through acts, *i.e.* through external manifestations and justice cannot repress a decision-making[10].

6. Yet, if the internal phase cannot trigger the agent's legal liability, the externalization of the criminal decision, even before passing to the commitment of the thought and planned deed could be incriminated as a crime *per se* to the extent to which the law-maker considers that the criminal decision-making, thus externalized, is susceptible to produce a social disturbance for example, making mutually the decision to commit a crime is incriminated in the Romanian legislation under the form of the criminal plot (art. 167 in the criminal code) or of criminal association (art. 323 in the criminal code).

The same way, the communication of the criminal decision to other persons, if its nature can alarm them, can represent criminal threatening crime (art. 193 in the criminal code)[11]. In these cases there are not incriminated the criminal thoughts but a certain form of their externalization, which does not necessarily involve the commitment of the deed of the threat, but only an externalization of these thoughts in situations in which such a communication could represent a danger for the legal order.

7. The internal spiritual phase of the illicit deed represents from the chronological point of view, a step before the external manifestation, being its psychic cause and the external action being the effect of the criminal decision-making. The illicit deed, like any human physical activity could not be conceived without being preceded by the subject's thinking, his/her psychic mental processes representing the factor that triggers, leads and orientates the external action[12]. The analysis of the internal phase of the development of the criminal action is important not only for emphasizing the internal psychic mechanisms that trigger the criminal deed, but also to reveal the limits in which these processes present relevance for the criminal law, in other words to specify to what extent the way of development of the psychical processes could influence the subject's criminal responsibility.

The criminal decision, once made, remains unchanged and could not be modified unless projecting another external manifestation. Remaining within the same decision, the external behaviour could be at the most corrected, or better oriented as regards the objective data that require it and that are sent to the subject in the process of committing the deed involved in the decision.

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[7] Gaston Stefani, Georges Levasseur, Bernard Bouloc, *Droit pénal général*, Edit. Dalloz, Paris, 1995, p.198.
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[11] Dongoroz, *Tratat*, op.cit., p.259; Dongoroz, *Explicații,I,* op.cit., p.133; Bulai, op.cit., p.164.
[12] George Antoniu, *Tentativa*, 1996, p.31.

8. Admitting this chronologic priority of the psychic processes of the internal spiritual phase we should also remark its limits, the fact that it is valid from a certain perspective – correlation between cause and effect, the psychic process playing the role of cause and the external manifestation the role of effect.

This conclusion cannot be maintained if we refer to the psychic processes that are capitalized in the category of guilt and that are always noticed and proved after the external manifestation was established; guilt is a *posterius,* and the identification of its content and of its sphere of influence is conditioned by proving firstly the existence and the character of the external manifestation[13].

Thus, an individual criminal liability is determined by the presence, first of all, of a concrete deed displaying the features of a deed stipulated in the criminal law and then by the evidence that the deed was committed in the form of guilt expresses by the law. On the other hand, the external manifestation is the one that reveal and allows the decoding of the psychic process on which it was founded. The external material activity, carried out in the view of committing the deed involved in the criminal decision, represents *the external objective phase* of the criminal deed.

This phase begins with the first acts, respectively with the preparatory act through which the criminal decision was externalized.

In a large sense, the whole activity carried out in the view of committing the deed involved in the criminal decision could be considered its application. In the criminal doctrine the difference is made between the acts preparing the commitment and the commitment itself of the criminal decision.

Obviously, the role of *posterius* of the psychic process within the above mentioned correlation does not mean placing the psychic process on a secondary level as guilt represents an essential element for the existence of the crime, as well as the external material activity. It is more about a certain order of probation justified by the objective reality that shows that is not possible to establish the guilt unless starting from the research of the external manifestation.

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SYSTEMATIZING THE LEGAL FRAMEWORK EXISTING IN THE FILED OF TOURISM

Diana FORIS*

Abstract: *The numerous Romanian standards and legal regulations as well as their particularities in the field of tourism lead us to formulating systematising proposals of the existing legal framework in the field of tourism.*

As a result of reviewing legal regulations of public administration applied to Romanian tourism activities, we observe that there are numerous legal regulations that bring under their powers the field of tourism; moreover, according to an analysis of the nature of these regulations applied in tourism, we notice that it is particularly the state and the public authorities that have regulatory roles in tourism, more precisely the protection role against abnormalities and abuses caused in tourism and the role of developing tourism. We identify the flexibility and heterogeneity as being the important particularities of legal regulations in the field of tourism.

To conclude, we consider as opportune the proposal regarding the systematisation of the existing legal framework in the field of tourism, by creating and elaborating a „Code of tourism", instrument that shall re-unite the law regulations applicable to the touristic industry for an accessible and easy identification both juridically and institutionally.

Keywords: *legal framework, legal regulations, tourism, systematisation.*

The numerous Romanian standards in the field of tourism and the particularities of legal regulations in this field make us formulate a proposal of systematisation of the legal framework existing in tourism.

Reviewing as follows the legal regulations that the public authority applies on Romanian tourism activities, we notice a multitude of legal regulations that bring tourism under their powers.

Regulation on touristic organisation and activities was applied by the Government Ordinance no. 58 of August 21, 1998 regarding the tourism organisation and activities in Romania[1], approved with amendments and completions by Law no. 755 of December 27, 2001[2], with further amendments and completions, placing tourism as a priority field within the national economy and ensuring the legal framework of its organisation, coordination and development.

This legal document is complex, comprising the definition of the terminology specific to tourism, provisions regarding the touristic patrimony registration and certification, touristic resorts certification and protection, definition / declaration of protected areas, homologation of ski slopes and touristic paths. The Ordinance defines the roles of speciality central public administration, of local public administration Consultative Council of

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[1] Government Ordinance no. 58 of August 21, 1998 regarding tourism organisation and activities in Romania, with further amendments and completions – Published in the Official Gazette no. 309 of August 26, 1998.

[2] Law no. 755 of December 27, 2001 regarding the approval of Government Ordinance no. 58 of August 21, 1998 regarding tourism organisation and activities in Romania – Published in the Official Gazette no. 7 of January 09, 2002.

Tourism, professional associations and NGOs in the field of tourism. Furthermore, it comprises provisions regarding training, specialization and certification of personnel employed in tourism, authorization and classification of touristic accommodation units, certification of tourism agencies, internal and external touristic promotion as well as provisions regarding rights and obligations of economic agents operating in tourism.

However, by taking this regulation into account as an attempt to formulate a Framework-Law of tourism, we consider that this legal act is not sufficiently complex, it presents outdated concepts – especially as regards tourism skills distribution at the level of public administration, case in which specialists in the field need a new Framework-Law of tourism to be elaborated so as to reflect the present image of this field in the context of its harmonisation to the main European trends. To conclude, we underline the necessity to elaborate a new Framework-Law of tourism.

Regulation on classification of touristic accommodation units, certification of tourism agencies and conferring of tourism certificate is provided by the following legal acts:

- Government Decision no. 1267 of December 08, 2010[3] regarding the issuing of classification certificates, tourism licences and certificates aimed at protecting tourists. According to the provisions of the legal act presented above, the touristic accommodation units, irrespectively of their ownership and organisation, are classified according to their constructive features, offered equipment and services, whereas the economic organisation can undertake bidding and selling services and touristic service packages within Romania only if conferred upon a tourism licence and, in case, its appendices, issued by the central public administration body in charge with tourism,
- Minister of Regional Development and Tourism's Order no. 1051 of March 3, 2011 regarding the approval of the Methodology for issuing classification certificates, tourism licences and certificates[4].

Regulation on commercialization of touristic service packages is stipulated by the Government Ordinance no. 107 of June 30, 1999[5], republished in 2008 and approved with amendments by Law no. 631 of November 16, 2001[6], regarding the harmonization of legislation to that of the member countries of the European Union on touristic packages sold and supplied within Romania, irrespectively of their location.

Commercialization of touristic services packages is made according to the *Framework-Contract of commercialization of touristic service packages,* approved by the Minister of Transports, Constructions and Tourism's Order no. 516 of April 12, 2005[7].

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[3] Government Decision no. 1267 of December 8, 2010 regarding the issuing of classification certificates, licences and tourism certificates – Published in the Official Gazette no. 866 of December 23, 2010.

[4] Minister of Regional Development and Tourism's Order no. 1051 of March 4, 2011 regarding the approval of the Methodology of issuing classification certificates, licences and tourism certificates – Published in the Official Gazette no. 182 bis of March 15, 2011.

[5] Government Ordinance no. 107 of June 30, 1999, regarding the commercialization of touristic service packages, republished according to art. V letter p) of title III of Law no. 363 of 2007 regarding the combat against sellers' unfair practices in their relationship with their consumers and harmonisation of regulations to European legislation regarding consumers' protection – Published in the Official Gazette no. 448 of June 16, 2008.

[6] Law no. 631 of November 16, 2001 for approval and completion of Government Ordinance no. 107 of 2001 regarding the commercialization of touristic service packages – Published in the Official Gazette no. 754 of November 27, 2001.

[7] Minister of Transports, Constructions and Tourism's Order no. 516 of April 12, 2005 regarding the approval of the framework-contract for commercialization of touristic service packages – Published in the Official Gazette no. 334 of April 20, 2005.

Regulation of insuring tourists in case of tourism agency's bankruptcy or insolvency is stipulated in Minster of Tourism's Order no. 235 of June 6, 2001[8], according to which, economic agents commercializing touristic service packages are obliged to conclude insurances with insuring companies regarding the insurance of reimbursement of repatriation expenses and/or sums paid by tourists, in case of tourism agency's insolvency or bankruptcy.

Regulations on tourists' protection in accommodation units are comprised in different normative acts, presented as follows:

- Government Decision no. 237 of February 08, 2001, that regulates the approval of norms regarding the tourists' access, record and protection in touristic accommodation units[9].
- Government Decision no. 306 of March 08, 2001, that imposes to economic agents in the field of tourism and cultural bodies to use indiscriminate tariffs and prices for Romanian and foreign tourists and visitors[10].
- Government Decision no. 805 of August 23, 2001 that establishes some information measures on maximum tariffs for accommodation services in the tourist accommodation units with functions of touristic accommodations at unorganized tourism[11].

Regulation on quality increase of hotel services is comprised in the provisions of Government Decision no. 668 of 2003 regarding the approval of the National Programme of quality increase in hotel services and Q brand launching[12], considering as necessary the elaboration and approval of the Methodology of approval of quality quantification criteria and conditions for hotel services, for conferring the Q brand so as to apply the mentioned legal act.

Touristic resorts certification and assessment and accreditation of national centres of touristic information and promotion are regulated by the Government Decision no. 852 of August 13, 2008 regarding the approval of certification regulations and criteria for touristic resorts, adopted so as to protect, preserve and capitalize touristic resources, being certified as a touristic resort that locality or area of a locality disposing of natural and anthropic resources and fulfilling cumulatively, for one of the categories, the criteria mentioned in the appendix to this legal act; the certification is made by the ministry in the field of tourism, at the demand of local public administration and it is approved by Government Decision[13].

Accreditation methodology and criteria of national centres for touristic information and promotion were approved by the Minister for Small and Medium Enterprises, Commerce,

[8] Minister of Tourism's Order no. 235 of June 6, 2001 regarding tourists' insurance in case of tourism agency's insolvency or bankruptcy - Published in the Official Gazette no. 433 of August 2, 2001.

[9] Resolution no. 237 of February 08, 2001 regarding the approval of Regulations regarding tourists' access, record and protection in touristic accommodation units – Published in the Official Gazette no. 92 of February 22, 2001 and republished in the Official Gazette no. 649 of September 12, 2008.

[10] Resolution no. 306 of March 08, 2001 regarding the indiscriminate use of tariffs and prices to Romanian and foreign tourists and visitors by the economic agents and cultural bodies in the field of tourism – Published in the Official Gazette no. 142 of March 22, 2001.

[11] Resolution no. 805 of August 23, 2001 regarding some information measures on maximum tariffs for accommodation services in the touristic accommodation units with functions of touristic accommodation at unorganised tourism – Published in the Official Gazette no. 519 of August 30, 2001.

[12] Government Decision no. 668 of 2003 regarding the approval of the National Programme for quality increase in hotel services and Q brand launching – Published in the Official Gazette no. 424 of June 17, 2003.

[13] according to Government Decision no. 852 of August 13, 2008 regarding the approval of regulations and criteria for certifying touristic resorts – Published in the Official Gazette no. 613 of August 20, 2008.

Tourism and Liberal Professions' Order no. 1096 of September 3, 2008[14], accreditation made by the ministry in the field of tourism at the demand of local and county councils which they are subordinated to.

Regulation on leisure activities in touristic resorts is stipulated in the Government Decision no. 511 of May 31, 2001 regarding some organizational measures of leisure activities in touristic resorts[15], and establishes that leisure activities shall be provided only in especially developed areas that are authorized to function according to the certification conferred by mayors, according to legal regulations in vigour, with prior notice from the ministry in the field of tourism so as to ensure tourists protection and quality tourism development in touristic resorts.

Homologation of mountainous touristic paths and leisure ski slopes are regulated by the following legal acts:

- Government Decision no. 77 of January 23, 2003 regarding the impose of some prevention measures of mountainous accidents and the organisation of rescue activities in the mountains[16], that comprises regulations on the development, homologation and maintenance of mountainous paths, prevention measures of mountainous accidents and the organisation of rescue activities in the mountains,
- Government Decision no. 263 of February 22, 2001 regarding the development, homologation, maintenance and exploitation of ski slopes and leisure paths[17], republished in 2008, that aims at ensuring tourists' protection and skiers' security on leisure ski slopes and paths by homologating leisure ski slopes by the minister in the field together with the county councils who form special commissions and consult the representatives of professional associations in the field and the local council in charge of the ski slope or path under homologation, made at the demand of the administrator of the ski slope or path,
- Minister of Tourism's Order no. 491 of October 5, 2001 in order to approve the Regulation regarding the homologation, development, maintenance and exploitation of leisure ski slopes and paths[18].

Authorization of touristic beaches and leisure water activities is regulated by the following legal acts:

- Government Emergency Ordinance no. 19 of February 22, 2006[19] regarding the use of the Black Sea beaches and the control of activities undertaken on the beaches, approved

[14] Minister for Small and Medium Enterprises, Commerce, Tourism and Liberal Professions' Order no. 1096 of September 3, 2008 regarding the approval of accreditation Methodology of national centres for touristic information and promotion, paragraph.1.2 – Published in the Official Gazette no. 658 of September 18, 2008.

[15] Government Decision no. 511 of May 31, 2001 regarding some organisational measures of leisure activity in touristic resorts – Published in the Official Gazette no. 307 of June 11, 2001.

[16] Government Decision no. 77 of January 23, 2003 regarding the establishment of some prevention measures of mountainous accidents and the organisation of rescue activities in the mountains - Published in the Official Gazette no. 91 of February 13, 2003.

[17] Government Decision no. 263 of February 22, 2001 regarding the development, homologation, maintenance and exploitation of leisure ski slopes and paths - Published in the Official Gazette no. 115 of March 7, 2001.

[18] Minister of Tourism's Order no. 491 of October 5, 2001 for approving the Regulations regarding the homologation, development, maintenance and exploitation of leisure ski slopes and paths - Published in the Official Gazette no. 736 of November 19, 2001.

[19] Government Emergency Ordinance no. 19 of February 22, 2006 regarding the use of the Black Sea beaches and the control of activities undertaken on the beaches, with further amendments and completions - Published in the Official Gazette no. 220 of March 10, 2006.

with amendments by Law no. 274 of July 7, 2006[20], with further amendments and completions, adopted so as to conserve beaches and ensure adequate protection to tourists,

- Minister of Regional Development and Tourism's Order no. 1204 of March 26, 2010[21] approving the Methodology of tourist beaches authorization,
- Government Decision no. 452 of April 18, 2003[22] regarding the leisure water activities, establishing the conditions of undertaking leisure water activities in national navigable waters, with the aim of ensuring tourists' protection and security and environment protection so as, for undertaking profitable leisure water activities, the bearer of the leisure water area must be in the possession of a touristic authorization certificate issued by the ministry in the field of tourism and an operation certificate issued by the mayor houses, according to the documents the bearer put in for as a solicitor,
- Minister of Transports, Constructions and Tourism's Order no. 292 of September 12, 2003[23] regarding the approval of Methodology for undertaking leisure water activities that establishes the criteria, conditions, issuing procedure of the leisure water activities certificate, as well as the criteria regarding the development, equipment and supply of leisure water areas and regulations regarding the undertaking of such activities.

Notification of urbanism documents for touristic areas and resorts and of technical documents for constructions with touristic purposes is regulated by Government Decision no. 31 of January 24, 1996[24] regarding the approval of the Methodology for notification of urbanism documents for touristic areas and resorts and of technical documents for constructions with touristic purposes. The specialty notification of the Ministry of Tourism proceeds and conditions the issue of construction / demolition certificate for touristic objectives, whereas it intends to meet the following objectives:

a) correlation of urbanism and field plan of touristic areas and resorts to the demands of their touristic development and to features specific to planning in the field of tourism, aligned to internal and international standards;

b) touristic patrimony capitalization and protection through developing sustainable and qualitative tourism in accordance with the strategy and national programme in the field;

c) increase of the competitiveness of the Romanian touristic demand according to performance criteria specific to constructions with touristic purpose.

Regulation on tourism guides certification is stipulated by**:**

- Government Decision no. 305 of March 8, 2001[25], with further amendments and completions, regarding tourism guides certification and employment,

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[20] Law no. 274 of July 7, 2006 for the approval of the Government Emergency Ordinance no. 19 of February 22, 2006 regarding the use of the Black Sea beaches and the control of activities undertaken on the beaches - Published in the Official Gazette no. 586 of July 6, 2006.

[21] Minister of Regional Development and Tourism's Order no. 1204 of March 26, 2010 regarding the approval of Methodology of touristic beaches authorization - Published in the Official Gazette no. 236 of April 14, 2010.

[22] Government Decision no. 452 of April 18, 2003 regarding leisure water activities – Published in the Official Gazette no. 282 of April 23, 2003.

[23] Minister of Transports, Constructions and Tourism's Order no. 292 of September 12, 2003 regarding the approval of Methodology for water leisure activities – Published in the Official Gazette no. 664 of September 19, 2003.

[24] Government Decision no. 31 of January 24, 1996 regarding the approval of the notice Methodology of urbanism documents for touristic areas and resorts and of technical documents for constructions with touristic purpose – Published in the Official Gazette no. 22 of January 30, 1996.

[25] Government Decision no. 305 of March 8, 2001 regarding the certification and employment of tourism guides – Published in the Official Gazette no. 140 of March 21, 2001.

• Minister of Transports, Constructions and Tourism's Order no. 637 of April 1st, 2004[26] regarding the approval of Methodology for conditions and criteria for selection, schooling, certification and employment of tourism guides.

Regulation on the system regarding holiday tickets is comprised in the following legal acts:

• Government Emergency Ordinance no. 8 of February 18, 2009[27] regarding holiday tickets, which are value vouchers that can be given by employers to their personnel employed according to individual employment contract so as to recover and keep their labour capacity,

• Government Decision no. 215 of March 4, 2009[28] regarding the approval of Methodology for holiday tickets.

Having analyzed the nature of regulations in the field of tourism, we observe that it is the state and public authorities that particularly have regulatory roles in tourism, more precisely the protection role against abnormalities and abuses caused in tourism and the role of developing tourism.

1. *Protection according to the law against abnormalities and abuses in tourism* aims at fixing abnormalities generated by touristic activities that can threaten public order and abuses within private law rapports, more precisely:

a) *Protection according to the law of public order* generated regulations regarding ensuring public safety, peace and cleaning, aspects that the public administration is in charge of. In Romania, there were regulated water and mountainous sport practices which could harm public safety (Government Decision no. 511 of 2001 regarding some organisational measures of the leisure activities in touristic resorts, Government Decision no. 452 of 2003 regarding the undertaking of leisure water activities, Minister of Transports, Constructions and Tourism's Order no. 292 of 2003 regarding the approval of Methodology for undertaking leisure water activities, Government Decision no. 263 of 2001 regarding the development, homologation, maintenance and exploitation of leisure ski slopes and paths, republished, Minister of Tourism's Order no. 491 of 2001 regarding the approval of Regulations on development, homologation, maintenance and exploitation of leisure ski slopes and paths). Night leisure activities that can disturb public peace were regulated both by the central public administration (Government Decision no. 1267 of December 8, 2010 regarding the issuing of classification certificates, tourism licences and certificates) and by the local public administration, according to Decisions taken by the Local Council regarding the operating programme of public food units, respectively the organization of musical activities or other crowds of people. Regulations on ensuring public cleaning were adopted at the level of local public administration and at the level of the central public administration as well, especially those regarding environment protection against touristic pressure, creation of natural parks and protected areas.

[26] Minister of Transports, Constructions and Tourism's Order no. 637 of April 1, 2004 regarding the approval of Methodology for conditions and criteria for selection, schooling, certification and employment of tourism guides – Published in the Official Gazette no. 534 of June 15, 2004.

[27] Government Emergency Ordinance no. 8 of February 18, 2009 regarding holiday tickets – Published in the Official Gazette no. 110 of February 24, 2009.

[28] Government Decision no. 215 of March 4, 2009 regarding the approval of Methodology for holiday tickets – Published in the Official Gazette no. 145 of March 9, 2009.

b) *Protection according to the law of touristic consumer* generated specific regulations of tourists' protection in Romania: organisation of lifeguard activities (Government Decision no. 1021 of 2002 regarding the approval of regulations on lifeguard and first-aid activities organisation on beaches and pools), rescue activities organisation (Government Decision no. 77 of 2003 regarding measures to prevent mountainous accidents and organisation of rescue activities in the mountains), regulations on indiscrimination (Government Decision no. 306 of 2001 regarding the use by economic agents in the field of tourism and cultural bodies, of indiscriminating tariffs and prices for Romanian and foreign tourists and visitors), information regulations (Government Decision no. 805 of 2001 regarding some information measures on maximum tariffs for accommodation services in touristic accommodation units with functions of touristic accommodation at unorganised tourism), regulations on comfort assurance (Government Decision no. 1267 of December 8, 2010 regarding the issuing of classification certificates, tourism licences and certificates, Minister of Regional Development and Tourism's Order no. 1051 of March 3, 2011 regarding the approval of Methodology for issuing classification certificates, tourism licences and certificates), regulations on personal protection assurance (Government Decision no. 237 of 2001 regarding the approval of regulations on tourists' access, record and protection in touristic accommodation units), regulations on assurance of rights and obligations obedience and knowledge (Government Ordinance no. 107 of 1999 regarding the commercialization of touristic service packages, republished, Law no. 631 of 2001 regarding the approval of Government Ordinance no. 107 of 1999 regarding the commercialization of touristic service packages, Minister of Transports, Constructions and Tourism's Order no. 516 of 2005 regarding the approval of the commercialization Framework-Contract of touristic service packages), regulations in the field of hygienic and sanitary safety (Mutual Order of Minister of Tourism, Minister of Health and Family, Minister of Public Administration and Minister of Waters and Environment Protection no. 330/262/109/327 of 2002 regarding disinfection and deratization of touristic accommodation units in beach resorts), regulations for tourists' insurance (Minister of Tourism's Order no. 235 of 2001 regarding tourists' insurance in case of tourism agency's insolvency or bankruptcy) etc.

c) *Protection according to the law of touristic profession* needed regulations so as to ensure honesty, competence and solvency of service providers in the field, protection of the commercial sector against abusive and disloyal competition and nonprofessional providers and last, but not least, tourists' protection. Tourism organisation and activities in Romania were regulated by Government Ordinance no. 58 of 1998 that was approved with amendments and completions by Law no. 755 of 2001, with further amendments and completions. The activity of touristic accommodation units, of tourism agencies and the issuing of tourism certificates was regulated (Government Decision no. 1267 of December 8, 2010 regarding the issuing of classification certificates, tourism licences and certificates, Minister of Regional Development and Tourism's Order no. 1051 of March 3, 2011 regarding the approval of Methodology for the issue of classification certificates, tourism licences and certificates). Furthermore, the profession of tourism guide was certified (Government Decision no. 305 of 2001 regarding tourism guides certification and employment, with further amendments and completions, Minister of Transports, Constructions and Tourism's Order no. 637 of April 1, 2004 regarding the approval of the Methodology for conditions and criteria of tourism guides selection, schooling, certification and employment).

2. *Protection according to the law of tourism development* is manifested by the creation of laws to regulate touristic activities by the public powers (Government Ordinance no. 58 of 1998, regarding tourism organisation and activities in Romania, with further amendments and completions, that was approved by Law no. 755 of 2001, with further amendments), as a result of considering tourism as an important source of income at the national level, as a lever within regional development, and last, but not least, as a social necessity. Moreover, the regulation of paid holidays, subsidies given to retired persons as balneary treatment tickets, created so as to introduce tourism in the social field, introduction of holiday tickets, have all determined the development of important bodies and legal rules.

The particularities of legal regulations in the filed of tourism are determined by the specificity factor in the originality of legal regulations features that regard this field, identifying flexibility and heterogeneity as important particularities of the legal regulations in this field.

Flexibility is one of the particularities of legal regulations in the field of tourism, as they must be integrated within less definite and less constant notions, theories, rules than those of other fields, in order to keep up with the dynamics of the tourism activity. The legal instruments must be able to translate the necessities of some compliant economic policies and adapt to the evolution and complexity of production and consume specific to touristic activities.

Heterogeneity is another feature of the legal regulations in the field of tourism, as tourism according to its nature, is heterogeneous. Heterogeneity manifests itself at the level of objects, sources and nature of all the legal acts in this field.

To conclude, as a consequence of all presented above, we consider as opportunistic the systematisation proposal of the legal framework existing in tourism, by creating and elaborating a „Code of tourism", instrument that shall unify all the legal stipulations applicable to tourism, making the identification easier and accessible both juridically and institutionally.

This „Code of tourism" shall contain a legislative part and a regulatory one.

The legislative part of the „Code of tourism" shall consist of the following titles:

Title I. – will be on the general organisation of tourism, especially on the assignment of tourism skills among the state, the territorial communities and institutions resulted through the public-private partnership;

Title II. – regulation of activities and occupations in tourism,

Title III. – regulation of the activities of accommodation units, infrastructure and development in the field of tourism, respectively, the status of touristic resorts and national centres for national touristic information and promotion.

Title IV. – taxation in tourism and grouping of regulations regarding the financing of tourism activities and access to holiday, rest and treatment.

The regulatory part of the „Code of Tourism" shall respect the principle of coding taken from the legislative part, underlining the necessity of ensuring harmony and hierarchy of its right to abolish contrary provisions. This part shall also comprise regulations regarding the procedure of enforcement, the establishment of exercising activities of journeys and stays organization and commercialization, as well as including regulations from other fields crossing the field of tourism.

This „Code of tourism" shall systematize the legal framework existing in the field and shall comprise all the legal regulations and also other regulations connected to tourism so as all the further completions should be accessible rapidly, in a competent and coordinated manner.

We consider that the proposal to create and elaborate a „Code of tourism" is formulated in an adequate moment, combining with the opportunity to set up the Inter-ministerial Commission for touristic development in Romania[29] – consultative body with no legal personality, created with the aim of coordinating and promoting policies as well as analysis and development actions in the field of tourism – body that shall coordinate the elaboration of this instrument.

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ON PRELIMINARY IMPACT ASSESSMENT OF NEW RULES IN EXISTING LEGISLATION

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Abstract: *In order to apply the principle of scientific substantiation in the drafting of government acts, which is deemed the essential principle in regulation, Romania introduced the preliminary impact assessment of draft laws, proposed laws and other drafts of government acts.*
Keywords: *preliminary assessment, impact, government act, regulation.*

M. Djuvara insisted on two significant moments for legislative actions: finding out the existing social circumstances that claim legal regulation, and establishing an ideal legal behaviour adequate to such circumstances, by the legislator. [1]

To pass on human behaviours expressed in various relations, from a non-juridical life to law-making, means to have a thorough, systematic and accurate knowledge of the social phenomena, as the only way one can hope for legislation in harmony with justice, human ideals, and the natural evolution of society.

Nicolae Titulescu said that the essential nature and role of legislative drafting is creativity, and its aim is to 'provide the legislator with legal rules and institutions tailored to the new social needs, aiming at fully satisfying the practical social interests, and at legal progress.'[2]

In legal writing, legislative drafting was defined as a part of legal technique, consisting in a complex set of methods and procedures, capable of providing a suitable form for the content (substance) of legal regulations.[3]

Pursuant to Article 1 of Law no. 24/2000[4] regarding legislative drafting standards for government acts, as republished, legislative drafting provides the structure, uniformity, coordination, and an adequate legal content and form for each government act.

Legislative drafting is based on the following:

- specific legal standards, called legislative drafting standards;
- separate principles, called principles of regulation.

In the Romanian legal system, legislative drafting standards are included in Law no. 24/2000 regarding legislative drafting standards for government acts, republished, with subsequent modifications and completions.

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[1] M. Djuvara, *General Theory of Law. Rational Law, Positive Sources and Law*, All Publishing, Bucharest, 1995, p. 563.

[2] N. Titulescu, *'Essay sur une théorie generale des droits eventuels'* (Essay on a General Theory of Contingent Rights), Bonvalot-Jouve, Paris, 1907, p.18.

[3] N. Popa, *General Theory of Law*, 3rd Edition, C.H. Beck Publishing, Bucharest, 2008, p. 171. For the same purposes, *see* I. Rădulescu, *General Theory of Law*, Universul Juridic Publishing, Bucharest, 2010, p. 155.

[4] Law no. 24/2000 was published in the Romanian Official Gazette, Part I, no. 139 from March 2000 and republished in the Romanian Official Gazette, Part I, no. 777 of 25 August 2004. It was subsequently modified by Law no. 173/2007, published in the Romanian Official Gazette, Part I, no.406 of 18 June 2007 and by Law. 194/2007, published in the Romanian Official Gazette, Part I, no. 453 of 4 July 2007. Then, Law no. 24/2000 was republished again in the Romanian Official Gazette, Part I, no. 260 of 21 April 2010. After republication, it was modified by Law no. 29/2011, published in the Romanian Official Gazette, Part I, no. 182 of 15 March 2011.

These standards define the component parts of a government act, its structure, form and content design, the technical procedures to modify, complete, annul, publish and republish government acts, and the language and style of such acts (Article 2 paragraph 2 of Law 24/2000, republished).

As indicated by the provisions of Article 3 of this law, these legislative drafting standards are mandatory in writing draft bills and legislative proposals, in drafting and adopting government decrees and decisions and government acts issued by central or local state administrative bodies.

Let us also say that, under Article 71 of Law no. 24/2000, republished, legislative drafting standards equally and accordingly apply to government acts which ratify or approve international treaties or agreements.

The analysis of legal provisions and opinions expressed in the literature lead us to conclude that the principles of regulation are the following:[5] the principle of scientific substantiation in drafting legal standards, the principle of ensuring a natural rapport between the static and dynamic issues of law (principle of equilibrium), the principle of correlating the system of government acts, and the principle of accessibility and economy of means in drafting government acts. These principles are mandatory in any legislative action, not only because it is legally impossible to override them but rather that they are essential for the coherence of the legislative system.

The fact that social relations are constantly changing and increasing triggers the adoption of legal regulations, which in turn claims a process of investigation, research, knowledge and understanding of social phenomena by the regulatory relevant bodies.

Article 6 of Law no.24/2000, republished, modified by Law no. 29/2011, states that the solutions included in a draft government act should be thoroughly reasoned, taking into account the social interests, the legislative policy of the Romanian state, and the need of correlating the entire system of government acts, the harmonization of the national laws with community laws, the international treaties to which Romania is a party, and the case law of the European Court of Human Rights. These provisions are to be related to those under Article 22 of the same law, as modified.

Thus, legislative solutions provided under the new regulation are to take account of the European Union relevant rules, of the provisions of the international treaties to which Romania is a party, and of the European Court of Human Rights case law, and to ensure compatibility with them.[6]

If required by the legislative reality, proposed modifications and completions of internal government acts are to be submitted if they include provisions which are not concurrent with those of international acts to which Romania is a party, are not compatible with the community law, or override the European Court of Human Rights case law.

To this purpose, the statutory obligation to initiate the draft law regarding the modification and completion or the repeal of a government act, or a part of it, that counters the provisions of the European Court of Human Rights or any ancillary memoranda, ratified by Romania, and the rulings of the European Court of Human Rights devolves with the

[5] For the same purpose, *see* N. Popa, *op. cit*., pg. 172-179; C. Voicu, *General Theory of Law*, Universul Juridic Publishing, Bucharest, 2008, p. 179-185; I. Craiovan, *General Theory of Law*, Second edition, revised and completed, Olimp Publishing, Bucharest, 1998, p. 226-228.

[6] We note that, through Law no. 29/2011, the Romanian legislator pursued the promotion of a close relation between the legislative process and ECHR case law, and to expressly avoid further convictions of Romania by ECHR.

Government, which shall submit this initiative to the Parliament within 3 months at the most, from the date the ruling of the European Court of Human Rights was communicated.

The interpretation of these statutory provisions leads us to the conclusion that the principle of scientific substantiation of drafting legal standards is quintessential for all other principles.

Current and envisaged social aspirations, as well as deficiencies of the legislation in force must underlie the drafting of any government act that fully meets the needs for regulation.

In this regard, paragraph 4 of Article 6 of Law no. 24/2000, republished, states that the drafting of government acts having an impact on social, economic or environment areas, on the general consolidated budget, or on the laws in force is to be based on the public policies approved by the Parliament or the Government, whose type and structure are defined by the Government.

As a warranty for obtaining the necessary, sufficient and possible rule of law, likely to contribute to a solid legislative stability and efficiency, Article 7 of Law no. 24/2000, republished, with subsequent modifications and completions, also lays down the rules of preliminary impact assessment for new rules.

Pursuant to the legal definition in Article 7 paragraph (1), preliminary assessment of the impact of draft bills, proposed laws and other draft government acts constitute a set of activities and procedures mean to provide an adequate substantiation to legislative initiatives. This implies the identification and analysis of economic, social, environment, legislative and budget effects likely to be produced by the proposed rules.

The legislator stresses the significance of this assessment and states, under paragraph (2) of the above-mentioned Article that preliminary impact assessment of draft government acts is deemed to be the course of substantiation for proposed legislative solutions, and must precede the adoption of government acts.

The substantiation of a new regulation shall have in view both the impact assessment of specific legislation in force at the moment when the draft government act has been written, and the impact assessment of public policies implemented through the draft government act.

The preliminary assessment of the impact is performed by the initiator of the draft government act. All the same, Article 7 paragraph 4 states that, for more complex draft government acts, the assessment may be achieved, under service agreement, by scientific research institutes, universities, trading companies or non-governmental organizations, in accordance with the relevant public procurement provisions.[7]

In the light of the fact that, in many cases, the right of legislative initiative is exercised by the Government, on the one hand, and that, on the other, the Government and the central or local public administrative bodies have executive and administrative power, paragraph 5 of Article 7 provides that, in order to draft the preliminary assessment of the impact of proposed legislation initiated by members of the Parliament, deputies and senators, or of

[7] We underline that the first impact assessments of the new administrative procedure rules in public procurement (O.U.G. (Government Emergency Ordinance) no. 19/2009 regarding measures for public procurement legislation, published in the Official Gazette of Romania, Part I no.156 of 12 March 2009), led to the following results: regulations may restrain individuals' right to appeal acts issued according to public procurement procedures, public procurement agreements will only be signed after prior verification by the court to which the matter was referred, and unlawful public procurement agreements may be affirmed by the very courts that ascertained their unlawfulness (for a detailed presentation of these results, *see* R. Bălaș, *First impact assessments of the new public procurement administrative procedure rules,* at www.hotnews.ro).

citizens' initiatives, members of the Parliament may request the Government to provide access to the necessary data and information.

Although, pursuant to Article 6 paragraph 6, preliminary assessment of new regulations is not mandatory for legislation proposed by deputies and senators, or for citizens' initiative, pursuant to paragraph 3^1 of this Article, recently introduced by Law no. 29/2011, proposed legislation, draft laws and other draft governmental acts shall mandatorily be accompanied by a preliminary assessment of the impact of the new rules on fundamental human rights and liberties. In the anticipation of the need for expressly provided legal specifications, in a letter to the Chamber of Deputies Committee for Budget, Finance and Banks, the National Bank of Romania (BNR) upheld that the National Authority for Consumers' Protection (ANPC) to make a preliminary assessment of the impact of the new regulations under O.U.G. (Government Emergency Ordinance no. 50/2010[8] regarding consumer loan agreements. In its motivation, the Central Bank insisted on for an assessment that would have established the impact of such provisions' enforcement, and would have confirmed their applicability to the loan categories exempted under the transposed directive, arguing that a preliminary impact assessment of new rules is an obligation under the legislative drafting standard as well. This holds especially since the initiator's failure to observe the statutory obligation to perform an impact assessment on the proposed piece of legislation, including the creditors and credit market, prevents the central bank from rendering an opinion on whether the provisions of Article 3 paragraph (2) of Law 312/2004[9] on the Statute of the National Bank of Romania are applicable, namely the necessity of an advisory opinion of the central bank on some categories of government acts.

A preliminary assessment would have established the extent to which some provisions of the emergency ordinance may have laid the ground for prejudices to BNR's objective to set rules regarding loans and to maintain financial stability.

Also, stressing the significance of an impact analysis of new regulations on the credit market, the central bank stated: 'BNR's mere consolidation of data from banks, in an attempt by the latter to show authorities the aggregate impact on the bank system of the enforcement of OUG 50/2012 cannot be deemed an impact study, or a substitute of it, because, on the one hand, it is not BNR's task to check the validity of these data but rather of the line authority – ANPC, and, on the other hand, because such assessment ought to include elements other than the costs incurred with the entities subject to the regulation.'[10]

In close connection to the preliminary impact assessment of new rules, Law no. 24/2000, republished, with subsequent modifications and completions, regulates further obligations devolving with the initiators of draft government acts. In this regard, pursuant to Article 19 paragraph (1), the writing of draft government acts, depending on their relevance and complexity, is to be preceded by scientific documentation and analysis, in order to form a thorough view on the social and economic reality to be regulated, on the history of relevant legislation, and on similar rules in foreign legislation, especially in the European Union member states.

[8] O.U.G. (Government Emergency Ordinance) no. 50/2010 was published in the Official Gazette of Romania, Part I, no. 389 of 11 June 2010, approved with modifications by Law no. 288/2010, published in the Official Gazette of Romania, Part I, no. 888 of 30 December 2010, and is the transposition of the European Directive 48/CE/2008.

[9] Published in the Official Gazette of Romania, Part I, no. 582 of 30 June 2004.

[10] Visit, in this regard, www.euroavocatura.ro.

For their legislative documentation, initiators of draft government acts may request, additional information from the Legislative Council and other authorities or agencies with duties in giving notice in a particular area (Article 19 paragraph 2).

Paragraph 3 of Article 19 stipulates that the results of the research studies and the references to additional information sources, relevant to the debate of draft government acts, are deemed as an instrument for submitting and substantiating the draft government act.

To document the substantiation of a draft government act, one should examine the relevant practice of the Constitutional Court, the European Court of Human Rights case law, the practice of courts of law in applying the rules in force, and the relevant legal writing. We need to highlight both the significance of judicial practice and/or precedent, and of the legal writing in the process of law interpretation and enforcement, and to add the argument of introducing the obligation of consulting the two sources by initiators of draft government acts.

Having analyzed the most important legal provisions, we agree with the opinions expressed in the literature stating that scientific substantiation of draft government acts should be made of the following stages:[11]

- a detailed description of fact patterns about to be transformed into legal situations;
- an analysis of the reasoning and arguments demanding the control of that area;
- an assessment of the social costs for adopting and enforcing the legal regulation;
- to establish the advisability for adopting a particular government act.

In the light of the analysis we have proposed, among these chronological stages, we believe that the preliminary impact assessment of draft bills, proposed legislation and other draft government acts is, one of paramount importance, and a solid reason for new regulations.

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[11] N. Popa, *op. cit*., p. 173; C. Voicu, *op. cit*., p. 179.

DIRECT ACTION IN SETTLEMENT OF THE NEW CIVIL CODE

Mara IOAN[1]

Abstract: *The current Civil Code brings some new elements for actions direct to the previous legislation (Civil Code 1864). So, there are regulated for the first time direct actions against the landlord sub-tenant benefit. Also, some changes are made to direct the matter of the Contract.*

Keywords: *direct action, contract, term, rent*

Invoking the contract in court proceedings is a party right, the accessory that forms the content of legal rights arising from contract. The exception to this rule in cases provided by law, recognizes and third parties to the contract can exercise direct action against one of the Contracting Parties that contract just relying on their behalf[2]. The direct actions are the possibility of the creditor to ask for the payment directly from the debtor of his debtor[3] without losing the right against the debtor[4]. The term „direct" means that independent legal existence of any links between the owner and third party action taken to satisfy the claim, first you get this payment, which will benefit directly from the latter, and in any direct way, but not necessarily legal[5]. Thus, direct action implies the existence of three parts in two separate contracts but with one common element that is just one of those parties: lender - principal - the principal debtor, debtor named sub-debtor. Direct action against the creditor holds sub-debtor. Direct action, as a personal right [6] of a third party for the contract which he claims, a possibility has its source in the law [7] – directly and immediately [8] -, is presented as a derogation from the principle of relativity effects contract the active side [9]. Since the birth of third party rights is irrelevant, this is an apparent exception to this principle [10].

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[2] I. Adam, *Civil Law. General Theory of Obligations,* All Beck Publishing House, Bucharest, 2004, page 126; I. Adam, *Civil Law. The Obligations. The Contract (In the reglementation of the New Civil Code)*, C.H. Beck Publishing House, Bucharest, 2011, page 545; L. Pop, I-Fl. Popa, S.I. Vidu, *Basic Treaty of Civil Law. The Obligations (according to the New Civil Code)*, Universul Juridic Publishing House, Bucharest, 2012, page 198.

[3] L. Pop, Treaty of Civil Law.*The Obligations. volume I. The General Legal Regime or The Being of Civil Obligations*, C.H. Beck Publishing House, Bucharest, 2006, page 414; C. Stătescu, C. Bîrsan, Civil Law. T*he General Theory of Obligations*, Hamangiu Publishing House, Bucharest, 2008, page 76; B. Fajes, *Droit des obligations*, L.G.D.J., Paris, 2009, page 223; M. Fabre-Magnan, *Droit des obligations. Contract et engagement unilateral*, P.U.F., Paris, 2008, page 112; P. Vasilescu, *Civil Law. The Obligations (according to the New Civil Code)*, Hamangiu Publishing House, Bucharest, 2012, page 112.

[4] Yv. Buffelan-Lanore, V. Larribau-Terneyre, *Droit civil. Les obligations*, 12e edition, Sirey, Dalloz, Paris, 2010, page 108.

[5] L. Pop,*in the work cited*, p. 415; P. Vasilescu, *in the work cited*, pages 112-113.

[6] Yv. Buffelan-Lanore, V. Larribau-Terneyre, *in the work cited*, page 106.

[7] L. Pop, *in the work cited*, page 101.

[8] C.A. Bucharest, decision from 20 of April 1882, in *Adnotated Civil Code*, by C. Hamangiu, N. Georgean, volume III, apud I. Adam, *Civil Law. The Obligations… in the work cited*, page 546, note 1.

[9] C. Stătescu, C. Bîrsan, *in the work cited*, page 76.

[10] I. Adam, *Drept civil. Obligațiile … in the work cited*, page 546.

Exerting direct action, a creditor acts as its own virtue, but a right of his debtor[11]. Direct action by the existence of a right of the debtor's means on the one hand, a creditor can not act only within its debtor's rights and, on the other hand, guarantees that he will have his debtor's claim accessories[12]. In return, sub-debtor will oppose them exceptions they have against their creditor occurring before bringing proceedings[13].

Civil code from 1864 did not contain general rules on direct action, but, taking the French model, cover only two cases: the enterprise field (art.1488 previous Civil Code) and mandate (art.1542 last paragraph previous Civil Code)[14].

Some particular reglementations from normative acts such as, for exemple, action against the user provided by temporary employees of art. 96 paragraph 4 from the Labor Code.

Situation is little changed under the rule of the current Civil Code does not include a provision with general character, common law, direct actions, there are only rules concerning situations. Moreover, the new Civil Code, like the previous one, provides two direct actions mentioned above, in favor of third parties: direct action in the matter of the Contract, available to employees of contractor use, which may act directly on the beneficiary to obtain payment of amounts due to them for services rendered, to the extent that these amounts were not paid to the contractor (Article 1856 civil Code) direct action of the mandate of material made available to the principal against sub-representative (art. 2023 paragraph 6 Civil Code). Also included there are lesser action against sub-locator governed by art.1807 of the New Civil Code.

Moreover, this model is reflected in the laws of other states, such as:

a. French civil code provides applications in law contract by sub-rent (art. 1753[15]), bycontracting(art. 1799[16]) and of mandate (art.1994 alin.2[17]). Law no.82-1153 from 1982 regarging the interior trasports[18] is in ***art. 34 paragraph 3*** right to direct action of the locator of industrial vehicles with driver against the sender and recipient, to pay its benefits.

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[11] Yv. Buffelan-Lanore, V. Larribau-Terneyre, *in the work cited*, page 108.

[12] *Ibidem*.

[13] *Ibidem*.

[14] P. Vasilescu, *in the work cited*, page 113.

[15] Article 1753 Franch Civil Code: „(1) The sub-lessee is not bound to the owner only up to the price of sub-rental whose debtor he may be in the moment of execution and without opposing to the payments made in advance. (2) The payments made in advance by the sub-lessee under a stipulation of the rent or as a consequence of the use of the sites may not be considered to have been made in advance".

[16] Article 1799 paragraph 1 and 2 of the French civil Code: „***(1)*** The owner of the work who signs a convention on the work covered by paragraph 3 of article 1779 must ensure to the developer the payment of the due sums when they exceed the threshold targeted by the Council of State decree. ***(2)*** When the owner of the work uses a specific credit to finance the work, the lending institution may not disburse the loan other person but to those referred to in paragraph 3 of article 1779 as long as they have not received the payment of the claim arising from the loan agreement. Payments are made at the written order and under the responsibility of the owner of the work personally or of the representative designated for this purpose**".**

[17] Article 1994 paragraph 2 Of the French Civil Code: „In all cases, the principal may act against the person who replaced the agent".

[18] See http://www.legifrance.gouv.fr. Article 34 from the law which was modified by Law no. 2010-788 from 2010 according to the national agreement for the medium: „The person who rents industrial vehicles with driver has a direct action for the paying benefits against the sender and its recipient, which are guarantees for the payment of the rent payable by the carrier who has been entrusted transport of their goods. Any contrary clause is reputed unwritten**".**

b. Swiss Code of obligations governing three applications of direct action contracts of sub-rent (ART.262 PARAGRAPH 2[19]), OF sublease (ART.291 PARAGRAPH 3 THESIS II[20]) and of empowerment CONTRACT (ART.399 PARAGRAPH 3[21])[22].

c. The Italian Civil Code covered all three applications of direct action: the relationship between landlord and sub-tenant (art.1595 paragraph 1[23]), between the principal and the sub-agent (art.1717 PARAGRAPH 3[24]) and between the third party beneficiary and the insurer (art.1917 paragraph 2[25]).

d. Civil Code of Quebec contains, in turn, provisions which concern the application of direct actions on: sub-rent (art.18 paragraph1[26]), entreprise art.2123[27]) and insurance (art.2500[28]).

I. Direct action in the matter of the Contract

Art.1488. first Civil Code said: „*Builders, craftsmen and other workers employed in building a foundation of a building* or other works apalt data (in the enterprise), may claim their payment from the principal, on both the developer as it would owe at *the time of complaint*".

Art. 1856 Civil Code, having the marginal name „direct action of the workers", states: „To the extent not paid by the contractor, persons who, under a contract with it, have been engaged for carrying out the work contracted services or have direct action against beneficiary, up to the amount on which the latter owes to the contractor at the time of the action".

The current Civil Code, unlike the previous established one, specifically settles the legal nature of the action both in name and the marginal standard itself. Another novelty is given by broadening the beneficiaries of direct action: the „builders, craftsmen and other

[19] Article 262 paragraph 3 of Swiss Obligatory Code: „The lessee is warrant that for the lessor that the sub-lessee will only use the place for the authorized use by the main lease. The lessee may address directly to the sub-lessee in order to force him".

[20] Article 291 paragraph 3 thesis II of Swiss Obligatory Code: „Lessor may address the sub-lessee in order to force him".

[21] Art. 399 alin. 3 Swiss Obligatory Code: „ In both cases, the principal can realize through direct action against the person the representative replaced the rights it has against it".

[22] See http://www.pambianco.net/Droit/codeobligations/index.htm.

[23] Article 1595 paragraph 1 of Italian Civil Code: „ The lessor, without prejudice its rights to the lessee, takes direct action against the sub-lessee to claim the lease price, this being a debtor in the moment of the legal request, and to fulfill all obligations arising from sub- lease contract"

[24] Article 1717 paragraph 3 Italian Civil Code: „Principal can act directly against the person substituted by the agent".

[25] Article 1917 paragraph 2 Italian Civil Code: „The insurer must, in addition to socializing the insurance, pay the compensation directly to injured third party, and must do direct payment if the insured requires it".

[26] Article 1874 paragraph 1 Quebec Civil Code: „When an action is brought by the lessor to the lessee, the sub-lessee is held, to the lessor, only up to rent sub-rent whose debtor this is to the lessee; he can not oppose the payments made in advance".

[27] Article 2123 Quebec Civil Code: „(1) In the moment of the payment, the client may retain, from the contract price, an abundant sum of money to pay the claims of workers, like those of other persons who may assert a legal mortgage on the real estate work and who denounced the agreement made with the contractor, for works made or materials or services provided after this accusation. (2) This deduction is valid as long as the contractor has not resolved the customer a receipt of such claims. (3) He can not exercise this right if the contractor gives a sufficient guarantee to guarantee its claims".

[28] Article 2500 Quebec Civil Code: „(1) The insurance is only injured by the compensation of the third parties affected „. and article 2501 shows that: „(1) The injured third party may assert the right of action against the insured or the insurer, or against both (2) Choosing the quiet way of injured third parties in this regard does not mean giving up other procedural ways".

workers employed", workers who actually participated in the work, the „people who ... have worked for the service or execution of work „.

We notice that in article 1856 Civil Code it requires people to be laborers or, in general, services under a *contract* with the contractor. We believe it's providing evidence needed to prove the value of the necessary to prove the value of the sum of money the owner has to the direct action holder, not by an additional condition for bringing proceedings. This is because most contracts are consensual. Of course, when the contract is a solemn one, as in the case of the individual employment contract, evidence of the amount of salary will be the document that is recorded as the manifestation of the will of the parties (*instrumentum),* its absence being the equivalent to lack of contract (as *negotium).*

Arrangements for exercising direct action are:

- the existence of valid ended contract;
- existence of works or services carried out by the contractor, through „engaged" persons;
- beneficiary has not paid the price of the enterprise to the entrepreneur;
- the contractor has not paid, in turn, the people who have provided services or performed the work [29].

The formulation at the end of the norm „*at the moment of action introduction"* could lead to the conclusion that the direct action can be done by calling the court.But direct action is not legal action [30], They acquire this data only to the extent that sub-debtor (the beneficiary of the contracting, in this case) refuses to do the respective payment and, more, a certain interpretation would bring an unuseful interpretation of realising the law of article 1856 Civil Code.

II. Direct action in the matter of the mandate

Article 1542 paragraph 2 Civil Code says that: „In all cases, the principal may bring direct action against the person the trustee substituted it."

Article 2023 Civil Code entitled „Substitution made by agent", decides: „(6) In all cases, the agent has a direct action against the person the agent substituted it".

Expression „in all cases" refers to the fact that direct action may be done and when the representative authorised the agent expressively to substitute another person and then when the substitution operated in the lack of such authorising. Thus, the representative has a direct action against every person who the agent substituted it, with or without the first person wish.

We notice that between the new and old reglementation, there are no differences regarding the direct action of the agent.

III. Direct action of sub-lease matter

Article 1.807, intitled „Effects of sub-lease. Actions against the sub-lessee", disposes: „(1) In case of non-payment of rent due under lease, the lessor can pursue the sub-lessee up to *rent competition* this owes to the main lessor. Advance payment of the rent may not

[29] Gh. Gheorghiu, in The New Civil Code. *Comment on articles*, by Fl.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), C. H. Beck Publishing House, Bucharest, 2012, page 1886.

[30] P. Vasilescu, *in the work cited*, pages 112-113.

hinder the main lessor. (2)The lessor maintains his law from the paragraph (1) when the due rent under sub-lease was transferred. (3) the lessor can go directly against the sub-lessee to compel the execution of other obligations under the sub-lease contract".

The previous Civil Code did not regulate the exercise of direct action against the sub-lessee. The current Civil Code took the provisions of article 1753 French Civil Code and the solutions of the French doctrines and Jurisprudence[31], thus, given by the law, the lessor has two direct actions against the sub-lessee: the first on rent, up to sub-lease price (article 1807 paragraph 1 Civil Code.) and the second for the other obligations assumed by execute the agreement of the sub-lease by the lessee (article 1807 paragraph 3 Civil Code).

Even if article 1807 Civil Code does not determine the nature of the actions of the lessor expressly against it arising from the existence of the sub-lessee tripartite structure specific mechanism of direct action (there are two contracts where the lessee is a party, the debtor in one and the creditor into one another), the lessor, as proprietor of direct action exerting direct right against the debtor of his debtor. Furthermore, paragraph 3 of article 1807 Civil Code. provides that the lessor may act directly against a sub-lessee to compel the execution of other obligations under the contract of sub-lessee.

In this respect, Canadian law case [32] has shown that, in principle, the sub-lessee and the lessor have no standing to ask, one against another, fulfilling contractual obligations of the lease contract (1874-1876 Quebec Civil Code). If there is a contractual relationship between lessor and lessee and between the latter and the sub-lessee, there is no a priori contractual relationship between the lessor and the sub-lessee. They can not, therefore, in principle, exercise a contractual action against one another. Law has, however, some exceptions, notably by article 1874-1876 Quebec Civil Code.

The Court finds that these provisions are sui generis type of indirect claim[33]; they aimed at protecting the right of the obligations between the lessor and sub-lessee. Although there is, initially, between the parties, no contractual relationship, these provisions provide special facilities to enable them to obtain execution of contractual obligations by those who are truly concerned, even if the conventions were originally established with the tenant. The court does not share the view that this type of action can be regarded as a stipulation for another one (article 1444 Quebec Civil Code) or an imperfect payment delegation (article 1667 Quebec Civil Code). The sub-lease does not represent a transformation of the original obligation. It can not be made for the benefit of a person and it always involves undetermined and the manifestation of will of the sub-lessor and lack of opposition of the lessor. The sub-lease is a legal institution itself, its provisions promote specific obligations, without the constraints of oblique action, but to achieve the same purpose „„ being thus in he presence of a direct action.

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[31] Fr. Terre, Ph. Simler, Yv. Lequette*, Droit civil. Les obligations*, 4e edition, Dalloz, Paris, 1986, no. 1106.

[32] Quebec Court, in the case Pitre c. Fortier (decision of the civil room from 23 January 2007 published on http://www.canlii.org/fr/qc/qccq/).

[33] D.-C. Lamontagne, B. Larochelle, *Droit spécialisé des contrats, Volume 1, Les principaux contrats: la vente, le louage, la société et le mandat*, Cowansville, Yvon Blais, 2000, p. 609.

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CORRUPTION IN PUBLIC ADMINISTRATION

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Isabela STANCEA[**]

Abstract: *Corruption should be seen as an extremely serious social phenomenon, that took very different forms over time. It is present in all social levels, but becomes more dangerous when it is found in the high levels of Society, because it then becomes a threat to democracy, a violation to the fundamental human rights and democratic principles.*

In Romania the corruption phenomenon turns out to be expansive in many areas of social life and in public administration it has become a custom value and is more difficult to be removed, as neither the corrupt nor the corrupted wish for it.

Government has recently adopted National Anticorruption Strategy 2012-2015, document premised on the legal and institutional anticorruption stability and adequate resources for proper functioning of these institutions. One of the features of this strategy is to focus on prevention and education. One of the goals is the protection of the mechanisms that reported cases of corruption or possible corruption before they happen. The difference between this strategy and the previous character is comprehensive, integrated and generality.

Keywords: *strategies, corruption, public administration, prevention.*

Introduction

In ordinary language, corruption is understood as a deviation from normality, from irreproachable moral conduct, from honor and duty. In a broader sense it is perceived as a manifestation of evil, a serious degradation, moral decay, venality, a fact which obviously reflects a state of abuse of power of those vested with the power of organized exercise, which is committed to achieving material benefits or other benefits or favors. Corruption represents unpunished systematic violation of the rules rules of an organization or institution by some members in virtue of the fact that they have a certain authority, they use resources of the organization with different destinations aims.

Multidisciplinary Group on Corruption (GMC),has adopted the following definition: „corruption includes hidden fees and all other steps involving persons vested with public or private functions, who have breached their obligations deriving from the quality of public servant, private employee, independent agent or from another relationship of this type, to obtain illicit benefits, of any kind for themselves or for others „.

Corruption was and is perceived as an extremely serious social phenomenon, which has acquired over time a large variety of forms and a special scale. It is present in all social levels, but becomes more dangerous when we meet it at the highest levels of society, as it becomes a threat to democracy, a violation of fundamental human rights and democratic principles. So, corruption is also a social and legal phenomenon; it is a social phenomenon because its existence is conditioned by the existence of social life and the rules of behavior established

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within each society. The quality of the legal phenomenon is caused by the fact that his existence gives life to legal consequences and entails criminal liability.

The fact that the corruption phenomenon existed in ancient times, being so far one of the most serious and most common behaviors of people in charge, it is a statement not to be doubted. Some lawyers even consider the human tendency toward corruption has always existed.

In ancient, great civilizations: Roman, Greek, Hebrew, etc. faced with corruption and powered a natural reaction-legal protection against it, especially starting from the need for defense against serious moral decay, degradation, of the venality those invested with the exercise of power or public office.

As shown, making itself known since antiquity, corruption was even then suppressed, being applied at the time, harsh penalties to prevent and combat it. For example, in the ancient laws, corruption was severely punished, especially when it was committed by a judge. From Herodot we learn that the Persian king Cambysc II (530-522 BC Cambyses II Achaemenids dynasty, son of Cyrus II) ordered the killing of a judge who was found guilty of corruption, the king upholstered his chair with his skin. Cicero, the great thinker of antiquity, considered that the magistrate who lets himself get corrupted, commits a crime among of the worst. A law that passed in 204 î.e.n. - Lex five Donis et Muneribus – was forbidding lawyers to receive a legitimate benefit from their talent and regulate a refund action. The measure has been updated several times and extended to the imperial age by Augustus, Claudius and Nero and was aiming the gifts made to magistrates, regardless of the cause which led.

Faced with the alarming spread of corruption, ancient Rome took steps to suppress it by various laws. However, corruption has not only survived through the ages, but obviously progressed. Corruption as a social phenomenon and as a criminal offense, proved to possess a unenviable vitality, growing with the society, with the state and law, getting new forms and modifications.

Montesquieu emphasized the antonymy between corruption and democracy. „Corruption destructures fundamental principles of state of law, demolishes confidence in the mechanisms of democracy, weakens the constitutional order. Resulting in confusion and suspicion, corruption affects the state of law „.

"Corruption generates discrimination and inequalities, fast and illicit enrichment, leading to the creation of monopolies that pervert or destroy the laws of market economy. It violates economic and social rights, and ultimately weakens the confidence <of man to man>, attacking so, the essence (heart)of human rights „.

Corruption in Romania has become unpredictable and impressive size and shape, proving to be expansive in many areas of social life and public administration, it became a custom and it is more difficult to be removed, as neither corrupting, nor corrupt do not want it. The update of the problem is needed especially because of the powerful negative impact of corruption on state of democracy, social equity, justice and respect for human rights and fundamental freedoms.

Corruption involves the misuse of public power in order to obtain for himself or for another, an undeserved gain and may be observed by:

- Abuse of power in exercising their duties;
-Fraud (deception and harm to other persons or entities);
-Use of illicit funds to finance political parties and electoral campaigns;
-Favoritism;

- Establishing a mechanism for the exercise of arbitrary power in privatization or procurement;

- Conflict of interest (by engaging in transactions or acquire a position or a commercial interest which is incompatible with the role and official duty).

By article 1 of Law no. 78 of 8 May 2000 for the prevention, detection and sanctioning of corruption, have instituted measures to prevent, detect and sanction corruption acts, which applies to the following persons:

a) the ones exercising a public function, regardless of how they have been vested in public authorities or public institutions;

b) the ones meeting, permanently or temporarily, by law, a function or task, in case they participate in decisions or influence public services, autonomous regis, commercial companies, national companies, national corporations, cooperative units or other businesses;

c) exercising control powers under the law;

d) providing specialized support units under the letter. a) and b), as long as they participate in decisions or to influence them;

e) that, regardless of their conduct, control or specialized assistance, to the extent that they participate in decisions or influence on: operations that involve the movement of capital, bank transactions, foreign exchange or credit, investment operations, the scholarships, insurance, mutual placement or regarding bank accounts and their related ones, domestic and international commercial transactions;

f) holding a leading position in a party or a political party, a trade union in an employers' organization or a non-profit association or foundation;

g) other persons than those referred to. a) - f), as provided by law.

How the population feels the corruption in public administration.

Serious and repeated cases of corruption in public administration continuously eroded the credibility of state institutions, reflected in their representatives, which produces a state of grave social danger, considering that many of the contributors have come to regard corruption as a characteristic of market economy, an essential and normal aspect of social life.

Seen as a phenomenon belonging strictly to public administration, corruption is the abuse of public power in order to satisfy personal or group interests. In all areas of public administration in Romania, corruption remains widespread and is particularly serious because it favors the interests of individuals, especially in the economic area, affecting the collective interests: bribery, abuse of power in exercising their duties, economic and financial fraud , extortion, influence peddling, favorite nephew, embezzlement, unfair appropriation of funds, conflict of interest by engaging in transactions or positions or acquisition of a commercial interest which is incompatible with the role and official duties.

Corruption in public administration covering a range of activities immoral, illegal, made not only of individuals in leadership positions or exercising a public role, but also by various groups and public organizations, in order to obtain material benefits or moral or higher social status by using forms of coercion, blackmail, fraud, bribery, buying, intimidation.

Following the spread of this scourge have been a number of effects such as decreased quality of public services, increasing immorality, eliminating power as an evaluation

criteria, enrichment of unemployed people, disadvantaged people with limited financial resources, slowing economic development, underground economy growth, lower prestige authorities, lower prestige law and justice, demoralization of honest citizens.

From a social perspective, corruption is seen as the major factor in the polarization of Romanian society: the poor - who form the vast majority of Romania's population who continue to believe in the virtues of morality and respect for legality and the rich ones or the ones getting rich - between which are the favored power or authority or who identify with them. Those ignoring morality or legality, to satisfy their interests using all sorts of illegal means including, corruption and fraud.

Most people feel personally affected by corruption in the relationship they have with public institutions, such as health, public administration, customs, schools, police, etc. and points out that corruption is manifested in the act of justice through political pressures and other types on the magistrates, attempts to corrupt magistrates and the abuse of some lawyers near magistrates.

Measures should be taken to destroy corruption

However as a society, in any event, we want to eliminate or at least reduce public sector corruption and the measures envisaged should aim, first, change the mentality of citizens, and, secondly, the adoption of a legislation providing severe penalties for both the corrupter and the corrupted.

Adopting an anti-corruption law is necessary but often insufficient to destroy corruption. If you want to really eradicate corruption, it must be operated in all its causes, we must improve transparency and communication in public administration, reducing the monopoly positions of public office, etc..

When it comes to fighting corruption in appropriate legal framework, the emphasis is on adopting a legislative package to provide and strengthen penalties for the corruption phenomenon, often ignoring the amendment of existing legislation, a measure as absolutely necessary. Causes of corruption are more shortcomings of existing management systems in the public sector. In this area, an anti-corruption reform package must include series of measures to change working conditions in public administration.

According to the Civil Society Development Foundation, the causes of corruption, besides identifying relatively balanced historical and cultural conditions as causes of corruption, people felt in varying specific action favoring factors. It is interesting to note that when referring to the responsibility of officials, citizens tend to show rather moral and psychological traits (eg. Greed) than structural and institutional aspects (such as discretionary nature of the relationship official-citizen or insufficient salaries of civil).

On the other hand, when referring to his own responsibility, public priorities lack of information ("people do not know the services they are entitled"), followed by a strong desire to enjoy preferential treatment ("people are desperate to obtain favors „).

Culture of reciprocity (the desire to return to service), although only holds a share of almost 48%, remains an important indicator. As for the psychological and moral preference, it indicates the low degree of formalization of officer-citizen relationship, which means that in everyday life, it should be treated like some personal relationships.

Government has recently enacted the National Anticorruption Strategy 2012 - 2015, document premised on the legal and institutional anticorruption stability and adequate resources for proper functioning of these institutions.

One of the features of this strategy is to focus on prevention and education, and one of the goals is the protection mechanisms that reported cases of corruption or possible corruption before they happen. The difference between this strategy and the previous character is comprehensive, integrated and general.

Preventive character education requires public officials in the sense of awareness of harmfulness of corruption, both institution and society, and the person who commits corruption. Education involves knowledge and compliance with ethical codes officials underlying exercise of public functions. This education takes into account guidance counselors ethical integrity, and managers of public institutions to ensure regular participation of public servants in corruption training courses according to the type of service that we provide. And beneficiaries of public services must contribute to promoting integrity in public administration.

Thus, they must reject and report corruption from public officials and abuses committed by them. A key part of this strategy will be to inform citizens so they know the legal obligations of public institutions and civil servants.

Therefore, under this strategy, we want to move from simple detection, investigation and punishment that corruption in a broader effort of prevention and education officials in public institutions within the meaning of rejection of corruption.

Smooth running of public administration is closely related to the efficiency and accuracy of relevant legal acts, the more they are clearer, the more precisely contoured and the penalties are more severe, the less corruption will be recorded in the public sector. Anticorruption legislation in Romania in the last decade contains rather a series of preventive measures designed to ensure a high level of integrity in public administration. National Anticorruption Strategy 2012 - 2015 seeks to intervene on the legal framework, particularly the law on financing political parties and electoral campaigns.

Conclusions

Widespread social phenomenon, corruption is very dangerous enemy of civilized social life, of an organized society, the rule of law, democracy, could adversely affect progress and even disappearance.

Updating the problem by adopting new strategies are required as a consequence of the negative impact of corruption on the powerful state of democracy, social equity, justice and respect for human rights and fundamental freedoms.

Note that as long as this phenomenon is discussed in theory and less practical, while society will tolerate, it will remain in the state. It is up to each of us what kind of society we exist in, who leads us and how we want to live in the future.

Our country, as a European state, the matter of strengthening institutional integrity, promoting an active and focused on reducing costs of corruption and business growth based on competition, taxpayer confidence in the justice and administration, but also civil society in decision making.

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RECONFIGURING THE LABOR MARKET AT EUROPEAN LEVEL IN THE CONDITIONS IMPOSED BY ECONOMIC AND LEGAL RULES OF OPERATION PERFORMANCE

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Abstract: *Development at all levels of society, the human factor is the main factor of production. Without it economic and social life is not possible, without the direct or indirect human factor can not be held production and other economic activities, capital goods may be sold by the company and its needs is not possible.*

Keywords: *labor market, economic conditions, legal conditions, operation performance*

International experience shows that the main driving force of change, the restructuring is the human factor. No matter how modern equipment and technologies as current production, economic activities can not take place under conditions effective and still can not improve without the active participation of the human factor. Numerous and complex factors of production that he knows the economy today are the result of creation generations of people. The whole social-economic and cultural life and scientific, but marked by considerable progress and many weaknesses and anachronisms, including unresolved issues, are due to human.

Among the number, structure and preparation of the population, on the one hand, and economic evolution, efficiency, on the other hand, there is a strong connection, complex inter-relationships. If the existence of these inter-relationships is evident, and, as such, enjoys wide recognition, views on their content are not converging. The number and quality, population strongly influence economic developments.

Between human factors and restructuring the economy there is a very close connection. The human factor is, on the one hand, a decisive prerequisite for the economic restructuring process, but the premise to be supported by material factor, financial, etc.. People with knowledge and work experience, the skills and behavior may contribute to increased braking or restructuring.

In developed countries and increasing possibilities have emerged for people to realize both the economic development factors - social, as well as beneficiaries of this process.

Modern economy can provide the possibility that people in our country to emerge in this double stance.

First, the qualitative transformation of the labor content. The accelerated introduction of technical progress - scientific work can be eliminated heavy, requiring a strenuous exercise, while enhancing the share of work which appeals to man a creative activity that is able to capitalize on skills, especially those intellectual. As a result, modern market economy, the high level of technical equipment, offers the possibility that the activity of a

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growing number of people to become more interesting and enjoyable, ensuring thus the conditions for the transformation of work in a vital necessity for man to achieve its fullest.

Second, mitigate disparities in social structure and asserting an interest in increasing economic efficiency. In modern market economy, more people acting both as employees, as well as owners (holders of equities).

Thirdly, to achieve this situation the owner to ensure a substantial factor contributing labor plentiful goods and services able to meet population needs. In developed countries, the abundance created and the entire population access to it, modern market economy offers the possibillity that all members of society to have the conditions for a dignified life, to assert that as fully as being bio - psycho - social.

Possibilities it offers modern market economy does not automatically come true. Transformation possibilities mentioned in reality depends largely on ensuring a democratic political regime in each country. Experience of developed countries shows that the transition Romania modern market economy must be made on the development and consolidation of democratic political regime, only so that opportunities will be created in our country as to achieve a modern market economy can be fully exploited development and human affirmation.

Regulating for Decent Work is an international and inter-disciplinary response to the neo-liberal ideologies that have shaped labour market regulation in recent decades. It draws on contributions by leading experts across a range of disciplines, including economics, law, political science and industrial relations. International in scope, it includes chapters on both advanced economies (US, Canada, Europe) and the developing world (China, Brazil, Indonesia, Tanzania).

Recommendations to national governments call for coordinated action on job creation, labour-market reforms, investment in skills, matching jobs and jobseekers, employment policies and funding.

Job creation is one of the EU's most pressing concerns as it struggles to emerge from the economic crisis. Unemployment has risen to record highs – about 24.5 million people are unemployed, over 10% of the workforce.

Also, the Commission is making a package of recommendations – both general and sector-specific – on the best ways to boost demand for workers and help people find jobs. The recommendations aim to provide jobseekers with more training and more job opportunities. Those in work would get help acquiring the skills they need to stay up-to-date with changing job requirements. Employers creating new jobs would also receive support.

The general recommendations include:

- encouraging job creation through support for businesses, entrepreneurs and self-employed persons, including decent and sustainable wages
- targeting key industries where jobs are being generated: the green economy, health and social care sector, digital economy, etc.
- using existing EU programmes to fund job creation
- reforming labour markets to meet future demand
- developing programmes to encourage lifelong learning and providing young people with training to advance their careers
- investing in skills training, anticipating future job requirements
- removing obstacles to finding a job in another EU country

- fine-tuning schemes – including the EURES jobs database – that match jobseekers with jobs across Europe
- improving coordination of employment policies across Europe
- increasing the involvement of employers' and workers' groups in employment policy making.

If implemented, the recommendations will help the EU get 75% of people aged 20-64 in work by 2020 – one of the main goals of the Europe 2020 growth strategy. A scoreboard will keep track of progress from early 2013.

Also, the commission will propose ways to enable job creation by cutting red tape. They will include reducing non-wage labour costs and addressing legal obstacles to hiring, firing, setting up new companies and self-employment. The commission is set to apply the agenda's 13 action points between now and 2014.

New approach to migration would establish agreements with EU neighbours and other countries to benefit the people and the countries concerned. Cooperation on migration between the European Union and other countries is already strong, but could be improved. The need for better coordination was highlighted this year when the wave of migrants to EU shores during the Arab spring strained the ability of frontline countries to handle them. The sudden influx led to proposals for a comprehensive approach to migration. Building on these, the Commission is now proposing a more strategic policy on migration and mobility, one which benefits the EU, source countries and migrants. The plan calls for closer cooperation with non-EU countries to maximise these benefits. Poorer countries benefit from migration in two ways – from the money sent home by migrants, and through the transfer of know-how and innovation.

The European Union would also work closely with non-EU countries to ensure refugees and displaced persons are fully protected under international law. The plan would also address the EU's need for effective border controls to reduce illegal migration, encourage legal migration, and better protect victims of human trafficking. It would align measures on migration and mobility with EU policies on external relations, development cooperation, education, growth and job creation. The European Union plans to give a stronger focus to legal migration and visa policies for short-term visitors, tourists, students, researchers, business people and families. The EU would offer to ease or lift visa restrictions when partner countries achieve agreed benchmarks, including in areas such as migration, asylum and border management.

Europe needs foreign workers to ensure prosperity. For example, by 2020 there will be an estimated shortage of about one million professionals in the health sector alone. Migrants can help fill these and other jobs. Under the plan, the European Union would continue to focus on establishing partnerships with neighbouring countries, those in Africa and in the east.

Migration partnerships would be offered first to countries in the immediate neighbourhood, including Tunisia, Morocco and Egypt. These agreements would make sure legal migration is well organised, ensure effective and humane measures are taken to prevent irregular migration, and reinforce the benefits for everyone. For other countries, the Commission proposes to increase the level of cooperation, based on a number of common aims and targets.

The transition to a market economy requires a restructuring of the national economy accelerated. In the early years of transition, however, restructuring has been delayed, which affected the Romanian economy significantly more than the delay in the privatization, and

perhaps even contributed to it. Thus, knowing the real market demand has led to the accumulation of stock production, which blocked the internal resources so scarce, modest quality of domestic products can not provide the propulsion of an already busy market, falling steeply, sometimes below 50% of capacity. On the other hand, lack of capital has allowed manufacturers purchase raw materials, subassemblies, power, gas. This triggered unmet customer and, ultimately, loss of contracts. Also, outdated equipment and high specific consumption required the use of additional work per unit of product. In addition, several production units to do little or nothing to keep equipment in good repair, overhauls are sometimes completely ignored. The structure of exported products has not changed, but rather focus on the same products with a low processing: wood, metal, cement, fertilizers.

A period, the government was concerned with developing strategies for restructuring the sectors and subsectors, eventually realizing that these strategies are designed to fail as long as they are not based on individual restructuring schemes for each type of enterprise. At the same time restructuring was significantly delayed by a false dilemma: restructuring before or after privatization? Special problems arose when large units, especially in chemistry, metallurgy, machine building, the large losses and arrears are not important and attractive for privatization. For these units should be done before privatization restructuring.

Economic restructuring had to be supported by legal measures to ensure financial discipline specific market economy, to facilitate agreement between debtors and creditors, prompt payment from businesses, by providing social assistance for redundant workers, the fund financial recovery. Such measures have been applied successfully in other transition countries in Western Europe (East Germany, Spain, Portugal).

In conclusion, economic growth affects the natural movement of people only when its target is the basic needs of most members of society. In most poor countries, economic growth does not meet this condition: very uneven distribution of national income, social needs are becoming more powerful and modern sectors of their economies, large inequalities in the distribution system of national income growth slows.

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THE MODERNITY OF THE NATIONAL LEGAL FRAMEWORK ON REGULATING CYBERCRIME

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Abstract: *The paper presents aspects of modernity in the national legal regulations of cyber-crimes. The Exordium presents the global phenomenon of cybercrime, reflecting the implications that the information technology and communications development have on the social environment in the context of a need for legal regulations which must ensure social protection against emerging criminal slippages in the field of informatics.The paper further introduces the main international legal benchmarks used for reshaping and modernizing the national legal framework for regulating the cyber-crime as well as the international organizations which are mandated to conduct activities designed to establish global regulations in cybercrime.*

In presenting the national legal framework, the legal standards contained within the Council of Europe Convention on the Romanian legislation are clarified, highlighting issues of substantive and procedural provisions contained in Law no.161/2003. Below are exposed the most important aspects of laws regulating cybercrime, including the new Penal Code and provisions relating to international cooperation in this field.

The final conclusions assess in the end, how the specific legal rules meet the challenges of the cyber-crime phenomenon, while noting that there is a gap between the increased incidence of cyber-crimes and the existent legislation. These conclusions are establishing guidelines for the introduction of appropriate regulations to combat cybercrime.

Keywords: *Modernity, cyber-crime, criminal offense, teleportation, cyberspace, jurisdiction, search warrants, harmonization, jurisprudence, hacking*

Exordium

The notion of modernity or modernism implies novelty, change, youth, vigor, integration, collaboration, optimism, balance, mobility and dynamism, as well as the use of new technologies, socialization, efficient communication, flexibility, adaptability, risk and security, continuous improvement, leadership, reflexive management, motivation, performance, predictability and anticipation.... and all these mean novelty and harmonization, success and consecration in considering universal values.

From a social point of view, it is obvious that modernity refers to structuring the subjective and creating a new type of conscience – expressing the political-cultural modernity both at the individual as well as at the group level , as civic participation to a profound process of change of the entire society, a process which lies in the system of legal coordinates and which reshapes and adapts the mutations to the rigors of the law system, designating the vocation of legal norms to efficiently manage social relations, ensuring the coherence within the social system.

The modernity of regulating the national legal framework in the field of cybercrime comes from the permanent need to reach perfection, to adapt, integrate and harmonize the

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Romanian legal system through the issuance of norms with high social components, taking into account the dynamics of the social life and of society at large, under the impact of Information Communication and Technology (ICT) increased development. This development imposes specific legal norms the value of which may choose to incline to certain interests, tendencies, ideals, or to a certain type of manifestation, thus laying the foundation of a paradigm which sets the social requests that are specific to the informational era we are facing at present.

The present evolution of the Information Society is primarily characterized by the ubiquity of information and technology and by the dynamics of the PC networks infrastructure development, which represent the main coordinates of the ICT evolution, with the Internet as its global dimension.

This space imported its shape from the model of the social systems theories, and configured its technical characteristics of digital communications according to the appropriate protocols of this specific field, the same way as the legal norms are regulating the rules of social conduct. The objective interaction cyber-space – society, makes itself felt more and more, and the other way round too. Thus the internet transforms the social parameters both individually as well as globally.

In view of this the importance of a universal regulation should be highlighted – a regulation which would manage the efficient tools and mechanisms at national and international level, in order to promote the collaboration between the entities mandated to impose, maintain and investigate the order in the field of cybercrime and offences. Thus the states are being called upon to issue the appropriate legislation that should enable the investigation of cybercrime and the prosecution of those who commit cybercrime. [1] The imposed legal norms have the special qualities to surpass and to reorient the partiality and the specificity of the social relations, ensuring coherence within the system, while the constituting dimensions of the legal norms are essentially and reciprocally dependent on one another, polarizing the general characteristics that define the legal framework.

Due to the unprecedented expansion of the cyberspace, the emergence of new principles and entities within social relationships have structurally changed the coordinates, reorienting and transforming the perceptions of social interactions. The unequaled developments in the field of communications and information technology, led to the creation of virtual communities in an unlimited cyberspace and to the expansion of sophisticated facilities within a global network. New instruments of action were created, by which the decision-making factors can be influenced, thus creating the premises for generating differences and controversies that can propagate beyond control.

Cyber attacks on availability of ICT services and infrastructure supported by the penetration rate on the electronic communications, determines the continuous development of a virtual environment with criminal potential, vitally affecting the concrete ways in which the decision-makers should respond and intervene proactively, to ensure the social equilibrium and protection of fundamental human rights and freedoms, in accordance with the main regulations in this field. Thus, the new information technologies have generated some of the most important challenges and opportunities, as evidenced by those who support, promote and protect human rights and social vulnerability. There is a significant disparity between the pace of development of ICT and how the environment reacts to these legislative changes, both directly and in that legislative proposals do not allow abuses that

[1] Irina Moroianu Zlătescu, *Human Rights an Evolving System*, Pub. I.R.D.O., Bucureşti, 2008, p.200.

may create problems by using the Internet, with the effect that the evolutions in this field might spiral out of legal standards control and can thus violate the human rights.

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The ICT huge potential must be effectively integrated and exploited in all directions and fields influenced by these revolutionary technologies, but with respect for common norms, principles and judgments, carefully taking into account the possibility to counteract or prevent the possible harmful consequences of an uncontrolled use of this resource[2].

As a result of developments in ICT, the cybercrime phenomenon has grown in complexity and importance, involving increasingly more the organized crime, hacking, botnets use, data theft and attacks inside the massive critical information infrastructures, with cyberterrorism related activities becoming more and more prolific.

Debates on human rights and information technologies have moved beyond the subject of just ensuring privacy and data protection, now comprising issues related to the ways we live and we are governed, the cryptography of messages in computer networks, the right to access any database pertaining to competent authorities for activities aimed at national security, combating terrorism and organized crime.

The idea that the new communication technologies can lead to changes at the social level, in the sense of generating greater powers to protect human rights worldwide, represents one of the positive influences brought by the communications revolution"[3].

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[2] Irina Moroianu Zlătescu, *Human Rights and the New Technologies of Information and Communication*, Human Rights Magazine, nr.4/2006, p.3.

[3] Van Koert, Robin, *Electronic Media in Rural Development*. PhD Dissertation, University of Amsterdam, 2001. Link: http://www.btinternet.com/~rvankoert/IndexIE.htm.

An important factor of supporting and protecting human rights is the way the power is handled by those who manage and regulate the sphere of ICT.[4]

All stakeholders should contribute to the development of the Informational Society, by adopting a common and explicit vision of how new information technologies should be implemented closely related with human rights and international legal regulations in the field, through harmonization of development policies with the guidelines for the use of cyberspace. *International legal Benchmarks for fighting the cybercrime.*

The criminal activities of the cyberspace perpetrators cannot be counteracted effectively by measures at national level only. There is a need for a concerted effort by all concerned: the ICT industry, the governments, the authorities responsible for implementing the relevant legislation and the users in all states who are connected to the global ICT infrastructure[5].

Cyberspace calls into question traditional notions of jurisdiction[6] and sovereignty, requiring an elaborated and coordinated international response in this regard.

The current difficulties are generated by the lack of a global agreement regarding the investigation procedures and practices in data communications policies, the lack of appropriate systems for digital communications, the existence of inadequate laws[7], disparities in terms of legal provisions and lack of expertise in the judicial and investigative bodies[8]. Cybercrime is of a global nature, involving the development of multiple geographical connections, the offender being subject to the jurisdiction of a particular country, but his or her activities may involve multiple targets distributed on the territories of various states, which confers cross border characteristics to the phenomenon of cybercrime. Therefore, the legal framework in this field requires a global consensus to harmonize legislation and procedures of investigation and indictment, in new forms of multilateral or globalized law[9].

Thus, due to the Trans boundary nature of cybercrime and the development of the Internet infrastructure, it can be said that no state can by itself eliminate or to diminish the problem of cyberspace criminality. This requires shared leadership and determination. A demarche to this effect is represented by the European Convention on Cybercrime (ETS No. 185), developed by the European Council – an action to be continued and strengthened with regard to case by case necessary details and specifications of consistent procedures for investigation and prosecution of offenders, etc [10]. Moreover, as the European Commission observes, common minimum standards in certain areas of cybercrime are necessary, to enhance mutual trust between Member States and national judicial authorities in order to enable good cooperation [11].

The following key areas should be taken into consideration for combating the cybercrime phenomenon: creating effective laws in the field, effective problem solving , jurisdictional cooperation in international investigations [12], developing best practices

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[4] Audrey N. Selian, *ICTs in Support of Human Rights, Democracy and Good Governance*. Link: www.itu.int/osg/spu/wsis-themes/humanrights.

[5] F.H. Easterbrook, *Cyberspace and the Law of the Horse*, UNIVERSITY OF CHICAGO LEGAL FORUM 207. Link: http://www.law.uchicago.edu/node/514/publications.

[6] S.W.Brenner şi B.J. Koops, *Approaches to Cybercrime Jurisdiction*, 4 JOURNAL OF HIGH TECHNOLOGY LAW. Link: http://www.cybercrimejournal.com/lynnerobertsijccjan2008.pdf.

[7] D.B. Hollis, An *e-SOS for Cyberspace*, HARVARD INTERNATIONAL LAW JOURNAL, Vol. 52, No. 2, 2011.

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[9] M. Goodman: *International Dimensions of Cybercrime*, in Cap. 17 of *Cybercrimes*: *A Multidisciplinary Analysis* (2010), S. Ghosh and E. Turrini (eds.).

[10] I. Vasiu şi L. Vasiu, *Criminality in Cyberspace*, Pub. Universul Juridic, Bucureşti 2011, p.124.

[11] Communication of the EU Commission to the EU Parliament, COM (2011) 573 final.

[12] A. Ehuan, Cybercrime and Law Enforcement Cooperation, in J. Bayuk(ed.), *Cyber Forensics*, Springer's Forensic Laboratory Science Series (2010).

regarding investigation search and seizure in the ICT environment, establishing effective interaction between public and private environment[13], imposing technical and procedural measures to ensure a minimum residual risk in informatics security systems.

The present efforts to develop regulations to combat global cybercrime seem to indicate real support of such demarches. Thus, international Bodies and Organizations such a the United Nations, The Council of Europe, the G8 Group of States, ITU, the United Nations Office on Drugs and Crime Problems (UNODC), the Organization of American States (OAS), the Organization for Cooperation in the Asia-Pacific Economic Community, the Organization of West African States (ECOWAS), the Commonwealth of Nations or the OECD have made and progress and are working for a harmonized Legislation in this field.

United Nations, to its twelfth Congress on crime prevention issues (held in Salvador, Brazil, 12-19 April 2010), have revealed the importance of finding solutions to the challenges posed by cybercrime. The Resolution 64/179, entitled *Strengthening the United Nations Crime Prevention and Criminal Justice Program, in particular its technical cooperation capacity* draws attention to the problems identified by the UN Secretary-General (A/64/123) which include cybercrime, and calls upon UNODC to explore all possible means of remedy.

G8 adopted a set of principles and encourages countries to take them into consideration when developing a strategy to reduce risks to critical information infrastructures [14].

ITU and UNODC signed in May 2011 a cooperation Agreement in order to take action together in combating the increasingly growing threat of cybercrime. In addition, the IMPACT partnership was created as an exclusive agent of ITU dealing with crimes committed in the cyberspace. This is a private-public partnership which comprises 140 nations [15].

In the present period which is considered as an edict of the global framework of the cybercrime phenomenon, the European Convention on cybercrime represents the only agreement which legislates the ICT crime aspects. The Convention is opened to all states and can be used as a paradigm for constituting national legal frameworks in this field as well as a starting point for their evolution through the integration of norms and principles contained in accordance with the specific legal system and jurisprudence existent in each country.

The national legal framework on computer crime

Following the guidance from the European Convention, the country began compiling its Penal legislation since the signing of the Convention and ratified the document by Law. 64/2004, this act of the Council of Europe's being the main source of Romanian legislation in the field; the reference element for modernizing and harmonizing the national legal framework on crime in cyberspace, a direction which can be found as transposed in the new Penal Code.

The challenges caused by the unprecedented development of information and communications technologies require permanent modernization of the states legal frameworks by correlating concrete specific needs, emerging at national level with the strategy envisaged at European level, in order to achieve the aspirations contained by the conventions in this field.

[13] American Bar Association, *International Guide to Combating Cybercrime* (2003).
[14] *Priciples for Protecting Critical Information Infrastructures*, adopted by ministers of Justice and Home Affairs of G8.
[15] http://www.impact-alliance.org/home/index.html.

Law no. 161/2003. Considered as the most important regulatory reference to cybercrime national legal framework, *Law no. 161/2003 on measures to ensure transparency in the exercise of public dignities, public functions and business environment, preventing and sanctioning corruption,* achieves simultaneously the harmonization and modernization of the national legal system in accordance with the directives of the European Council Convention with regard to cybercrime.

Title III of this law „Preventing and combating the cybercrime", exposes the main themes related to cybercrime:

Chapter I: General Provisions; Chapter II: Preventing cybercrime; Chapter III: Offenses and Crimes; Chapter IV: Procedural Provisions; Chapter V: International Cooperation.

Under Law no. 161/2003, Chapter III the following offenses are presented:

Section 1. Offences against the confidentiality and integrity of data and information systems: Illegal access to a computer system; illegal interception of data from a computer, altering the integrity of computer data, distorting the functioning of information systems; illegal operations with devices or software.

Section 2. Cybercrime: cybercrime, false information, computer fraud.

Section 3. Child pornography through computer systems

From the content analysis of the European Convention on Cybercrime and of Law 163/2003, it appears that the provisions established at European level on „offenses related to infringements of intellectual property and related rights" are not found to be transposed in the Romanian law mentioned above, the protection of these rights being achieved through the provisions contained in Law No. 8/1996, amended by Law No. 285/2004 and by Government's Decision No. 124/2000, approved with amendments by Law No.213/2002. In addition to these legal tools, the protection of computer programs is also achieved through technical protection through the following technologies: insertion of signs, activation code, dongle, licenses management, concealment of source code, copy protection.

Procedural provisions of Law no. 161/2003. One of the most important problems generated by the phenomenon of cybercrime is the difficulty to identify the perpetrator and to determine the extent of the consequences that this emerging social danger can trigger. It is also difficult to detect which computer data can be damaged or can volatilize, since ensuring confidentiality and efficiency are essential for successful investigations of criminal acts.

Since the Romanian law regulations must meet these new challenges, the contents of the Law no.161/2003 besides the substantive law provisions, contains procedural provisions to regulate the activity of the prosecutors in investigating cybercrime. These are presented in the following order: preservation of computer data; confiscation of objects containing computer data, computer searches, access to a computer system, interception and recording carried out through computer systems; new institutions are in place for preserving immediately the confiscated data on the respective PCs..

The following conditions[16] should be met in order to intercept and record communications carried out through computer systems:

- the existence of sound reasons or clues regarding the preparation or the commitment of a crime for which the prosecution is made by default; these reasons are determined in Art. 91 paragraph 2, CPP;

[16] Mihai Udroiu, Radu Slăvoiu, Ovidiu Petrescu, *Special Investigation Technicques in Criminal Justice*, Pub. C. H. Beck, Bucureşti, 2009, p.96.

- Only in cases when assessment of the real situation or identification of offenders and of their location cannot be made by other evidence, or if the request for investigation would be considerably delayed.

The obligations under the European Court of Human Rights are respected by the Romanian legislation, which provides in paragraph 1 of art. 57 of Law No. 161/2003 that access to a computer system as well as intercepting and recording communications through such systems is allowed only when they are useful for finding out the truth, and when the assessment of the situation and the identification of perpetrators cannot be done on the bases of other evidence[17].

International cooperation on Cybercrime. The legal framework in Romania has transposed most rules of the European Convention on Cybercrime with reference to international cooperation, these regulations being found in Title III, Chapter 5, Art. 60-66 of Law no. 161/2003.

Along with this bill, Law no. 302/2004 on international judicial cooperation in criminal matters providing international cooperation aspects that also introducing provisions of European Union Council Framework Decision 2002/584/JHA about European arrest warrant and surrender procedures Between Member States and provisions of the Convention ETS No.185[18].

Legal regulation of electronic commerce in Romania. The main regulation in our country with regard to e-commerce is the Law. 365/2002, which defines in art. 1 point 10 the notion of electronic payment instrument as „a tool that allows the holder to perform the following types of operations:

- Transfer of funds other than those ordered and executed by financial institutions; - Cash withdrawals as well as loading and unloading an electronic money instrument.

The Law 365/2002 stipulates in Articles 24-28, the crimes that can be committed in connection with the issuance and use of electronic payment instruments and the use of identification data to carry out financial transactions, which are: falsifying payment instruments, possession of equipment to counterfeiting of electronic payment instruments, false statements with the aim to issue or to use electronic payment instruments, fraudulently conducting financial transactions and accepting these fraudulent transactions.

Legal regulation of electronic signatures in Romania. The most important piece of legislation in the field of electronic signatures in Romania is the Law. 455/2001, a regulation that entirely respects the provisions of the Directive 1999/93/EC on establishing a Community framework for electronic signatures.

According to article 5 of Law 455/2001, in conjunction with art. 290 of the Penal Code, the document in electronic form, into which was incorporated , attached to or logically associated with an electronic signature recognized by the one who contests it, produces the same legal consequences as an authentic document between those who signed it, and among those who represent their rights[19].

In accordance with art. 7 of Law no. 455/2001, if legal misunderstandings occur between parties who signed the document with electronic signature, in the sense that one

[17] Maxim Dobrinoiu, *Cybercrime*, Pub. C.H. Beck, Bucureşti, 2006, pp. 269-270.

[18] Ministry of Justice, European Union.Twinning project between Romania and Austria. PHARE RO 2005/IB/JH/03. Strengthening legal and institutional framework in international judicial cooperation, „*Judiciary Cooperation in Penal Matters*". Manual, 2007.

[19] Marius Daniel Peştină, *The Electronic Signature*, Romanian Magazine of Criminalogy nr. 4/2003.

party does not recognize the document or electronic signature, the court may order that the authenticity of these signatures be probed with specialized expertise.

Legal regulation of personal data processing. Processing of personal data is regulated in Romania by Law no. 677/2001, which provides that personal data should be processed in good faith, in accordance with the laws in force, gathered for well-defined , explicit and legitimate purposes, that the data must be accurate and, where necessary, updated. The protection of personal data against accidental or unlawful destruction, loss, alteration, disclosure, or unauthorized access, especially if that involves processing data within a network, and the protection against all other unlawful forms of data processing shall be planned, implemented and monitored, only by the entitled persons; while policies and procedures regarding personal data protection should be clearly communicated to employees. The Measures taken must guarantee a security level proportional with the risk faced by the exposure of confidential personal data.

Legal regulation of child pornography in Romania. The law in our country has three rules that contain incriminations on child pornography: child pornography as stipulated by Law 678/2001 on preventing and combating human trafficking and the Law 196/2003 on preventing and fighting pornography and child pornography through computer systems, which represents a special offense and is stipulated by Law. 161/2003. The constitutive elements of incriminations of the legal rules for the three regulations concerning child pornography are summarized in the text of the new Penal Code, an aspect, which is further exposed.

Regulation of cybercrime in the new Penal Code. In considering certain symmetrical aspects of the entry into force of the new Penal Code, we can say that the opportunity of a new Penal Code is actually a justification for legislative streamlining and for achieving internal correlation of the overall law. This need has emerged due to a number of acts occurred after 1990, taking over the community acquis , the compliance with the requirements of the ECHR jurisprudence and not least, excessive regulation, the occurrence and enhancement of major gaps in our legal system also containing specific provisions on cybercrime offences[20]. The new Penal Code of Romania was adopted by Law No, 286/2009, published in the Official Gazette No. 510 of 24 July 2009.

The cybercrime are comprised in the special part of the new Penal Code as follows:

- Chapter IV of Title II „offenses against patrimony" includes fraud committed by electronic systems and electronic modalities of payment: computer fraud, fraudulent financial transactions, accepting the performance of fraudulent transactions.

- Chapter I of Title VI „forgery offenses" includes: falsification of debt or payment instruments; the circulation of false values, possession of instruments for counterfeiting securities.

The provisions on forgery of currency or other valuables in the new Penal Code were separated into two incrimination norms, namely counterfeit money and counterfeiting the securities and other payment instruments. This solution is justified by the danger represented by the two different acts, also reflected in their respective penalties[21].

- Chapter III of Title VI „Offences of false" includes the art. 325 offense of false informatics:

- Chapter VI of Title VII „offenses against public safety" includes offenses against the security and integrity of information systems and data, the background content being the same

[20] Mircea Duțu, *The New Penal Code: bewteen Tradition and Modernity*, Article of High Court of Cassation and Justice, Romanian Academy.

[21] Valerian Cioclei, *ThePenal Code,* Pub. C.H. Beck, Bucureşti, 2009, p.61.

as provided by Law. 161/2003, but two special limits of the penalties were reduced, being reinstated in agreement with the other criminalities mentioned in the Code.

- Chapter VIII of Part I „offenses against the person" includes the crime of recruiting minors for sexual purposes, provided in art. 222.

- Chapter I of Title VIII „Offences affecting the relations of social cohabitation" includes the offense of child pornography in art. 373.

Regulation of child pornography offense in the Penal Code, aimed at removing regulatory overlaps caused by the existence of three pieces of legislation containing incriminations in this area. Elements of incriminations of these texts were summarized in the proposed content of the new Penal Code, which also took into consideration the text of the Framework Decision of the European Union Council No. 2004/68/JAI referring to the fight against sexual exploitation of children and against child pornography[22]. The provisions of the Council of Europe Convention regarding the protection of children against sexual exploitation and sexual abuse were also taken into consideration[23].

- Chapter IX of Part I „offenses which affect home and private life" include the offense of invasion of privacy, included in art. 226.

It appears that the new Penal Code contains most of the provisions in cybercrime matters contained in special laws (Law no. 161/2003, Law no. 365/2002 and Law no. 196/2003), with some changes to sanctions, the special limits of which are diminished compared to the provisions of the special laws [24].

Conclusions

• At present, the national legal framework regulating cybercrime, is outlining a balanced contents, both in terms of the emergence of international legal standards, as well as in terms of modernizing its own legislation and achieving a global cooperation with all stakeholders in combating cybercrime by ensuring the existence of legal provisions that meet the challenges of the local environment;

• Computer crime investigation and detection requires trained staff, the use of sophisticated techniques, continuous specialization, new regulations to fill the remaining gaps of a legislation that remains one step behind the development of the criminal phenomena in the ICT environment;

• Introduction of specific legal rules in the management of cyber systems to combat cybercrime;

• The need to adopt legal rules on combating cyberterrorism, particularly for critical infrastructure protection;

• Permanent update of national legal rules on cybercrime in the process of harmonization and modernization of national legislation with international regulations, in order to ensure the security of information and communications environment.

[22] Mihai Adrian Hotca, *The New Penal Code and the Previous Penal Code: Differences and Transitions*, Pub. Hamangiu, Bucureşti, 2009, p. 361.

[23] Raluca Simion, *Recent developments as regards cybercrimelegislation in Romania,* Council of Europe. Octopus Interface Conference 2010. Cooperation against Cybercrime, Strasbourg, France, 23-25 March 2010.

[24] Adrian Cristian Moise, *Cybercrime Investigation Methodology,Pub*.Universul Juridic, Bucureşti, 2011, pp. 109-115.

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THE NEW CIVIL CODE – NOVELTY ELEMENTS WITH REGARD TO THE RESTITUTION OF DONATIONS[1]

Maria Marieta SOREAȚĂ*

Abstract: *The establishment of the restitution obligation aims at maintaining the equal status of all the descendants of the deceased on the one hand, as well as of the descendants and the surviving spouse on the other hand. The restitution relies on the presumed will of the donor. In this respect, since the persons who have the restitution obligation are close to the deceased, and the latter shows equal affection to them, the law presumed that, by the donation, the deceased wanted to give in advance part of the inheritance owed to the heir, also a donee in this case, as provided by law. The origin of this institution lies in Roman law, as an innovation of Praetorian law, later regulated in ancient Romanian law, as well as in all subsequent written regulations. The New Civil Code does not bring about significant changes with regard to the legal regime of the restitution of donations, but, unlike the Civil Code of 1864, it attempts to offer a clearer regulatory framework, meant to avoid different interpretations and enforcement of the law.*

Keywords: *restitution of donations, exemption from restitution, restitution by equivalent, restitution by imputation, restitution by taking over*

1. Definition and legal basis

The Civil Code of 1864 did not contain an express definition of the obligation to give back the donation, therefore the doctrine provided several definitions of this institution[2]. D. Alexandresco[3] defined the restitution of donations as „an operation preceding the distribution, by which a descendant who received gifts from his ascendant, brings to the joint mass of property the gifts direcly or indirectly received from this ascendant (art. 751) or the money he owes to this ascendant (art. 738 of the Civil Code). M.B. Cantacuzino[4] defined the restitution of donations as „the obligation of the heirs to bring back, in kind or by equivalent, the gifts that they had received from the deceased, in order to place them in the mass of the property to be distributed among all the successors." In M. Eliescu's opinion[5], „the restitution of donations is the obligation – on condition that he accepted the inheritance, even on condition that an inventory is made – of any heir belonging to the class of descendants (art. 751 of the Civil Code), as well as of the surviving spouse as a successor together with the descendants (art. 3 of Law no. 319/ 1944) to return, that is to give back to the mass of the property to be distributed whatever he received as a donation from the deceased, except for the case when the donor exempted him from this obligation".

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[2] I. Dogaru, V. Stănescu, M. Soreață, Bazele dreptului civil. Volumul V. Succesiunile, Ed. C.H. Beck, București, 2009, p.451 and the next.

[3] D. Alexandresco, Principiile dreptului român, București, 1926 p. 546.

[4] M.B. Cantacuzino, Elementele dreptului civil, Ed. All, București, 1998., p. 258, no. 419.

[5] M. Eliescu, Curs de succesiuni, Ed. Humanitas, București, 1997, p. 237.

Concerning these proposals, it has been considered that the definition given to the restitution of donations must contain the following elements[6]:

a) it represents a civil obligation;
b) this obligation is incumbent on the descendants, and, under certain conditions, on the surviving spouse when he is an heir together with the descendants;
c) it consists in the restitution to the mass of the property to be distributed of the assets that they received as a donation from the ascendant;
d) the restitution can take place in kind or by equivalent.

The New Civil Code consecrates by the dispositions of art. 1146 an express definition of this institution, which contains all the previously mentioned elements of the definition. Thus, according to the legal provisions in force „the restitution of the donation is the obligation that the surviving spouse and the descendants of the deceased have towards each other, as effective heirs by the intestacy rules, to bring back to the inheritance the assets that were donated without exemption from restitution by the person leaving the inheritance". Pursuant to art. 1146 par. 2, the restitution obligation becomes operational only if the surviving spouse and the descendants had had a concrete vocation to be heirs, in case the inheritance had been opened at the time of the donation.

By comparing the new code and the former, it is easily noticed that the New Civil Code does not bring significant changes with regard to the definition, the categories of persons who have the restitution obligation as well as the conditions under which the restitution may be required.

2. The requirements for the legal obligation of restitution

In order that the restitution obligation may be valid and the donations made by the deceased may be subject to restitution, several requirements must be concurrently met: the existence of several descendants or of the surviving spouse as an heir together with one or several descendants; the inheritance must be legal; the heir must have accepted the inheritance, the heir must be a donee; the donation must not be exempted from restitution and the asset must not have been taken out of the civil circuit and the donated asset must not have perished accidentally[7].

2.1. Several heirs

The restitution of donations can be required only if there are two or several descendants of the deceased or the surviving spouse is an heir together with one or several descendants. This requirement expressly arises out of the definition contained in art. 1146 of the New Civil Code, but it does not constitute a novelty element since the same requirement was provided by art. 751 of the Civil Code and art. 3 of Law no. 319/ 1944[8]. As for the scope of application regarding the group of persons having this obligation, the restitution obligation refers strictly to the heirs belonging to class I (the descendants) and the surviving spouse

[6] I. Dogaru, V. Stănescu, M. Soreaţă, Bazele dreptului civil. Vol. V. Succesiunile, Ed. C.H. Beck, Bucureşti, 2009, p.451 and the next.
[7] Ibidem.
[8] Trib. Suprem, s. civ., dec. nr. 1393/1969 C.D., 1969, p. 147.

only when the latter is an heir together with the descendants. It has no importance whether the kinship in a descending line results from marriage, outside of marriage or from adoption. If they have a legal vocation, the descendants will owe the duty of restitution even if they are not equally related to the deceased (as the case of the descendant of the pre-deceased child as an heir by representation and the living child of the deceased) [9].

The restitution obligation is not incumbent on the other legal heirs (ascendants or collateral relatives) or on the legatees. Any donation made by the deceased to the ascendants or collateral relatives is final, therefore if the inheritance is distributed between ascendants and collateral heirs, the distribution will take place without considering the donation received by one of them, regardless of the value of the donation[10].

The provisions under art. 1146 par. 2 of the New Civil Code impose a supplementary condition, according to which, in order to require the restitution, it is necessary for the descendant and the surviving spouse to have had a concrete vocation to the inheritance of the deceased in case the inheritance had been opened at the time of the donation. This requirement implies to previously meet the condition of the concrete, useful vocation for the inheritance of the person having the restitution obligation[11].

2.2. The inheritance must be legal

The Romanian Civil Code did not reproduce the provisions of art. 843 of the French Civil Code which, in its original form, also consecrated the restitution of legacies. Neither under the former civil code, nor under the present one, are legacies subject to restitution, since they take effect upon opening the succession, and the intention of the testator, which must be respected, was to give an advantage to the legatees as compared to other heirs. For excessive legacies, there is the reduction institution within the limits of the available share.

The new regulatory framework does not expressly provide the condition of the intestacy in the case of the legal restitution obligation[12]. In this respect, the provisions under art. 1147 NCC are relevant, presenting the exemption from restitution of the person renouncing the intestacy, so that the requirement concerning the intestacy as a manner of inheritance transfer, a premise for the existence of the restitution obligation incumbent on the persons having this obligation by law, is implied.

2.3. The inheritance must have been accepted

This condition is inferred from art. 1147 par. 1 NCC, which establishes the exemption from restitution for the descendant or surviving spouse who renounced the intestacy and who can keep the donation within the limits of the available share. The solution is identical with the one consecrated by art. 752 of the Civil Code of 1864, which provided for the renouncing heir the exemption from the restitution obligation and the right to keep the received gift within the limits of the available share. Such a solution was motivated by the fact that by renouncing the inheritance, one loses, with a retroactive effect, the quality of

[9] Fr. Deak, Tratat de drept succesoral, Ed. Actami, Bucureşti, 1999, p. 399.
[10] I. Dogaru, V. Stănescu, M. Soreață, op. cit., pp.459-461.
[11] D.C. Florescu, Dreptul succesoral, Ed. Universul Juridic, Bucureşti 2011, p. 139.
[12] Trib. Suprem, s. civ., dec. no. 185/1965, Repertoriu (...) 1952-1969, p. 449.

heir, as well as any right to it, the renouncing person not being entitled to the inheritance any longer, as if he was a stranger. By analogy with the situation of a third party and because it is not about the re-establishment of equality among the heirs of the deceased[13], any donations that the renouncing heir would have benefited from are considered final and are to be kept, being subject to reduction in case they exceed the available share[14].

2.4. The heir must have the quality of donee

Out of the manner in which the restitution obligation is regulated, the analysis of the requirement for the coexistence of the quality of heir and that of donee imposes the investigation of two aspects in order to establish whether this condition is met. The former aspect concerns the moment when the two qualities – of heir and donee - must coexist. The latter aspect implies to establish whether the heir owes the restitution only in the case of the donations that he received personally or the restitution is also owed to another.

It is certain that the two qualities of donee and heir are acquired at different moments, since at the conclusion of the donation, the heir obtains the quality of donee, and the quality of heir is acquired at the time of the opening of the inheritance. For the restitution obligation, the two qualities must coexist in the person of the one having the restitution obligation. There have been debates over the moment when the two qualities must coexist in the person of the heir, on the date of the opening of the inheritance or on the date of the acceptance of the donation.

The Romanian Civil Code of 1864, by the dispositions under art. 753, provided expressly that „the donee who did not have the quality to inherit at the moment of the donation, but who will have this quality at the moment of the opening of the inheritance, has the restitution obligation." As a consequence, the donee who at the moment of the conclusion of the donation was not a possible heir, but who at the moment of the opening of the inheritance has a concrete vocation to inherit, also has the restitution obligation. The New Civil Code changes the solution consecrated by the previous regulations, disposing by art. 1146 par. 2 that „in the absence of a contrary stipulation on the part of the donor, the descendants and surviving spouse as heirs, have the restitution obligation only if they had had a concrete vocation to the inheritance of the deceased in case it had been opened on the date of the donation". Consequently, the moment taken as a reference moment for the analysis of the coexistence of the two qualities in the person of the heir as a beneficiary of the donation is the date of the donation, not the date of the opening of the inheritance. Thus, for example, under the former Civil Code, the grandson-donee owed the restitution, even if at the time of the donation he had no possible inheritance vocation, since his father (the son of the donor) was still alive[15]. He will not owe the restitution according to the solution of the New Civil Code, due to the fact that at the time of the donation he would not have had a concrete vocation to the inheritance of the donor.

As previously mentioned, another aspect which needs attention within this requirement concerns the personal nature, or not, of the obligation to give back the donation. The Romanian Civil Code of 1864 chose the solution in accordance with which, as a matter of principle, the heir must be personally a donee in order to have the restitution obligation. In

[13] D. Chirică, Drept civil. Succesiuni, Ed. Lumina Lex, Bucureşti, 1996, p. 308.
[14] I. Dogaru, V. Stănescu, M. Soreață, op. cit., pp.457-459.
[15] Ibidem.

this respect, by art. 754 of the Civil Code, it is provided that „the donations and legacies made to the son of a person who has the status of heir at the time of the opening of the succession, are presumed to have been made by an exemption from restitution", and art. 756 of the Civil Code disposed: „the donations and legacies made to the spouse of a descendant who will also inherit, are considered as exempted from restitution" [16].

The New Civil Code consecrates expressly the personal nature of the restitution obligation, providing in art. 1149 par. 2 that the heir owes the restitution only in the case of the donations that he received personally from the donor, thus avoiding the possibility of expressing contradictory points of view on this subject, as actually happened under the former Civil Code.

2.5. The donation must not be exempted from restitution

The need to meet this requirement arises out of the provisions of art. 1146 par. 2, as well as art. 1150, which enumerate expressly and in a limited number the legal hypotheses within which the exemption from restitution operates. The exemption from restitution must be express and can be made by the donation deed itself or by a separate act in writing. The solution is identical with the one in the former Civil Code which by the dispositions of art. 751 final thesis disposed that the descendants have the restitution obligation, „except for the case when the donor otherwise disposed". By the exemption from restitution, the donation acquires a final character, the beneficiary heir holding the donation and the share of the inheritance that he is entitled to.

Therefore, it was rightly noted that „the exemption from restitution only takes effect within the limits of the available share[17]".

Pursuant to art. 1150 NCC, the following categories of donation are not subject to restitution, thus representing an exception with regard to the restitution obligation:

- the donations made with a view to the exmption from restitution, which must be express, and which can be made by the donation deed or by a subsequent act drafted by observing the formal requirements provided by law.
- disguised donations in the form of transfer of property with onerous title, made by agents, except for the case when it is proved that the intent of the donor was other than the one of exemption from restitution.
- common gifts, remunerative donations, sums of money spent for the maintenance or professional training of descendants, wedding expenses, as long as they are not excessive, and the person leaving the inheritance did not otherwise dispose[18].
- the fruit gathered, the income falling due on the date of the opening of the inheritance and the pecuniary equivalent of the use exercised by the donor upon the donated asset[19].

[16] As previously mentioned, ther restitution of donation is applicable only to intestate succession. Legacies are not subject to restitution, so the reference made by the legislature to legacies in the former Civil Code was an inadvertence of the legislature.

[17] The plenum of the Supreme Tribunal, Dec. no. 36 of 5 June 1958, C.D., 1958, no. 37, p. 117.

[18] In that respect, see also the provisions of art. 759 of the former Civil Code.

[19] In that respect, see also the provisions of art. 762 of the former Civil Code.

- the restitution is not owed in the case the donated asset perished and the done is not liable[20]. But the benefit resulting from an insurance contract or the property reconstituted on the basis of the insurance benefit are subject to restitution.

3. The persons entitled to require the restitution of donations

If the the previously analyzed requirements are met, in accordance with art. 1148 NCC, the right to require the restitution is recognized to the co-heirs, descendants of the deceased, and to the surviving spouse as an heir together with the descendants[21]. The restitution obligation is mutual, so that any of the co-heirs will be entitled to require the donation restitution that one of the co-heirs benefited from, but on the other hand, the requiring co-heir is subject to this obligation towards the other co-heirs. The heirs of other categories have no right to require the restitution from each other. Any donation made by the deceased to the latter has a final character, not being subject to restitution[22]. The right to require the restitution has an individual character, and it can be exercised by any of entitled co-heirs[23].

Besides the descendants and the surviving spouse (who are beneficiaries of the restitution and, to the same extent, have the restitution obligation), there are also other categories of persons with an interest in requiring the donation restitution when the property is distributed. Pursuant to art. 1148 NCC, the personal creditors of the descendants or of the surviving spouse can also require the restitution by way of an indirect action. This solution was unanimously accepted by the doctrine and under the regulations of the former Civil Code[24], by accepting that, although the personal creditors of the heirs cannot require the restitution on their behalf, they can make use of an indirect action (art. 974 of the Civil Code), by exercising the restitution action on behalf and at the expense of their debtor.

In this respect, the regulations in the New Civil Code are more precise, determining expressly the categories of persons who can require the restitution of donations before the distribution of the inheritance.

4. The ways of performing the restitution

By regulating the restitution obligation from the perspective of the persons having the this obligation, of the object of the obligation, the Romanian legislature was concerned with the way in which the assets donated by the deceased will be brought back to the inheritance to be distributed. The New Civil Code contains in this matter a simpler regulation, also instituting new rules with regard to the way of performing the restitution. In the former Civil Code, art. 764 regulated the ways of performing the restitution , and art. 765-773 regulated in a distinct manner the carrying out of the restitution according to the way it

[20] In that respect, see also the provisions of art. 760 of the former Civil Code.
[21] The Supreme Tribunal, col. civ., Dec. no. 185/1965 J.N. no. 10/1965, p. 160.
[22] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, Tratat de drept civil român, vol. II, Ed. All, Bucureşti, 1998 p. 352, no. 830.
[23] I. Dogaru, V. Stănescu, M. Soreaţă, op. cit., pp.467-469.
[24] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, op. cit., p. 352, no. 831. M. Eliescu, Transmisiunea..., pp. 241-242. C. Stătescu. Drept civil. Contractul de transport. Drepturile de creaţie intelectuală. Succesiunile, Ed. Didactică şi Pedagogică , Bucureşti, 1967, p. 244. Fr. Deak, op. cit., p. 403. D. Chirică, op. cit., p. 310.

refers to movables or immovables. The purpose of the donation restitution, under both civil codes, is to restore the succession back to the status it would have had if, by the donations, the deceased had not given in advance, to some of the descenadants, part of the inheritance.

Unlike the previous regulatory framework where the legislature considered that this result could be attained in two ways: either by giving back the donated asset in its specific nature (restitution in kind), or by giving back an equivalent in cash for the assets, which is compensated by the value of the inherited share of the heir-donee (the restitution by taking less)[25]. Relating to these two ways, the former Civil Code established the donations subject to restitution in kind and those subject to restitution by the imputation system, thus making a fundamental distinction between the restitution of immovables and movables[26].

The New Civil Code, by art. 1151 par. 1, sets out a different rule concerning the way of carrying out the restitution, providing that the restitution is made by equivalent, and considering as not written, therefore with no legal effect, the provision by which the donee has the obligation of a restitution in kind. Exceptionally, the donee can perform the restitution in kind if at the time of the request for restitution, he owns the asset, if the property is not encumbered by a real obligation, or he did not let it for a period longer than three years.

In its turn, the restitution by equivalent can be fulfilled by taking over, by imputation or in cash.

4.1. The restitution by taking over

This procedure was also described under art. 739 of the former Civil Code, according to which: „If the restitution is not in kind, the co-heirs to whom they owe, first take an equal share of the mass of the inheritance. This taking over is done, whenever possible in objects of the same nature and quality as those which were to be given in kind." The New Civil Code preserves the solution in a different formulation. Thus, in accordance with art. 1151 par. 4 the restitution by taking over is carried out as follows: the heirs entitled to restitution take from the mass of the inheritance certain assets of the same nature and quality as those making the object of the donation whenever possible, taking into account the shares of each person. The restitution by taking over confers on the co-heirs entitled to restitution the right to take over from the mass of the inheritance a share equal to the object of the restitution, consisting of assets of same nature and quality as those subject to restitution whenever possible.

The property which was taken over will be distributed among the co-heirs entitled to restitution in conformity with the shares they are entitled to, and the remaining assets will be distributed among all heirs, including the one having the restitution obligation, according to their legal shares. In this way[27], the equality of all co-heirs is assured.

[25] M.B. Cantacuzino, op. cit., p. 263, nr. 424.
[26] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, op. cit., p. 361, no. 860.
[27] D. Chirică, op. cit., p. 313.

4.2. The restitution by imputation

The fulfilment of the restitution by imputation essentially consists in a decrease in the value of the donation on the part of the heir having the restitution obligation. *In concreto*, it implies two stages:

a) in the first stage, the value of the donation subject to restitution is brought to the mass of the property to be inherited by a calculation, in a written form , and the result is divided among the heirs in accordance with the share that each heir is entitled to;

b) in the second stage, after the determination of the value of the share, the value of the donation is subtracted from the share of the heir who has the restitution obligation, the latter receiving from the mass of the inheritance only the difference up to the value of his share.

Thus, for instance, the deceased left two children as his heirs, A and B. A benefited during the life of the deceased from a donation amounting to 10 million lei. At the time of the distribution of property, in the first stage, the value of the donation will be added to the value of the inheritance of 30 million lei, there resulting a calculation mass of 40 million lei. This calculation mass is divided into two, therefore each heir is entitled to a share amounting to 20 million lei. In the second stage, at the time of the distribution, the value of the donation will be subtracted from the share that A is entitled to, so he will take a share of 10 million lei of the inheritance, and B will take a share of 20 million lei[28].

4.3. The restitution in cash

Pursuant to art. 1151 par. 6 NCC, in the case of the restitution in cash, the person having the restitution obligation will place at the disposal of the other heirs a sum which represents the difference between the value of the donated property and the part of this value corresponding to his share of the inheritance. This procedure for the fulfilment of the restitution implies to submit to the mass of the property to be inherited a sum of money representing the equivalent value of the property subject to restitution. One should mention that the heir having the restitution obligation will bring to the inheritance mass only the difference between the value of the property subject to restitution and the value of the share he is entitled to as provided by law. Generally, this way is used in case the assets of the inheritance mass are not sufficient in order to allow the restitution by taking over or by imputation[29], and the donee cannot renounce the succession in order to keep the donation.

The essential difference between the regulations contained in the two systems consists in the fact that the former Civil Code consecrated the rule of the termination of the donation by the effect of the restitution, whereas the New Civil Code, by establishing the rule of the restitution by equivalent, consecrates the solution of its maintenance.

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[28] I. Dogaru, V. Stănescu, M. Soreață, op. cit., p.479-480.
[29] Mazeaud, op. cit., p. 1290, nr. 1660.

Considering the fulfilment of the restitution by equivalent, the New Civil Code also sets out clear rules with regard to the way and time in accordance with which the value of the asset having made the object of the donation subject to restitution is established. Thus, pursuant to art. 1153, the evaluation of the asset is made by relating it to the value of the donated asset at the time of the trial, taking into account the condition of this asset at the moment of the donation. If the asset was given away, it is the value at the time of the transfer which is taken into account.

The sums of money are subject to adjustment in proportion to the inflation rate applied for the interval between the date of their entering the patrimony of the donee and the date of the restitution.

In case the restitution is in kind, the donee is entitled to recover in proportion to his share, the value of the reasonable expenses he had with extra works, as well as the necessary and useful works for the restituted property. The legislature also recognizes a right of reservation of the asset subject to restitution, for the benefit of the donee, until the date of the effective payment of the sums which are owed to him in relation to the asset brought back to the mass of the succession.

The donee is liable for the degradation caused to the property by his wrongful act, if the degradation determined a decrease in the value of the property.

5. Conclusions

Aware of the fact that the approach we have attempted is not complete, we still consider that the purpose of this analysis, namely to present the novelty elements in the New Civil Code with regard to the legal regime of the institution of the donation restitution, has been attained.

The final conclusion can be drawn by the readers themselves, since the analysis has signalled the fact that the regulations in this matter are not essentially different from those in the former Civil Code, and the rules containing absolutely new elements are quite few. It is also important to emphasize that the drafting and formulation of the legal texts are widely based on the signals of the doctrine, for the purpose of setting out a clear regulatory framework, giving rise to no contradictory interpretation.

As a juridical notion and basis, the institution of the restitution of donations preserves the same juridical features within the scope of the present Civil Code.

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PATRIMONIAL LIABILITY OF THE ADMINISTRATIVE BODIES OF A LEGAL ENTITY UNDER THE NEW CIVIL CODE. CRITERIA FOR ASSESSING THE ADMINISTRATIVE FAULT

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Abstract: Starting from the previous regulation of *the* patrimonial civil liability of a legal person's administrator, in the Decree no. 31/1954 regarding the natural and legal entities, and from the contractual liability and tort liability principles contained in the previous Civil Code, the present study focuses on the manner in which these provisions can be found regulated in the New Civil Code. *Also, the novelty elements brought by the new civil code regarding the category of administrative bodies are emphasized, in an attempt to clarify this notion in accordance with the jurisprudence at the European level, and also of the criterion of the good owner regulated as a standard for assessing the fault, similar to that provided by the Law on trading companies. Based on these aspects and on the regulations of the New Civil Code, we are attempting to find the answer to how the administrative body will respond – contractual or tort liability- for the breach of obligations, considering that in practice it is customary that a series of obligations which are incumbent to the administrator according to the law, should be resumed, expressly mentioned, in the contract effectively concluded with the managed legal entity. It is also envisioned the issue whether we can estimate the conventional, in the form of the penalties clause, the injury caused to the legal entity by the administrative body.*

Keywords: *administrative body, legal entity, tort liability, contractual liability, penalty clause, compensations, management agreement.*

1. The concept of administrative body. Civil liability of the administrative bodies. Delimitation from the civil liability of a legal entity.

As a distinct subject of law, the legal entity participates to legal relationships, and acquires rights and assumes obligations through its bodies. In this respect, the provisions of art. 209 par. 1 and 2 of the New Civil code-Law no.287/2009[1] are fully applicable. *„(1) The legal entity exerts its rights and fulfills its obligations through its administrative bodies, from the date of their creation. (2) Have the quality of administrative bodies, in the sense of art. 1, the natural or legal entities which, by law, by constitutive act or status, are entitled to act, in relations with third parties, individually or collectively, in the name or on behalf of the legal entity."*

The legal text is more complete than the art.35 par.1 of the Decree no. 31/1954 regarding the natural or legal persons[2] according to which „the legal entity is exercising its rights and fulfills its obligations through its organs". In this context, the provision of the New Civil code invoked, clarifies a series of aspects regarding the administrator of a legal entity in general.

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[1] Law no. 287/2009 on the Civil code, republished in the Official Gazette no. 505/15th July 2011 under art.218 of Law no 71/2011 for the implementation of Law no. 287/2009 of the Civil code (Official Gazette no. 409/10th June 2011).

[2] Published in the O.B. no 8/30th January 1954, amended by Law no.4/1956 (O.B. no. 11/4th April 1956). The Decree was repealed upon the entry into force on 1st Octomber of the New Civil code.

1.1 Under the new provisions, the legal entity, participates in relation with the third parties through their management bodies. The legislative amendment is welcomed considering that the term „bodies" used by Decree no.31/1954 was too broad. However, the quality of an administrator as a body empowered to act in the name and on behalf of the legal entity is directly recognized. Although in the foreign legal literature[3] it remains the opinion according to which, the body of a legal entity can only be a collegial one, according to art. 209 par.2 of the Civil Code, even one person invested by law, constitutive act or status, with power of representation may represent a body for the legal entity.

Thus, the administrative body of the legal entity can be both collective (such as the administrative board, the board of directors and the supervisory board, as specific organ of the unitary system, respectively the dual system of the joint stock company, governed by Law 31/1990; the board of directors for associations and foundations, governed by Ordinance no. 26/2000 on associations and foundations[4]), and unipersonal- comprising one natural person or legal entity for example, the sole manager, the general manager. Through the express qualification in the New Civil code of the administrator as a body of a legal entity we can state, safely, that the legislation joined the jurisprudence.

1.2. With respect to the responsibility of the legal entity the liability rules from the common law are applicable. Currently, the basis for the patrimonial responsibility (contractual and tort liability) of the legal entity is represented by art. 218 par.1 and art. 219 par. 1 of the New Civil code, provisions which do nothing but resume the provisions form the previous Decree. Thus, according to art. 218 par.1 „*the legal acts made by the administrative bodies of a legal entity, within the limits of their conferred powers, are the acts of the legal entity itself"*. And under art.219 par.1 „*the licit or illicit facts concluded by the bodies of the legal entity bind the legal entity itself, but only if they relate to the duties or the purpose of the duties assigned"*. Regarding the power to represent the company and to engage it by signing legal documents and committing legal acts, the New Civil code assigns it expressly to the administrative body, thus not to any body of the legal entity (as assigned previously by the Decree no. 31/1954). Provisions similar to the ones from the New Civil code could be found also in **art. 35 par. 2 and 3 of the Decree no 31/1954**, according to which „*the legal documents concluded by the legal entity's bodies within the limits of their conferred powers are the acts of the legal entity itself" (par.2) and „the licit and illicit facts committed by its bodies binds the legal entity itself, if they were carried out when exercising their functions*" (par.3).

From the presented texts we conclude that a legal entity has direct responsibility, under the law, for the acts and facts of its administrative bodies. In these cases, the liability of the legal entity is not subject to legal proof of personal liability of the administrative body whose act caused the damage.

1.3. At the same time, establishing by law the legal entity's responsibility for the illicit acts of the administrative bodies doesn't exclude individuals that constitute these bodies. Thus, according to art. 219 par.2 of the New Civil Code- Law no.287/2009: „*Tort liability attracts also personal and joint liability of those who have committed the wrongful act, both*

[3] J.Pardel, *Treaty of general criminal law*, Cujas, 14th edition 2002/2003, quoted by M.L. Bălănoiu, „Persons who can engage the tort liability of the trading company", in *Curierul Judiciar* no.4/2009, p.197.

[4] Published in the Official Gazette no. 39/31.01.2000, with amendments. According to art.29 (1) „*The boars of directors of the Foundation is its body of…administration."*

towards the legal entity as for the third parties." Similarly stated art.35 par.4 of Decree no 31/1954, „*the illegal acts committed by the individual acting as a body of the company, attracts personal liability of the individual who commuted the acts both towards the company the third parties."* Also, as far as the legal entity compensated the injured party through a civil illicit act, can be corrected through recourse action against the natural person directly responsible. Recourse action shall be founded on the legal provisions regarding the responsibility for one's own actions (art. 1357 par.1 New Civil code according to which „*he who causes injury to another by an unlawful act, committed with guilt, is obliged to pay compensation*") and is justified by the fact that the legal entity can not be confused with natural persons who caused the damage and which, ultimately, must bear the caused damage.

Establishing the legal liability of the administrative bodies for the wrongful acts causes a series of consequences. If tort liabilities are of civil nature, compensation for damage is achieved by engaging civil liability. In this case, the injured individual has three possibilities, of their choice, to get compensated: he may engage in a civil action against the legal entity or against the responsible person (its representative body) or against the legal entity jointly with his representative body. In all cases where the legal entity is held responsible for its representative body, compensating the injured party, the legal entity has always recourse action against it, from which they will recover the amount paid as compensation. Although, according to common law of the civil liability, there are sufficient possibilities to insure repairing the damage caused by the administrative body by his wrongful actions both to the legal entity and to the third parties, Law 31/1990[5] on trading companies establishes a personal liability specific to administrators for caused damages. This solution of the law has been considered as a result of the tendency to expand the liability autonomy in company law. Whether it is about liability towards the company or towards the third parties, art. 72 of Law no. 31/1990 establishes the rule outlining the special framework of a trading company's administrator's liability „ *the obligations and the administrators' liability are governed by provisions on mandate and those specially provided within this law",* framework that is complemented by the general rules of the Civil Code.

2. Forms of patrimonial civil liability of the administrative body

The patrimonial liability of the administrator has a reparatory character and materializes in an obligation to repair the injury. Considering its double nature- contractual and legal- of the legal relation as mandate which already exists between the administrator and the managed legal entity[6] the vast majority of authors[7] give (it has been said

[5] Republished in the Official Gazette no. 1066/17.11.2004, with the subsequent amendments.

[6] The doctrine describes the relationships between the administrator and the legal entity as mandate relations, whose content is primarily contractual and secondly legal, and the double nature of the juridical liability of the administrator.

[7] S. Angheni, *Some issues of law regarding the management of the trading companies. Aspects of comparative law, in Ad Honorem Stanciu D Cărpenaru. Selected juridical studies*. C.H.Beck Publishing House, Bucharest, 2006, p.106.; S. D. Cărpenaru, *Romanian commercial law*, VIIIth edition, Universul Juridic Publishing House, Bucharest, 2008, p.227; C.Popovici, „The liability of the trading companies' administrators*",* in *Revista de Drept Comercial* no.7-8/2002, p.183; S.Popa., *Trading companies*, Universul Juridic Publishing House, Bucharest, 2007, p.85; M Foodor, S.Popa, „The main amendments to Law no.31/1990 on trading companies by GEO no.82/2007", in *Law Review* no. 1/2008, p 12-13. In the sense that the liability is, for all cases, contractual liability. M. Şcheaua, *Law on trading companies no.31/1990, commented and annotated*. Rosetti Publishing House, Bucharest, 2002, p.257 *("even when certain requirements are provided by law, and not by the constitutive act or decision of the assembly of the shareholders, the administrator is held to perform those obligations as a result of the contractual relationship established between him and the company*").

metaphorically „by ricochet") the same double juridical nature, contractual and legal of the administrator's liability, for the manner in which they meet their obligations. In other words, in the majority's opinion, the nature of the liability shall be determined by the source of the breached obligation.

2.1. In this regard, of particular importance are the provisions of art.72 of Law no. 31/1990 (" *the obligations and the liability of the administrators are governed by the provisions on mandate and the ones of the present law*"). At the same time, the Civil Code underpins on contractual grounds the relationships between the legal entity and it administrative bodies, stating in art. 208 par.(3) „*the relationships between the legal entity and those who make up its administrative bodies are subject, by analogy, to the rules of mandate, unless otherwise provided by law…".* Similar provisions could be found also in art.36 of Decree no. 31/1954, *("the relationships between the legal entity and those who form their bodies are subject, by similarity, to the rules of the mandate, unless otherwise provided by law").* The text was limited only to stating in a generic manner the quality of the legal entity without expressly individualizing the administrative body, as provided by the regulation of the New Civil Code.

The empowerment (position) given to the administrative body has double grounds: firstly contractual, namely within the mandate comprised by the appointment act: the constitutive act or the decision of founders/members/shareholders and concluded when the administrator explicitly expressed its consent to accept the position. Such acceptance of the position results form the express declaration in this sense of the person, embodied in a document, contained in the contract concluded with the company (in practice a mandate or administration contract is concluded), and if such a contract is not concluded, through the express statement of the Genera Assembly where the appointment has been recorded in the minute of the meeting.

Secondly, the empowerment given to the administrator has its legal basis also in the law. Thus, the special laws establish a series of obligations and attributions to complement the (conventional) contractual framework of the mandate of the administrative body specific to each legal entity. For example, the Law on trading companies imposes an obligation to submit the signature specimen (art.45), the diligence and prudence duty (art.144^1 par.1) loyalty duty (art. 144^1 par.4), confidentiality duty (art.144^1 par.5). For the obligations and duties provided by the mandate (whether resulting from the appointment act- constitutive act or decision of the competent body, subsequently accepted by the administrator or through the finalization in practicum of such a contract) thus agreed by the parties, the administrator assumes contractual liability, and for the obligations and attributions provided by law which fall within his responsibility, he assumes a tort liability.

2.2. However, we wonder what nature the civil liability of the administrator shall have, to the extent to which the legal obligation is inserted in the contract concluded with the legal entity (mandate, administration or even management contract)? In this context, is it possible that for the same breached obligation, the responsibility to be different? The doctrine answered in this sense that „*we are faced with multiple liabilities between the contractual liabilities arising form the mandate and the tort liability. The company and its*

associates can choose between the contractual and tort basis of the administrator's liability for the damages caused to the company".[8]

We appreciate that, breaching the legal duties included in the contract, by its conclusion, shouldn't attract a tort liability. In this case, the basis for the liability is not represented by the law, but by the contract itself, reason for which the liability shall have a contractual nature. Whenever we are in the presence of a contract, the liability can only be contractual[9]. And, as far as the violation of the obligation stipulated in the contract goes, even if initially, its basis was a legal one, the liability is contractual, especially since, for all the contracts, the rights and obligations of the parties, regulated by framework laws, are detailed by the parties within the contract. Once included within the contract, by agreement of the parties, the obligations become contractual obligations, with a more detailed content or which can limit the initial content set by law. Under this circumstance it cannot be argued that the source for the obligations is not contractual. Consequently, breaching them shall engage the contractual responsibility of the concerned administrator.

2.3. Generally, the main distinction between tort and contractual liability is represented by the source of the non-performed obligation. In this respect the New Civil code provides comparative provisions, regarding tort and contractual liability. According to art. 1349 New Civil code, entitled „Tort liability" „*(1) Each person has the duty to respect the rules of conduct which the law ... requires and he shouldn't harm, by his actions the legitimate rights or interest of others", (2) the one who, with discernment violates this duty is responsible for any prejudice caused, being forced to fully compensate.* Contractual liability is defined in art. 1350 (1) „*any person must fulfill the obligations which they contracted. (2) when, without justification, the person fails to fulfill this duty, he is responsible for the damage caused to the other party and is forced to repair this damage, according to the law".*

Legislative intervention is worthwhile, clarifying the issue discussed above. Thus, the legislator outlines the two forms of civil liability, in relation to the source of the breached obligation, lying down at the same time, expressly, the tort liability for failure to comply with the provisions of the law. At the same time, in a basic regulation, the legislator clarifies also the problem of the relation between the two types of liability, expressly prohibiting the right of choice between them or the right to remove the implementation of the contractual liability in favor of some more favorable rules. According to art. 1539 par. 3 „ *if the law doesn't stipulate otherwise, neither party may remove the contractual liability rules in order to opt for other rules that would be more favorable.*

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[8] V. Paşca, „Some theoretical considerations and practical aspects regarding the liability of the members of the board of the trading company subject to the procedures stipulated by Law no.64/1995*",* in *Commercia*l *Law Review* no.2/2004, p.26.

[9] On the inadmissibility of the option between the two forms of liability, in case of a contract, see C. Stătescu, C. Bîrsan, *Civil Law. General theory of liabilities*, All Educational Publishing, 1998, p.133. „*the civil tort liability forms the common law of the civil liability, whereas the contractual liability is a liability with a special character, derogatory. Compared to the legal basis of the two liabilities, „...for the case of tort liability, the breached obligation is a legal obligation, (...) for the contractual liability, the breached obligation is an actual obligation established by the pre-existing contract, concluded between the two subjects of the liability- the injured one and the one who has breached its contractual obligations*".

3. Forcing the administrative body to pay compensation

Whatever the source of the non-performed obligation (contractual or legal), or the committed wrongful act, the juridical liability- contractual or tort- of the administrative body must be materialized in the obligation to compensate the prejudice caused to the legal person or third parties. The general juridical basis for the obligation of compensation is represented by art. 1530 New Civil code „*the creditor shall be entitled to damages for the reparation of the injury caused by the debtor and which comes as a direct and necessary consequence of non-performing the obligation, or as the case may be, culpable failure*[10]." In the case of damages resulting form a wrongful act, the basis for repairing them is represented by art. 1357 par.1 of the New Civil code[11] „*the one who causes injury to another by a wrongful act, committed with guilt, is obliged to fix it*".

3.1. The conditions for granting compensations. The criteria for assessing the guilt of the administrative body.

As a rule, the subjective right of the creditor to claim compensation for the suffered damage arises at the moment the contractual and tort liabilities are met[12]. Therefore, the injured legal entity or third party must prove also, cumulatively, all the conditions of the civil liability of the administrative body. On evidentiary field, in contractual matters, the injured party must prove only the existence of the contract and the failure to fulfill or the improper fulfillment of the obligation that lies with the administrator. Instead, on tort matters, it must be proven, cumulatively, in the administrator's person, all the general conditions for engaging his liability according to art.1357 par.1 of the New Civil code: wrongful act, causing injury, the causal relation and the administrator's guilt (conditions identical to those provisioned by art.998-999 previous civil code).

Unlawful conduct may consist of an action or inaction through which the administrative body has not fulfilled or improperly fulfilled the obligations which the law, the constitutive act, the decision of the general assembly or the contract concluded with the legal person has set in his responsibility. In this respect, some courts have stated that „*the management contract concluded with a private trading company is a commercial contract and for the breach of the management contract, the applicant is entitled to compensation*[13]*"*. At the same time, the administrator's conduct may consist also in a wrongful act having as a result an injury of the subjective rights of the company or third parties. Considering the unlimited number of wrongful acts which can draw the administrator's liability, the doctrine couldn't proceed to enumerate them, therefore it has

[10] Similar conditions could be found in the Civil code of 1864: art. 1073 C.Code and art. 1082 C.Code.

[11] The same stipulated art. 998 of the previous Civil code: „*any act of the individual, causing injury to another, obliges the one of whose fault was caused to repair it".*

[12] C. Stătescu, C. Bîrsan, quoted work, p.301.

[13] Decision no.89/Ap of 30th may 1996 of the Court of Appeals Brasov, in the CLM no.5/2007, p/132-138 ("according to art.969 par.1 Civil code, the convention legally concluded have the force of law between the contracting parties. According to art 1073 Civil code, the creditor has the right to compensations. For breaching the management contract no.660/1994, the applicant is entitled to compensations.").

been established the principle that, any act performed or omitted which has unlawful character draws the administrator's liability.

Regardless of its form the patrimonial liability of the administrator for the damages caused is based on his guilt for non-performing or improper performance of the legal or contractual liabilities. If in contractual matters, the administrator's guilt who has not executed his obligation it is presumed, according to art. 1548 New Civil code *("the debtor's guilt for a contractual obligation is presumed by the mere fact of non-performance*"), in terms of tort liability, its guilt must be proven. Considering the fact that the civil liability of the administrator against the legal entity is primarily contractual and the liability against third parties is, usually, tort liability, the latter has a disadvantageous position. Initially, in the absence of a legal principle that will establish the form and the severity of the administrator's guilt, the criterions for assessing guilt from the common law were called for. Thus, considering the provisions of art. 1080 of the Civil code of 1864, according to which „*the diligence that should be required to fulfill an obligation was always the diligence of a good owner" mutatis mutandis* it was appreciated that the same diligence must be considered by the administrator in fulfilling his responsibilities[14]. In other words, the administrators' responsibility was considered according to the abstract type of the prudent and diligent individual- *bonus pater familias*. In concrete, the administrator should ensure a good management that will lead to the achievement of the company's objective.

In another view[15], in assessing guilt, the administrator's conduct must be related to the diligent conduct of a „good trader", diligence clearly superior to the „good owner" diligence- *bonus pater familias*- specific to the civil law (art.1080 previous Civil code), due to the onerous character of the mandate. Starting from the onerous character of the administrator's mandate it has been concluded that the administrator's liability must be severely assessed, and he will be held liable *in abstracto*, thus regardless of the form and degree of guilt, according to art. 1540 Civil code. According to the cited text, the mandatary with pecuniary interest will be held liable for failure to comply with the mandate for any fault, negligence or imprudence. Therefore, the administrator was held liable regardless of the severity of the guilt, even for the slightest fault (*culpa levissima*).In this context the intervention of the legislator was needed in order to establish the presumption of guilt falling within the administrator's duties, but also the criteria according to which the liability shall be assessed. Thus, by amending the law on trading companies, art. 144^1 par. 1 introduced the criterion of „good administrator". According to the legal text „the members of the board of directors shall exercise their term of office with prudence and diligence of a good administrator". Consequently the diligence that the administrator must prove in exercising his mandate is the diligence of a good administrator. In this context arises the question what presupposes the criteria of a „good administrator"? The doctrine[16] offered an answer to this question, saying that the standard of a good administrator must be related to the conduct of an abstract human model with experience and special knowledge, more than

[14] M. Şcheaua, *Law on trading companies no.31/1990, commented and annoted*, Rosetti Publishing House, Bucharest 2002, p.205.

[15] S.D. Cărpenaru, S.David, C. Predoiu, Gheorghe Piperea, *Company Law. Comments on articles*, 3rd edition, C.H.Beck Publishing House, Bucharest, 2006, p.347. S.David, F.Baias, *Civil liability of the administrator of a trading company*, in Law no. 12/2005, p.21. S.Popa, *Trading companies. Theory and jurisprudence. Models of constitutive acts,* Universul Juridic Publishing House, Bucharest, 2007, p.88-89; M.Fodor, S.Popa, „Main amendment made to Law no 31/1990 on trading companies by GEO no.82/2007*"*, in Law no.1/2008, p.13.

[16] R. N. Catană,"The duty of prudence and diligence of the administrators in the context of company law reform*"*, in *Pandectele Române* no 3/2006, pp.190-191.

average. Thus, guilt concerning the fulfillment of the mandate shall not relate *in concreto* to the qualities and personal circumstances of the administrator in question (subjective criterion), but to the knowledge, skills and abilities which, *in abstracto*, an individual who acts as an administrator must have under similar conditions (objective criterion). Therefore, the individual acting as an administrator must adopt a qualified conduct, similar to a professional person, based on specialized knowledge and business experience. For this reason, it has been argued that instituting de duty of diligence and prudence is nothing but the expression of the legislator's intention to regulate the administrator's liability for the easiest guilt- carelessness and negligence. Thus, the administrator is responsible for the damage caused to the company both for negligence and imprudence, in relation to the abstract model of the good administrator.

It should be mentions that, generically, the New Civil code introduces the criterion of the good owner (similarly to the criterion of the previous Civil code) in assessing the conduct of the legal entity's administrator, thus inclusively of a trading company, provisioning in art. 213 that: „the member of the board of directors of a legal entity must act in the company's interest with the prudence and diligence required of a good owner." Basically, the criterion of a good owner is identical in its content with the criterion of the good administrator, this similarity resulting from the systematic interpretation of art.213 with the provisions of art. 2.018 par.1 of the New Civil code regarding the diligence of the mandate ("if the mandate is with pecuniary interest, the mandatary is bound to execute the mandate with de diligence of a good owner. But if the mandate is on a free basis, the mandatary is obliged to fulfill his duties with the diligence they show when managing their own businesses". According to the mentioned text the good owner criterion applies depending on the pecuniary or free of charge character of the mandate. Since the administrator's mandate is a remunerated act, it means that the liability will be severely assessed (*in abstracto*), according to the diligence of a good owner acting under similar conditions, thus the administrator being held responsible, regardless of the form or degree of his guilt, similarly to the good administrator criterion provisioned in art 144^1 par.1 of Law no. 31/1990.

3.2. Assessment of compensations

For the cases where the legal entity or the third parties manage to prove the conditions provided above, the administrator at fault for non-performance or improper performance of obligations may be obliged to pay compensations. Their determination is made by the court (judicial evaluation), according to the principles provided in art. 1530-1533 of the New Civil code, similar to those provided in art. 1084-1086 previous Civil code.

In general, the judicial evaluation of the damage should be based on a prior expertise. However, it is possible that the result of the expertise may not always reflect the actual loss suffered by the legal entity in question. Also, the judicial evaluation of the damage has the disadvantage that requires proving all the conditions for establishing the administrator's liability.

All these drawbacks could be avoided by opting for a conventional assessment of the damage. Thus, we wonder if such penalties clauses, whereby the parties establish in advance the amount of the compensation for the suffered damage by the legal entity through the administrative acts, are admissible in terms of the administrator's liability? Due to the complexity of the position held by the administrator and the duties which their

position involves, we believe that such clauses are justified only in terms of assessing the damage resulting from breach of the contractual duties, not being accepted for the legal ones. Also, since it is a conventional assessment, the penalties clause necessarily requires concluding a contract (mandate, administration or management) between the company and the administrator, where it should be inserted, or a separate agreement if no such contract is concluded. At the same time, as a rule[17], the court has no right to reduce or to increase the amount of the compensation established in the penalties clause. Furthermore, the court of law cannot verify the extent of the damage suffered by the company and cannot ask the company to prove the extent of the damage. Due to these advantages, in principle we don't exclude such a conventional assessment of the eventual damage caused by the administrator.

4. Conclusions

As pointed above, the Civil code keeps in terms of civil liability of the administrative body of the legal entity the principles and regulation contained in Decree no. 31/1954 and in the previous Civil code. Meritorious is however, the clarification of the administrative body concept, including both the unipersonal and collective body and the introduction of the good owner criterion for assessing the guilt of this body. Relevant, under the first aspect is the practice at the EU[18] level according to which *„if the representative body of a company can comprise one or more members, it should be published not only the scheme for representation in case of plurality, but also it is necessary to specify that, in case of appointing a single administrator, he represents the legal entity even if such power results with evidence from the national law"*. Through the express qualification in the New Civil code of the administrator as a body of the legal entity, we can state without mistake that, the legislation joined the jurisprudence.

Compared to the administrator's conduct, which must be a conduct similar to a professional, we find more appropriate the good administrator criterion provided by the law on trading companies. *De lege ferenda* a correlation of the legal texts is required, the one contained in the basic rule of the Civil code with the one from the special rule of the company law regarding the criterion for assessing the administrator's guilt. In any case, related to the principle *specialia generalibus derogant*, the criterion of the good administrator provided by the Law on trading companies as a special rules will apply with priority. In addition, the law on trading companies, stipulates also the exemption from liability clause of the administrator as a business judgment rule, instead, the New Civil code, although it provides the criterion of the good owner as a standard for assessing the administrator's guilt of any legal entity, doesn't cover the situation of exemption from liability of the administrator, art.213 of the New Civil code being incomplete in this respect. *De lege ferenda* it is necessary an express regulation of the business judgment rule in the body of the New Civil code, the more since, it represents a law of general applicability.

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[17] According to art. 1541 of the New Civil code *„the court can reduce the penalty only when a) the main obligation was performed partially and this execution was for the creditor's advantage; b) the penalty is obviously excessive compared to the injury which could have been foreseen by the parties when concluding the contract*."

[18] ECJ, Case 32/74, The Hague GmbH, Decision of 12 November 1974, in D. Şandru, *Trading companies in the European Union*, Universitara Publishing House, Bucharest 2006, p 38, note 99.

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WRITTEN CULTURE IN THE ROMANIAN MIDDLE AGES THE ROLE OF THE *CHURCH* AND OF THE *REIGN*

Ion CROITORU[*]

Abstract: *The the Middle Ages cultural life in Romania revolved around two traditional authorities: the Church and the Reign. These authorities included various cultural institutions such as schools, scriptoria (places of copying manuscripts), printing houses and libraries which were either under the patronage of one or other of the two authorities, or benefited from the protection and support of both the Church and the Reign. These institutions, the Church and the Reign, have provided the teaching and the education for the Romanian people; they have arbitrated the relationships between people, by establishing an ethical code of conduct for each person, hence the legal, civil and criminal functions were divided between the two authorities; they have patronized the literary and artistic creations, the cultural programs of the rulers, architecture and arts; they contributed to the establishment and the cultivation of the political, cultural and intellectual relationships with foreign countries.*

Keywords: *Church, Reign, legal, civil and penal functions, Pravile (Collections of laws), legislation, Civil Law, Canon Law.*

Until the appereance of the written records of the first monuments of the Romanian language, probably towards the end of the fifteenth century, the written culture of the Romanians put on the Slavic clothing of Medio-Bulgarian origin. The fact that Slavonic language was used had multiple consequences for a large period of time for the Romanian written culture, and its prestige has delayed the adoption of the Romanian language in worship, administration and culture; it has tied the Romanian initiatives to the culture of the Southern Slavs[1], first, and later to that of those in the east; it has left traces in the literary language and represented, along with Greek, a mediating factor in the relations with the highest Eastern Christian culture, the *Byzantine* culture.

Among the rare testimonies about the Slavic culture of the tenth through thirteenth centuries, some came from Transylvania and Banat, from where we have the *Octoechos* from Caransebeş (thirteenth-fourteenth centuries)[2], and other manuscripts[3]. Romanian culture in Slavonic incorporated the results of the cultural activity from both Bulgaria and Serbia. A broad absorption process took place north of the Danube, in the already existing monasteries, or in those that were established starting with the second half of fourteenth century.

The fact that Romanian scholars had deep knowledge of Slavonic can be assessed by the large number of manuscripts (translations of Byzantine writtings such as theological, historical, philosophical and legal literature) accumulated in the three-four centuries of Slavic-Romanian written culture. Thus, the written culture of Byzantium became, through Slavonic translations, the foundation upon which the ancient Romanian culture was built.

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[1] The culture of the Southern Slavs had a strong impact early on upon the Romanian culture, see P. P. Panaitescu, *Manuscrise slave din biblioteca Academiei R.P.R.,* vol. I, Bucureşti 1959, pp. 410-411.

[2] *Ibidem*, p. 411.

[3] I. Iufu, «Manuscrise slave în bibliotecile din Transilvania şi Banat», *Romanoslavica* VII (1963), pp. 451-466.

Cataloguing the oldest Slavic manuscripts kept in Romania reveals that from the fifteenth-seventeenth centuries most of those writings are Medio-Bulgarian editions, the others, a small number of them, are Serbian, while the appearance of the manuscripts in the Russian editions is recorded for the seventeenth and eighteenth centuries.

Notable in this regard is the study done by the slavist I. Iufu concerning the group of Slavonic manuscripts from Dragomirna monastery, where he identified six *Sbornice*, also called *Cetâi-minei*, originally belonging to Moldovița monastery[4]. The manuscripts were revised medio-Bulgarian editions, from the School of patriarch Eftimie († approx. 1400/1412) of Târnova (1375-1393), but the fruits of this reform in orthography and in reviewing of ecclesiastic literature, conducted by the great scholar, could not be spread in Bulgaria due to the fact that it fell under the Ottoman domination[5]. The place where the great work of collecting, confrontation and straightening of the original literature and of the South Slavic translations took place was Constantinople. Studion monastery in this city was the spiritual and cultural center for this extensive work. By the end of fourteenth century, a large collection of hagiographic and homiletic writings was created in this famous monastery[6], which writings were arranged according to the liturgical calendar of the Orthodox Church. These were a collection of ten large *Sbornice*, also called, as mentioned above, *Cetâi-minei*. They were completed after 1359, but never arrived in Bulgaria. They were adopted directly by the Romanians from Moldavia, during the reign of Prince Alexandru cel Bun (1400-1432), who used them as prototypes. From the acknowledgement of these aspects, it becomes evident that the Slavic manuscripts from the period of maximum development of Romanian culture in Slavonic, i.e. from the fifteenth-sixteenth centuries, written in Medio-Bulgarian, following the Eftimian spelling, are the direct product of Romanian scholars and did not come from elsewhere[7].

This thesis is also based on facts from the Bulgarian historiography. For instance, Professor B. Tsonev, doing the statistics of a number of 350 medio-Bulgarian manuscripts, kept in the National Library in Sofia, noticed an uninterrupted increase in the number of medio-Bulgarian manuscripts from the twelfth century until the seventeenth century, which was unexpected, given the fact that any literary activity ceased in the late fourteenth century in Bulgaria, as a result of the conquest of the Bulgarians by the Ottomans. Wondering where these manuscripts might have come from, the Bulgarian scholar answered and stated that they *originate from the scholarly centers outside Bulgaria, most of them being from Wallachia and Moldavia*[8].

Consequently, after the end of the fourteenth century, the Romanians are the depositaries, continuers and emitters of culture in Slavonic. For this reason, many of the Slavic cultural monuments were published based on Romanian manuscripts. For instance, the only copy of the *Bulgarian Medieval Chronicle* was found in the *Sbornic* drafted and copied by the scholar Isaiah from Slatina, bishop of Rădăuți, before 1561, currently being held in Kiev; most of the works of patriarch Eftimie of Târnova was edited based on the copies of the calligrapher and miniaturist Gavriil Uric, a monk from Neamț Monastery,

[4] Idem, «Monastery Moldova - important cultural center of Romanian culture in Slavonic period (XV-XVIII)», *Mitropolia Moldovei şi Sucevei* 39/7-8 (1963), pp. 448-449.
[5] Zlatca Iufu, «Manuscrisele slave din biblioteca şi muzeul Mânăstirii Dragomirna», *Romanoslavica* XIII (1966), p. 197.
[6] *Ibidem,* p. 200.
[7] *Ibidem,* p. 197.
[8] *Ibidem,* p. 198.

which date from the first half of the fifteenth century[9], and examples could go on. Considering the above, we can infer about the appearance of the early Romanian culture that it is *a section of the Byzantine-Slavic culture north of the Danube*.

Slavic-Romanian culture reflects a high level of activity, permanently updated about the achievements of Byzantine-Slavic culture at South of the Danube. The aspiration for a refined culture is evident in creations of architecture and painting, the works of minor arts (calligraphy, miniature, embroidery, silver work etc.), as well as in the circulation of Byzantine manuscripts (especially translations of the great theologians of the Eastern Church).

This cultural climate has also favored the emergence of original Romanian creations in Slavonic, notable in this respect being *The Teachings of Neagoe Basarab to his son Theodosius*, written at the beginning of sixteenth century[10]. The literary and inspirational background of *The Teachings* is the hesychast literature, which circulated in manuscripts copied in Wallachia[11]. The author used as sources not only works of the Holy Fathers (John Chrysostom, Gregory the Theologian, John Climacus, Ephrem the Syrian, Maximus the Confessor, Simeon the New Theologian etc.), but also works of popular and sapiential literature (*Barlaam and Ioasaf, Alexandria, The Physiologist* etc.) or apocryphal writings (*Virgin Mary's Journey to Hell, The Wood of the Cross*)[12]. The originality of this work resides in the revealing of a political thinking in symbiosis with the life principles of living the Orthodox faith, as result of the experience of an independent Christian state, which had to face major difficulties due to the pressure of the Ottoman rule.

The sources used in the editing of this *summary of Eastern asceticism and mysticism*[13], also considered a *summary of the Romanian diplomatic experience and thought*[14], shows that Slavonic was, on the one hand, a positive factor in Romanian written culture, representing a bridge to the Byzantine creations and those from the Slavic centers from South-East Europe (Studion monastery, Târnova, Serbian monasteries etc.).

On the other hand, even if during the period of Slavonic expression the original works have a Romanian content (*The Teachings of Neagoe Basarab...*, *The Chronicles of Macarius, Eftimie, and Azariah* etc.), Slavonic language was, however, a slowdown factor for the Romanian expression in written culture. For the Romanians, Slavonic was not a native language, and this was a known fact at that time. For example, the Dalmatian bishop Nicholas of Modrussa, the emissary of pope Pius II (1458-1464) at the Court of king Matthias Corvinus of Hungary (1458-1490), while visiting Oradea and Budapest for a few months, learned that the Romanians made a clear distinction between the Slavonic they

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[9] See G. Ivaşcu, *Istoria literaturii române,* vol. I, Bucureşti 1969, pp. 37, 40-42; V. Cândea, «Biserica ortodoxă şi sacralitatea artelor tradiţionale româneşti», *Autocefalie, Patriarhie, Slujire Sfântă*, Bucureşti 1995, p. 181; M. Păcurariu, *Istoria Bisericii Ortodoxe Române*, I, Bucureşti 1991[2], pp. 418-419; I. Crăciunaş, «Mânăstirea Neamţ, lavra monahismului din Moldova», *Mitropolia Moldovei şi Sucevei* 38/5-6 (1962), p. 347; I. R. Mircea, «Contribution à la vie et à l'oeuvre de Gavrile Uric», *Revue des Etudes Sud-Est Européennes* 6/4 (1968), pp. 573-594.

[10] See *Învăţăturile lui Neagoe Basarab către fiul său Theodosie*, ed. Florica Moisil, Dan Zamfirescu, Bucureşti 1970, as well as the recent editions of *The Teachings* (*Învăţăturile...)* from 1996 (Bucharest) şi 2009 (Curtea de Argeş).

[11] Dan Zamfirescu, «Învăţăturile lui Neagoe Basarab. Problema autenticităţii»*, Studii şi articole de literatură română veche,* Bucureşti 1967, pp. 114-115.

[12] See idem, «Studiu introductiv. I. Primul monument al literaturii române», *Învăţăturile lui Neagoe Basarab către fiul său Theodosie*, Bucureşti 1970, pp. 21, 42-54; idem, *Neagoe Basarab şi Învăţăturile către fiul său Theodosie. Probleme controversate*, Bucureşti 1973, pp. 328-348; Metropolitan Serafim, *Isihasmul, tradiţie şi cultură românească,* Bucureşti 1994, pp. 97-103.

[13] Dan Zamfirescu, «Studiu introductiv..., p. 28; idem, *Neagoe Basarab şi Învăţăturile...*, p. 290.

[14] Idem, «Studiu introductiv..., p. 28.

used (*utantur*) in the church services and their cradle language (*ab incunabulis loquuntur*), which was of Latin origin[15].

Note that until towards the middle of the seventeenth century, when the institutionalization of the process of using the Romanian language in the Church and in the royal chancelleries was outlined, the increase of the cultural potential can be traced through the work of training and educating monks and laymen, through the accumulation of canon law, theology and didactics literature, through the circulation of certain historical and world literature writings, as well as through the efforts to equip churches and newly built holy places with ornaments and liturgical books necessary for worship. The written culture acts were diversified in the seventeenth and eighteenth centuries by writing original works, translating books from the world literature, by the establishment of new schools, learning and using classic languages in writing, sending young people to study in important centers abroad, by the adoption in the culture of the living language spoken by the masses, the establishment of libraries, by making contact with environments of foreign culture, etc.. That was when the early modern manifestations took place, i.e. the first trends of modernization of the intellectual equipment, all this leading to the emergence of new intellectuals and written culture creators in Eastern Europe.

Late Middle Age features were kept in the Romanian Countries in the seventeenth century. The explanation lies in the persistence of medieval political and socio-economic structures in a society with other rates of evolution caused by an era of Ottoman domination, but with a different structure of perception and cultural manifestation compared to a Western society. This has led to a historical chronology specific to the Romanians, and in general to Eastern Europe, which presents great differences from that of Western Europe, if we consider data that marks the great epochs: for Western Europe, the *Middle Ages* ends in the year 1453, with the fall of Constantinople, yet, in Romania, specific Middle Age features were encountered until around 1821; *the modern age* is considered between 1453-1789 for Western Europe, while in Romania it is placed between the years 1821-1916; the beginning of the *contemporary age* in the West is connected to the year 1789, i.e. when the French Revolution occurred, while for the historic development in Romania the benchmark is considered the year 1916, when Romania entered World War I (1914-1918) joining the Entente. It is worth pointing out that these differences in centuries compared to the Western chronology are not considered a disadvantage for Romanians in terms of cultural report, and research is still far from having said the last word in this regard.

Therefore, we will continue by submitting a representative analysis of the very factors that played an important role in the manifestation of written culture during the Romanian Middle Ages: the *Church* and the *Reign*, with their centers and creators.

1. The Church

Cultural life in Romania in the Middle Ages revolved around two traditional authorities: the *Orthodox Church* and the *Reign*. They included various cultural institutions, such as schools, scriptoria, printing houses and libraries, which were either under the patronage of one or other of the two authorities, or benefited from the merging protection

[15] Şerban Papacostea, «Les Roumains et la coscience de leur roumanité au Moyen Age», *Revue roumaine d'histoire* 4 (1996), pp. 21-22.

and support of both the *Church* and the *Reign*. This reality derives from the fact that a medieval ruler, such as prince Matei Basarab of Wallachia (1632-1654), skilled in politics and strategy, could not establish a cultural program on his own, without the aid of the *Church*, so he found the collaborators he needed (copyists, translators, school teachers, printers etc.) among its members (hierarchs, clergy, monks and laymen).

In the history of culture and society of this period, the *Church* is the institution which gives us the most important landmarks. The adoption of church organization according to the Byzantine model and also the use of old church Slavic as language of worship caused the *Church* and the culture it promoted to hold an essential role. This also lead to the parallel evolution of the two authorities: *it was possible for the Church to conduct a wide cultural activity, placed in the service of the society, and it gained the support of the Reign*.

The *Church* was the depository of the official doctrine of the state, having a dominant role in society, and, through its activities, it provided the teaching and education of children and the faithful; it moderated the relationships between people, by establishing an ethical code of conduct of each person, hence the legal, civil and penal functions shared with the *Reign*; it sponsored the literary and artistic creations, the cultural programs of the rulers, architecture and arts. The cultural-political and intellectual relations with foreign countries were also favored by the *Church*, through the connections with the Orthodox Churches of the Slavic world and the Orthodox Patriarchies of the East, through the material help given to Christian settlements in the former Byzantine Empire, the Balkans, all the way to Anatolia and the Middle East.

The travels of the Eastern patriarchs in the Romanian Lands, which although were primarily interested in getting material help, led to the establishment of important cultural relations, contributing to the development of written culture in theological works, copied, printed or translated in Romanian cultural centers. Thus, Gheorghe Duca, as ruler of Moldavia (1665-1666, 1668-1671, 1672, 1678-1683), established in 1680, at the request of patriarch Dositei of Jerusalem (1669-1707), a Greek printing press in the monastery Cetățuia, near Iassy[16], where several works of polemical theology were printed. Patriarch Athanasios III Dabbas of Antioch (1685-1694, 1720-1724), arriving in Wallachia, where he spent over four years (1700-1704), composed a *History of the Patriarchs of Antioch*, and, at his request, at the expense of Saint Constantin Brâncoveanu and by the printing activity of Saint Anthimos of Iviria, two books with Arabic letters were printed: a *Greek-Arabic Liturical Book* (Snagov, 1701) and *Greek-Arab Horologion* (Bucharest, 1702)[17]. Leaving Wallachia, the patriarch took away with him the printing material, establishing a printing house in Aleppo, in 1706, which was then moved in 1724 to Balamand, near Tripoli, and from there a part[18] was taken to the monastery of St. John of Şuer (Lebanon, 1734-1899)[19],

[16] D. Stăniloae, *Viaţa şi activitatea patriarhului Dositei al Ierusalimului şi legăturile lui cu Ţările Române*, Cernăuţi 1927, pp. 23-24; P. P. Panaitescu, «Patriarhul Dositei al Ierusalimului şi mitropolitul Dosoftei al Moldovei», *Biserica Ortodoxă Română* 64/1-3 (1946), p. 100.

[17] *Bibliografia românească veche, 1508-1830,* I, ed. de Ioan Bianu, Nerva Hodoş şi Dan Simionescu, Bucureşti 1903, pp. 423-433, 442-447, 539-540; Em. Legrand, *Bibliographie Hellénique ou description raisonnée des ouvrages publiés par des grecs au dix-huitième siècle*, I, Paris 1918, Bruxelles 1963[2], pp. 1-2, 19-20.

[18] Another part was moved to the city Zaurac. Being completed with the necessary pieces, the printing house continued its activity for a while in the new location, without reaching, however, the importance of that which was in the monastery of *St. John* [Mircea Păcurariu, «Legăturile Ţărilor Române cu Patriarhia Antiohiei», *Studii Teologice* 16/9-10 (1964), p. 608].

[19] Mircea Păcurariu, «Cultura în timpul lui Constantin Brâncoveanu», *Biserica Ortodoxă Română* 114/7-12 (1996), p. 354; V. Cândea, «Opera lui Constantin Brâncoveanu în Orientul Apropiat», *Constantin Brâncoveanu*, Bucureşti 1989, p. 175.

considered to be the printing house with the longest activity in the Arab world[20]. In the context of the relations with the Orthodox world of the East, we remember the work of metropolitan Matthew of Myra (1605-1624), who, upon arriving in Wallachia, where he was made aot of Dealu monastery (1602/1609-1624), wrote and decorated several Greek manuscripts of great artistic value[21].

But in addition to the work of foreign scholars, we also encounter a rich contribution made to medieval writing by the Romanian scholars who belonged to the clergy. We note this as a selective thematic feature of the works composed, translated, copied or printed, exhibiting a conception of the book functions, directly inspired by the *Church*. These works are liturgical texts necessary for worship, rules required by the regulation of human relations, translations from the *Holy Scripture* and interpretations of patristic books (homilies, sermons, ascetic and mystical texts, reference books for the spiritual life etc.). All this literature was distributed by the *Church*, which was the main institution of education for Romanians, through parishes and monastery schools, and through the activity of confessors and priests. Monastic establishments and parish churches ensured that the training of both the clergy and the laity remained connected to the long tradition of the Church, which, through its dynamic spirit, transcends the ages. In addition to learning writing and catechetical teachings, taught according to a Christian education concept, which *The Christian Pedagogy* by monk Gregory of Moldavia (eighteenth century) later tells us about, considered the last or perhaps the only hesychast education manual known to us from the era of confrontation between *Tradition* and *Modernism*[22], these settlements continued the ancient method of oral teaching and practice, that is liturgical practice[23], through the important role of liturgical services, especially the Eastern *Divine Liturgy*. In this respect, the Roman-catholic scholar Sévérien Salaville, pointing to the wealth of ascetic teachings and concepts contained in Orthodox worship, through an extensive use of the *Holy Scripture* and patristic writings, says that *the wealth of dogmatic and moral content of the Eastern Liturgy easily offers material for an entire volume that could group, on different topics, into a collection of various liturgical books, regarding the Trinity, the Incarnation, Salvation, the Eucharist as a Sacrament and Sacrifice, The Theotokos, ... the Church, ... the Tradition, the seven Sacraments, the cult of the Angels, the Saints of the Old and New Testaments, the cult of relics, the cult of the icons, prayers for the dead*[24].

Therefore, here's how many themes, with a profound theological content, were given to the faithful not only to meditate on, but also to achieve in practice, through the traditional educational system, which was communicated liturgically through the beauty of Byzantine hymnography. The teaching of the *Church*, passed on in this manner, formed outstanding intellectual figures, prominent scholars of the Romanian culture, but also of South-East European culture. *The Romanian Book for Teaching* (Iasi, 1643) by St. Barlaam (1590-1657), metropolitan of Moldavia (1632-1653), was compared, for Romanian culture, with

[20] *Ibidem*.

[21] Their number rose at 53, of which 24 *Hieratikons* or *Liturgikons* (books of the priest), but also original works hagiographic and canons of prayer to the Saviour and Mother of God, dogmatic writings and letters, works of Romanian history, and a translation from Slavonic into Greek (*The Teachings Neagoe Basarab to his son Theodosius*), see M. Păcurariu, *Istoria Bisericii Ortodoxe Române,* II, Bucureşti 1994[2], p. 269; T. Ἀθ. Γριτσοπούλου, «Ματθαῖος. Ἐπίσκοπος Μυρέων», *Θρησκευτικὴ καὶ Ἠθικὴ Ἐγκυκλοπαιδεία* 8 (1966), col. 836; Demostene Russo, *Studii istorice greco-române,* I, Bucureşti 1939, pp. 160-165, 168-176.

[22] Virgil Cândea, *Raţiunea dominantă,* Cluj-Napoca 1979, p. 259.

[23] *Ibidem*, p. 260.

[24] S. Salaville, *Liturgies orientales,* vol. I, Paris 1932, pp. 72-73.

Luther's *Bible* in the German culture, being one of the most significant contributors to the formation of literary language, both through its extraordinary distribution[25] and through the linguistic genius of the translator, who managed for the first time to emancipate the Romanian language from the original Slavonic, creating the Romanian style of our ancient language. St. Dosoftei (1624-1693), metropolitan of Moldavia (1671-1674, 1675-1686), will continue St. Barlaam's work of promoting the Romanian language in the culture of the age. By printing *The Psalter in Verse* (Uniev, 1673), St. Dosoftei is considered *among the first rhymers of the Psalter throughout the Orthodox East* and marks the birth of Romanian cultic poetry, representing the titanic effort of shaping Romanian language *in the new form* of cultic verse[26]. The ability of the Romanian language of putting on, in *the habit of a national rhetoric*, the finest theological thoughts and ideas, as well as the moral pathos and the criticism of manners, is proven by St. Anthimos of Iviria, metropolitan of Wallachia (1708-1716), through his collection of *Sermons* (*The Didache, Words of Instruction*), marking one of the highest moments of Romanian rhetoric[27].

Traditional education has rendered notable results, for the *Church* has set up and controlled the most developed network of training people and stimulating intellectual activities through the great number of monastic settlements and parishes. A researcher interested in Romanian spiritual life recorded, based on historical documents and the analysis of linguistic and toponymic elements, made evident the existence of at least 930 monastic settlements, since then disappeared or still active nowdays, from the beginning of religious life in the land inhabited by Romanians until towards the end of the twentieth century. In the seventeenth and eighteenth centuries, 26 new monasteries and 133 hermitages and sketes were established in Moldavia, 46 new monasteries and 208 hermitages in Wallachia[28]. In Transylvania more than 150 monasteries and sketes were documented, with over one thousand five hundred monks, which were destroyed, unfortunately, between 1761-1762 by the anti-orthodox repression of the Court of Vienna[29].

Note that most Romanian monastic settlements were not large monasteries, but the sketes. This distribution suggests two things. First, it pinpoints to the existence of a monasticism belonging to the ascetic, hesychast tradition, composed predominantly of small groups of disciples in obedience to a confessor, as a spiritual guide. Not large lavras, with hundreds of inhabitants, as the Western Christianity, the Byzantine and then the Slavic world had known, or as it was the case during the age of St. Paisius (Velichicovsky) from Neamț Monastery, but small sketes, true redoubts of spiritual exercises and of keeping the faith, represent a foremost feature of the Romanian monasticism, of the hesychast tradition. The second aspect, related to the first, is the existence of the so-called *monastery villages*,

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[25] St. Barlaam's book was reprinted, in part, in 1644, in *Evanghelia învățătoare de la Dealu*, and then taken over entirely, with some modifications and additions, in 1699, in *Kiriakodromionul de la Alba Iulia*. In this form, it has seen about 13 editions, from 1732 to 1929. After the original form of the text from Iasi, two editions were partially known, in 1894 and 1903, as well as two complete editions in 1943 and 1991; see Florea Mureşanu, *Cazania lui Varlaam 1643-1943. Prezentare în imagini,* Cluj 1944, pp. XIV, 128-182; Florentina Gaftoi-Holtea, *Mitropolitul Varlaam şi Damaschin Studitul,* Bucureşti 2006, pp. 21-51.

[26] M. Păcurariu, *Istoria Bisericii Ortodoxe Române,* II..., pp. 97, 107; G. Ivaşcu, *Istoria literaturii române,* vol. I..., p. 200; also see G. Istrate, «Limba română literară în Psaltirea în versuri a lui Dosoftei», *Mitropolia Moldovei şi Sucevei* 50/9-12 (1974), pp. 777-799.

[27] See Al. I. Ciurea, «Antim Ivireanul predicator şi orator», *Biserica Ortodoxă Română* 74/8-9 (1956), pp. 775-817; *Istoria literaturii române*, I, Bucureşti 1964[2], p. 539; G. Istrate, «Locul didahiilor lui Antim Ivireanu în istoria limbii române literare», *Mitropolia Moldovei şi Sucevei* 53/5-6 (1976), pp. 374-382.

[28] Ierom. Ioanichie Bălan, *Vetre de sihăstrie românească, secolele IV-XX,* Bucureşti 1982, pp. 27-30.

[29] *Ibidem*, p. 30.

established around hermitages and monasteries. They had their origin in the the apostolic practice. While such settlements have been replaced by large Lavras in the West[30], in the Romanian Countries the hesychast life has not been weakened, even after the development of monasticism in the fourteenth century, but continued towards the mid-nineteenth century. Likewise, the monastery villages survived, for a few more centuries. The phenomenon, described by Father Ioanichie Bălan[31] reveals the desire of laymen, who withdrew in isolated places, or of monks, who left the cenobitic life, to establish small hermitages. Later, around the cells of these inhabitants, a village was created, which, in most cases, was named after the hermit who had founded the skete or after the respective monastery. Sometimes, hermits, looking for solitude, left their wooden church, their icons, their cells, and the cemetery to the peasants, and went back deep into the woods or climbed the mountains, where they founded other small hermitages. Thus, more than 250 villages emerged in the Romanian toponymy, with name deriving from the monastic environment[32].

These aspects demonstrate rigour, a certain understanding and practice of the Christian teaching, as well as of the human purpose, which passed on from the hermits and ascetics to the faithful in the world, leading their behavior, way of thinking and creations.

The effect of this orientation of the Romanians, that is of their attachment to the Orthodox faith, is also revealed by the existence in the early nineteenth century of a large number of parishes, which had a special role in the manifestation of written culture through the circulation of books and manuscripts[33].

These notes entitled Nicolae Iorga to define, in an exemplary manner, the role of Orthodoxy in the history of Romania, which he viewed as *the scene of an organized life, of almost a millennium, during which metropolitans, bishops, abbots and so often humble monks or priests educated the people almost on their own, endowed the nation with a literary language, a sacred literature, and an art according to its taste and needs, supported the state without being taken over by it, led people on the earthly roads..., giving our history scholars, calligraphers, wood sculptors, silversmiths, statesmen, soldiers, martyrs, saints*[34].

2. The Reign

The second traditional authority that played a very important role both in the manifestation of the written culture and in the conflict between tradition and innovation was the *Reign*, that is to say, on the one hand, the role of the prince, not only as a factor of initiative of the acts of culture, but also as a factor of design and of implementation of cultural policy, and on the other hand, the royal Court, as one of the polarizing centers of cultural life.

[30] In the Alps there were hermitages until the fifteenth century, according to the testimony of the distinguished scholar Virgil Cândea.

[31] Ierom. Ioanichie Bălan, *Vetre de sihăstrie*..., p. 17.

[32] *Ibidem,* p. 38, also see their list at pp. 549-555.

[33] A statistics of the clergy, drawn by the order of exarch Gavriil Bănulescu in 1810, gives us the following figures: in Wallachia there were 24 cities, 2.417 villages, 3.105 parish churches, 45 protopopes, 5.794 priests and 2.823 deacons. In Moldova (except Bukovina) there were 29 cities, 2.193 towns and villages, 2.313 parish churches, 45 protopopes, 4.229 priests and 733 deacons; see Mircea Păcurariu, *Istoria Bisericii Ortodoxe Române,* II..., p. 570.

[34] Nicolae Iorga*, Istoria Bisericii româneşti şi a vieţii religioase a românilor*, vol. I, Bucureşti 1909, 1929[2], p. 4.

It is obvious that we can talk about a *conception of culture* in the political reflection of the rulers from the extracarpathian Romanian Lands. Their acts, which we define today as a cultural, such as building churches of high artistic quality and outstanding architectural features, establishing printing houses or schools, sponsoring works of the written culture (translations and editions of important books), sending young people to study abroad, for a higher and innovating education compared to the one available in their country, inviting local and foreign scholars at the Court etc., were caused by other reasons, among which primary were their understanding of the Christian ruler's duties, the political will of personal assertion through memorable achievements and sometimes their will to emulate, that is their desire to imitate or surpass the former or contemporary rulers [prince Matei Basarab (1632-1654), for instance, had his predecessor on the throne of Wallachia, St. Neagoe Basarab (1512-1521,) as a role model, but wanted at the same time, to surpass his contemporary ruler, Vasile Lupu of Moldavia (1634-1653, 1653)[35], as far as the patronage initiatives were concerned].

One of the first duties of a Christian ruler was to support the *Church*, through various acts: equipping them with books of worship, promoting religious education though homilies and didactic books, teaming up to fight for the doctrinal purity of Orthodoxy against the proselytism of other religious denominations etc. Thus, for several centuries, written culture was mainly dominated by such accomplishments, considered acts of culture. The Christian identity of the ruler and the country was declared in the very princely title, exemplary being the one assumed by Mircea the Elder (1386-1418), who stated in a charter of donation to Cozia monastery that he was not only *right-believing*, but both *right-worshipping* and *Christ loving*. With this title, the ruler demonstrated his spiritual positioning, not only because of his Christian education, as the only doctrinal alternative of the European Middle Ages or because of the obligations derived from his princely dignity, but out of the love of Christ as the only worthy honor[36]. So, the title expressed a reality: the Romanian rulers governed in fact according to a political concept and legislation where the Roman-Byzantine law norms were intertwined with the canons of the local and ecumenical Councils or of the Holy Fathers, as confessed by the *Pravile*, printed in the seventeenth century, with the endorsement of the *Church* and of the *Reign*[37]. The political thought was Christian; it was the source of inspiration for the country's administration, the foreign relations, the cultural programs, thus the phrase *Byzance après Byzance* became applicable to the Romanian Countries[38]. Written in this spirit, *The Teachings of Neagoe Basarab to his son Theodosius* are not only a manual for kingship, but also a manifesto of a Christian prince, a confession of faith.

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[35] *... who from the earlier princes of the country, except for the one whose nation and too illustrious family our most noble grace descends from, that is the most kind Neagoe Basarab of old, proved to be most beneficial to the country like our most kind reign,* wrote the learned Udrişte Năsturel (1596-1658/1659) about Matei Basarab in the *Preface* to *Antologhionul slavon*, printed in Câmpulung Muscel, in 1635, with the material help of the prince; see *Bibliografie românească veche...*, p. 132.

[36] V. Cândea, «Identitatea spirituală a domnului de ţară», *Transilvania* 24/3-4 (1994), p. 16.

[37] *Pravila de la Govora* or *Pravila cea mică* (Govora, 1640/ 1641); *Pravila* by Vasile Lupu or *Carte românească de învăţătură de la pravilele împărăteşti şi de la alte giudeaţe* (Iaşi, 1646); *Îndreptarea legii* or *Pravila cea mare* (Târgovişte, 1652).

[38] See N. Iorga, *Byzance après Byzance*, Paris 1992; as well as O. Iliescu, «La naissance d'une idée politique: Byzance après Byzance», *Revue Roumaine d'Histoire* 25/1-2 (1986), pp. 35-44.

All this is reflected in the particle *Io* (*Iῶ*), specific to the title of Wallachian and Moldavian rulers[39]. Medieval lords and princes were wont to put a name in their title that revealed their spiritual patron, and for the Romanian rulers that was St. John the Evangelist, whose abbreviation is found in particle *Io* (*Iῶ*). This testimony is given to us by Paul of Aleppo (1637-1667), the son of patriarch Macarius III Zaim of Antioch (1647-1672), who, while travelling with the patriarch through Wallachia, Moldavia and Russia (1653-1658), made in his notes few remarks about the title of Romanian rulers, connecting the particle *Io* with the name of the Saint Apostle and Evangelist John, which has a double significance: it was *a sacred name* and *a theocratic attribute*[40]. This particle shows that the rulers assumed the role of keepers and continuers of the Christian teachings through charitable works, arised out of love, much like the disciple John. At the same time, it highlighted the fact that the royal authority was subordinated to the *Divine law*, that is to the Orthodox doctrine and requirements deriving from it, which were imposed to the ruler, both through the nature of his office, and through the spiritual authority of the metropolitan or the prestige of ascetics and Saints[41].

The *Chronicles*, starting from the sixteenth century, contain motivations and functions specific mainly to a Christian way of life. Only later, in the seventeenth century, they acquired almost exclusively a secular message and the achievements related to living life in Christ they recorded became a secondary topic. The *Pravile* (*Codes of laws*), printed in the first half of the seventeenth century[42], met some needs of education inspired by the Church, and by the secular justice. They represented a sector of the written culture in which the concern for the adaptation to modern solutions is obvious even in the reigns of Vasile Lupu and Matei Basarab, by appealing to foreign *Codes* of law[43].

The printing press, a privilege exercised both by the *Reign* and the *Church*, was, in the same time, a political instrument outside the borders of Wallachia and Moldavia, when its products were intended especially for Orthodox communities from the Christian East or from Transylvania. The book, as spiritual food, is given *to nations related only through faith*[44], such as the Slavonic *Triodion-Pentecostarion*, printed in 1649, in Târgovişte, for the Athonite monks from Hilandar. Prince Constantin Brâncoveanu exercised a political and cultural influence in the East Orthodox world through the first publications in Arabic, as shown above, but also through the establishment of the first printing house in Tbilisi

[39] This abbreviation of the name John, derived from the Hebrew name Johana, meaning the one given by God, that is, who was given the reign, in the case of the ruler, lasted in the official title of the Wallachian rulers until 1828 [V. V. Muntean, «Statul şi Biserica la români (sec. XIV-XX)», *Revista istorică*, 7/5-6 (1996), p. 438].

[40] V. Cândea, «Letopiseţul Ţării Româneşti (1292-1664) în versiunea arabă a lui Macarie Zaim», *Studii. Revistă de istorie* 23/4 (1970), p. 676, note 13; on the theocratic and theoforic of the term meaning *Io* see E. Vârtosu, *Titulatura domnească şi asocierea la domnie în Ţara Românească şi Moldova până în secolul al XVI-lea*, Bucureşti 1960, pp. 37-38, 79, 83-101, 228, 230; D. Ciurea, «Io din intitulaţia documentelor româneşti (câteva noi sublinieri)», *Anuarul Institutului de Istorie şi Arheologie „A. D. Xenopol"* 4 (1967), pp. 187-189.

[41] V. V. Muntean, «Statul şi Biserica..., pp. 437-438.

[42] See note 37 above.

[43] Vasile Lupu's *Pravila*, translated from Greek by the scholar chancellor Eustratie (?-c.1646), is composed of two parts: the first part is the translation into Romanian of an agrarian law or *Bizantine rural code*, and the second part represents a processing of a Greek version of the Italian Prosper Farinacci's book (1554-1618), *Praxis et theoretichae criminalis*; see Mircea Păcurariu, *Istoria Bisericii Ortodoxe Române,* II..., pp. 18, 23, 25-26; I. Licea, *Studii şi cercetări*, Galaţi 1933, pp. 3-50; C. Teodorovici, «Eustratie Logofătul (? – c. 1646)», *Dicţionarul literaturii române de la origini până la 1900,* Bucureşti 1979, pp. 340-341; M. Gherman, «Profil cultural: Eustratie Logofătul», *Un veac de aur în Moldova 1643-1743*, Chişinău – Bucurşeti 1996, pp. 44-58.

[44] *Predoslovia* from *Psaltirea slavonă,* Govora 1637, see *Bibliografia românească veche...*, p. 105.

(Georgia), with craftsmen printers sent over from Bucharest. The primary contributor to this program was St. Anthimos of Iviria[45]. Through these acts of the written culture, i.e. the printed books, the help of the Romanians offered to the Arabic and Georgian Orthodox people was a remarkable event in their their culture, with ecclesiastical, literary, and educational consequences, affecting even the evolution of the social life[46]. But the printed book was appreciated also among Romanians, revealing in this respect being *The Homily* or *The Romanian Book of Teaching* by St. Barlaam, which has seen the greatest circulation among the ancient Romanian editions, appreciated both for its content and the beauty of speech. It's worthy of note that it was spread mostly in Transylvania, Banat, Bihor and Maramureş, in the context of a religious and political oppression of Romanians in these areas, where over 350 copies were found[47].

By the presence of the ruler, the Court functioned as the political, economic, and cultural center, on which the process of modernization will depend later. The decisive act for the introduction of the Romanian language in all areas of writing, from religious texts and books of Christian doctrine, to the literature of royal chancelleries, was only for the supreme secular or religious authorities of the Romanian society to decide: the *Church* and the *Reign*. Romanian translations from the seventeenth century benefited of the approval of the *Church* and received the material support of the political power, being printed with the blessing of the metropolitan and the will or the counsel of the prince, which guaranteed the doctrinal accuracy of the respective book. The authority of the *Reign* also gave the power of circulation to a book. The publications of the Orthodox deacon Coresi (c. 1510-1583), which remained unknown to scholars in Moldavia and Wallachia, did not enjoy a wide circulation precisely because they were printed both without the royal approval and the blessing of the Orthodox Church. This caused the work of the Calvinist propagandists not to have any role in the cult of the Orthodox Church in the three Romanian Countries. Those books were not considered religious by the Romanians in Transylvania.

If in Wallachia and Moldavia the *Reign* and the *Church* worked together to institutionalize the Romanian language in worship and in the royal chancelleries, during the seventeenth century, despite the fact that the Romanian language was a propaganda weapon of Calvinists in the same period, the situation was completely different for the Patriarchate of Constantinople. In theological circles in Fanar there were also tendencies to condemn the translations or transpositions from ancient Greek into modern Greek. These were considered dangerous[48], on the one hand, because of the support they received from the Protestants, and on the other hand, because of the inability of the spoken language to convey the precise meanings of sacred texts. Around 1700, when St. Martyr Constantin Brâncoveanu wanted to have *The Interpretations of the Four Gospels* by St. Theophylact, archbishop of Ohrid and Bulgaria (eleventh-twelfth centuries), transposed from Byzantine Greek into the spoken Greek, and then printed, he sent a letter to the ecumenical patriarch requesting that the patriarchal Synod consider this initiative. In response, patriarch Calinic

[45] Doru Bădără, *Tiparul românesc la sfârşitul secolului al XVII-lea şi începutul secolului al XVIII-lea,* Brăila 1998, pp. 116-117.

[46] Virgil Cândea, «În 2008 – cinci secole de tipar românesc», *Logos Arhiepiscopului Bartolomeu al Clujului la împlinirea vârstei de 80 de ani,* Cluj-Napoca 2001, pp. 309-310.

[47] Mircea Păcurariu, *Istoria Bisericii Ortodoxe Române,* II..., p. 22; also see Fl. Dudaş, *Cazania lui Varlaam în vestul Transilvaniei. Studiu cultural-istoric şi catalog*, Timişoara 1979; idem, *Cazania lui Varlaam în Transilvania*, Cluj-Napoca 1983.

[48] Idem, «Noul Testament în limba română ca act de spiritualitate şi cultură», *Noul Testament*, Alba-Iulia 1988, p. 46.

II (1688, 1689-1693, 1694-1702) wrote to the prince, on November 28th, 1700, an ample ratiocination, reinforced by the signatures of five bishops, by which he commended him for the initiative to print books in different languages, *to help our unfortunate nation*, that is the Greeks, *and for the use of the Christian community*. But as far as their printing in the simple tongue or the spoken language of the people was concerned, the patriarch exposed part of the discussions held at the Synod regarding the prince's request. The content of the letter shows that the patriarch and the theological circle around him disagreed with the translation of theological books and even of *the Holy Scriptures* in the *common speech*, left it to the prince to decide whether or not to fulfill his intention and urged him rather to print the book non-transposed[49]. However, at the prince's order, the Greek scholar John Comneni (1658-1719) finished the translation of St. Theophylact's book in February 1702. The prince did not dare to print this translation, but it was widely spread as a manuscript[50].

On the other hand, the cultural initiative of St. Constantin Brâncoveanu was not an innovation, because among the first books printed in the royal typography in Bucharest by St. Anthimos of Iviria there was a book *in the simple language of the Romes* (*εἰς τὴν ἁπλῆν τῶν Ρωμαίων γλῶσσαν*)[51]. Printed in 1691, at the expense and by the order of the prince, the book included the work of Basil I the Macedonian, emperor of the Romes, with the title *Sixty-six Urging Chapters to His Son, Leo the Wise and King*. The transposition of the text into the spoken Greek and the editorial supervision was done by hieromonk Hrisant Notaras, the future patriarch of Jerusalem (1707-1731)[52].

As for the situation in Romania, by that time not only educational books had been translated and printed, which included patristic references, but also scriptural texts, such as the *Bible of Bucharest* (1688), with the blessing of patriarch of Jerusalem, Dositei[53], or even patristic texts, such as *The Pearls* (*Homilies*), a collective work with various patristic texts, circulating under the name of St. John Chrysostom (Bucharest, 1691)[54], both having the approval and support of ruler Constantin Brâncoveanu.

The princely Courts were centers of intellectual reunions, attended not only by Romanian scholars, but also by Greeks, Ukrainians, Bulgarians, Serbs or by Saxons and Hungarians from Transylvania. Thus, the princely Court in Iasi, which hosted the proceedings of the Synod from 1642, which brought together the three branches of the Orthodoxy: the Romanians, Greeks and Slavs. Prince Vasile Lupu presided, much like the Byzantine emperors of old times. Similarly, the princely Court in Târgovişte became, during the reign of Matei Basarab, the place for theological discussions held at the residence of metropolitan Stephen I (1648-1653, 1655-1668), among Russian and Greek ecclesiastical circles. The first was represented by Arseny Suhanov, the second by Greek teachers, such as Gabriel (Gavriil) Vlasios, Meletius Syrigos and Paisius (Pantelimon)

[49] See Eudoxiu de Hurmuzaki*, Documente privitoare la Istoria României,* XIV, Bucureşti 1887-1942 (published by N. Densuşianu, E. Hurmuzaki and N. Iorga), pp. 329-332.

[50] Olga Cicanci, Paul Cernovodeanu, «Contribution à la conaissance de la biographie et de l'oeuvre de Jean (Hierothée) Comnène (1658-1719)», *Balkan Studies* 12/1 (1971), pp. 163-166.

[51] That is of the Romans, a term that refers the Orthodox Christians from the area of the former Bizantine Empire.

[52] *Bibliografia românească veche...*, p. 324; Em. Legrand, *Bibliographie Hellénique ou description raisonnée des ouvrages publiés par des grecs au dix-septième siècle,* III, Paris 1894-1903, Bruxelles 1963², pp. 5-6.

[53] *Bibliografia românească veche...*, pp. 286-289; Mircea Păcurariu, *Istoria Bisericii Ortodoxe Române,* II..., pp. 134, 136-137; Nicolae Dură, «Biblia de la Bucureşti (1688). 300 de ani de la prima tipărire integrală a Bibliei în versiune românească», *Studii Teologice* 90/6 (1988), pp. 9-29.

[54] *Bibliografia românească veche...*, pp. 315-321.

Ligaridis, accompanied by patriarch of Jerusalem, Paisius[55]. Christian prelates of the East, Dositei and Hrisant Notaras, patriarchs of Jerusalem, Macarius III Zaim and Athanasios III Dabbas, patriarchs of Antohia, and many others, were present in the cultural life of the extracarpathian Romanian Countries, enriching the cultural horizon, and also benefitting from the Romanian written culture. Patriarch Macarius III Zaim, who stayed in Wallachia, Moldavia and Russia between 1653-1658, translated into Arabic *The Wallachian Chronicle* (the oldest Romanian writing) through a Greek intermediary, *The Life of St. Paraskevi* and other texts existing in the Romanian culture at that time[56]. Patriarch Athanasios III Dabbas who, like his predecessor, was trying to enrich the Arabic Christian *soul-profiting* literature, translated into Arabic *The Divan* by the scholar Dimitrie Cantemir. So far, eleven copies of this translation are known[57]. Princely Courts were also points of cultural interest for Western scholars, who visited them and were impressed by the royal libraries. An edifying example is the case of the Swiss historian and musician Joseph Sulzer († 1791), former professor at the Court of Alexander Ypsilanti, while the last one was the ruler of the Wallachia (1774-1782, 1796-1797)[58], who searched the princely library of the Mavrocordats, leaving us an account in 1776[59].

These are but a few of the landmarks that demonstrate, by eloquent facts, a close collaboration between the *Church* and the *Reign*, which was once exemplary, and is moralizing for today's times. Also, the above considerations show the major role of the two authorities both in promoting the Romanian written culture, and for the victory of writing in the vernacular – a crucial phenomenon, *with consequences so great, not only on a spiritual and cultural level, but also for the affirmation of the national consciousness and for the entire Romanian political development and civilization*[60].

[55] P. Panaitescu, *L'influence de l'œuvre de Pierre Mogila, archevêque de Kiev, dans les Principautés Roumaines,* extrait des *Mélanges de l'Ecole roumaine en France,* V, Paris 1926, pp. 38-39. Suhanov refused to argue with Gabriel Vlasios and Paisie Ligaridis, because they were educated in the Roman-catholic world (Şt. Andreescu, *Restitutio Daciae,* Bucureşti 1989, p. 257).

[56] Virgil Cândea, «Letopiseţul Ţării Româneşti (1292-1664) în versiunea arabă a lui Macarie Zaim», *Studii. Revistă de istorie* 23/4 (1970), pp. 673-692.

[57] Idem, «Studiu introductiv», in Dimitrie Cantemir, *Divanul*, Bucureşti 1947, pp. 82-84.

[58] He was also ruler in Moldavia (1786-1788).

[59] Raisa Radu, «Biblioteca Mavrocordaţilor», *Economia. Seria Management* 8/2 (2005), pp. 156-162.

[60] Virgil Cândea, «Noul Testament în limba română...», p. 47.

ELECTIONS IN ROMANIA. CURRENT ISSUES AND PERSPECTIVES

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Abstract: *In Romania the organization and carrying out of the elections is regulated by: The Romanian constitution, Law no. 35/2008*[1] *regarding the single vote for the Chamber of Deputies and the Senate, Law no. 370/2004 regarding the election of the Romanian President and Law no. 67/2004*[2] *regarding the local elections modified by Government Decision no. 97 of 27.08.2008*[3]*. All these regulations represent the set of rules that regulate the elections in Romania*[4].

Keywords: *electoral ethics, election, uninominal system, election campaign*

Electoral ethics

The electoral ethics means all the rules of conduct and ethical obligations that should govern the activities related to the organization and carrying out of the elections.

Ethics means, also, all the rules and ethical and professional practices governing the relations between people involved in the electoral process. As such, ethics represents issues that have different coordinates, according to the categories of players that cooperate or face each other, during the electoral competition:

- election officials
- representatives of political parties, political alliances, electoral alliances
- candidates
- representatives of the media, TV and radio
- polling institutes
- voters

Electoral campaign by broadcasting services, public and private, must serve the following general categories of interest:

- the interests of voters, to get accurate information so that they can exercise their right to vote being well informed;
- the interests of political parties, political alliances, electoral alliances, organizations of national minorities and candidates, to make themselves known and to present their platforms, political programs and election bid;
- the interests of media providers, to exercise their rights and responsibilities arising from the profession of journalist.

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[1] The Law on single vote. The Law for election in the Chamber of Deputies and the Senate and to annotate Law no. 67/2004 for electing the authorities of the local public administration, Law on local public administration no. 215/2001 and Law no 393/2004 on the statute of local representatives, published in the Official Gazette no. 196 of 13 March 2008.

[2] Republished in the Official Gazette no. 333 of 17 May 2007, modified by Law no. 35/2008.

[3] Published in the Official Gazette no. 630 of 29 August 2008.

[4] M. Badescu, C. Andrus, C. Draghiciu, *Constitutional law and Political Institutions*, Ed. Pro Universitaria 2009, p. 244.

Providers of public and private media are obliged to ensure, within the broadcasting services, fair electoral campaigning, balanced and fair towards all political parties, political alliances, electoral alliances, organizations of national minorities and independent candidates.

Elections must cover the following steps:

1. Establishing the Election date is the first action which means the beginning of the elections procedure. Under the Constitution, (Art. 63 par. 2) elections for the Chamber of Deputies and the Senate shall be held within three months from the expiry mandate or the dissolution of Parliament. Law no. 35/2008 as amended provides that public disclosure of the election date is with at least 90 days before the election day, by publication in the Official Gazette of the Government decision on election day. The elections for the Chamber of Deputies and Senate are run on a single ballot, provided that at the first round at least half plus one of citizens must vote[5]. If partial organization of elections is held the date is determined with at least 45 days before the vote.

2. Determining the number, establishing the electoral districts and uninominal colleges. Territorial constituencies are the territorial organizational framework in which the electoral operations are carried out. To elect the head of state is set up a single constituency in the country, and to elect deputies and senators there will be established within each single-member electoral colleges[6]. In accordance with the law, deputies and senators will be elected by single vote, according to the principle of proportional representation. The number of constituencies depends on the type of scrutiny. Single vote requires a large number of districts, which must be equal to the Deputies or Senators to be elected, meaning that residents in a district designate a single deputy or senator in Parliament, as appropriate. Numbers of electoral districts and the number of deputies and senators to be elected in each district is approved by the Government with the announcement of elections7

The representation is unique, does not fluctuate and is legally established in a population of 70,000 for one member for the Chamber of Deputies, and 160,000 inhabitants for a senator.

3. Electoral Register. It is a centralized database where all Romanian citizens are enrolled, including those who have reached the age of 18, with voting rights. Registration of citizens living abroad will be based on the existing evidence to the General Directorate of Passports from the Ministry of Interior.

Electoral Register for Romanian citizens residing in Romania, is divided into counties, cities, towns, villages, and for those living abroad, in countries and localities.

The Permanent Electoral Authority shall establish, maintain and continuously update by 31 March each year, the electoral register. In each county and district of Bucharest, the register including the voters that reside in the territory of the administrative territorial units is maintained and updated by the territorial office of the Permanent Electoral Authority[7].

4. Uninominal Colleges

Deputies and senators are elected in single-member colleges, by the single vote, according to the principle of proportional representation. According to Law no. 35/2008 as

[5] Idem.

[6] To organize elections there are set up constituencies in all 41 counties, one in Bucharest and one for Romanians that live abroad. The total number is 43.

[7] The data written in this register are: personal serial number, country of residence, address, series and number of the voting card and series and number of the identity card.

amended a uninominal college means a division of an electoral district in which it has been given only one mandate. Regarding the setting up of uninominal colleges, the law provides that the number of colleges for the Chamber of Deputies, and for the Senate shall be determined in accordance with the number of inhabitants of each constituency representation rules, plus one college per deputy, or senator for exceeding the standard representation, the number of member colleges from one constituency to be no less than 4, and the senator, less than 2. The number of people considered to calculate the number of Deputies, which is delimited within each county is the result after the last census. One constituency may contain only uninominal colleges and the whole territory covered by one college must be in one and the same county or in Bucharest, where single-member colleges must not exceed the administrative-territorial limits of the 6 sectors. In the special Constituency for Romanian citizens residing abroad four colleges shall be set up for the Chamber of Deputies and two colleges for the election of the Senate. Geographic assignation of the four colleges for the Chamber of Deputies and two colleges for the Senate will be established by Government decision, as agreed by the parliamentary committee specially constituted on the basis of proportionality of parliamentary representation[8].

5. Distribution of mandates is done in two stages, at the colleges' level and at each constituency level. First, at the colleges' level, it is given a mandate to candidates belonging to a competitor who has met the threshold under art. 47 par. 2 of Law no. 35/2008 and got the majority of valid votes in the Uninominal college. In the second stage, the allocation of mandates in colleges and awarding electoral competitors who have met the threshold, the electoral committee shall prepare a list with all candidates who were not given mandates in the first stage, listed in descending order of the relationship between the votes obtained in single-member colleges that have applied and the rate of electoral constituency concerned.

For each competitor who won the electoral threshold from the number of mandates allocated for uninominal colleges less the number of seats assigned to the single-member colleges, the result representing the number of seats assigned to each competitor in the electoral constituency in the second stage of the award and allocation.[9]

6. Electoral lists include voting citizens registered on the electoral register. They are permanent electoral lists and additional electoral lists. Permanent electoral lists are made according to localities and include all citizens entitled to vote and residing in the locality for which they were derived. Romanian citizens who live abroad are enrolled in the permanent electoral lists prepared by the Permanent Electoral Authority. The mayor must inform the court and the Permanent Electoral Authority any change in the lists[10].

In additional lists (which previously carried the name of special lists) there are written by the chairman of the constituency, names of people who come to vote and reside in the area, but were omitted from the permanent electoral list, members of the electoral constituency, those charged with maintaining order at the consulate, Romanian citizens abroad that have passport as a proof of residence abroad, Romanian citizens indicating that they reside in a country belonging to that uninominal college with a passport and diplomatic missions and consular posts.

[8] M. Badescu, C. Andrus, C. Draghiciu, op. cit. p. 247.
[9] Idem.
[10] M. Badescu, B. Tonea, *Constitutional law and Political Institutions*, Ed. Juridical Universe, 2005 p. 51.

These lists have the same identification data as the permanent ones[11]. Lists are compiled and made available to voters for consultation no later than 45 days before election day.

7. Voter cards, which is the inter-war tradition in our country, was reintroduced by Law no. 68/1992. It is the electoral identity card valid for all consultations with national character, according to the number of ballots provided there and is issued to voters on the electoral register. Voter card is kept and used only by the holder.

8. Pooling stations

According to Law 35/2008 as amended, to organize the election for the Chamber of Deputies and Senate it is established the precinct register, administered by the Permanent Electoral Authority, including delimitation and numbering of polling stations in Romania. Polling stations are organized in localities as follows:

- in settlements with a population of 1,500 inhabitants, one polling station for 1000-2000 inhabitants;
- in towns with a population under 1,500 inhabitants, one polling station;
- in villages or groups of villages with a population of 1,000 inhabitants, situated within a distance of 3 km from the pooling headquarters in residence village, town or municipality;
- the diplomatic missions and consular offices for members of these representations and their families, as well as Romanian citizens residing abroad or in that countries on the election day, the constituency of polling stations belongs to the city Bucharest[12];

Delimitation of polling station shall be established within 30 days from the announcement of elections for mayors, city, municipal or territorial administrative subdivisions of municipalities with prefects. The numbers of pooling stations is determined by the prefect.

9. Electoral Bureaus. For the purpose of a well organization of elections these bureaus are set up. These are: the Permanent Electoral Authority, the Central Electoral Commission, electoral offices and bureaus of the polling stations. For Bucharest districts electoral offices shall be established. Bureaus and election offices are made of citizens entitled to vote, candidates in elections cannot be members thereof. Permanent Electoral Authority is headed by a president with the rank of minister, assisted by two vice-presidents. President is appointed by joint decision of the Chambers of Parliament, following the proposal of parliamentary groups, among persons with knowledge and experience in legal or administrative domain, for a period of eight years and can be renewed once. The Vice Presidents are not members of any political party.

The Central Electoral Commission consists of five judges from the High Court of Cassation and Justice (appointed by lot within a public hearing) and the Vice President of the Permanent Electoral Authority and more than 12 representatives of political parties, political alliances and electoral alliances involved in the election, and a representative of national minorities in the Chamber of Deputies. The Central Electoral Bureau finishes its activity after 48 hours of the publication in the Official Gazette of the election result. The electoral district is composed of three judges (appointed from the county judges by the president of the county court, by lot), a representative of the Permanent Electoral Authority and more than 9 representatives of parties and political alliances, electoral alliances and

[11] M. Badescu, C. Andrus, C. Draghiciu, op. cit. p. 247.
[12] M. Badescu, C. Andrus, C. Draghiciu, op. cit. p. 248.

organizations, national minorities in the election in that constituency. Electoral offices are held at the Bucharest districts and are comprised of a President, his deputy, a representative of the Permanent Electoral Authority and more than 7 members, representatives of political parties, political alliances, electoral alliances and organizations of citizens belonging to national minorities that participate in elections in Bucharest. The president and deputy are magistrates appointed by the president of the Bucharest Court, by lot. The electoral bureau is composed of a President, his deputy and 7 members. The chairman and deputy chairman are magistrates appointed by the president of the County Court (of Bucharest), by lot. Members of the electoral bureaus shall designate one representative of the parties, political alliances, electoral alliances and organizations of national minorities. Bureaus and election offices are working in the presence of the majority and make decisions by the vote of the majority of members present.

10. Proposal of applications. Nominations are made for the Romanian President, the Houses of Parliament and for mayors and local councilors. Nomination for President of Romania shall be submitted to the Central Electoral Commission and those of Parliament, mayors and local councilors to electoral districts. Nominations for uninominal constituencies are submitted in written in 4 copies, signed by party leaders, political alliance, electoral alliance or organizations of citizens belonging to national minorities. Candidates born before January 1st, 1976 are required to give a statement regarding collaboration with security or political police.

11. Ballot papers are documents that translate voters' options. Establishing a model of the ballots is made by the Government and is necessary to ensure uniformity of these papers, but also to ensure secrecy of the vote.

Ballots dimensions are set by the electoral district bureau, taking into account the number of candidates and lists of candidates, independent of space required for printing.

12. Election signs that voters are accustomed to during the campaign, help them on election day to more easily identify the candidates on the lists, or possibly an independent candidate. Electoral sign is printed at the right angle of the quadrilateral on the ballot.

Election signs shall be set by each party, political alliance, electoral alliance or organization of national minorities and notified to the Central Electoral Bureau. These election signs used in previous elections cannot be used by other parties, political parties, coalitions or independent candidates except with the consent of those they belonged to. Independent candidates cannot use election signs.

13. The stamps are necessary for the proper development of electoral operations. The law establishes two types of stamps, namely: „*control stamp"* of the polling station and the stamp „*voted*". The control stamp identifies (usually by number) a certain polling station. It is applied by the chairman of the polling station on the last page of the ballot, the ballots that do not have this stamp applied are null.

It is also used to seal ballot boxes and „formalize" documents from the polling station. The stamp „voted", is used on election day, its application, by the voter inside the quadrangle that includes the full name of the candidate that you vote.

14. Election campaign. In the electoral campaign of political parties, political alliances, electoral alliance, organizations of national minorities, candidates and their supporters, popularize by rallies, press, radio, television etc. their political programs, in

order to guide the choice of voters. The electoral campaign begins 30 days before the election day and ends 24 hours before the start of voting.

During the election campaign candidates, parties and political alliances, electoral alliances, organizations of national minorities have the right to express opinions freely and without discrimination, on meetings, media channels, but not contrary to public order. The campaign of parties and political parties may receive a budget from the state, but is prohibited to use subsidies, directly or indirectly, by natural or legal persons abroad. It is also prohibited the financing of the campaign in any way of a party, alliances or independent candidate by a public authority, public institution, autonomous national company, or banking company, where the state or administrative-territorial units have majority are majority or by companies engaged in publicly funded activities and the funding in any way by trade unions, religious organizations, associations or foundations abroad. Legal sanction is the same in all cases: the amounts so received shall be confiscated and are revenues from the state budget.

15. The voting process. Voting takes place at polling stations under the supervision of the President of the polling station. The voting process comprises two stages: first, includes pre-election voting operations (consisting in taking organizational measures) and the second contains the actual voting on election day. Voting begins at 7.00 and ends at 21.00. Voting is declared closed at 21.00. People that are at 21.00 in the room where the vote is taking place are allowed to exercise their right to vote.

For rating reasons the voting process may be suspended, but suspension may not exceed one hour. Chairman of the election bureau is required to announce this. During the suspension all documents and ballot boxes will remain under permanent guard, and members of the committee will not leave the voting room all at once.

16. The election results are established according to the law, at two levels. First, at the polling station and the second at the constituency.

a) The ascertainment of results at polling stations after voting involves counting of ballots that remained unused and separately recorded in the minutes for each type of election, the result of counting in separate documents, for the Chamber of Deputies, the Senate and President of Romania. Last operation of this first step is the submission of the file of the polling district to the election office within 24 hours after polls closed.

b) Establishing the election results in constituencies is also strongly regulated by Law no. 35/2008 as amended. Thus, after receiving the files referred to in art.45 of Law no. 35/2008, namely the minutes and records referred to in art. 46 of the same law, the electoral district office writes, separately for the Chamber of Deputies and the Senate, a report containing the total of votes for candidates of each political party, political alliance, electoral alliance, organization of national minorities and for each independent candidate in all single-member colleges of the jurisdiction over the election and submits it within 24 hours to the Central Electoral Bureau.

After receiving records signed by the electoral constituencies, the Central Electoral Commission establishes political parties, political alliances, electoral alliances and organizations of national minorities who meet the threshold, separately for the Chamber of Deputies and the Senate. This finding of the Central Electoral Bureau is transmitted across the country, to all constituencies.

After receiving from the Central Electoral Bureau the names of the candidates who met the threshold, according to art. 47 par. (2) of the law, the electoral district shall first stage of

the distribution of deputy mandates per competitor, respectively senator, at the constituency level. It also sets apart for the Chamber of Deputies and the Senate, the constituency electoral quotient by dividing the total number of votes for all candidates who met the requirements set out in art. 47 par. (2) and independent candidates who received more votes in the uninominal college, the number of deputies, senators to be elected in that constituency. Independent candidates are given one seat by the electoral district where a majority of valid votes is obtained in the uninominal college they belong to.

The remaining votes, for example, unused or lower electoral quotient obtained by electoral competitors that met the requirements stipulated in the law mentioned above, and mandates that could not be assigned by the electoral district shall be notified by the Central Electoral Commission, to be distributed centrally in the second stage, at national level. Parliamentary Commission on election legislation decided in April this year that we will have a mixed voting system in the 2012 legislative elections, in which half of the MPs will be elected uninominal, and half of them on the list.

The Senate decided that the elections for parliament this year should have a single vote system, applying the principles of classical majority. This solution is criticized from the point of view expressed above but in the current political context I consider this is a good solution for the next four years. Meanwhile the new elected Parliament has to clarify certain aspects such as:

a) What kind of constitutional changes are needed for the current economic and social development, taking into consideration the experience in the last 10 years;
b) What type of Parliament does Romania need?

The new Parliament should consider a balanced voting system, like in most European states, even taking into consideration the pressure the systems from France and Great Britain are facing.

Until now it hasn't been established the number of colleges, or how to make their delineation, or what kind of joint voting will be applied. Theoretically, there two variants of mixt vote. The first, half of MPs are elected uninominal, half on a list that includes the best of the winners of the second.

In the second half there are elected uninominal half lists „simple" party that includes people who have applied to colleges. Half, a return to the list system, used until 2008.

Who benefits?

The mixed vote in either of these two variants has an advantage for the most important people in parties, which provides practically re-election to Parliament. Furthermore, if you choose the model with simple lists, they are exempt from political damage of their image in that they went to Parliament, although not winning in colleges.

The mixed voting system brings several significant changes, especially in the way MPs are accountable to voters. First, in a mixed voting list plus simple single name, we have certainly more MPs than others. This means that public responsibility falls to half of them. The fact is that the number of colleges will decrease.

Side Effects? First, it creates two classes of MPs - those who are directly responsible, representing the first choice of voters in that college, or others who have not had any direct competitor and benefits from the political system, or were rejected as first choice.

As we already know, from the second category we have more MPs in the current Parliament. There will also be difficulties within parties - all will want to be on the lists, if you go the „extra uninominal simple list". More accurately, in this variant, there are two

categories of MPs - those who directly face the electorate and those who go on the list. Of course, two types of political and electoral legitimacy.

There are also certain advantages. Both from a proportionate system on party lists and to uninominal voting. Obviously it has many people directly elected, compared with the first case, and people votes count more than the second, there is no major risk that one party to win elections, though they have far fewer votes or voters.

Other options? So far, Romania had two voting systems. One was on the party list, the other „uninominal compensated" in 2008.

The vote on the list is probably the most popular. Voting lists can mean the existence of a „filter" of the parties, which may exclude from the application „dubious people". The main advantage of voting list is that, unlike pure nominal, votes are „wasted" only for parties that do not meet the threshold for entry into Parliament. The problem is that it's unpopular among the public. Its great disadvantage, however, is that the link between the electorate and parliament is very weak.

Uninominal is, paradoxically, in some cases better, in terms of democracy. Many people have the chance to send in Parliament who they want to and to reject some. Of course, this system allows people ranked 3rd in their colleges to go to Parliament.

Distrust in political parties and political elites has become constant in the public life in European democracies. Abstention from voting and lack of interest in politics are, as we know, growing throughout Europe. This phenomenon is associated in the Western countries with the rise radical and highly xenophobic trends.

The first signs of revival of the election appetite have appeared in France, at the presidential elections, where over 80% from voters exercised their right. The same phenomenon is expected in other states like Netherlands, Germany, Belgium, which will have election as well. But this revival of democratic appetite has sometimes extremist tendencies, with nationalistic accents (see Greece, France, The Netherlands) which are politically counterproductive as we can see in Greece at this moment.

More than ever, traditional political parties, democratic, the legitimacy and wisdom which were built in the postwar decades of Western generation system are called today to redefine its role in a world profoundly changed, with new threats and new challenges, and to recreate confidence in democracy's ability to provide a perspective of safe and attractive life.

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COMPANY DIRECTOR UNDER THE REGULATION OF THE NEW CIVIL CODE

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Abstract: *Romanian New Civil Code establishes general regulations for companies in Book 1 of the Civil Code on the legal and natural persons, as well as in Book V regarding the Obligations in the 7th Chapter „Corporate agreement" of the Title IX. Company management is governed in subsidiary by the provisions of 9th Chapter (Mandate Agreement) of the Title IX. Further to a brief review of several provisions of the New Civil Code, applicable to companies Directors and especially to the Directors liabilities and obligations, this essay concludes that the Romanian New Civil Code reiterates some principles of the old civil code, of the Law no 31/1990 on companies as amended and some ideas of the doctrine. The Company director has under the new Civil code as main obligations: the obligation to fulfill its mandate, the obligation to act with loyalty, prudence and diligence and in the interest of the Company, the obligation to explain its activity and to submit to the company whatever he received for Company during his mandate. Regarding the duration of the mandate the new Civil Code comes with a new rule the mandate duration is of 3 years if parties do not agree otherwise. Consequently in case the duration of the Company Director mandate is not specified in the documents concluded after 1st of October 2011 than the duration of the mandate is of 3 years in accordance with article 2.015, 1st paragraph of the new Civil Code, except for directors of SA (joint stock companies) and SCA (partnership by shares) that are nominated by the Constitutive act, whose mandate may not exceed 2 years. For the rest of the companies, including for societas europeea the duration of the Directors mandate is of 3 years if not expressly agreed otherwise by the parties.*

Nevertheless the impact of the new Romanian Civil Code on companies and companies directors is in my opinion a minor one. Company Directors are obliged to fulfill their mandate observing the provisions of the special law (Company law no 31/1990) , of company corporate documents as well as the provisions of the new Civil Code regarding the mandate agreement, that mainly reiterates the general rules provided by the Company law and previous regulation of the old civil code.

Keywords: *New Romanian Civil Code, companies/commercial companies, company's management, companies bodies, company directors, director powers, directors obligations.*

Romanian New Civil Code establishes a general legal framework for companies in Book 1 of the Civil Code on the legal and natural persons, as well as in Book V regarding the Obligations (VII Chapter „Corporate agreement" of the IX Title). Moreover the provisions of the Romanian New Civil Code regarding the mandate agreement govern the relationship between the company and its directors based on the art. 72 of the company Law no 31/1990 that states that the directors obligations and liability are governed by the legal provisions on the mandate.

Generally, Romanian New Civil Code does not bring important new rules and principles on companies and its directors and Company Law no 31/1990 remains the special regulation of the companies. The provisions of the new Romanian Civil Code applies only subsequently and only if they are compatible with the special law – the Company law.

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Art. 1889, 3rd paragraph of the Civil Code provides that if the shareholders decide that the company (corporation) is a legal person and it has its distinct legal personality, irrespective of its object of activity the respective Company can be established only under the conditions provided by the special law. The same legal provision specifies that unless the law provides otherwise the company becomes legal person from the date it is registered with the register of commerce.

The new Romanian Civil Code avoids the terminology company/trading company, probably in order to underline the unitary vision of the code and the elimination of the private law division in civil law and commercial law. Nevertheless companies (commercial companies) remain commercial or trading company as it is expressly stated in art. 10, 1st paragraph of the Law no. 71/2011 on the application and implementation of the New Civil Code.

Title IV of Book I of the new Civil Code provides the regulations for Company organization and operation, including legal provisions regarding company management, the effects of the deeds and contracts entered into by the company bodies exceeding the rights granted to these bodies by company corporate documents and other similar issues.

Article 209, 2nd paragraph of the new Civil Code states that company's management body is formed by the legal or natural persons, who, in accordance with the law or company corporate documents, are authorized, acting individually or collectively, to act in relation with third parties on the name and behalf of the company. The legal provisions is not very accurate, as far as company management does not involve only the right of company representation of the persons forming the management bodies of the company, but also internal acts of management. It is not accurate in our opinion the fact that the legal provision quoted above theoretically excludes from the management body of the company the directors/managers who do not have the power to represent the company. The power to represent the company is a distinct power than the power to accomplish the acts of internal management[13] of the company. It is true that company organization and internal management can be done also through decisions of the general meeting of shareholders and not only through decisions of the directors, while the representation power is the exclusive attribute of the directors[14] and cannot be exercised by other body of the company, but the internal acts and management operations represents a very important part of the activity of Company directors.

Some authors[15] pointed out even that generally, the company directors are bodies of deliberation and not bodies that express the company will. In order to represent the company and to express the corporate will it is necessary the directors to be expressly invested with this power at company establishment or further on. We disagree with the above opinion and together with other specialists[16] we consider that the power to represent the company represents the nature of the director function and activity, and therefore, if the company has only one director, than the single director automatically has the power to represent the company even if the constitutive act does not expressly confer these representation powers. Nevertheless, director activity cannot be limited at company representation and includes management internal acts and operations.

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[13] Stanciu. D Cărpenaru, Cătălin Predoiu, Sorin David, Gheorghe Piperea, *Company Law. Comment on articles*, Edition 4, Publishing Company C.H. Beck, Bucharest, 2009, p. 275.

[14] Stanciu. D Cărpenaru, Cătălin Predoiu, Sorin David, Gheorghe Piperea, *Company Law. Comment on articles*, Edition 4, Publishing Company C.H. Beck, Bucharest, 2009, p. 290.

[15] I. L. Georgescu, *Romanian Commercial Law*, , Publishing Company Socec, Bucharest, 1946, p. 191.

[16] Stanciu. D Cărpenaru, Cătălin Predoiu, Sorin David, Gheorghe Piperea, *Company Law. Comment on articles*, Edition 4, Publishing Company C.H. Beck, Bucharest, 2009, p. 292.

The general meeting of shareholders is, in all cases, competent to decide the powers of company directors. But even if the general meeting of shareholders does not confer representation powers to some Directors the respective Directors still are Company directors and act within Company management body, performing the internal management of the company, while the Directors with representation powers act on the name and behalf of the company in relation with third parties.

The article 211, 1st paragraph of the Romanian New Civil Code provides that the persons having a limited capacity of the exercise of their rights, the persons deprived of their right or the persons that are not capable to exercise their rights may not be part of the companies bodies. The same restriction is applicable to the persons who according to the law or the corporate documents are incompatible with the function of company director. The Article 211, 1st paragraph of the Romanian New Civil Code civil does not represent a new rule, but reiterates a provision of the company law that is extended to other legal persons.

Until the date when Company management body is established the company is under the article 210, 1st paragraph of the new Romanian Civil Code represented by the founders or by the legal or natural persons authorized by the founders to engage the company until its establishment. The above mentioned legal provision also states that in case the company incorporation is not finalized and the company fails to be established such representatives (the founders or the persons authorized by the founders) are personally liable in relation with third parties if the contract they signed does not provides otherwise. Such situation may occur any time a rent agreement for company headquarters is signed and the company fails to be established.

Company will is formed within the general meeting of shareholders or in some cases within the management body (Board of Directors). This will is reflected in Directors acts of management. In exercising their activity the Directors have under articles 213, 214 and 215 of the new Romanian Civil Code obligations of loyalty, prudence, diligence and to avoid the conflicts of interest similar with those provided by Company Law no. 31/1990 for the Directors of Joint Stock Company (art. 144^1 and art. 144^3 of Company Law no 31/1990).

Moreover article 220 of the new Romanian Civil Code extends the rules regarding the court claim against the administrators and administrators liability established by article 155 of Company law no. 31/1990 to all corporations.

The liability of company director under the new Civil Code is governed by the rules applicable to the mandate agreement if the law or corporate documents does not provide otherwise (article 209, 3rd paragraph of the Civil Code). Also the obligations of Company director are regulated by the rules provided by the Civil Code for the mandate agreement.

Based on the legal provisions of the new Civil Code applicable to the mandate agreement Company director has the following obligations:

The obligation to fulfill the mandate granted by the company

The main obligation of the representative is to fulfill the mandate (*to do obligation*). The mandate has to be fulfilled within the limits of the mandate and in accordance with the powers granted to the representative by the represented person. Article 2.017 first paragraph of the new Civil Code expressly states that the legal operations performed by the representatives have to be within the limits established by the represented person. Company director has therefore the obligation to fulfill the mandate of company director, namely to

perform the acts of internal management and to enter into relationships with third parties on the name and behalf of the company in accordance with the limits provided by the corporate documents (constitutive act) and by the company Law.

Article 2.017 second paragraph of the new Civil Code allows the representative to exceed the limits established by the represented persons if it is in the interest of the represented person. In such cases the representative may take the measures considered in represented person advantage exceeding the powers and without informing previously the represented person if it is impossible to announce the represented person and if it can be presumed that the represented person would have approved the exceeding of the limits if the circumstances were known to him. If this is the case the representative is obliged to immediately inform the represented person about the changes in the fulfillment of the mandate.

Representative obligation to fulfill the mandate is in case of Company director a diligence obligation and not a result obligation. Whereas the mandate of the company director is generally a paid mandated Company director' fault in fulfilling the mandate is appreciated *in abstracto*, based on the abstract criteria of a prudent and diligent person as expressly provided by the article 2.018 first paragraph of the new Civil Code that requires the good care of an owner. If Company directors are not paid for their management of the company, than they have to fulfill their mandate with the same diligence as they manifest for their own business. In such cases Company director liability is appreciated *in concreto.*

Obligation of loyalty and of acting for company interest

Company director has the obligation to fulfill its mandate with good faith, acting for the company interest with prudence and diligence. Company Administrator, acting as company representative, has to avoid any situation that implies a conflict of interest between himself (or a person closed related to the Director) and the company. Company interest must prevail and company patrimony has to be managed as it is managed the patrimony of the administrator. This obligation of loyalty and fidelity[17] is expressly provided by the article 2.018, 1st paragraph of the new Civil Code. The company director acting as representative is obliged to inform the company about all circumstances and events occurred after the company granted the mandate which may conduct to the revocation or change of the Director's mandate.

Company director may not abuse of the powers granted to him by the company and may not use company assets in its own interest. Based on the article 2.020 of the new Civil Code Company director has to pay interest for the amounts of the company he used in his own interest starting with the date he used such amounts. Fort the debt to the company the company director has to pay interest from the date he was warned to make the respective payment.

[17] Gheorghe Piperea, *The obligations and liability of Company Directors. Basic elements*, Publishing Company All Beck, Bucharest, 1998, p. 74, C. Cucu, M. Gavriş, C.G. Badoiu, C. Haranga, *Company Law no. 31/1990, bibliographical references, courts practice, decisions of the Constitutional Court, notes,* Publishing Company Hamangiu, Bucharest, 2007, p. 327, Stanciu. D Cărpenaru, Cătălin Predoiu, Sorin David, Gheorghe Piperea, *Company Law. Comment on articles*, Edition 4, Publishing Company C.H. Beck, Bucharest, 2009, p. 606, etc.

The obligation to give explanations to the represented person about the fulfillment of the mandate

In accordance with article 2.019, first paragraph of the new Civil code, Company administrator, as representative of the company, has the obligation to explain and justify its actions to the represented person (the company) and to submit to the company everything received as representative even the things received that were not due to the represented person.

In this context I appreciate that the company director has to act in a transparent manner and to inform periodically the general meeting of shareholders about the modality in which he manages the company, as well as about any events that may have a significant effect or impact on Company. At least once per year the company director has to submit to the general meeting of shareholders his report of activity and has to make available for the shareholders all relevant information they request about company activity under the terms provided by Company Law.

Duration of Company Directors mandate

Regarding the duration of the mandate of the directors the article 2.015, 1st paragraph of the new Civil Code establishes a new rule, namely that the representative mandate has duration of three years from the date the mandate agreement is concluded in case the parties do not agree expressly a duration of the mandate. This new rule applies in subsidiary to the provisions of company law regarding the duration of company director mandate.

For the directors of the joint stock company (SA) or for the company comandite by shares (SCA) the article 153^{12} paragraph 1 and 2 of the law no. 31/1990 provides that the duration of their mandate may not exceed 4 years, respectively 2 years for the Directors nominated by the Constitutive act. Considering these legal provisions some authors[1] appreciated that in the absence of a duration of company director mandate specified in the Constitutive Act or in the decision of the general meeting of shareholders, the duration of company director mandate is the maximal duration that is allowed by the law (2 years, respectively 4 years). This affirmation may still be valid for the mandate of company directors nominated previous to the new Civil code entrance into force. After the Civil code entered into force, in case the duration of the mandate is not specified in the documents concluded after 1st of October 2011 than the duration of the mandate is of 3 years in accordance with article 2.015, 1st paragraph of the new Civil Code, except for the directors of SA (joint stock companies) and SCA (partnership by shares) nominated by the Constitutive act whose mandate may not exceed 2 years.

[1] Cristina Cucu, Marilena-Veronica Gavriş, Cătălin-Gabriel Badoiu, Cristian Haraga, *Company Law no. 31/1990, bibliographical references, courts practice, decisions of the Constitutional Court, notes,* Publishing Company Hamangiu, Bucharest, 2007, p. 356.

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SCRIPTS AS A MEANS OF EVIDENCE IN THE NEW CIVIL PROCEDURE CODE

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Abstract: *The new Civil Procedure code brings forth new provisions regarding to the admissible means of evidence of the civil lawsuit. Some of these, naturally, concern the writs, the new provisions bringing the realities of the procedural aspects in tune with the social reality. It was only natural that the proper provisions would be made, taking in account that the current reality of the information age society was not present at the moment of the Code's conception, thusly many aspects could not be foreseen at that time.*

Keywords: *New Civil Procedure Code, writs, evidence, civil lawsuit.*

Introduction

The present study includes the last modifications brought on by the New Civil Procedure Code (NCPC), the form adopted by the Parliament these last days, the provisioned date of the entering in effect being the 1st of September 2012[1]. Speaking from a practitioner's point of view, we only hope that these modifications will not be followed by a great number of adjustments after the code will enter in effect. It is very probable though that this will be a necessary intercession, especially because some of the problems can be already observed in this preliminary phase.

Another important element that we have to underline, which is evidently already discussed by the specialists is the effective possibility of the implementation of this new code, taking in account the substantial modification that it brings forth in that which regards certain aspects of the procedures before a court of law.

Legal provisioning

Without claiming an exhaustive analysis, we intend to analyse which are the new legal provisions regarding some of the essential elements of the civil lawsuit – the enquiry and the probation phase. From the possible evidence which are named and provisioned through the NCPC we have chosen to discuss the status and provisioning of writs, consecrated under the denomination „proof with writs" and comprised in articles 259-301 NCPC.

Concerning the structural aspect, this part has in its turn 9 sub-parts. The first is comprised of general dispositions, followed by the sub-parts that analyse different categories of writs: authentic, under private signature, on virtual support, copies or duplicates, recognition or renewal writs as well as others. Of course, we are dealing here with an arguable classification concerning certain aspects, but a classification through which the lawmaker tried to cover as many types of writs as possible. Finally there is a

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[1] http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=12664.

distinct sub-part for the administrative procedure of this evidence and another for the verification of the writs.

The modification is substantial, because the old provisions (those still in effect today, actually) did not exist in the Civil Procedure Code but in the Civil Code (the old one) at articles 1171-1190, the only provisions regarding to writs being those of articles 172-185 of the Civil Procedure Code. All these articles regard only aspects related to the administration of the evidence and the verification of writs by the court. As for the rest, all the new provisions did not previously exist in the Civil Procedure Code, more so being finally classified in a coherent form, adding to the old provisions regarding authentic writs, writs under personal signature the new ones regarding computer and electronic technology, excluding some forms already outdated by the social realities (ex: the tally system, previously provisioned by article 1187 of the Civil Code, presently totally excluded on reasonable grounds).

The writ – evidence in the civil lawsuit

According to article 259, the NCPC considers the writ of being: „Any writ or other consignment comprised of data about a juridical act or fact, irrespective of its material support or the conservation and storage method"[2]. This is the notion on which the beginning of our intercession is based. It is distinctly defined in article 276 that the writ on virtual support, which is an absolute novelty in the civil procedure, is also admitted as evidence. The discussion remains open in the case of the electronic writ[3] (and the question of the distinction between this one and the virtual one) especially in the context in which, according to article 261, the first is the subject of the dispositions of the special law.

The NCPC underlines the proving power of the signature that proves consent of the party until contrary evidence is presented. More problematic is another provision that mentions that the signature of a public clerk on a writ grants it authenticity, in the conditions of the law. Many questions could stem from here, along with possibilities of interpretation. As there are no provisions that would distinguish between documents signed by public clerks that become authentic writs and which not, if we would literally interpret this provision we would discover a series of writs that have the properties of an authentic writ through the simple appliance of the signature of a public clerk. Again, for the electronic signature the provisions of the special law are applied.

We will now shortly revise the types of provisioned writs, especially the proving power attributed to them by the NCPC.

The first of the writs that we will refer to is of course the authentic writ, defined by article 263 as being the writ emitted or received and authenticated by a public authority, by the public notary or by another person invested by the state with public authority, in the form and conditions established by the law, the authenticity of the identity of the parties, their consent, the signature and the date.

The authentic writ fully proves the personal findings of the person that authenticates it until it is declared to be a fake. In that which regards the declarations of the parties, they make proof until the contrary evidence. Finally, any other mentions conex from a writ,

[2] Other possible definitions in *Dicţionar de procedură civilă*, ed. a II-a, ed. Hamangiu, 2007, pp. 526-530.
[3] Law no. 455/2001 regarding the electronic signature.

represent a start of written evidence. As a result, the proving power of such a writ is extremely powerful but at the same time it is structured in an extremely complex fashion, according to the elements proved[4].

According to the definition of the Code's article 266, the writ under private signature is that writ that „bears the signature of the parties, regardless to its material support". We appreciate that in that which relates to the problem of the material support, the intention of the lawmaker was that of strictly referring to the material on which the document is written, this article excluding the ones on electronic support. Although this aspect does not necessarily result from this rather defective definition it results from the distinct treatment of virtual and electronic documents, in a distinct part of the NCPC. The proving power manifests itself, in this case, up until contrary evidence and in case there are other mentions that are not directly linked to the juridical rapport that makes up the object of the document, the writ represents a start of written evidence[5]. We underline the provision of the code that mentions the obligation that the writ must bear the signature of the parties. In order to be able to talk about such a writ, the requirement of the plurality of copies must be at all times respected, every party with contrary interest having to keep one of its own.

The Code also kept some of the provisions regarded as excessive at least by the practitioners, because in today's practice some of the courts do not even admit the replacement of the formula provisioned in the code by a similar one of equal value, in the context in which, usually, these writs under private signature are not made by professionals but are mostly writs that the parties conclude between themselves. This way, the obligation of the mention „good and approved" is maintained on the writs that consecrates the obligation of a person to pay a lump sum to another. Taking these provisions into account, the parties will have to become more diligent in the future, concerning the editing of writs through which they consecrate their reciprocal obligations or not.

Article 270 also mentions that these provisions do not apply to the rapports between professionals, though without explaining if they are applicable to the rapports between a professional and a physical person, juridical rapports that are at least as frequent as the others, a gap which would have been preferred to be corrected.

Another essential problem in determining the value of the content of the writ is the date at which this was assumed by the parties, reflected palpably through that which is called writ bearing certified date, date from which the writ is opposable to other persons than those that have perfected it, according to article 270. There are many situations in which a writ acquires a certified date, the first one being linked to the moment in which the parties are present at the public notary's office, court executor or any other public clerk to this purpose, categories to which, through a first modification, the lawmaker forgot to add the lawyer. Following this, there are 5 other situations in which a certified date can be set: the mention made on writs by an authority or public institution regarding the date, the recording made in a public document or register regarding the date, the recording made in a register or public document, the death or physical incapacity of he who has prepared the document, the encompassing of the document within an authentic writ or another fact of the same nature from which the date of the denotation of the writ can be deduced. All these

[4] M. Tăbârcă, *Drept procesual civil*, vol. I, ed. Universul Juridic, 2005, pp. 522-526.
[5] *Eadem*, pp. 530-534; I. Leş, *Codul de procedură civilă*, ed. C. H. Beck, 2007, pp. 529-532.

provisions can be set aside by the court, according to the concrete situation when freeing writs are concerned.

The domestic registers can be taken as evidence against the person who wrote them, those of professionals for the rapports amongst them, similarly to the domestic ones, against those that wrote them[6]. Distinctly, any mention of the creditor that is favourable to the debtor is evidence in his favour, in the conditions of article 275 NCPC.

Another special category, newly introduced as a writ with probation value within the civil lawsuit is that of the writs on virtual support. The definition of this type of writ seems to be somewhat in the red. Thusly, according to article 276 we are referring to the situation in which „the data of a juridical act are rendered on a virtual support, the document that reproduces this data constitutes the probation instrument of the act, if it is understandable and presents sufficiently serious guarantees in order to prove its content and the identity of the person it emanates from in full faith". Beyond keeping some archaic formalities like „will make *in full faith*", formulations that we have met before in this version of the NCPC, the manner or evaluation is left in the red, from our pint of view, being left at the whims of the court. Thusly, if the extent of intelligibility of the writ can be assessed somewhat objectively (in contrary, the intelligibility question is posed relating to any kind of writ), in that which regards the „sufficiently serious guarantees" we consider that this is an unhappy formulation and a drafting which leaves allot of room to subjectivity and multiple interpretations, with much to extended decision possibilities lest exclusively at the whims of the court of law. Of course, theoretically, article 277 offers more precision to this presumption of validity of the writing but through equally relative terms – „when it (the writing of data on support) is made systematically and without lacunas and when the data inscribed is protected against alterations and counterfeiting in such a way that the integrity of the document is fully assured". Any kind of court with minimal technical knowledge will know and realise in this situation that it is impossible to fully assure the security of such a document, in the context in which virtual technology greatly surpasses the visions of the Romanian legislator and of the editor of the Code. More so, it is evident that the number of the connoisseurs and users of such technologies is sufficiently large that a professional is not needed in order to make the writ. Most people make these documents using the personal computer. Of course that, as a consequence, at the slightest doubts (which should exist in every situation if we judge objectively), some courts could become tempted to totally set aside such means of evidence which are already more frequent than any other writ under private signature, drafted by the parties. We assess that the lawmaker should have paid more attention to these aspects regarding the virtual writs and try to regulate them with more casually, in order to be able to assure the use of these means of evidence, which are already prevalent in any kind of field and in the interpersonal relations. The proving power remains, in this case that of a simple material means of evidence or start of written evidence.

We do not understand in this case, what is the value of a legalised document, which at least theoretically, through this special procedure made in a solemn background that confers a dose of authenticity to the document which somewhat becomes the equivalent of the original. For the copies of the documents on virtual support, the probation value is the same as the writs on which they were rendered.

[6] I. Leş, *Codul de procedură civilă*, ed. C. H. Beck, 2007, pp. 533-535.

Finally, the renewal or acknowledgement writs of debts makes proof against the debtor or his successors until contrary evidence, through the original document. It is interesting that the law does not provision here that this proof can be made through other means of evidence aside from the original initial document, aspect that cannot be deontologically correct because we can presume the existence of consent vices in the moment of the realisation of the supposed recognition, thusly, it would be only logical that the document should be disputed by any means of evidence.

The assortment of writs that can be used as a means of evidence is of course very large. The NCPC tries to introduce some small general provisions regarding other types of writs, at articles 283-285. To make a couple of examples, other types of possible writs are identified: standardised contracts, similar notes and documents, telex, telegram (a little outdated, we may add, in the context in which statistically speaking it is less probable that someone communicates through such means, maybe in exceptional situations), all these writs being writings under private signature. For writs like plans, sketches, papers, photographs or other annexed documents, the probation value is the same with that of the document to which they are annexed, presuming there is a direct link to that writ and they are signed by the person that made them.

These provisions seem to be for once natural and logical, as is the one that refers to the obligation of signing any kind of striking out, correcting, erasing, modification or addition etc.

The NCPC Procedure Rules Relating to Administering Written Evidence

These provisions mostly keep the rules applied up until now, some by virtue of already existent provisions, others following the institution o judiciary practice. This way, all these writs must be deposited in copies certified for conformity, with the obligation of presenting the original. The owning party can be obligated to deposit this original in safe keeping to the judicial greffe, from where one can redraw it after a legalised copy is made through the signature of the court actuary (new provision, although some courts already used this procedure). If the writs are made in another language, they must be accompanied by a legalised translation.

The court can obligate the opposing party to deposit a writ if the writ is common to the parties or the opposite party already referred to it or if it is obligated by law to bring it forward. In certain situations, expressly provisioned by article 288, the court can reject this solicitation- in strictly personal matters, would lead to a legal obligation of keeping a certain secret and would attract the penal action against the party, spouse, relative or in-law up to the third class, included.

If the court disposes the presentation of the writ and the party refuses, the affirmations regarding that script will be considered to be proven (article 289)[7].

The possibility of studying the writs by a delegate judge is instituted in the situation in which, because of objective reasons (great costs, big writs etc.) these cannot be physically brought before the court. Similarly, certain acts cannot be brought in their original form taking their nature in account (article 293 – examples: land registry books, books of the authorities', other original writs etc.) The Registers of professionals could be solicited for study by the court.

[7] M. Tăbârcă, *op.cit.,* pp. 535-539; I. Deleanu, *Tratat de procedură civilă*, 2004, pp. 714 sqq.

Third persons, physical persons as well as public authorities or institutions could be obligated to the deposition of scripts by the court.

The Inspection of Deposited Scripts

Facing the sanction of decay of the evidence, the challenge of a script, of its writing or signature must be made up until the first term after its deposit[8]. The steps are mostly the ones provisioned by the regulations still in effect, respectively the inspection of the contested script by the court, directly or through comparison scripts which fulfil the legal conditions of article 297 paragraph 3, as well as through graphoscopic expertise or other means of evidence allowed by the law.

More interesting is the possibility, in the case of forgery, of the court of the court to assess if it is not the case of starting a penal action and if this one, from diverse motives, becomes impossible separately, the forgery could be inspected within the civil lawsuit. We are limited here by the space of the paper but we must point out a lacuna that the legislator left, which from our point of view must have had regulated the modality of inspection of the forgery as a penal institution within the civil lawsuit. This regulation existed previously too, without its modifications being consistent, although this was needed.

Conclusions

In these conditions, the provisions of the NCPC remain a mix of old and new, old because of the aspect of taking over some provisions linked to the administering of the evidence and the inspection of the scripts or of some linguistic aspects (expressions like „makes full faith" being maintained, although they perhaps mean too little for contemporary man) and new because of the aspect of the introduction of all the new provisions that regulate evidence that is the product of the computerised society in which we live today.

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PERSONAL RIGHTS PROTECTED BY CIVIL AND CRIMINAL LAW IN ROMANIA

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Abstract: *Law protects values considered of the greatest importance for the society. Legal norms are the only ones that may be enforced, as disobeying the legal norms is punished by the state with different sanctions. The heaviest sanctions, criminal sanctions, punish the conducts that breach norms protecting the most important values. The new Civil Code of Romania, Law No. 287/2009, contains dispositions regarding values traditionally protected in our legislation by norms belonging to criminal law, such as life, health, integrity of the natural person, human dignity. In 2009 the new Criminal Code was also adopted with the Law No. 286/2009, but it has not yet entered into force. The new Criminal Code does not mention human dignity as a value that is protected in itself, but in connection with other values. Also, contrary to the opinion of the Constitutional Court of Romania, left out insult and defamation as criminal offences, considering that the right to honour and reputation are sufficiently protected by the civil law. No criminal offences regarding organs harvesting are mentioned in the Criminal Code, such provisions were left into a special law, No. ..... The new Civil Code also regulates organs transplant from living or deceased persons and in this area the dispositions from different normative acts overlap. The article aims to present values now protected by both civil and criminal legislation and the specific methods of protection in each branch of the law.*

Keywords: *protection of rights, civil code, criminal code*

Law is protecting society's most appreciated values. Law uses the constraining force of the state in order to ensure that society members may benefit from the exercise of those values and to punish those infringing them[1]. Legal sanctions for infringing the law may be of civil, administrative or criminal nature. Civil sanctions are applied for breaching obligations derived from relations between private persons, regulated by law, so civil sanctions are mainly protecting subjective rights and interests[2].

Values most prised by society may also be considered in an objective way. When a breaching of such a value occurs, the conduct is sanctioned regardless the claim of the injured person. It is the mission of criminal law to establish such values and sanction them.

Traditionally, values attached to human personality, with its physical and psychic sides, such as life, health and integrity of the natural person, were protected by criminal law that incriminated wrongful conducts and established sanctions. Whenever a felony occurred, the civil sanction in the form of repairing the prejudice was applied. In the new civil code of Romania a new approach may be identified, as a special chapter, Chapter II ("chapter") of the first Title in Book one, regarding the persons, is dedicated to the respect due to human beings and their inherent rights. Those rights are mentioned in article 58 of the civil code: life, health, physical and psychic integrity, dignity, one's own image, respect of private life

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[1] On the relationship between law and other social norms see E.M. Fodor, *Norma juridică – parte integrantă a normelor sociale/The Legal Norm – a Part of Social Norms,* Argonaut, Cluj-Napoca, 2003.

[2] G. Boboş, C. Buzdugan, V. Rebreanu, *Teoria generală a statului şi dreptului/The General Theory of State and Law,* Argonaut, Cluj-Napoca, 2008, pp.329-334; C. Buzdugan, *Teoria generală a dreptului/The General Theory of Law,* Universul Juridic, Bucharest, 2011, pp. 19-33.

and other such rights recognised by law. It is to be observed that the code is not exhausting the values associated with respect due to human beings and their inherent rights.

The most important rights associated with human personality by the civil code are mentioned in section 2 of the chapter: life, health and integrity, both physical and psychic, of the natural person. Article 61, paragraph 2 stipulates, regarding to these values, that the interest and well being of the human being must prevail upon the sole interest of the society or science. Article 69 refers to the means of protecting those values in court, stating that, at the request of the interested party, the court may order all the necessary measures in order to prevent or to stop any illicit harm of the integrity of human body and the reparation of the material and moral prejudice. Although at the end of the chapter regarding the respect due to human being and its inherent rights article 253 enumerates the means for protecting the rights mentioned in the chapter, by asking the court to order the prohibition of the imminent wrongful act, termination of the breaching and prohibition of further violation, as well as specific means of reparation for breaching personal non-patrimonial values, the presence of similar dispositions at the end of section 2, enhance the importance of the rights mentioned there.

Articles 64 to 68 are related to the inviolability of the human body. The criminal code also contains dispositions regarding the same value in Title II, Chapter I, articles 174-185. Article 65 of the civil code protects the privacy of the genetic characteristics. Articles 67 and 68 are related to medical and scientific practice and organ harvesting and transplant. Similar and even richer dispositions concerning the transplant of human organs, tissue and cells are to be found in articles 144-153 of Law No. 95/2006 regarding the reform in the health area. These dispositions were not abrogated by the entering into force of the civil code. So, we do not see the point of repeating some of the dispositions of the Law No. 95/2006 into the new civil code, this being also against article 15 of Law No. 24/2000, regarding the legislative technique. Articles 154-159 from Law No. 95/2006 also incriminate as felonies different breaches of articles 144-153. As we will demonstrate further, in our opinion, if a value is protected by dispositions of criminal law, certain measures, such as ones described in article 253 of the civil code, may be ordered by the civil court in order to prevent or to put a stop to any violation of the protected value. Once the value is protected by law, it does not matter the character of the law – it does not matter if the protection is given by a civil or a criminal law, a code or a special law – in order to apply any means of protection provided by the civil law. The criminal law may not proclaim a certain value, but, describing as a felony a conduct that prejudices a value, shows that the value is protected by law as being one of the most important ones and that should be enough in order to consider that any procedural measures are admissible in order to protect it.

Section 3 of the chapter regarding inherent rights of persons, in the civil code, considers the respect of private life and dignity of the human being. Article 72 with the title „The right to dignity" refers to honour and reputation.

The criminal code now in force also contains a chapter dedicated to criminal offences against persons, the protected values being: life, corporal integrity and health, liberty and dignity. In the conception of this code, dignity is also associated with honour and reputation, as the criminal offences described there are insult and defamation. By the Law No. 278/2006 both articles 205, incriminating the insult, and 206, incriminating defamation, of the criminal code were abrogated. The abrogating dispositions, from the Law No. 278/2006 formed the object of constitutional control when an exception was raised in 2007. The Constitutional Court of Romania considered that the facts incriminated as insult and

defamation, by articles 205 and 206 of the criminal code, bring serious harm to human personality, to the dignity, honour and reputation of the victims. If such conduct would not be discouraged by the means of criminal law, there would be a *de facto* reaction of the victims and endless conflicts, resulting in the impossibility of normal social cohabitation, assuming respect for every member of the society and just appreciation of everyone's reputation. The above mentioned values (honour and reputation) were considered by the Constitutional Court as constitutional rights of high value, according to art. 1 par. 3 of the Romanian Constitution: „Romania is a democratic and social state, governed by the rule of law, in which *human dignity*, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism *represent supreme values*, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed." The Constitutional Court appreciated that abrogating the articles from the criminal code that protected those values, created a legal vacuum, as no other legal protection is offered to the same values. Following to Decision No. 62/2007[3] of the Constitutional Court, articles 205 and 206 were reinstated into force. Mentioning honour and reputation as protected values by the new civil code was considered sufficient protection of those values by the Romanian legislator and as a result, insult and defamation are no longer incriminated by the new criminal code (Law No. 286/2009).

In our opinion, the situation created by the new civil and criminal codes is not different by the situation existing when articles 205 and 206 of the actual criminal code were abrogated. First of all, if a value is mentioned in the Constitution, any threat against such a value may be stopped by means specific to civil law and any damage resulted by breaching such a value may be repaired according to civil law. So, by the abrogation of articles 205 and 206 from the criminal code there was no void in the legislation, as long as the value was protected by Constitution. On the other hand, at the time of the abrogation of articles 205 and 206 from the criminal code, the Decree No. 31/1954 regarding the natural and legal persons was in force. Article 54 of the decree sated that any person who's right to honour or reputation was injured was entitled to ask the court to order the termination of the damaging actions, the publication of the court order or other facts that would rehabilitate the injury. The same dispositions are now to be found in the new civil code (Law. No. 287/2009), Chapter II of Book one, so it seems that the legislator and the Constitutional Court have different views on the importance of honour and reputation.

In the new criminal code (Law 286/2009) no specific mention of human dignity is to be found. In some cases, degrading or inhuman treatment of others is considered an aggravating circumstance, for example in article 263 letter c) concerning the traffic of migrants, article 281 paragraph 2 regarding detention, article 440 paragraph 1 letter h) regarding war crimes. An analysis on the protection of human dignity reveals that this is a very particular value. First of all, there are situations where a certain conduct is considered degrading for a human being and yet it is not sanctioned if the consent of the victim exists. Commenting on a decision of the highest court on administrative matters of Germany, that decided that the so-called „peep-shows", in which women perform striptease and other obscene acts while spectators watch behind windows, could be prohibited based on their incompatibility with human dignity, despite the fact that the women worked there voluntarily, it was appreciated that such an approach may transform human dignity from a

[3] Decision No. 62/2007 of the Constitutional Court of Romania, published in the Official Journal of Romania No. 104 from February 12th 2007.

right into a burden[4]. In our opinion, such a decision proves the close link between moral and law. In the particular case mentioned, the court did not take into account the suffering of the person being subjected to a humiliating treatment (being watched while performing intimate acts), but the fact that such a behaviour was considered immoral for both the peepers and the performer and for this reason it should be discouraged. Human dignity was perceived as an objective value, and not as a subjective right. Moral values are flexible and differ from a social group to another and thus, other solutions are possible in such cases. Westerners were the first to issue different acts that protected human rights and among them human dignity. But similar threats have provoked similar responses despite the cultural, geographical and historical contexts. Protecting the same values did not result in a unification of culture, as each specific culture has modernised in its own way and maintained its own character[5]. It has also been noticed that human dignity may be harmed through acts other than speech, through speech and through media content that does not contain statements about individuals but show scenes of severe humiliation[6]. Insult and defamation are conducts breaching human dignity through speech and our legislation considers that this is a minor infringement, as those acts are no longer considered felonies. Any other act incriminated as a felony, if committed by subjecting the victim to degrading treatment is considered more serious, according to article 77 letter b) from the new criminal code (Law 286/2009).

As we have shown before, according to article 61 paragraph 2 of the civil code, the interest and welfare of the human being must prevail upon the sole interest of the society or science, in what concerns life, health and integrity of the natural person. When human dignity is concerned, real life has shown that things are different. A case recently presented by the Commissioner Geraldine Van Bueren[7], emphasised that economic crisis may lead to cost cuts that may lead to indignity. The situation was of a person that following a stroke was awarded a care package including night-time care, as she needs to use a toilet three or more times a night. In time of economic crisis, the local authority decided to withdraw the night-time care on the basis that the person could use incontinence pads instead. But this should result in an indignity with two components: the lack of control over her own life, because she was not consulted about the decision to amend her care package and the degrading circumstances resulting from that decision, because it would have meant sitting in her urine and faeces for 12 hours at a time, until her next carer arrived. UK courts found no violation of article 3 of the Human Convention of Human Rights, comparing with the case of Limbuela, where the Home Secretary's practice of refusing accommodation or food to those asylum seekers who do not claim asylum promptly on arrival, was considered inhuman and degrading and violated article 3 of the Convention of Human Rights[8].

An example of the idea that a value protected by Constitution and criminal law may be also protected by means of civil law is related to domicile, as part of private life. The

[4] T. Hörnle, M. Kremnitzer, *Human Dignity as a Protected Interest in Criminal Law,* Israel Law Review Vol. 44 (2012), pp. 143-167 .

[5] J. Donelly, *Human Dignity and Human Rights,* Research Project on Human Dignity in the Swiss Initiative to Commemorate the 60th Anniversary of the UDHR, on http://www.udhr60.ch/report/donnelly-HumanDignity_0609.pdf, last consulted on the May 20th 2012, pp. 79-80.

[6] T. Hörnle, M. Kremnitzer, *op.cit*.

[7] Commissioner for the Equality and Human Rights Commission.

[8] G. Van Bueren, Dignity, *Equality and Human Rights and the Age of Austerity*, http://www.equalityhumanrights.com/human-rights/our-human-rights-work/articles-and-speeches/speech-dignity-equality-and-human-rights-and-the-age-of-austerity/, last consulted on the May 20th 2012.

Constitution of Romania states in article 27 paragraph 1: „The domicile and the residence are inviolable. No one shall enter or remain in the domicile or residence of a person without his consent." The constitutional goal is achieved through dispositions of the criminal law. Article 192 from the criminal code in force is incriminating the violation of the domicile as a felony. The social values protected by the criminal law are considered to be of public interest and the actions that infringe those values concern public order, life in a social group. The criminal jurisprudence has decided that the offence may be committed by the spouse that had left home, settled elsewhere and then came to the former domicile and against the will of the spouse that remained home, broke the locker, entered the house and put out the furniture. Also, special dispositions of the Law No. 21/2003 concerning domestic violence provide the opportunity of taking complementary measures besides criminal sanctions to keep the aggressive member far from the family domicile. A particular situation occurs when a house has more than one owner, and one of them is acting to disturb the domestic life of others. Jurisprudence generally stated that the property right prevails upon the right to the inviolability of domicile and, until the property is divided, every owner has a right to enter the property, even if it does not live there. Some opinions[9] appreciated that the protection of domicile by criminal law may be exercised by the tenant against the landlord, but it is possible to include a clause in a lease contract that would permit the landlord to enter at any time in the leased space. If the tenant opposes to the entrance of the landlord in such a situation, the tenant is breaching a contract and that would permit the landlord to terminate the leasing contract. At the same time, when the landlord enters the leased space against the will of the tenant the action will be a criminal offence, violation of domicile. In our opinion, a certain conduct may not be licit in the conception of the civil law and illicit in the conception of criminal law. It should be noticed that a clause permitting the landlord to enter the leased space at any time would be a total alienation of the right to the inviolability of the domicile. As the right to the inviolability of the domicile is a personal non-patrimonial right, it may not be alienated. Such a clause in a contract would be null, so there is no right of the landlord to terminate the contract, as the conduct will be considered illicit according to criminal law. The tenant could restrain his right, allowing the landlord to enter the space in certain conditions. If the landlord enters the leased space in the conditions mentioned in the contract, that would not be an illicit conduct as he is exercising a right derived from the contract where the consent of the tenant is expressed. There will not be any criminal offence, as the conditions of entering without having any right or without consent are not accomplished. If the tenant is opposing the entrance of the landlord and the landlord is using violence, the offence of assault is committed. Another value is being protected, the integrity of human body. According to article 192 paragraph 3 of the criminal code, the offence of violating the domicile is punished only at the request of the victim. This shows that criminal law is considered a last resource for the victim who is entitled to use the protection of civil law first.

In national civil law, the constitutional norm from article 27 paragraph 1 has to be applied in accordance with article 8, of the European Convention on Human Rights, concerning the private and family life. A unique court decision in the Romanian jurisprudence[10] was pronounced by the first instance court of Cluj-Napoca before the entering into force of the new civil code. Based on the constitutional text and the European

[9] S. Bogdan, *Drept penal. Parte specială/Criminal Law. The Special Section,* Universul Juridic, Bucharest, 2009, p. 142.
[10] Decision no. 10413/27.08.2010 of the First Instance Court of Cluj-Napoca, unpublished.

Convention on Human Rights, the court decided that the former husband that, after the divorce, entered the former spousal home, property of both former spouses, against the will of the former wife who still had her domicile in the property, was an illicit conduct. By means of a Presidential Ordinance the court ordered that until the litigation concerning the partition of property is over, the entrance of the former husband in the property is not permitted without the acceptance of the former wife. The new civil code (Law No. 287/2009) states in article 74, letter a) that entering the home without the consent of the legal occupant is considered a breach of the right to private life. This new legal provision enhances the fact that the court decision that considered the right to private life at domicile more important than the right to property was just. Also, according to the same article of the new civil code, taking any object from one's home, without the consent of the legal occupant is illicit. This means that, if a former spouse, who left the marital home where the other spouse remained to live, takes a personal object from that home, without the consent of the current inhabitant, there will be a breach of law. In our opinion, the text is not about property, but about domicile and completes the attributes of the right to domicile as part of the private life. This provision is consistent with article 935 of the civil code which establishes a presumption of property for the person possessing an object.

Another right associated with private life is inviolability of outgoing communications. According to article 28 of the Constitution of Romania, secrecy of the letters, telegrams and other postal communications, of telephone conversations, and of any other legal means of communication is inviolable. Article 74 of the new civil code prohibits telephone taping. As for mail, only the dissemination or use of mail is expressly prohibited by the civil code (Law No. 287/2009) in article 74 letter i), nothing is mentioned about reading someone else's mail. In the criminal code now in force, article 195 – Violation of the secret of communication – incriminates as felony opening another person's mail, tapping, stealing or disseminating the content of the communication. This article belongs to the chapter referring to felonies against the liberty of a person (Title II, Section 3, Chapter II). The new criminal code contains the same dispositions in the chapter regarding felonies in connection with duty (Title V, Chapter II). Article 226, regarding violations of private life, do not mention mail. The authors of the new criminal code (Law 286/2009) argue that chapter IX from Title I of the special part is reuniting felonies regarding domicile, private life and mail[11]; as to felonies committed by officials on duty (Title V, Chapter II), it is mentioned that these may be committed only by public servants or natural persons exercising a profession of public interest[12]. These would lead to the conclusion that reading someone else's mail is not an illicit conduct.

Our brief incursion in the civil and criminal new codes, Law No. 287/2009 and Law No. 286/2009, shows that although dispositions in the civil code regarding civil methods for protecting personal values are a good thing, in the balance between civil and criminal protection of personal rights, a better attention must be given to avoid overlapping dispositions or omitting important values.

[11] Motivation of Law No. 286/2009, in *Codul penal (Legea nr. 286/2009)/Criminal Code (Law No. 286/2009)*, C.H. Beck, Bucharest, 2009, p. 43.
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